In the
Supreme Court of Ohio

STATE OF OHIO, BUREAU OF WORKERS' COMPENSATION,	:	Case No. _____
Plaintiff-Appellant,	:	On Appeal from the Summit County Court of Appeals, Ninth Appellate District
v.	:	
LORETTA M. VERLINGER, *et al*.,	:	Court of Appeals Case No. 27763
Defendants-Appellees.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANT STATE OF OHIO, BUREAU OF WORKERS COMPENSATION

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INTRODUCTION

By case law and by statute, Ohio law broadly recognizes that an injured party is not entitled to recover twice. As this Court has said, "[t]he law of Ohio is well-settled that an injured party is entitled to only one satisfaction for his injuries. . . ." *Seifert v. Burroughs*, 38 Ohio St. 3d 108, 110 (1988). Statutes, too, recognize this bedrock principle. A broadly applicable statute "reduces the claim against" other tortfeasors after settlement. R.C. 2307.28(A). Another requires that any damage award against the State be reduced "by the aggregate of insurance proceeds, disability award, or other collateral recovery." R.C. 2743.02(D). The principle extends to social insurance programs as well. For example, a provision in the unemployment-compensation statutes reduces payments if the employee received a severance package. R.C. 4141.31(A)(4); *see Walton v. Ohio State Bur. of Emp't Servs.*, 2002-Ohio-681, *1 (10th Dist.) (noting such an offset).

For workers' compensation cases, a statute follows this principle by recognizing that a worker injured on the job should have medical expenses and lost wages paid, but should not recover a second time for that injury by collecting overlapping amounts from the third party that caused the injury. The Recovery Statute, R.C. 4123.931, thus requires employees seeking workers' compensation benefits to notify the Bureau of Workers' Compensation about related tort claims and recoveries. It also creates a cause of action for the Bureau to seek reimbursement from both employees and third-party tortfeasors.

The Ninth District's fractured decision here mistakenly breaks from the general principle by misreading the Recovery Statute. The decision prevents the Bureau from recovering payments after it has paid benefits to an employee and the employee has also received a settlement from a third party for the same injury. In this case, appellee Loretta Verlinger was paid twice for the same injuries because she received both a tort settlement and workers'

compensation benefits after she was injured on the job. The Recovery Statute should have led the trial and appellate courts to allow the Bureau to recover that double payment. But the Ninth District said that Verlinger need not do so because she settled *before* she received workers' compensation benefits. *Bureau of Workers' Comp. v. Verlinger*, 2016-Ohio-8029 ("App. Op.").

This Court should review the Ninth District's judgment for four reasons. *First*, the Ninth District's judgment deepens a divide in the common pleas and appellate courts about when the Bureau may recover overlapping payments. The Ninth District has now joined the Sixth District in holding that the Bureau may not recover those payments if an injured employee settles before the Bureau makes any payments. Courts in Franklin and Washington counties disagree, holding that an employee who is *pursuing* workers' compensation benefits, and ultimately succeeds, is liable to the Bureau for any double recovery. The division in these courts, although not a formal Article IV conflict, reveals a festering disagreement that this Court should resolve. Workers' compensation cases are prolific. Any imprecision about the rules of the road in the lower courts could lead to divergent outcomes for similarly situated employees based only on where they live.

Second, the Ninth District's judgment clashes with general principles about double recovery. For one thing, the Ninth District hinted that any double recovery could be cured through other means. App. Op. ¶ 20 (Hensal, J., concurring in judgment). That sentiment repeats what the Sixth District said in a case that also shut down the Bureau's right of recovery. Those suggestions clash with the rule in Ohio and elsewhere that settlement destroys a right of recovery through subrogation. The question whether the Recovery Statute is the only route to avoid double recovery deserves review whether the appellate courts are right or not.

The Ninth District's judgment is also hard to square with the general principle against double recoveries in workers' compensation cases, as sister supreme courts recognize. If Ohio is to deviate from that norm, this Court should have the final say.

Third, the Ninth District's judgment cuts off an important source of recovery for the Bureau (and therefore all State Fund employers) and self-insured employers. All Ohioans ultimately bear the costs if employers cannot reduce workers' compensation costs either by recovering money from third-party tortfeasors who are responsible for the underlying injuries, or from employees who collect twice for the same injury. There is no free lunch. If employees get paid twice, or third-party tortfeasors underpay, all of those who participate in the system share the cost of an inefficient workers' compensation system.

Finally, the Ninth District's judgment merits review because its analysis provides an instruction manual for keeping double recoveries. If the decision remains on the books, it tells future litigants and their lawyers how to cut off the Bureau's right of recovery. So, even if only a handful of cases currently pose the problem, more will likely arise in the future. That possibility calls out for this Court's review of the Ninth District's judgment.

For all these reasons, the Court should review and reverse the decision below.

STATEMENT OF THE CASE AND FACTS

A. The Bureau of Workers' Compensation has a right to recover funds paid out on a claim when the employee also recovers from a third-party tortfeasor for the same injury.

Ohio's system of recovery for workers' compensation benefits where the injured worker also has a tort claim against a third party (also called "statutory subrogation") is contained in 4123.931 (with definitions in R.C. 4123.93). Under those statutes, the Bureau (or a self-insured employer) has a right to recover the money it has paid to an employee if the employee receives money from a third-party tortfeasor. The Recovery Statute gives the Bureau an "independent"

right to recoup money; it does not merely place the Bureau in the employee's shoes. *Bureau of Workers' Comp. v. McKinley*, 130 Ohio St. 3d 156, 2011-Ohio-4432 ¶ 30. The statute has these key components.

The statute defines a "claimant" as a "person who is eligible to receive" some form of workers' compensation. The definition reads:

> (A) "Claimant" means a person who is eligible to receive compensation, medical benefits, or death . . . .
>
> (B) "Statutory subrogee" means the administrator of workers' compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services . . . .

R.C. 4123.93(A)-(B).

The statute creates a right of recovery against third parties: "The payment of compensation or benefits . . . creates a right of recovery in favor of statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party." R.C. 4123.931(A).

The statute also includes several enforcement mechanisms against employees: It requires an employee to notify the Bureau regarding potential tortfeasors; it prevents tort awards or settlements from being final when the Bureau is excluded; and it renders the employee jointly and severally liable with the third party to the Bureau if the Bureau is not notified or if a settlement excludes the Bureau's interest. *See* R.C. 4123.931(G).

Finally, another provision reinforces these rights against third parties and employees by providing that the Bureau's right to recover from the third party includes both direct rights against the tortfeasor and rights to piggyback an employee's tort claim. In relevant part, it reads, "A statutory subrogee may institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant." R.C. 4123.931(H). Subsection (H) also provides that

the "right of subrogation under this chapter is automatic, regardless of whether the statutory subrogee is joined a party in an action," and that "a statutory subrogee may assert its subrogation rights through correspondence."

B. Verlinger received both workers' compensation benefits and a tort settlement for the same injury.

Loretta Verlinger was hurt in a motorcycle accident in 2011. *Bureau of Workers' Comp. v. Verlinger*, 2016-Ohio-8029 ¶ 2 ("App. Op.) (Ex. 1). The Ohio Bureau of Workers' Compensation denied her application for workers' compensation benefits a month later, and she appealed that denial to the Industrial Commission. *Id*. Three months later, while her administrative appeal was still pending, Verlinger settled both with the other driver's insurer and with her own. *Id*. ¶ 3. Verlinger did not inform the Bureau of either settlement. *Id*.

Verlinger then prevailed in her administrative appeal and the Bureau started paying her medical and wage-replacement benefits. *Id.* ¶ 4. An affidavit filed in the trial court in this case relayed that the Bureau had already paid over $73,000, and estimated that it would pay another $47,000 for these expenses.

The Bureau later learned of the settlements and sued Verlinger in common pleas court because she had not notified the Bureau about the two settlements. The parties filed cross motions for summary judgment. The common pleas court ruled that Verlinger was not a "claimant" for purposes of the Recovery Statute because the Bureau had denied her right to participate in the State Fund at the time of her settlements, and she had yet to vindicate her right to participate in the then-pending administrative appeal. *Bureau of Workers' Comp. v. Verlinger*, No. CV-2013-08-3707 (Summit C.P. March 31, 2015) (Ex. 2).

The Bureau appealed, and the Ninth District affirmed by issuing four opinions from three judges. A per-curiam opinion for the court rejected the Bureau's assignment of error in one

sentence. App. Op. ¶ 10. Judge Moore wrote a one-paragraph decision pointing to and adopting the rationale of the Sixth District in *Ohio Bureau of Workers' Comp. v. Dernier*, 2011-Ohio-150 (6th Dist.). Judge Moore reasoned that, because Verlinger could not collect benefits at the moment she settled with the insurance companies, she was not a claimant. *Id.* ¶ 11 (Moore, J., concurring in judgment).

Judge Hensal concurred in judgment, reasoning that the meaning of "claimant" was not dispositive. She posited that the Bureau had no right of recovery because, at the time of the settlements, the Bureau had not yet made any payments to her. *Id.* ¶ 19 (Hensal, J., concurring in judgment). Judge Hensal noted that the Ninth District's judgment would seemingly allow Verlinger to "double dip," but that the Bureau had "other theories of recovery" to avoid that outcome. *Id.* ¶ 20.

Judge Whitmore dissented, rejecting the reasoning of both concurring opinions. She opined both that Verlinger was a claimant under the "plain reading" of the Recovery Statute and that the "timing of the [BWC] payments[s]" did not cut off the Bureau's right of recovery. *Id.* ¶ 22 (Whitmore, J., dissenting). As to the meaning of claimant, Judge Whitmore reasoned that an injured worker is "qualified" to receive benefits at the "moment she is injured," and therefore meets the definition of a "claimant" as one who is "eligible to receive" benefits. *Id.* ¶ 25 (citing R.C. 4123.93(A). That right, she continued, does not fluctuate while the parties appeal a Bureau decision about benefits. *Id.* As to the timing of the benefit payments, Judge Whitmore pointed out that the Recovery Statute makes a claimant liable for "'past, present, and estimated future compensation,'" which indicates that the timing of those payments is irrelevant to the right of recovery. *Id.* ¶ 35 (quoting R.C. 4123.93(D)).

The Bureau now appeals to this Court.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The Ninth District's fractured holding conflicts with the decisions of other courts, conflicts with general principles opposed to double recovery, shuts down an important source of funds for the workers' compensation system, and threatens to leave a blueprint for the future erosion of those funds. This Court should therefore exercise jurisdiction and reverse.

A. The Ninth District's judgment deepens a divide in the appellate and common pleas courts about the meaning of the Recovery Statute.

The Ninth District's splintered decision reflects disagreement statewide about the Recovery Statute's meaning. On one hand, Judge Moore, along with a panel of the Sixth District, read the meaning of claimant to require *current* entitlement to benefits. App. Op. ¶ 11; *Dernier*, 2011-Ohio-150 ¶¶ 29-30. Those judges would cut off the Bureau's right to recover duplicative payments so long as the employee was "not qualified" to receive benefits at the moment she settled with a third-party tortfeasor. *Dernier* ¶ 29; App. Op. ¶ 11 (Moore, J., concurring in judgment).

Judge Hensal reached the same result through different reasoning. She opined that the Bureau has no right to recover whenever an employee has not received money from the Bureau "at the time" of settlement. App. Op. ¶ 20 (Hensal, J., concurring in judgment).

On the other hand, Judge Whitmore and judges of the Franklin County and Washington County courts of common pleas take the opposite view. They would permit the Bureau to recover from claimants who have received double recovery because, in the words of the dissent below, an injured employee is qualified to receive payments as "the moment she is injured" in a work-related incident. App. Op. ¶ 25 (Whitmore, J., dissenting); *see Bureau of Workers' Comp.*

v. Kidd, No 07-CVH-010619 (Franklin C.P. Oct. 1, 2008); *Bureau of Workers' Comp. v. Swick*, No. 13 OT 322 (Washington C.P. Feb. 25, 2015).

The diverging opinions across Ohio beckon further review. Without guidance from this Court, employees and employers will be treated differently in different corners of the State.

B. The Ninth District's judgment conflicts with core principles articulated by this Court and sister supreme courts.

Beyond the conflict in and among the lower courts, the Ninth District's judgment conflicts with basic principles opposing double recovery.

First, the Ninth District's judgment creates tension with this Court's cases, and the general rule nationwide, that a third-party settlement destroys a common-law subrogation interest of a first party. The Ninth District's judgment rests, in part, on the idea that the Bureau has "other theories of recovery" beyond the Recovery Statute. *See* App. Op. ¶ 20 (Hensal, J., concurring in judgment). In that way it builds on an error that the Sixth District committed in *Dernier*. *See* 2011-Ohio-150 ¶ 39. The premise that the Bureau would have a remedy if the Recovery Statute is unavailable is doubtful, as shown by the rule in Ohio and elsewhere that a settlement destroys a traditional (i.e., non-statutory) right of subrogation. *See, e.g.*, *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St. 3d 186, 2002-Ohio-7217 ¶ 88 (noting rule); *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004) (same). It also raises discord with *McKinley's* statement that "[w]orkers' compensation subrogation recovery would not exist 'but for'" the statute. 2011-Ohio-4432 ¶ 27. The meaning of this Court's statements about the Bureau's right of recovery, and its consistency with the rule nationwide, is a reason to review this case. *See, e.g.*, *Burnham v. Cleveland Clinic*, ___ Ohio St. 3d ___, 2016-Ohio-8000 (discretionary appeal to clarify the meaning of earlier decision); *Antoon v. Cleveland Clinic Found.*, ___ Ohio St. 3d ___, 2016-Ohio-7432 (same).

Second, the Ninth District's judgment creates tension with the general principle against double recoveries in workers' compensation. The Kentucky Supreme Court, for example, has held that the outlay of workers' compensation benefits "without knowledge" of a third-party settlement "entitle[s]" the payor to an "immediate statutory" right of recovery for the "duplicate" benefits. *Mastin v. Liberal Mkts.*, 674 S.W.2d 7, 14 (Ky. 1984); *cf. Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶ 42 ("virtually every jurisdiction provides some statutory mechanism enabling the employer or fund to recover its workers' compensation outlay from a third-party tortfeasor" (internal quotation marks omitted)); *Thick v. Lapeer Metal Prods. Co.*, 353 N.W.2d 464, 465 (Mich. 1984) ("workers' compensation law does not favor double recovery"). If Ohio is to deviate from these general principles, it should be for this Court to announce, not the intermediate courts. *See, e.g., State v. Anderson*, ___ Ohio St. 3d ___, 2016-Ohio-5791 (discretionary appeal considered Double Jeopardy question that been addressed in sister states); *Combs v. Ohio Dep't of Natural Res.*, 146 Ohio St. 3d 271, 2016-Ohio-1565 (discretionary appeal considered tort principle that had been reviewed by sister supreme courts).

C. The Ninth District's judgment harms Ohio employers because it reduces a source of revenue, leaving others to make up the difference.

The Ninth District's judgment hurts Ohio employers either directly or indirectly. Because the judgment eliminates a way for self-insured employers to recoup costs from responsible tortfeasors, it harms those employers directly. And because it prevents the Bureau from making the same kinds of recoveries, it harms all employers who participate in the State Fund indirectly by increasing the cost of keeping that fund solvent. To be sure, not every case will involve a third-party tortfeasor. And not every case will involve a settlement while the employee's right to participate remains undecided. Still, the judgment below has wide effect.

First, the decision below creates a bright-line rule; it is not tied to anything unique about Verlinger's case. The court held that the Bureau cannot recover when an employee settles a tort case at a moment when the claim has been disallowed, even if the employee eventually receives benefits for the same injury. That rule arguably applies to anyone who, at the relevant moment, is not *declared* to have a right to participate. That is, the appellate court equated the employee's status in ongoing litigation with the ultimate question of whether the employee participated in the workers' compensation system at the end of all litigation.

The ruling, therefore, could block the Bureau's reimbursement rights at many stages. It applies to all those who settle tort claims before applying for workers' compensation, because those employees have not yet had their claims allowed, so they have not had a right to participate *declared* at that moment, even if they are in fact eligible. It applies as well to all those who settle after they have filed benefits claims, but before a declaration of a right to participate. And it arguably includes those whose claims are allowed but then disallowed on appeal—even though those employees receive benefits continuously after an allowance.

If the Bureau's right to recovery turns on the latest administrative or court decision in place on settlement day rather than the final resolution of the right to participate, that right could switch on and off at seven different levels (the Bureau and three levels of administrative appeal and three levels of court appeal). Under the Ninth District's judgment, the Bureau's right to recover could turn on whether a claimant had won the latest round of litigation on the day the settlement money arrived, regardless of the final eligibility determination.

Second, the Ninth District's judgment may have consequences for suits to recover double payments. Suits to recover these payments may be filed even though an employee's right to participate is still being litigated because an employee starts to receive benefits immediately once

an agency or court determines that the employee has a right to participate. Those payments continue, despite intervening losses on that issue, until the question is settled by exhausting or waiving all appeals. *See* R.C. 4123.511(H)-(I). In such cases, the Ninth District's judgment will sow uncertainty. The Bureau may sue both an employee "claimant" and a tortfeasor for reimbursement of the money it has paid. *See* R.C. 4123.931(G). Therefore, even if an employee was a "claimant" on settlement day, triggering *an initial* liability for double payments, a later decision that the employee has no right to participate could still invalidate a subrogation suit because the employee would no longer be a "claimant." If the employee's right to participate turns on and off, the separate recovery case would correspondingly turn on and off as well.

At a minimum, that potential zig zag creates uncertainty for courts and the Bureau about the status of recovery suits. The Bureau might start a suit to recover a double payment, but then face a roadblock if a tribunal decided that the employee had no right to patriciate. That roadblock might then disappear (and reappear again) as the right-to-participate suit climbs the administrative and appellate ladder.

The rules for workers' compensation case potentially affect thousands of cases a year. That is perhaps why this Court routinely reviews appeals that set the ground rules for those cases. *See, e.g.*, *Bennett v. Adm'r., Ohio Bur. of Workers' Comp.*, 134 Ohio St. 3d 329, 2012-Ohio-5639; *Spencer v. Freight Handlers, Inc.*, 131 Ohio St.3d 316, 2012-Ohio-880; *Clendenin v. Girl Scouts of W. Ohio*, 42 N.E.3d 812, 2015-Ohio-4506 ¶ 8 (1st Dist.), review granted, 145 Ohio St. 3d 1421, 2016-Ohio-1173. This case, too, fits that mold.

D. The Ninth District's judgment invites employees and tortfeasors to evade the Recovery Statute, because they, not the Bureau, control settlement timing.

The consequences of the Ninth District's judgment are stark because the pattern in this case turns on events that are largely controlled by an employee or an employee along with a

tortfeasor. And because the decision eliminates the Bureau's right *entirely* in these cases, it creates a blueprint for those who want to prevent the Bureau from eliminating double recoveries.

As explained above, the Ninth District's judgment, like the Sixth's before it, creates multiple windows in which parties could evade the Bureau's recovery efforts. At the outset, employees and tortfeasors will have a strong incentive to settle before the employee files a workers' compensation claim, as that fully insulates the funds from recovery by the Bureau. And even those who file workers' compensation claims immediately will face many windows for opportunistic timing. Employees might file workers' compensation claims, but later find themselves close to a tort settlement, with their workers' compensation claim still being contested on appeal. In that case, the employees and tortfeasors share an incentive to settle right after a decision denying the right to participate, thereby insulating the settlement from recovery.

Moreover, the Bureau cannot counter any of these timing issues. Both the tort settlement's timing and the timing of the workers' compensation appeal process are out of the Bureau's control. And the Bureau cannot work around a tort claim it knows nothing about. The Recovery Statute's mandatory notification requirement does not help either, as the Ninth District concluded that those in Verlinger's shoes had no duty to notify the Bureau. *See* App. Op. ¶ 20 (Hensal, J., concurring in judgment); *cf. id*. at ¶ 11 (Moore, J., concurring in judgment). Future employees will be able to keep the Bureau in the dark about tort settlements until it is too late.

For all these reasons, the Court should hear this case.

ARGUMENT

Appellant Bureau's Proposition of Law:

> *The Bureau of Workers' Compensation is entitled to reimbursement under R.C. 4123.931 whenever an injured worker receives both workers' compensation benefits and a tort recovery for the same injury.*

The Ninth District's judgment is flawed for several reasons. *First*, no matter which rationale is invoked, the judgment's focus on timing is wrong. The Recovery Statute deals with payments, not their timing.

For starters, the "claimant" definition, by its plain terms, does not support the ruling. A "claimant" is defined as a "person who is eligible to receive compensation, medical benefits, or death benefits" under the compensation laws. R.C. 4123.93(A). Judge Moore read the term "eligible" to require *a legal declaration* of eligibility, and required that legal declaration to be in place on the settlement date in order to trigger the Bureau's reimbursement rights. She used a claim's status as "allowed" or "disallowed" as a proxy for eligibility, but the statute does not require "allowance"; it requires eligibility.

No more persuasive is Judge Hensal's focus on the timing of payments. The Recovery Statute uses the Bureau's payment as the event that creates the right to recoup money, but it does not require that the money be paid before a settlement is finalized. The "paid by" language in subsection (G) means only that the Bureau's right to recover post-dates the payment, not that the settlement must post-date payment.

This overall focus on timing is not supported by the statute. The statute does not say that an employee must be declared to have the right to participate, or that the employee must have received payment by a given date; it says that someone must *be* eligible. Eligibility exists from the moment after an injury occurs, regardless of whether the Bureau has spoken, or has mistakenly disallowed the claim. The term "eligible" suggest *a potential* status.

Someone is often *eligible* for something before *entitlement* is resolved. A college athlete may be eligible for the draft, but not entitled to become a professional athlete. A child may be eligible for adoption, but not entitled to be. A citizen may be eligible to vote, but not entitled to do so without registering. *Cf., e.g., Cabell Huntington Hosp. v. Shalala*, 101 F.3d 984, 987-88 (4th Cir. 1996) (explaining the "clear difference between eligibility for Medicaid payments . . . and entitlement to them"); *Kemp v. Republic Nat'l Life Ins. Co.*, 649 F.2d 337, 339 (5th Cir. 1981) (distinguishing eligibility to enroll and actual enrollment).

To be sure, an employee's ultimate eligibility might seem unknowable early on, but when a court later applies the Recovery Statute, as here, it will know that the employee was ultimately found to have been eligible, *retroactive to the date of injury*. *See* R.C. 4123.511. That retroactive allowance, for benefits purposes, logically implies a retroactive look at eligibility for reimbursement purposes, too. It makes no sense for employees like Verlinger to have it both ways: retroactive benefits, but obligations that only start after a right-to-participate finding.

For another thing, the Ninth District's judgment gives meaning to the word "claimant" that is inconsistent with its meaning in other parts of the workers' compensation law. *See, e.g., Cleveland v. State*, 138 Ohio St. 3d 232, 2014-Ohio-86 ¶ 13 (reversing appeals court because "an in pari materia reading of the statute" revealed the error of viewing one piece of the statute alone). Here, the statutes governing administrative appeals use the term "claimant" to describe even those who have yet to establish a right to participate. R.C. 4123.511.

Finally, the Ninth District's judgment contradicts the structure of the statute. *See, e.g., Risner v. Ohio Dep't of Natural Res.*, 144 Ohio St.3d 278, 2015-Ohio-3731 ¶¶ 16-18 (looking at structure of law to determine meaning). For example, an employee must notify the Bureau of *potential* tort claims; and no settlement, award, or other compromise is to be final unless the

Bureau is notified *and* has a chance to assert its rights. R.C. 4123.93(G). The Ninth District's holding does not square with this provision, which requires notice *before* settling. Separately, if a claimant and tortfeasor settle without notifying the Bureau, *or* if a settlement excludes the Bureau, both are jointly and severally liable to the Bureau. *Id.* Those alternatives show the breadth of the Bureau's right. The alternatives mean that the General Assembly did not want anyone to evade the system and retain double payment.

In sum, Verlinger received payment for the same injuries twice. She ultimately secured a right to participate. She was eligible *retroactively* for benefits. Thus, she was eligible to repay as well as to collect. The Ninth's District's contrary judgment is mistaken.

CONCLUSION

The Court should grant review and reverse the Ninth District's judgment.

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