

**IN THE SUPREME COURT OF OHIO**

LAMAR THOMAS, : Case No.: 2022-0787  
Appellee, :  
vs. :  
JOHN LOGUE [STEPHANIE : On appeal from the Franklin County Court of  
MCCLLOUD], ADMINISTRATOR, OHIO : Appeals, Tenth Appellate District  
BUREAU OF WORKERS' :  
COMPENSATION, : Court of Appeals  
Appellant. : Case No. 21AP-385  
:

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**BRIEF OF AMICI CURIAE**  
**OHIO CHAMBER OF COMMERCE AND OHIO MANUFACTURERS ASSOCIATION**  
**AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS OHIO**  
**IN SUPPORT OF JOHN LOGUE [STEPHANIE MCCLLOUD], ADMINISTRATOR,**  
**OHIO BUREAU OF WORKERS' COMPENSATION**

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JAMES A. DEROCHÉ (0055613)  
JEFFREY D. JOHNSON (0077404)  
GARSON JOHNSON LLC  
2900 Detroit Avenue, Second Floor  
Cleveland OH 44113  
216-696-9330; 216-696-8558 fax  
[jderoche@garson.com](mailto:jderoche@garson.com)  
[jjohnson@garson.com](mailto:jjohnson@garson.com)

R. ERIC KENNEDY (0006174)  
DANTEL P. GOETZ (0065549)  
WEISMAN, KENNEDY & BERRIS Co.  
2900 Detroit Avenue, Second Floor  
Cleveland OH 44113  
216-781-1111; 216-781 -6747 fax  
[ekennedy@weismanlaw.com](mailto:ekennedy@weismanlaw.com)  
[dgoetz@weismanlaw.com](mailto:dgoetz@weismanlaw.com)

DAVE YOST (0056290)  
Ohio Attorney General

BENJAMIN M. FLOWERS\* (0095284)  
Solicitor General  
\*Counsel of Record

ZACHERY P. KELLER (0086930)  
Deputy Solicitor General

TIMOTHY MILLER (00709064)  
Assistant Attorney General  
30 East Broad Street, 17th Floor  
Columbus OH43215  
614-466-8980; 614-466-5087 fax  
[benjamin.flowers@ohioago.gov](mailto:benjamin.flowers@ohioago.gov)  
*Counsel for Appellant John Logue [Stephanie  
McCloud] Administrator, Ohio Bureau of  
Workers' Compensation*

ANDREW S. GOLDWASSER (0068397)  
CIANO GOLDWASSER, LLP  
28601 Chagrin Boulevard, Suite 250  
Beachwood OH 44122  
216 -658 -9900; 216 -658 -9920 fax  
[asg@c-g-law.com](mailto:asg@c-g-law.com)

*Counsel for Appellee  
Lamar Thomas*

SUE A. ROUDEBUSH (0078497)  
ANNE MARIE SFERRA (0030855)  
BRICKER & ECKLER  
100 South 3rd Street  
Columbus OH 43215  
614-227-2300; 614-227-2390 fax  
[sroudebush@bricker.com](mailto:sroudebush@bricker.com)

*Counsel for Amici Curiae  
National Federation of Independent  
Business/Ohio*

PRESTON J. GARVIN (0018641)  
MICHAEL J. HICKEY (0021410)  
NATHAN P. FRANZEN (0092532)  
GARVIN & HICKEY, LLC  
181 E. Livingston Avenue  
Columbus OH 43215  
614-225-9000; 614-225-9080 fax  
[nathan@garvin-hickey.com](mailto:nathan@garvin-hickey.com)

*Counsel for Amicus Curiae  
Ohio Chamber of Commerce, and  
Ohio Manufacturer's Association*

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## STATEMENT OF INTEREST

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. A more favorable business climate in Ohio promotes Ohio's economy and benefits all Ohioans. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

The Ohio Manufacturers' Association ("OMA"), is a statewide association of approximately 1,300 manufacturing companies which collectively employ over 700,000 men and women who work in manufacturing in the State of Ohio. The OMA's members have a vital interest in ensuring the Ohio remains a desirable place to do business.

The National Federation of Independent Businesses/Ohio ("NFIB/Ohio") is an association with more than 21,000 members, making it the state's largest association dedicated exclusively to serving the interests of small and independent business owners. NFIB/Ohio's members typically employ fewer than 20 people and record annual revenue of \$2,000,000 or less. NFIB/Ohio's members are almost exclusively state fund employers which will be impacted by the decision in this case.

*Amici's* members have an interest in this case because Ohio law requires most employers to contribute to a state insurance fund. R.C. 4123.35(A); R.C. 4123.38. The *Amici's* members are concerned that the decision of the Court of Appeals below will increase costs incurred by employers due to third party torts, if the potential for subrogation recoveries declines.

## STATEMENT OF THE FACTS AND CASE

This case asks whether costs of “medical examinations, recommendations and determinations” obtained to approve requests for compensable conditions are recoverable from third parties through subrogation, on the ground that they are costs paid “on behalf of the claimant.” R.C. 4123.30; R.C. 4123.93. For the following reasons, they are.

*Amici’s* members are in agreement with Appellant John Logue [Stephanie McCloud], Administrator, Ohio Bureau of Workers’ Compensation’s Statement of Facts and Case. There are a few additional points *Amici’s* members wish to address.

The Ohio Workers’ Compensation system, as codified by the General Assembly, is a compromise between employees, employers, and the State. This compromise includes the statutory right to recovery at issue in this case. When a third party injures a worker and the worker receives compensation or benefits pursuant to the Ohio workers’ compensation system, the Bureau or self-insured employer gain a “right of recovery” in the event that the injured worker later receives money from the third party. R.C. 4123.931(A). This right of recovery is defined as a share of “any costs or expenses paid to or on behalf of injured worker.” R.C. 4123.93(D).

In cases of injury, occupational disease, and a death resulting from either, the Bureau is charged with adopting rules to regulate “the nature and extent of the proofs and evidence, and the method of taking and furnishing the same”. R.C. 4123.05. On the other hand, self-insured employers,

\* \* \* By becoming self-insuring, the employer agrees to abide by the rules and regulations of the bureau and commission and further agrees to pay compensation and benefits subject to the provisions of these rules. The employer shall proceed to make payment of compensation or benefits without any previous order from the bureau or commission and shall start such payments as required under the Workers’ Compensation Act, unless it contests the claim.

Ohio Adm.Code 4123-19-03(K)(7).

Many claims are undisputed and the Bureau goes through an “initial review” process, which is non-adversarial. Ohio Adm.Code 4123-3-09(B). While state fund employers make "premium payments to the fund. Self-insurers, on the other hand, are the initial processing agents of claims brought by their employees. The commission or bureau becomes involved only if the self-insurer denies a claim and the employee appeals." *State ex rel. Baker Material Handling Corp. v. Indus. Comm'n*, 69 Ohio St. 3d 202, 205, 631 N.E.2d 138 (1994), quoting *Wargetz v. Villa Sancta Anna Home for the Aged*, 11 Ohio St.3d 15, 17, 462 N.E.2d 1215 (1984).

Both the Bureau and self-insured employers may forgo a file review, medical examination and determination for medical conditions which involve “matters of common knowledge” such as a contusion upon falling. *White Motor Corp. v. Moore*, 48 Ohio St.2d 156, 357 N.E.2d 1069 (1976), paragraph two of the syllabus; *Perry v. LTV Steel Co.*, 84 Ohio App.3d 670, 618 N.E.2d 179 (8th Dist.1992). However, a medical file review, independent examination and determination may be required for more complicated matters such as internal soft tissue injuries i.e., sprains, “where the testimony of lay witnesses is without probative value to establish a proximate causal relationship between the injury and the result claimed and where medical testimony is absolutely essential to prove such relationship.” *White* at 159, discussing *Stacey v. Carnegie-Illinois Steel Corp.*, 156 Ohio St. 205, 213, 101 N.E.2d 897 (1951); *Wright v. Columbus*, 10th Dist. No. 05AP-432, 2006-Ohio-759; *Howard v. Seaway Food Town*, 6th Dist. Lucas Court of Appeals No. L-97-1322, 1998 Ohio App. LEXIS 3684 (Aug. 14, 1998).

Even if an injured worker fails to submit proper evidence, the Bureau does not automatically dispute an injured worker’s request. The Bureau must make “every effort ... to complete the record” before it decides to dispute a claim. Ohio Adm.Code 4123-3-09(B)(1). The

Bureau, as an impartial, unbiased and neutral party, has independent medical file reviews and exams completed to make determinations on applications for compensation and benefits. Self-insured employers also have the same independent file reviews and examinations completed for requests for compensation and benefits and make determinations for claim allowances, compensation and benefits based on those findings.

These reviews, exams and determinations are completed for: injured workers who are represented by counsel, or unrepresented; injured workers who have, or do not have, a physician of record; and injured workers who do, or do not, have evidence relating medical conditions to a workplace injury. Many times, these exams are completed soon after the filing of a first report of injury. In the instant case, the determination was completed upon the request for an additional condition by the injured worker, which was accompanied by supporting evidence. However, requests for additional conditions do not always have supporting evidence. In many instances, these file reviews, medical examinations and determinations are often completed with nothing more than a form filled out by the injured worker and an emergency room or other medical record; devoid of any statement of causation relating a specific medical condition to the work injury. Reviews, examinations and determinations, relating injuries to a work accident or injury, are an essential function undertaken by The Bureau and self-insured employers on behalf of the injured worker to qualify the injured worker for workers' compensation benefits.

Once the injuries are established, The Bureau or self-insured employer then pay for compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant. Without these reviews, examinations and determinations, the injured worker may not receive proper medical treatment, paid time off work

in the form of Temporary Total Disability benefits, a Permanent Partial Disability Award, or other compensation and benefits they would be entitled to.

In the case of work injuries caused by a negligent third party, a portion of these costs may be recovered via the subrogation statutes at issue in this case. If recovered, the Bureau places subrogation funds from the third-party tortfeasor back into the state insurance fund for other injured workers. Since the costs for examinations come from the state fund, it follows they be returned to the fund upon recovery. These funds help pay for current and future claims and reduce the premiums paid by state fund employers. Self-Insured employers also use funds recovered from third parties through subrogation to offset the compensation and benefits paid in the claim. Conversely, if the ability to collect from third party tortfeasors for costs associated with file reviews, independent medical examinations and determinations is not permitted under R.C. 4123.93 et. al., there would be an increase in costs to the Bureau and employers.

The Ohio Workers' Compensation system is a compromise from the harsh realities that faced workers before it's adoption in 1913. Ohio Constitution, Article II, Section 35. The tradeoff resulted in more equitable compensation and benefits, for more injured workers, and eliminated the common law obstacles to their recovery. *State ex rel. Crawford v. Indus. Com. of Ohio*, 110 Ohio St. 271, 275, 143 N.E. 574 (1924) and *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 119, 748 N.E.2d 1111 (2001). In exchange, Ohio employers were protected from law suits and other forms of liability. R.C. 4123.35(A); R.C. 4123.38; R.C. 4123.74. This area of law, having been removed from the common law, continues to evolve and strike a more appropriate balance between the injured worker, employer, and the Bureau.

The statutory “right of recovery”, provided by R.C. 4123.91 et. al., also seeks to strike this balance by allowing the “statutory subrogee” to assert their “subrogation interest” against third party tortfeasors who injure workers.

[This] "[s]ubrogation interest" includes past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and *any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee* pursuant to this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

R.C. 4123.93 (D) (Emphasis added.).

R.C. 4123.931 provides a pro rata formula that reduces the statutory subrogee’s ability to collect from the third party by deducting the attorney’s fees, costs and expenses incurred by the injured worker from the amount which the statutory subrogee may collect. This reduction is referred to as the “Net amount recovered”. R.C. 4123.93 (E); R.C. 4123.931(B). The statutory formula further reduces the amount the statutory subrogee may collect by establishing a formula requiring the statutory subrogee to accept a percentage of the net amount recovered. R.C. 4123.93(F); R.C. 4123.931(B); R.C. 4123.931(D)(1). To avoid litigation on the matter, the parties often negotiate the statutory subrogee’s right of recovery amount lower than what the statutory subrogee may be entitled to under the statutory formula. Such negotiations are permitted pursuant to R.C. 4123.931(B). Further, the statute provides for alternative dispute resolution or a conference with the Administrator’s designee for a determination on the matter. R.C. 4123.931(B) and (C).

Pursuant to the statute, injured workers are not required to immediately pay the statutory subrogee’s estimated future payments of compensation, benefits, costs, or expenses directly after an award or settlement with a third party. Injured workers may keep more of the award or settlement recovered from third party tortfeasors by; first, reducing the statutory subrogee’s estimated future payments to present value; and second, by placing that reduced amount into an

interest-bearing account. R.C. 4123.931(E)(1). The injured worker would then reimburse the statutory subrogee semiannually for future payments of compensation from the interest-bearing account. R.C. 4123.931(E)(3). If the injured worker were to settle the underlying workers' compensation claim, pass away, or if some event precludes the injured worker from receiving future payment of benefits from their workers' compensation claim, any amounts in the interest-bearing account would revert back to the injured worker or their estate. R.C. 4123.931(E)(1).

The subrogation statutes in question give some unique advantages to the injured worker. The amounts paid to the statutory subrogees by negligent third parties, pursuant to the subrogees' right of recovery, are often reduced when compared to the actual costs incurred by the statutory subrogee. Importantly, in striking a fair balance, the General Assembly divided "the burden of ... undercompensation" between the injured worker and the statutory subrogee:

Rather than forcing either the claimant or the subrogee to shoulder the full burden of the undercompensation, the General Assembly chose to have them share the burden equally\* \* \* Although the *Holeton* court focused on the claimant's perspective, the subrogee's perspective should also be considered. It is not inequitable for the subrogee to obtain some level of reimbursement\* \* \*.

*Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶78-79. It is equitable for the statutory subrogee to obtain some level of reimbursement. The subrogation statute strikes a fair balance between the parties by allowing injured workers "to keep the workers' compensation benefits received from the subrogee", but also allows statutory subrogees to collect a prorated amount from the third party tortfeasor. *Id.* at ¶76-77.

It is with this practical framework in mind, we turn to the General Assembly's statutorily mandated use of state insurance funds at issue in this case. The state insurance fund consists of two separate funds, one for public employers and one for private employers. These funds,

constitute a trust fund for the benefit of employers and employees mentioned in sections 4123.01, 4123.03, and 4123.73 of the Revised Code *for the payment of compensation, medical services, examinations, recommendations and determinations*, nursing and hospital services, medicine, rehabilitation, death benefits, funeral expenses, and like benefits for loss sustained on account of injury, disease, or death provided for by this chapter, and for no other purpose.

R.C. 4123.30 (Emphasis added.) These payments cover different costs that injured workers would otherwise bear, including the cost to prove their claim, prove their entitlement to compensation such as temporary total disability or a permanent partial award, or to prove a requested additional condition is compensable through an expert medical opinion. The question in the instant case is if these examinations, recommendations and determinations are “on behalf of” the injured worker pursuant to R.C. 4123.93. Such “costs or expenses” are “on behalf” of the injured worker, because injured workers stand to benefit from them, in the form of proof to entitlement to the aforementioned compensation and benefits.

As *Amici’s* members are in agreement with Appellant John Logue [Stephanie McCloud], Administrator, Ohio Bureau of Workers’ Compensation’s Statement of Facts and Case the members refer the Court to Appellant’s brief for a more detailed case and procedural history.

### **ARGUMENT**

Appellant’s Proposition of Law: The cost of an independent medical review, which the Bureau pays in order to complete the record, is a cost paid “on behalf of the claimant” and thus subject to subrogation.

*Amici’s* members are in agreement with Appellant John Logue [Stephanie McCloud], Administrator, Ohio Bureau of Workers’ Compensation’s Proposition of Law and the members refer the Court to Appellant’s brief for a more detailed analysis of the proposition of law and legal arguments.

The ruling in this case will impact how the Bureau handles all requests for compensation or benefits during their non-adversarial proceedings, which in turn will impact recoverable amounts from third party tortfeasors and Ohio employer's workers' compensation premiums. Given the realities of the workers' compensation claim process and potential costs, these independent medical examinations, file reviews and determinations substantially benefit injured workers, many of whom are initially unrepresented by counsel and lack a medical expert opinion. Specifically, in this case, the Bureau was not satisfied with Thomas' application for an additional allowance, but instead of disputing Thomas' request, the Bureau paid for a second opinion from an independent medical expert. Compl. ¶¶29-32. The expert could have opined Thomas' requested additional medical condition was related to his workplace injury. The Bureau would have honored the expert's medical opinion, allowed the condition, and would have paid workers' compensation benefits related to the condition. (The employer of course, would have a chance to appeal the Bureau's initial determination and subsequent awards.) Ohio Adm.Code 4123-3-09(B)(1).

The independent medical examinations, file reviews and determinations at issue in this case are conducted by independent medical experts. Ohio Adm.Code 4123-6-16(E), Ohio Adm.Code 4123-6-16 (I). All injured workers receive the opportunity, at no cost, for a favorable expert medical opinion which will directly benefit them during the Bureau's initial determination of their application for compensation or benefits. In the instant case, the expert's decision was not in Thomas' favor. However, given that the Bureau was unsatisfied with his initial showing, Thomas benefited from a second review and opinion from a medical expert, at no cost to Thomas.

The General Assembly has broadly defined the "subrogation interest" to include "payments of compensation, medical benefits, rehabilitation costs, or death benefits, *and any other costs or expenses paid to or on behalf of the claimant.*" R.C. 4123.93(D) (Emphasis added.) The Bureau

has reasonably interpreted the subrogation statute at issue by including medical reviews, examinations and determinations in the prorated formula which they collect from third party tortfeasors, because such reviews, examinations and determinations are conducted by the Bureau to benefit the injured worker, providing them additional independent medical evidence free of cost to the injured worker. As discussed above, this evidence is obtained on behalf of injured workers where the Bureau is not satisfied with the injured workers' initial evidence for compensation and benefits. The Court should not overturn the Bureau's interpretation unless it is unreasonable. *Warren v. Morrison*, 2017-Ohio-660, 85 N.E.3d 394, ¶10 (10<sup>th</sup> Dist.) citing *State ex rel. Clark v. Great Lakes Constr. Co.*, 99 Ohio St.3d 320, 2003-Ohio-3802, 791 N.E.2d 974, ¶10. Given the balance the General Assembly has in created in Ohio workers' compensation system, including the shared sacrifices found in the statutory right to recovery against a third party, the prorated collection of costs from a third party tortfeasor at issue in this case fits squarely and equitably into this model of shared sacrifice.

### **CONCLUSION**

The Ohio workers' compensation system is a product of compromise, including R.C. 4123.93 and 4123.931's reduced and prorated right to recovery from third party tortfeasors. The Bureau, state funded employers and *Amici's* members will be impacted by this decision if their ability to collect from third party tortfeasors is further curtailed. The Bureau and self-insured employers provide medical reviews, examinations, and initial determinations on behalf of injured workers who receive the benefit of independent medical evidence in their workers' compensation claim, often entitling them to treatment, compensation and benefits which would not otherwise be approved upon an initial review. Injured workers, including Thomas, benefit from receiving additional medical evidence. The results of these reviews and examinations are immaterial, as the

benefit to the injured worker is created when the Bureau pays the costs to obtain independent medical evidence on the injured worker's behalf. Obtaining this evidence is more than an administrative task or cost, as it may be the only evidence to entitle an injured worker to workers' compensation benefits. Collection of these costs from a third party tortfeasor, reduced and prorated, is a reasonable interpretation of the statute and furthers the General Assembly's intended compromise between injured workers, employers and the state.

Respectfully Submitted,

/s/ Nathan P. Franzen, Esq.

PRESTON J. GARVIN (0018641)  
MICHAEL J. HICKEY (0021410)  
NATHAN P. FRANZEN (0092532)  
GARVIN & HICKEY, LLC  
181 E. Livingston Avenue  
Columbus OH 43215  
614-225-9000; 614-225-9080 fax  
[nathan@garvin-hickey.com](mailto:nathan@garvin-hickey.com)

*Counsel for Amici Curiae  
Ohio Chamber of Commerce, and  
Ohio Manufacturer's Association*

/s/ Sue A. Roudebush

SUE A. ROUDEBUSH (0078497)  
ANNE MARIE SFERRA (0030855)  
BRICKER & ECKLER  
100 South 3rd Street  
Columbus OH 43215  
614-227-2300; 614-227-2390 fax  
[sroudebush@bricker.com](mailto:sroudebush@bricker.com)

*Counsel for Amici Curiae  
National Federation of Independent  
Business/Ohio*

## CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing *BRIEF OF AMICI CURIAE* has been served upon the following via email this 23<sup>rd</sup> Day of December, 2022:

JAMES A. DEROCHÉ (0055613)  
JEFFREY D. JOHNSON (0077404)  
GARSON JOHNSON LLC  
2900 Detroit Avenue, Second Floor  
Cleveland OH 44113  
[jderoche@garson.com](mailto:jderoche@garson.com)  
[jjohnson@garson.com](mailto:jjohnson@garson.com)

R. ERIC KENNEDY (0006174)  
DANTE P. GOETZ (0065549)  
WEISMAN, KENNEDY & BERRIS Co.  
2900 Detroit Avenue, Second Floor  
Cleveland OH 44113  
[ekennedy@weismanlaw.com](mailto:ekennedy@weismanlaw.com)  
[dgoetz@weismanlaw.com](mailto:dgoetz@weismanlaw.com)

AND

ANDREW S. GOLDWASSER (0068397)  
CIANO GOLDWASSER, LLP  
28601 Chagrin Boulevard, Suite 250  
Beachwood OH 44122  
[asg@c-g-law.com](mailto:asg@c-g-law.com)

*Counsel for Appellee  
Lamar Thomas*

DAVE YOST (0056290)  
Ohio Attorney General

BENJAMIN M. FLOWERS\* (0095284)  
Solicitor General

\*Counsel of Record  
30 East Broad Street, 17th Floor  
Columbus OH 43215  
[benjamin.flowers@ohioago.gov](mailto:benjamin.flowers@ohioago.gov)

*Counsel for Appellant John Logue [Stephanie McCloud] Administrator, Ohio Bureau of Workers' Compensation*

SUE A. ROUDEBUSH (0078497)  
ANNE MARIE SFERRA (0030855)  
BRICKER & ECKLER  
100 South 3rd Street  
Columbus OH 43215  
614-227-2300; 614-227-2390 fax  
[sroudebush@bricker.com](mailto:sroudebush@bricker.com)

*Counsel for Amici Curiae  
National Federation of Independent Business/Ohio*

/s/ Nathan P. Franzen, Esq.  
NATHAN P. FRANZEN (0092532)  
GARVIN & HICKEY, LLC  
181 E. Livingston Avenue  
Columbus OH 43215  
614-225-9000; 614-225-9080 fax  
[nathan@garvin-hickey.com](mailto:nathan@garvin-hickey.com)

*Counsel for Amici Curiae  
Ohio Chamber of Commerce, and  
Ohio Manufacturer's Association*