

IN THE SUPREME COURT OF OHIO

DOUGLAS GROCH et al,	*	
		On Questions Certified by the United States
Petitioners,	*	District Court for the Northern District of
v.		Ohio, Western Division
GENERAL MOTORS	*	
CORPORATION, et al	*	Case No. 2006-1914
	*	
Respondents	*	U.S. District Court Case No. 3:06-CV-1604
	*	

REPLY BRIEF OF PETITIONER, DOUGLAS GROCH,

Kevin J. Boissoneault # 0040180 <i>Counsel of Record</i>	*	Robert H. Eddy # 0030739 <i>Counsel of Record</i>
Theodore A. Bowman #0009159	*	Colleen A. Mountcastle
Russell Gerney # 0080186		GALLAGHER SHARP
GALLON, TAKACS, BOISSONEAULT & SCHAFFER CO. L.P.A.	*	420 Madison Avenue, Suite 50
3516 Granite Circle	*	Toledo, Oh 43604
Toledo, OH 43617-1172	*	(419) 241-4860
(419) 843-2001	*	(419) 241-4866 - fax
(419) 843-6665 - fax	*	<i>Counsel for Respondents, Kard Corporation</i>
<i>Counsel for Petitioner</i>	*	<i>and Racine Federated, Inc.</i>
<i>Douglas Groch</i>	*	
	*	Marc Dann # 0039425
Stewart R. Jaffy # 0011377	*	Attorney General of Ohio
Marc J. Jaffy # 0046722	*	Elise W. Porter # 0055548
STEWART JAFFY & ASSOCIATES	*	Acting Solicitor General
Co. LPA	*	<i>Counsel of Record</i>
306 East Gay Street	*	30 East Broad Street, 17 th Floor
Columbus, OH 43215	*	Columbus, OH 43215
<i>Counsel for Petitioner's Amicus</i>	*	<i>Counsel for Respondent, State of Ohio</i>
<i>Ohio AFL-CIO</i>	*	
	*	Kimberly A. Conklin # 0074726
Paul W. Flowers # 0046625	*	<i>Counsel of Record</i>
PAUL W. FLOWERS, CO. L.P.A.	*	KERGER & ASSOCIATES
50 Public Square, Suite 3500	*	33 S. Michigan Street, Suite 100
Cleveland, OH 44113	*	Toledo, OH 43604
<i>Counsel for Petitioner's Amicus</i>	*	(419) 255-5990
<i>Ohio Academy of Trial Lawyers</i>	*	(419) 255-5997
	*	<i>Counsel for Respondent, General Motors</i>
	*	<i>Corporation</i>
	*	

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Victor E. Schartz # 0009240
Mark A. Behrens *pro hac vice*
SHOOK, HARDY & BACON, L.L.P.
600 14th Street NW, Suite 800
Washington, DC 20005-2004
*Counsel for Respondents' Amicus
National Federation of
Independent Business Legal
Foundation, et al.*

Kurtis A. Tunnell # 0038569
Anne Marie Sferra 0030855
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
*Counsel for Respondents' Amicus
Ohio Alliance for Civil Justice*

Robert A. Minor # 0018371
VORYS, SATER, SEYMOUR &
PEASE, LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
*Counsel for Respondents' Amicus
Ohio Self-Insurers' Association*

Preston J. Garvin # 0018641
Michael J. Hickey # 0021410
GARVIN & HICKEY, LLC
236 East Town Street, Suite 112
Columbus, OH 43215
*Counsel for Respondents' Amicus
Ohio Chamber of Commerce*

Thomas R. Sant # 0023057
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
*Counsel for Respondents' Amicus
Ohio Manufacturers Association
et al.*

* Patrick N. Fanning (MO # 47615)
David C. Vogel (MO # 45937)
* LATHROP & GAGE L.C.
2345 Grand Boulevard, Suite 2800
* Kansas City, Missouri 64108-2612
(816) 292-2000
* (816) 292-2001 - fax
*Counsel for Respondent, General Motors
Corporation*

* Carolyn A. Taggart # 00227107
PORTER WRIGHT MORRIS & ARTHUR, LLP
* 250 East Fifth Street Suite 2200
Cincinnati, OH 43202
* *Counsel for Respondents' Amicus
Ohio Association of Civil Trial Attorneys*

J.H. Huebert # 0078562
* PORTER WRIGHT MORRIS & ARTHUR, LLP
41 South High Street
* Columbus OH 43215
*Counsel for Respondents' Amicus
Ohio Association of Civil Trial Attorneys*

* Steven M. Loewengart # 0049086
Johnathan E. Sullivan # 0072371
* SQUIRE, SANDERS & DEMPSEY L.L.P.
1300 Huntington Center
* 41 South High Street
Columbus OH 43215
* *Counsel for Respondents' Amicus
COSE Group Services, Inc.*

*
*
*
*

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I. INTRODUCTION

The nine questions certified by the United States District Court encompass four distinct topics. These topics are: 1) whether the statute of repose violates the Ohio Constitution; 2) whether retroactive application of a statute of repose is constitutional; 3) whether Senate Bill 80 violates the one-subject rule of the Ohio Constitution; and, 4) whether the workers compensation subrogation statute is constitutional. Petitioner will briefly summarize the positions of the three Respondents and their five Amici by citing to portions of one or two briefs that typify the positions of all the Respondents and their Amici. Petitioner will then discuss in greater detail the reasons why the arguments put forth by the Respondents and their Amici are not well-taken.

II. BRIEF SUMMARIES OF RESPONDENTS' ARGUMENTS

Regarding the first topic the Respondents argue, *inter alia*, that a statute of repose for products liability is different from all the previous statutes of repose that this Court has found to be in violation of the Ohio Constitution (Brief of Respondent State of Ohio, p. 18) or that the previous statutes of repose found to be unconstitutional by this Court were not “true statutes[s] of repose.” (Brief of Respondent Kard, p. 10.) In support of this argument the Respondents cite to Sedar v. Knowlton Construction Company, (1990) 49 Ohio St. 3d 193 (*overruled by* Brennaman v. R.M.I. Company, (1994) 70 Ohio St. 3d 460). Respondents also suggest that the Ohio Constitution “should be read based on the express terms of R.C. 2305.10(C).” (Brief of Respondent Kard, pp. 9-10), however they offer no authority to support that contention.

The Respondents also suggest that this Court’s decision in *Brennaman* is nothing more than a “truncated three paragraph effort of constitutional reasoning completely at

odds with long established rules ...” (*Id.* p. 14.) and that *Brennaman* should be overturned. (*Id.* p. 15). Respondents fail to support this argument with the tripartite test enunciated by this Court in Westfield Insurance Co. v. Galatis, (2003) 100 Ohio St. 3d 216. Respondents contend that a statute of repose should be subject to rational-basis scrutiny as opposed to strict scrutiny. However, Respondents’ argument consists of nothing more than the conclusory statement, “[t]his argument is without merit.” (Brief of Respondent Kard, p. 18.) There is no authority of any sort to support Respondents’ conclusory statement.

Finally, Respondents suggest that the right to bring a cause of action does not vest until after the appellate process concludes. Although Respondents cite to a dissenting opinion of Justice Lundberg Stratton, that citation is wholly inapposite to the issues presented in the matter *sub judice*.

The essence of the arguments put forth by Respondents on the second topic is that 34 days is a reasonable time to enforce a legal right (Brief of Respondent Kard, pp. 33-34) or that R.C. 2305.10 is not unconstitutionally retroactive. (Brief of Respondent, State of Ohio, p. 23). Neither of these arguments is supported by sound authority.

The Respondents arguments regarding the third topic can be summarized as follows. First, S.B. 80 contains only one subject; second even if it does contain more than one subject (which Respondent Kard seems to concede on p. 38 of its brief) the enactment should be severed preserving the “tort reform” provisions; and, third this bill is distinguishable from H.B. 350 because the “tort reform” in H.B. 350 is distinguishable from the “tort reform” in S.B. 80. (Brief of Respondent Kard, p. 40).

The primary argument made by Respondents regarding the final topic is that if “non-economic damages are excluded from the [subrogation] formula, no double recovery

occurs. The new formula achieves that goal.” (Brief of Respondent State of Ohio, p. 11.) However the workers compensation subrogation statute, by its own definition does include non-economic damages and thus continues to violate the Ohio Constitution.

A final theme in the briefs submitted by Respondents and their Amici is that this Court must defer to the “General Assembly’s constitutional authority to determine what injuries are recognized as falling within the Open Courts provision [of the Ohio Constitution]...” (Brief of Respondent Kard, pp. 14-15). However, that is the role and responsibility of the judiciary. As this Court noted in *Sheward*:

While some members of this court, now and in the past, may disagree with the holding in *Brennaman*, no member of this court can, consistent with his or her oath of office, find that the General Assembly has operated within the boundaries of its constitutional authority by brushing aside a mandate of this court on constitutional issues as if it were of no consequence. Indeed, the very notion of it threatens the judiciary as an independent branch of government and tears at the fabric of our Constitution.

State ex rel. Ohio Academy of Trial Lawyers v. Sheward, (1999) 86 Ohio St. 3d 451, 478.

III. THE PRODUCTS LIABILITY STATUTE OF REPOSE VIOLATES SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION

Although this Court has not previously considered the products liability statute of repose in the matter *sub judice*, it has considered previous statutes of repose and their constitutionality pursuant to Article 16, Section I of the Ohio Constitution. None of the forbearers to the statute of repose at issue here has withstood constitutional scrutiny. Even the statute of repose for improvements to real property which was initially upheld in *Sedar v. Knowlton* was eventually overturned. As such, there is a significant body of law which provides that any statute of repose “violates the right to a remedy guaranteed by Section 16, Article I of the Ohio Constitution, and is, thus, unconstitutional.” Brennaman v. R.M.I. Company, (1994) 70 Ohio St. 3d 460, syllabus, ¶ 2.

The Respondents and many of their Amici have suggested that the decisions of this Court in *Brennaman* and in the trio of cases relating to the medical malpractice statute of repose (*Mominee v. Scherbarth*, (1986) 28 Ohio St. 3d 270; *Hardy v. Vermeulen*, (1987) 32 Ohio St. 3d 45; and *Gaines v. Preterm-Cleveland, Inc.*, (1987) 33 Ohio St. 3d 54) are not a broad statement on statutes of repose in general but rather should be narrowly construed. However, Ohio precedent contradicts that position. As noted by one of Respondents' Amici "Petitioners cite several cases in arguing that *any* statute of repose inherently violates the 'open courts' provision of the Ohio Constitution (Section 16, Article D). Admittedly, this Court's decision in *Brennaman v. R.M.I. Company* appears to hold as much." (Brief of Respondents' Amicus Ohio Association of Civil Trial Attorneys, p. 8, emphasis in original).

Moreover, it is not only *Brennaman* which supports Petitioner's position. This Court has also held that "*Hardy* is rooted not only in the right-to-remedy clause of the Ohio Constitution, but also in common sense. While *Hardy* dealt nominally with medical malpractice claims, its reasoning that the right-to-remedy clause requires a plaintiff's knowledge of her injury should be applied to all claims." *Burgess v. Eli Lilly and Company*, (1993) 66 Ohio St. 3d 59, 61.

It has long been understood that "a cause of action does not accrue until such time as the infringement of a right arises." *State ex rel. Teamsters Local 377 v. City of Youngstown*, (1977) 50 Ohio St. 2d 200, 203. For purposes of a products liability action, the infringement of a right occurs when the injury is sustained. In other words, the cause of action accrues when the injury occurs.

Oliver Wendell Holmes noted that the life of the law “has been experience.” THE COMMON LAW 5 (Harvard University Press, 1963). Experience clearly tells us that a cause of action must accrue before any determination about statutes of repose can be made.

As discussed in Petitioner’s Merit Brief, in a practical sense a plaintiff must have sustained some injury, and initiated legal proceedings in pursuit of a remedy on account of such injury, before any occasion could arise for a court to determine whether R.C. 2305.10(C) and (F) applies. Unless and until an action is commenced, there can be no occasion to assert the statute of repose as a defense for its prosecution.

When a tool, machine, or other piece of equipment inflicts real and substantial injury to living flesh and bone, a cause of action for such injury accrues. To suggest that a statute of repose prevents the cause of action from accruing is nothing more than an intellectually dishonest metaphysical exercise. In real and practical terms, the statute of repose does not prevent a claim for bodily injury from accruing. It prevents the injured party from pursuing his constitutionally protected right to seek a remedy for such injury by due course of law.

In the very first sentence of its opinion, the *Sedar* Court noted “[w]e are asked in this case to decide whether R.C. 2305.131 may constitutionally *prevent the accrual of actions sounding in tort ...*” *Sedar v. Knowlton Construction Co.*, (1990) 49 Ohio St. 3d 193, 194 emphasis added. In *Sedar* the Court answered that question in the affirmative, reasoning that while the medical malpractice statute of repose dealt with in *Mominee*, *Hardy* and *Gaines* operated to extinguish accrued causes of action, the statute of repose at issue therein prevented a cause of action from accruing. *Brennaman* explicitly repudiated that analysis. The plain teaching of *Brennaman* is that the cause of action for bodily injury

accrues when the injury is sustained, and Section 16, Article I requires that the injured party be afforded the opportunity to enter the courthouse to seek remedy by due course of law.

Faced with this unavoidable fact the Respondents are left with no alternative but to plead for the Court to overrule *Brennaman* and reinstate the repudiated holding of *Sedar*. This line of argument, however, runs afoul of the holding in *Westfield Insurance*.

The Court in *Westfield Insurance* articulated a tripartite test to determine when a prior decision of the Ohio Supreme Court should be overruled. The test enunciated in that case provides:

A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at the time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Westfield Insurance Co. v. Galatis, (2003) 100 Ohio St. 3d 216, SYLLABUS, ¶ 1.

The syllabus clearly provides that the party seeking to have the case overturned has the duty to demonstrate that the prior decision meets all three of the criteria. Respondents have failed to perform this necessary analysis because under the test articulated in *Westfield Insurance*, *Brennaman* is good law.

The first criteria is “the decision was wrongly decided at the time, or changes in circumstances no longer justify continued adherence to the decision.” *Westfield Insurance*, 100 Ohio St. 3d at SYLLABUS, ¶ 1. Despite all the ink spent criticizing *Brennaman*, Respondents have not been able to prove that it was decided wrongly. In *Westfield Insurance*, the Court determined that its previous decision in *Scott-Ponzer* was wrong. Among the primary reasons cited in making the determination that *Scott-Ponzer* had been decided incorrectly, the Court noted that its decision in *Scott-Ponzer* was a break with

“well-settled and intrinsically sound precedent which is verified by experience.” *Id.* at 228. Using this example, under the first prong of the *Westfield Insurance* test, *Brennaman* was decided correctly and it was *Sedar* which was decided incorrectly. When *Sedar* was decided in 1990, this Court had already decided the trio of medical malpractice cases (*Mominee v. Scherbarth*, (1986) 28 Ohio St. 3d 270; *Hardy v. Vermeulen*, (1987) 32 Ohio St. 3d 45; and *Gaines v. Preterm-Cleveland, Inc.*, (1987) 33 Ohio St. 3d 54) which found statutes of repose unconstitutional. Thus, it was *Sedar* which was a break from settled precedent and sound experience. *Brennaman*, under the first prong of the *Westfield Insurance* test, is correct.

The second prong of the *Westfield Insurance* test is “the decision defies practical workability.” *Westfield Insurance*, at SYLLABUS, ¶ 1. The holding in *Brennaman* provides that any statute of repose violates Section 16, Article I of the Ohio Constitution. Even Respondents’ Amici have conceded that point. That holding is a bright line test. Unlike the *Scott-Ponzer* decision which lead to numerous conflicts in the lower courts and created massive and widespread confusion (*Id.* at 229) the bright line articulated in *Brennaman* will not lead to conflict and confusion because there is nothing confusing or ambiguous about it. The holding of *Brennaman* readily admits of consistent application, and leaves no room for equivocation as to its meaning. It provides, in other words, for precisely the sort of consistency and predictability in the law which the fundamental notion of *stare decisis* seeks to assure. The *Brennaman* holding simply cannot be said to defy practical workability. Accordingly, it cannot be overruled because the second prong of the *Westfield Insurance* test cannot be satisfied.

Having demonstrated that neither of the first two prongs of the *Westfield Insurance* test can be satisfied, Petitioner forgoes any discussion of the third prong. Petitioner would simply note that according to the syllabus in *Westfield Insurance*, all three prongs of the test must be satisfied before a prior decision of the Court may be overturned.

IV. ASSUMING, ARGUENDO, THAT THE OPEN COURTS PROVISION DOES NOT PER SE PROHIBIT A STATUTE OF REPOSE, ANY SUCH LIMITATION ON THE RIGHT TO BE HEARD MUST BE EXAMINED USING STRICT SCRUTINY ANALYSIS

Should the Court find that Section 16, Article I is not a complete ban on all statutes of repose, then any such statute of repose must be examined using a strict scrutiny analysis. In his merit brief Petitioner cited to cases from the nineteenth, twentieth and twenty-first centuries to support his proposition. Aside from a bald denial of the proposition, it stands uncontested. Respondents have cited to no authority to support their contention that the right to be heard is not a fundamental right.

Thus, Petitioner will not repeat the arguments made in his Merit Brief but rather will simply note that strict scrutiny analysis requires the State of Ohio to prove that the statute of repose is constitutional. Neither the State of Ohio, nor any of the other Respondents or their Amici, have done the necessary analysis to prove the constitutionality of the statute of repose. Bald and flat denials are not analysis where fundamental rights are concerned. If this Court finds that statutes of repose are not unconstitutional *per se*, then the statute of repose at issue in this matter must be found to be unconstitutional because the Respondents have not met their burden, as required by strict scrutiny analysis, that the statute does not improperly impinge upon a fundamental right. As such R.C. 2305.10(C) and (F) must be found to be unconstitutional.

V. THE PRODUCTS LIABILITY STATUTE OF REPOSE VIOLATES SECTION 19, ARTICLE I OF THE OHIO CONSTITUTION

Although it should be obvious that the right to bring a cause of action is type of property, it is worthwhile to briefly consider and address Respondents contentions regarding this basic principle. Respondents two principal arguments are: 1) no one has a vested right to rule of common law; and 2) citing to a dissent in *Sheaffer v. Westfield Insurance*, Respondents suggest that the right to recovery does not accrue until one's claim has been reduced to judgment. Neither argument withstands scrutiny.

Respondents and their Amici suggest that because the General Assembly has the right to abolish a cause of action, it has the right to abolish a cause of action for some but not for others. In support of this proposition the Respondents noted that no one has a vested right in the rules of the common law and they quoted several venerable cases to support that proposition. However, neither the Respondents, nor any of their Amici, cited the entire quote, which provides, "No one has a vested right in the common law. Rights of property vested under the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will of the legislature *unless prevented by the constitutional limitations.*" *Fassig v. State ex rel. Turner*, (1917) 95 Ohio St. 232, 248 (emphasis added).

When the entire quote is read it becomes clear that *Fassig* actually supports Petitioner's position. As the discussion regarding Section 16, Article I has shown, the right to seek remedy for injury to person or property is rooted in and secured by the Ohio Constitution. In the present case, therefore, the authority of the General Assembly to change prior provisions of statutory common law is "constrained by the constitutional limitations." *Fassig*, 95 Ohio St. at 248. The General Assembly may not divest one who

has been injured of the right to seek redress. To do so, in the name of some alleged greater public purpose, is simply to deprive the injured person of his property interest in potential recovery for some supposed--but likely illusory--public benefit.

Respondents next sought to establish that the statute of repose does not give rise to an impermissible taking by citing to the recent dissent by Justice Lundberg Stratton in which she opined that a “party may claim a vested right when there is a final judgment.” Sheaffer v. Westfield Insurance Co., (2006) 110 Ohio St. 3d 265, 269 (Lundberg Stratton, dissent). Respondents apparently take this to mean that a *cause of action* does not accrue and the right to bring said cause of action does not vest, until after there has been a final judgment. However, when read in context (and after reading the opinion cited by Justice Lundberg Stratton) it is clear that she is saying that the right to *collect damages* does not vest until after final judgment. Nothing in the *Sheaffer* dissent, however, suggests or supports the notion that the right to bring suit on an accrued cause of action does not vest until judgment has been taken.

In fact, this Court has specifically noted that “a right to sue once existing becomes a vested right, and cannot be taken away altogether.” Smith v. New York Central Railroad Co., (1930) 122 Ohio St. 45, 49; *see also* Gregory v. Flowers, (1972) 32 Ohio St. 2d 48, 54. Thus the right to sue vests when the injury accrues and it is that intangible property which is protected by Article 19, Section I of the Ohio Constitution.

VI. THE PRODUCTS LIABILITY STATUTE OF REPOSE, AS APPLIED IN THIS CASE, VIOLATES SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION

Assuming *arguendo*, that the Court does not find the statute of repose unconstitutional, then its application to Petitioner clearly violates the prohibition against retroactive laws.

In the case at bar, the statute of repose, as applied, serves to extinguish an accrued right of action without affording the Petitioner a reasonable opportunity to have his claim heard in court. The Petitioner, Douglas Groch, was injured on March 3, 2005. The statute of repose came into effect on April 7, 2005. For practical purposes, the Petitioner only had 34 days in which to file his cause of action. This Court has consistently held that a plaintiff must be “afforded a reasonable time in which to enforce his right.” *Mominee v. Scherbarth*, 28 Ohio St. 3d at 278; *see also Gregory v. Flowers*, 32 Ohio St. 2d at 54. This Court has never held that a mere 34 days is a reasonable time in which to enforce a legal right.

Although there may be a temptation to consider the question of what is and what is not a “reasonable time in which to enforce a legal right,” such temptation needs to be resisted. Ohio law specifically provides “[w]hen the retroactive application of a statute of limitations operates to destroy an accrued substantive right, such application conflicts with Section 28, Article II of the Ohio Constitution.” *Gregory*, at SYLLABUS, ¶ 3. This basic holding has been followed by this Court in *Cochran v. Flowers*, (1972) 32 Ohio St. 2d 61 and in *Adams v. Sherk*, (1983) 4 Ohio St. 3d 37 along with a host of lower court decisions.

The above discussion demonstrates that a cause of action accrued and that a cause of action is a substantive right. Under *Gregory* and its progeny the retroactive application of the statute of repose in this case would operate to destroy an accrued substantive right. Such application conflicts with Section 28, Article II of the Ohio Constitution and must be found to be unconstitutional.

V. SENATE BILL 80 VIOLATES SECTION 15(D), ARTICLE II OF THE OHIO CONSTITUTION

In *Sheward* this Court expressly held that “tort reform” is not a single subject. Despite this holding, Respondents argue, *inter alia*, that there is no violation of the one-subject rule because S.B. 80 addresses the single subject of “tort reform.”

Respondents further suggest that by finding “tort reform” to be a multitude of subjects, this Court will prevent the General Assembly from passing comprehensive legislation. Nothing could be farther from the truth. The General Assembly retains ample power to pass comprehensive legislation.

For example, this Court has ruled that “workers compensation” is one subject. State ex rel. Ohio AFL-CIO v. Voinovich, (1994) 69 Ohio St. 3d 225, 228. Similarly, this Court has held that comprehensive legislation which addresses uninsured/underinsured motorists insurance issues encompasses one subject, albeit with a plurality of topics. Beagle v. Walden, (1997) 78 Ohio St. 3d 59, 62.

Tort law, on the other hand, by its very nature encompasses a multitude of subjects, each with a variety of topics. An action for battery, for example, has little in common with an action for defamation, even though both are generically intentional torts. Similarly, a claim sounding in product liability presents very different issues from an action for personal injuries sustained in a motor vehicle accident. It is not logical, or consistent with existing authority, to suggest that the entire corpus of civil law addressing diverse forms of tort actions comprises but a single subject.

Finally, Petitioner respectfully renews his argument that the plain language of Section 15(D), Article II of the Ohio Constitution which provides “[n]o bill shall contain more than one subject” and the holdings of this Court which provide that a “manifestly

gross and fraudulent violation of the one-subject provision contained in *Section 15(D), Article II of the Ohio Constitution* will cause an enactment to be invalidated,” (In re Nowak, (2004) 104 Ohio St. 3d 466, SYLLABUS ¶ 1) require that S.B. 80 be invalidated *in toto*. Any fair and honest appraisal of S.B. 80 reveals that it suffers from a gross and fraudulent violation of the one-subject rule. Petitioner has already enumerated the various subjects found within S.B. 80 and will not repeat that argument here. Rather, Petitioner respectfully asks this Court to follow its own mandate found in *Nowak* and invalidate S.B. 80 *in toto*.

VI. THE WORKERS’ COMPENSATION SUBROGATION STATUTE VIOLATES THE OHIO CONSTITUTION AS INTERPRETED IN *HOLETON AND MODZELEWSKI*

It is important to remember that:

Whether expressed in terms of the right to private property, remedy, or due process, the claimant-plaintiff has a constitutionally protected interest in his or her tort recovery to the extent that it does not duplicate the employer’s or bureau’s compensation outlay. Thus, if R.C. 4123.931 operates to take more of the claimant’s tort recovery than is duplicative of the statutory subrogee’s workers’ compensation expenditures, then it is at once unreasonable, oppressive upon the claimant, partial and unrelated to its own purpose.

Holeton v. Crouse Cartage Co., (2001) 92 Ohio St. 3d 115, 122.

Workers compensation, whether it is paid by the Bureau or by a self-insured employer provides only a partial recovery for economic damages such as lost wages and diminution of future earning capacity. In many instances the compensation payable under the workers’ compensation act falls well short of making an injured worker whole for even these losses. Moreover, some economic losses, such as loss of health insurance, or diminution of retirement benefits are not compensated under workers compensation.

Finally, workers compensation offers no award for non-economic damage items such as pain and suffering, hedonic damages or loss of consortium.

Thus, as a matter of logic, non-economic damages are, *per se*, not duplicative of workers compensation benefits. Indeed, certain portions of economic damages likewise do not duplicate workers' compensation benefits. In order for the current subrogation statute to pass constitutional muster, it must ensure that claimants are not required to be disgorged tort recovery, except to the extent, and only to the extent, that such recovery duplicates workers compensation awards.

The subrogation statute provides that "Net amount recovered" means the amount of any award, settlement, compromise or recovery by a claimant against a third party, minus the attorney's fees, costs, or other expenses incurred by the claimant in securing the award, settlement or compromise, or recovery. "Net amount recovered" does not include any punitive damages that may be awarded by a judge or jury." R.C. 4123.93(E). The plain language of the statute clearly provides that only attorney's fees, costs, expenses and punitive damages are excluded from the "net amount recovered." Moreover, "uncompensated damages" is defined to mean "the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest." R.C. 4123.93(F). Thus, neither "net amount recovered" or "uncompensated damages" as defined in R.C. 4123.93 exclude damage amounts attributable to non-economic damages, or economic damages attributable to losses not compensated or compensable pursuant to Chapter 4123 of the Revised Code.

Respondent State of Ohio glosses over this portion of the statute. The State cites to the Legislative Service Comm., Final Analysis of S.B. 227 to support its case. That

example however, clearly supports the proposition that the workers compensation subrogation statute is unconstitutional.

In the example, the net amount recovered is \$70,000.00; the subrogation interest is \$60,000.00; and the uncompensated damages are \$50,000.00. (Brief of Respondent State of Ohio, p. 4.) In the example, the injured worker receives only \$31,818.00 or 45% of his net recovery while the Bureau or self-insured employer takes \$ 38,182.00 or 55% of the net recovery.

Respondents argue that the statute affords roughly equal treatment to the parties, in that the plaintiff/claimant receives 64% of his “uncompensated damages” while the subrogee receives 64% of its outlay. Overlooked in this analysis is the fact that two critical values in the formula, the “net amount recovered” and “uncompensated damages” are derived from the gross tort recovery. The formula does not exclude those portions of the tort recovery which do not duplicate workers’ compensation benefits. It follows, therefore, that the statutory subrogee must take some percentage of those non-duplicative damages. This Court has specifically held that such a taking is unconstitutional. As such, the workers’ compensation subrogation statute suffers from the same constitutional defect as its predecessors.

VI. CONCLUSION

As noted at the outset, the nine questions before this Court pursuant to certification from the United States District Court encompass four topics in Ohio Constitutional law. These are: 1) whether the product liability statute of repose is unconstitutional on its face under Section 16, Article I, Section 19, Article I and Section 2, Article I of the Ohio Constitution; 2) whether such statute, as sought to be applied in the case at bar, violates the

prohibition on retroactive laws found in Section 28, Article II of the Ohio Constitution; 3) whether the omnibus provisions of S.B. 80 violate the one-subject rule contained in Section 15(D), Article II of the Ohio Constitution; and 4) whether the workers compensation subrogation statutes violate Section 16, Article I, Section 19, Article I and Section 2, Article I of the Ohio Constitution.

This Court has not previously ruled on any of the specific enactments at issue. In this respect, the case at bar presents matters of first impression. This is not to say, however, that this case leads us into uncharted territory, bereft of the guidance offered by precedent. Indeed, we have seen that prior rulings of this Court on enactments of substantially similar character and effect offer abundant and clear instruction.

In *Brennaman* this Court recognized that Section 16, Article I of the Ohio Constitution secures to all Ohioans the right to remedy by due course of law for injury to person or property and the right to open access to the courts to pursue and enforce that right to remedy. This holding accords fully with the holdings in *Mominee*, *Hardy*, and *Gaines*. Taken together, these holdings teach that Section 16, Article I requires that injured parties be afforded reasonable opportunity, after being injured, to seek legal redress. Semantic and metaphysical arguments to the contrary notwithstanding, R.C. 2305.10 does not prevent a cause of action from accruing. An injury must have been sustained, and legal proceedings seeking remedy for such injury instituted, before a statute of repose issue can be raised and determined. The manifest intent and effect of R.C. 2305.10 is nothing other than to do that which Section 16, Article I and numerous holdings of this Court prohibit: to deny any opportunity to pursue remedy for an injury to person or

property by due course of law. The product liability statute of repose must be held invalid for this reason.

The statute of repose at issue, moreover, fares no better under other provisions of the Ohio Constitution. For the reasons articulated herein, and in the Petitioner's Merit Brief, the Court should find that R.C. 2305.10 contravenes the due process clause of Section 16, Article I, the equal protection clause in Section 2, Article I and the takings clause in Section 19, Article I of the Ohio Constitution.

Even if this Court declines to invalidate R.C. 2305.10 *in toto* on the above grounds, however, it is nonetheless entirely clear that the application of this statute to the claims of Petitioner is manifestly contrary to Section 28, Article II of the Ohio Constitution. There can be no dispute that Petitioner's claims accrued prior to the effective date of the statute of repose. The retroactive application of such statute, which took effect only thirty-four days after the date of injury, would deny Petitioner any reasonable opportunity to bring suit on an accrued and vested cause of action. In *Gregory v. Flowers*, *Smith v. New York Railroad Co.*, *Cochran v. Flowers* and *Adams v. Sherk*, this Court has explicitly and consistently held that such a result is not permitted pursuant to Section 28, Article II of the Ohio Constitution.

This Court has expressly held that "tort reform" is not a single subject for purposes of the one-subject rule. *Sheward*, at 499. This Court has also held that an enactment which flagrantly violates the one-subject should be struck down *in toto*. State ex rel. Dix v. Celeste, (1984) 11 Ohio St. 3d 141, SYLLABUS ¶ 1; In re Nowak, (2004) 104 Ohio St. 3d 466, SYLLABUS ¶1. Notwithstanding these holdings, the General Assembly has once again sought to treat "tort reform" as a single subject and Respondents have contended that

it was within its constitutional prerogative to do so. The precedents noted above, however, teach otherwise.

In *Holeton* and *Modzewlewski*, this Court clearly held that an injured worker may constitutionally be required to disgorge only that portion of his tort recovery which is duplicative of past or future compensation benefits paid by a statutory subrogee. The current version of the workers' compensation statute, despite apparent efforts to remedy the defects which doomed two prior statutes, fails to preserve the claimant's right to retain all damages recovered which do not constitute a double recovery. To the extent that the statute permits a subrogee to take any portion of the damage recovery over and above that which duplicates workers' compensation benefits, it unjustly enriches the subrogee to the detriment of the claimant. For this reason the statute must be found to violation Sections 2, 16 and 19 of Article I of the Ohio Constitution.

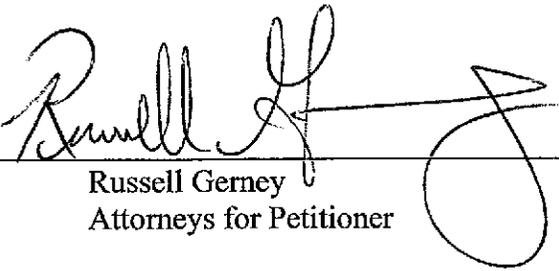
For the foregoing reasons, Petitioners Douglas Groch and Chloe Groch respectfully urge this Court to answer each of the nine certified questions in the affirmative and to instruct the United States District Court that the statutes reviewed herein must be regarded as void for the reason that they violate the Constitution of the State of Ohio.

Respectfully submitted

GALLON, TAKACS, BOISSONEAULT
& SCHAFFER CO. L.P.A.



Theodore A. Bowman
Attorneys for Petitioner



Russell Gerney
Attorneys for Petitioner

CERTIFICATION

This is to certify that a copy of the foregoing **Reply Brief of Petitioner, Douglas Groch** was sent this 1st day of June, 2007, via ordinary U.S. mail, postage pre-paid, to:

Kimberly A. Conklin, Esq.
KERGER & ASSOCIATES
33 S. Michigan Street, Suite 100
Toledo, OH 43604
Counsel for Respondent, General Motors Corporation

Patrick N. Fanning, Esq. (MO # 47615)
David C. Vogel, Esq. (MO # 45937)
LATHROP & GAGE L.C.
2345 Grand Boulevard, Suite 2800
Kansas City, Missouri 64108-2612
of Counsel for Respondent, General Motors Corporation

Robert H. Eddy, Esq.
Colleen A. MountCastle, Esq.
GALLAGHER SHARP
420 Madison Avenue, Suite 1250
Toledo, OH 43604
Counsel for Respondents, Kard Corporation and Racine Federated, Inc. National/Kard Division

Elise Porter, Esq. # 0055548
Acting Solicitor General
30 East Broad Street, 17th Floor
Columbus, OH 43215
Counsel for Respondent, Ohio Attorney General, Marc Dann

Stewart R. Jaffy, Esq.
Marc J. Jaffy, Esq.
STEWART JAFFY & ASSOCIATES CO. LPA
306 East Gay Street
Columbus, OH 43215
Counsel for Petitioner's Amicus Ohio AFL-CIO

Paul W. Flowers, Esq.
PAUL W. FLOWERS, CO. L.P.A.
50 Public Square, Suite 3500
Cleveland, OH 44113
Counsel for Petitioner's Amicus Ohio Academy of Trial Lawyers

Victor E. Schartz, Esq.
Mark A. Behrens, Esq.
SHOOK, HARDY & BACON, L.L.P.
600 14th Street NW, Suite 800
Washington, DC 20005-2004
Counsel for Respondents' Amicus National Federation of Independent Business Legal Foundation, et al.

Kurtis A. Tunnell, Esq.
Anne Marie Sferra, Esq.
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
Counsel for Respondents' Amicus Ohio Alliance for Civil Justice

Carolyn A. Taggart, Esq.
PORTER WRIGHT MORRIS & ARTHUR, LLP
250 East Fifth Street Suite 2200
Cincinnati, OH 43202
Counsel for Respondents' Amicus
Ohio Association of Civil Trial Attorneys

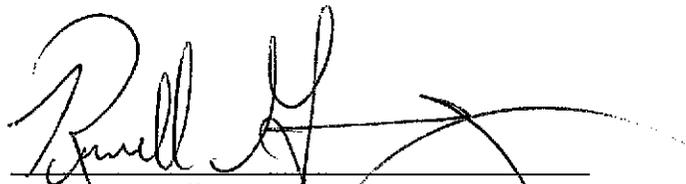
Robert A. Minor, Esq.
VORYS, SATER, SEYMOUR & PEASE, LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
Counsel for Respondents' Amicus
Ohio Self-Insurers' Association

J.H. Huebert, Esq.
PORTER WRIGHT MORRIS & ARTHUR, LLP
41 South High Street
Columbus OH 43215
Counsel for Respondents' Amicus
Ohio Association of Civil Trial Attorneys

Preston J. Garvin, Esq.
Michael J. Hickey, Esq.
GARVIN & HICKEY, LLC
236 East Town Street, Suite 112
Columbus, OH 43215
Counsel for Respondents' Amicus
Ohio Chamber of Commerce

Steven M. Loewengart, Esq.
Johnathan E. Sullivan, Esq.
SQUIRE, SANDERS & DEMPSEY L.L.P.
1300 Huntington Center
41 South High Street
Columbus OH 43215
Counsel for Respondents' Amicus
COSE Group Services, Inc.

Thomas R. Sant, Esq.
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
Counsel for Respondents' Amicus
Ohio Manufacturers Association et al.



Russell Gerney