

No. 2008-0857

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**In The Supreme Court of Ohio**

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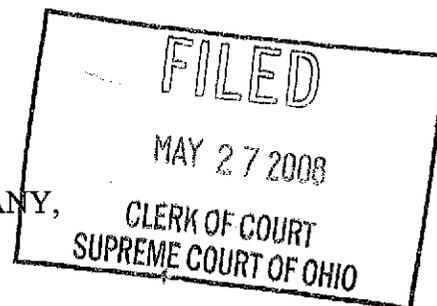
**APPEAL FROM THE COURT OF APPEALS  
SEVENTH APPELLATE DISTRICT  
COLUMBIANA COUNTY, OHIO  
CASE NO. 07-CO-15**

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ROSE KAMINSKI,  
*Plaintiff-Appellee,*

v.

METAL & WIRE PRODUCTS COMPANY,  
*Defendant-Appellant.*



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**MEMORANDUM OF PLAINTIFF-APPELLEE ROSE KAMINSKI IN RESPONSE  
TO APPELLANT'S AND AMICI CURIAES' MEMORANDA IN  
SUPPORT OF CLAIMED JURISDICTION**

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**I. NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED IN THIS CASE NOR IS THIS CASE OF PUBLIC OR GREAT GENERAL INTEREST**

Neither the Defendant-Appellant's nor the Amici Curiae's Propositions of Law warrant the review of this honorable Court. Defendant-Appellant and its Amici seek discretionary review of two issues: (1) the Appellate Court's review of the underlying facts pursuant to the common law intentional employment tort elements set forth in *Fyffe v. Jenos, Inc.* (1991) 59 Ohio St.3d 115; and (2) an employee's alleged "double recovery" in an intentional employment tort. Discretionary jurisdiction is not proper for either Proposition. First, Defendant-Appellant's Answer Brief in the 7<sup>th</sup> District Court of Appeals invited the court to examine the underlying facts pursuant to the common law *Fyffe* elements. Second, the Workers' Compensation Subrogation statutes have recently been held to be constitutional en toto by this Court thus eliminating any possibility of a plaintiff's "double recovery" in a suit against an employer for an intentional tort.

The two Propositions of Law alleging substantial constitutional questions arise in the context of two well-defined areas of judicial interpretation: (1) the doctrine of stare decisis; and (2) an employer's liability for an intentional tort. Defendant-Appellant's Proposition of Law Number One argues that "flexibility" is needed when considering the impact of the doctrine of stare decisis upon cases interpreting the Ohio Constitution. Defendant-Appellant's Proposition has already been examined and rejected by this honorable Court in a prior unrelated appeal, thus no substantial question exists to be answered.

Defendant-Appellant's Proposition of Law Number Two seeks to overturn both the well-reasoned decision of the 7<sup>th</sup> District Court of Appeals and multiple prior decisions of the Ohio Supreme Court. These prior decisions have held, in no uncertain constitutional terms, that a statute which requires an employee to prove a specific intent to injure to prevail in an intentional tort action

against his or her employer is both illusory and beyond the scope of the Legislature's power under Sections 34 and 35, Article II of the Ohio Constitution. Accordingly, no substantial questions of constitutional law are raised by Defendant-Appellant's appeal.

## II. ARGUMENT

### Response to Proposition of Law No. 1

**The *Galatis* stare decisis test is an appropriate analysis in constitutional adjudication and is a “well-structured method of ensuring a disciplined approach to deciding whether to abandon a precedent.”**

This Court has recently considered the import of *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216 in the context of constitutional interpretation and such interpretation's interplay with the doctrine of stare decisis. See *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546 at ¶¶ 130-147. *Groch* examined, in part, the propriety of the Ohio Supreme Court's decision in *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 639 N.E.2d 425. *Brennaman*, decided prior to *Galatis*, overruled past constitutional precedent regarding statutes of repose seemingly at whim. *Groch* at 137.

This Court's opinion in *Groch* makes it clear that the “flexibility” sought by Defendant-Appellee in its Proposition of Law Number One does not comport with sound judicial principle: “*Brennaman* illustrates why it is imperative that the *Galatis* factors be applied. Otherwise, the principles of predictability and stability are sacrificed for the sake of judicial whims.” *Groch* at ¶ 137.

While the *Groch* opinion found it possible to limit *Brennaman* to its facts rather than overrule the precedent, *Groch* made it clear that the reasonable and elementary approach to stare decisis set forth in *Galatis* should apply with equal force to judicial decisions involving constitutional interpretation.

The Opinion of the 7<sup>th</sup> District in *Kaminski* comports with this Court's instruction in the arena of stare decisis: "the fact that the Ohio Supreme Court has previously rejected a similar definition of substantial certainty is not a reason, in and of itself, to find R.C. § 2745.01 unconstitutional." See Case. No 07-CO-15, Opinion at ¶ 20. The 7<sup>th</sup> District's sound approach mirrors this Court's recent application of the doctrine of stare decisis in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468; 2007 Ohio 6948 at ¶ 23, citing *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 5, 539 N.E.2d 103.

Given this Court's recent examination of the substance of Defendant-Appellee's Proposition of Law and the propriety of the 7<sup>th</sup> District's approach to stare decisis, no substantial constitutional question exists to warrant this honorable Court's jurisdiction pursuant to Defendant-Appellant's Proposition of Law Number One.

#### **Response to Proposition of Law No. 2**

**R.C. 2745.01, due to its excessive standard of requiring proof of an employer's deliberate intent to injure its employee, is not a law that furthers the comfort, health, safety and general welfare of all employees and thus violates Sections 34 and 35, Article II of the Ohio Consitution.**

As a threshold matter, Defendant-Appellant cites *Thompson v. Ford* (1955), 164 Ohio St. 74, 79 in support of the proposition that the General Assembly has always had the right to "modify or entirely abolish common law actions and defenses." Mem. of Defendant-Appellant at 4, ¶ 2. *Thompson* arose from an automobile negligence case examining the effect of a municipal ordinance upon the common law standard of care regarding parked automobiles.

Defendant-Appellant carefully omits an important caveat which underlies the holding of *Thompson*: "[t]here is no question that the legislative branch of the government, unless prohibited by constitutional limitations, may modify or entirely abolish common-law actions and defenses."

*Thompson* at 79 (emphasis added).

This honorable Court has recently reaffirmed Ohio citizens' constitutional right to legal redress for intentional torts committed against them. See *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468; 2007 Ohio 6948 at ¶ 32, citing *Belding v. State ex. Rel. Heifner* (1929), 121 Ohio St. 393, 169 N.E. 301, syllabus, and *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio 3257 at ¶ 21. Contrary to the broad and absolute swath of power with which Defendant-Appellant arms the General Assembly, the Legislature does not have the constitutional authority to eliminate an Ohio Citizen's right to a jury trial in a negligence or intentional tort action, as those rights existed in the common law prior to the enactment of Section 5, Article I of the Ohio Constitution. *Id.*

Defendant argues, against this backdrop of purported absolute legislative authority, that this Court's decision in *Johnson v. BP Chemicals, Inc.* 85 Ohio St.3d 298, 1999-Ohio-267 is "demonstrably wrong." Mem. of Defendant-Appellant at 3, ¶ 3. *Johnson* is but one decision in a long line of constitutional precedent which must be overturned to reach Defendant-Appellant's desired result.

In *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St.2d 608, 613 this Court recognized that an intentional tort can be committed by an employer vis-à-vis an employee and is not a natural risk of the employee's employment. The *Blankenship* Court supported its conclusion as follows: "[t]he workers' compensation system is based on the premise that an employer is protected from a suit for negligence in exchange for compliance with the Workers' Compensation Act. The Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability. But the protection afforded by the Act has always been for

negligent acts and not for intentional tortious conduct. Indeed, workers' compensation Acts were designed to improve the plight of the injured worker, and to hold that intentional torts are covered under the Act would be tantamount to encouraging such conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act." Id. at 614.

Without Section 5, Article I constitutional authority to eliminate a common law intentional tort against an employer, the General Assembly's multiple efforts to do so post-Blankenship must be grounded upon another section of the Ohio Constitution to be a valid exercise of legislative power. This Court has made it very clear that the General Assembly has no such authority under the remaining applicable Sections of the Ohio Constitution: Sections 34 and 35 of Article II.

Section 34, Article II of the Ohio Constitution provides the General Assembly with the power to promulgate laws "fixing and regulating the hours of labor, establishing a minimum wage, and providing for the health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power." Section 35, Article 2 of the Ohio Constitution provides the General Assembly with the power to pass laws establishing a State fund and administering board "for the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment \*\*\* " (emphasis added)."

The General Assembly does not have the power under Section 35, Article 2 of the Ohio Constitution to codify an employer's common law intentional employment tort as the tort necessarily occurs outside of the employment relationship. See *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 634; *Johnson v. BP Chemicals, Inc.* 85 Ohio St.3d 298, 305, 1999-Ohio-267 ¶¶ 11-12.

The legislative power of Section 34, Article 2 is constrained by the interests of the health, safety and general welfare of all employees. All past attempts by the General Assembly to statutorily

exclude or redefine into non-existence the term “substantial certainty” as it pertains to the intentional employment tort have been held to be “totally repugnant” to Section 34, Article II of the Ohio Constitution: “[a] legislative enactment that attempts to remove a right to a remedy under common law that would otherwise benefit the employee cannot be held to be a law that furthers the comfort, health, safety and general welfare of all employees \*\*\*.” *Brady* at 633; cited with approval by *Johnson* at 308.

In *Brady*, the Ohio Supreme Court considered the constitutionality of a statute which attempted to codify, by utilizing the authority of the State Worker’s Compensation Board, the common law intentional employment tort. See former R.C. § 4121.80. R.C. § 4121.80(G)(1) attempted to define the term “substantial certainty” as follows: “substantial certainty means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.” The statute at bar contains the exact same definitional language as the statute reviewed by the *Brady* Court and held to exceed and conflict with the legislative authority granted to the General Assemble pursuant to Sections 34 and 35, Article II of the Ohio Constitution. *Id.* at 635.

In *Johnson*, the Ohio Supreme Court reviewed yet another statute which attempted to codify and extinguish the intentional employment tort. Former R.C. § 2745.01(D)(1) defined an “intentional employment tort” as: “an act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee.”

The *Johnson* Court expressed its frustration at the General Assembly’s continued attempts to codify the common-law employment intentional tort: “[w]e thought that we had made it abundantly clear that any statute created to provide employers with immunity from liability for their intentional tortuous conduct cannot withstand constitutional scrutiny. Notwithstanding, the General Assembly has enacted R.C. 2745.01 and again seeks to cloak employers with immunity. In this regard, we can

only assume that the General Assembly has either failed to grasp the import of our holdings in *Brady* or that the General Assembly has simply elected to willfully disregard that decision. In any event, we will state our holding in *Brady* and hopefully put to rest any confusion that seems to exist with the General Assembly in this area.” *Johnson* at 304, citing *State ex. rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St. 3d 225, 230 fn. 5, 631 N.E. 2d 582, 587.

The Ohio Supreme Court has repeatedly considered the constitutionality of statutes such as R.C. § 2745.01 which supply illusory remedies in an effort to grant immunity to employers for intentional torts. The *Kaminski* Court’s determination of the constitutional issue is supported in both constitutional methodology and substantial constitutional precedent. “Any enactment that eliminates an individual’s right to a judgment or to a verdict properly rendered in a suit will \*\*\* be unconstitutional.” *Arbino* at ¶ 45, citing *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 426, 633 N.E.2d 504.

As no substantial constitutional question is presented by Defendant-Appellant’s Proposition of Law , jurisdiction over Defendant-Appellant’s Proposition of Law Number Two is not warranted.

### **Response to Proposition of Law No. 3**

**Defendant-Appellant’s Answer Brief in the 7<sup>th</sup> District Court of Appeals asserted, at p. 15, that “[t]he record before the court supports summary judgment in favor of \*\*\* Metal & Wire Products Company even if the common law standard under *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115 is applied.” Therefore the Appellate Court’s examination of the record under the *Fyffe*’s elements does not violate App. R. 12(A)(1)(b).**

Defendant-Appellant’s argument displays a lack of knowledge of its own Answer Brief in the 7<sup>th</sup> District Court of Appeals and of the trial court proceedings. As an initial matter, Defendant-Appellant misses the mark when it states that “the majority decided issues relating to *Kaminski*’s motion for partial summary judgment under the *Fyffe* standard that were never part of *Kaminski*’s

appeal.” Mem. of Defendant-Appellant at 14, ¶ 2.

Plaintiff-Appellee never moved the trial court for partial summary judgment pursuant to *Fyffe*. The common law standard of *Fyffe* was never applied to any of the trial court’s proceedings due to the trial court’s ruling granting Defendant-Appellant’s Motion for Summary Judgment on its declaratory judgment counter-claim asserting that R.C. § 2745.01 was constitutional. The case then proceeded pursuant to R.C. § 2745.01.

At page 15 of Defendant-Appellant’s Answer Brief in the Court of Appeals, Defendant invited the court to examine the underlying facts pursuant to the common-law test of *Fyffe* if the court found R.C. 2745.01 to be unconstitutional. The 7<sup>th</sup> District’s Opinion cited Defendant-Appellant’s invitation to apply the common law elements of *Fyffe* as the basis for the court’s common-law analysis of the underlying facts. See Case. No 07-CO-15, Opinion at ¶ 45.

Accordingly, Defendant-Appellant’s proposition of law No. 3 lacks merit and no question of great public and general interest is presented.

**Response to Amici Curiae**

**This honorable Court’s decision in *Groch v. General Motors Corp., et al.*, 117 Ohio St.3d 192, 2008-Ohio-546, upholding the constitutionality of R.C. 4123.93 and R.C. 4123.931, renders the primary Proposition of the Amici Curiae moot.**

The Amici echo the allegedly substantial constitutional question briefed by Defendant-Appellant in Proposition of Law Number Two. Plaintiff-Appellee has substantively responded to this issue, *supra*, and incorporates her Response herein.

The Amici also seek the discretionary jurisdiction of this honorable Court. These organizations primarily take issue with an injured employee’s ability to pursue workers’ compensation benefits while also pursuing an intentional employment tort action arising from the

same injury. The Amici claim that this practical arrangement allows an injured worker to recover “twice for the same injury.” Mem. of Amici at 3.

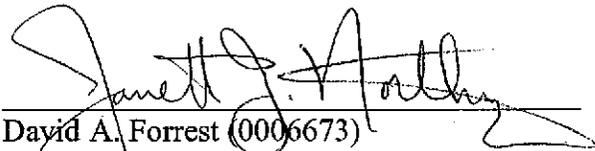
The Amici’s concerns have been addressed by the legislature by the promulgation of R.C. § 4123.93 and R.C. § 4123.931, the workers’ compensation subrogation statutes, and by this Court in *Groch v. General Motors Corp., et al.*, 117 Ohio St.3d 192, 2008-Ohio-546, holding that the workers’ compensation statutes are constitutional en toto. At the termination of an intentional employment tort case through settlement or favorable verdict, the Bureau of Workers’ Compensation or a self-insured employer has the statutory right to recover the past and estimated future workers’ compensation benefits received by the plaintiff-claimant. See R.C. § 4123.93 (A), (B), (C) and § 4123.931 (A), (B).

By the operation of the above cited statutes and interpretive case law, an intentional employment tort plaintiff does not receive a “double recovery” at the conclusion of an intentional employment tort action. Thus the Amici’s Proposition is moot and no question of public or great general interest is raised in the instant appeal.

### III. CONCLUSION

The 7<sup>th</sup> District's well reasoned Opinion conforms to years of Ohio Supreme Court constitutional precedent regarding an employer's liability for an intentional tort. In contrast, R.C. § 2745.01 clearly does not. Accordingly, this case does not present a substantial constitutional question meritorious of this honorable Court's jurisdiction.

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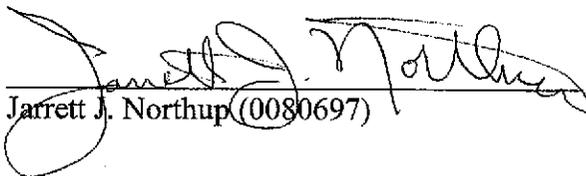
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