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IN THE SUPREME COURT OF OHIO

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CASE NO. 2008-0972

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Carl F. Stetter, *et al.*  
Plaintiffs-Petitioners

Vs.

R.J. Corman Derailment Services LLC, *et al.*  
Defendants-Respondents.

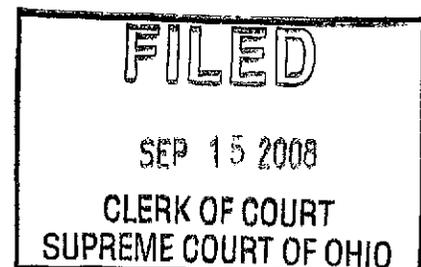
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## STATEMENT OF FACTS

This lawsuit involves an injury to Petitioner Carl Stetter (hereinafter "Petitioner"), while he was working in the course and scope of his employment with Respondents R.J. Corman Derailment Services, LLC, and/or R.J. Corman Railroad Group, LLC (hereinafter "Respondents"). Respondents are related companies with offices throughout the United States which provide, among other things, railroad construction and derailment services. Petitioner was an employee of Respondents and worked out of their derailment services facility in Millbury, Wood County, Ohio.

On March 13, 2006, Petitioner was inflating a large truck tire in the course of his employment with Respondents when the tire explosively separated from the rim and rocketed over twenty (20) feet into the ceiling of the facility. Petitioner was, unfortunately, caught in the trajectory of the propelling tire, and he consequently suffered severe and permanent personal injuries which included multiple skeletal fractures to his ribs, vertebrae, face, ankle, and foot. These injuries have had a permanent effect on Petitioner, negatively impacting his earning capacity, overall health, and ability to carry on the activities of daily life.

After the incident, on March 12, 2007, Petitioner filed a complaint against Respondents in the Wood County Court of Common Pleas, alleging that Respondents had committed an intentional tort against Petitioner. The basis of Petitioner's claim was that Respondents failed to comply with the OSHA and Ohio Administrative Code Requirements applicable to employers, like Respondents, whose employees were required to routinely change truck tires in the course and scope of their duties. Specifically, Petitioner alleged that Respondents failed to comply with 29 CFR §1910.177, which required Respondents to provide proper training and instruction on the inflation of truck tires, furnish its employees with a tire cage or other proper restraining

device for the inflation of truck tires, and ensure that its employees safely inflated truck tires by making use of the required safety procedures and equipment. Respondents also violated the similar provisions of Ohio Administrative Code §4123:1-5-13 which required that Petitioner and his fellow employees be provided with a safety tire rack or cage for use while inflating and servicing truck tires.

While there is no dispute in this case that Respondents procured workers' compensation coverage which was in effect on the date of this incident, Petitioner alleged in his complaint that Respondents had committed an intentional tort against him. The complaint specifically alleged that Respondents "committed an intentional tort against [Petitioner]...with a deliberate intent to cause [Petitioner] to suffer injury and/or with the belief that injury was substantially certain to occur." (Complaint at ¶19).

Respondents then removed the action to the United States District Court for the Northern District of Ohio, Western Division. Thereafter, on or about February 29, 2008, Respondents filed an Amended Answer which contained a Fifteenth Affirmative Defense, asserting that all of Petitioner's claims are governed by the new version of Revised Code Section 2745.01, as enacted by House Bill 498. Specifically, Respondents' Fifteenth Affirmative Defense averred that Petitioner would be unable to establish liability on Respondent's part under R.C. §2745.01 due to an alleged lack of evidence that Respondents acted with "deliberate intent" to cause Petitioner's injuries.

After Respondents amended their answer, the parties jointly moved the district court for an order certifying questions to this Court on the construction and constitutionality of R.C. §2745.01. On August 6, 2008, this Court issued an entry declaring that it would answer the following eight (8) questions:

1. “Is R.C. §2745.01, as amended by Senate Bill 80 [sic]<sup>1</sup>, effective April 7, 2005, unconstitutional for violating the right to trial by jury?”
2. “Is R.C. §2745.01, as amended by Senate Bill 80 [sic], effective April 7, 2005, unconstitutional for violating the right to a remedy?”
3. “Is R.C. §2745.01, as amended by Senate Bill 80 [sic], effective April 7, 2005, unconstitutional for violating the right to an open court?”
4. “Is R.C. §2745.01, as amended by Senate Bill 80 [sic], effective April 7, 2005, unconstitutional for violating the right to due process of law?”
5. “Is R.C. §2745.01, as amended by Senate Bill 80 [sic], effective April 7, 2005, unconstitutional for violating the equal protection of the law?”
6. “Is R.C. §2745.01, as amended by Senate Bill 80 [sic], effective April 7, 2005, unconstitutional for violating the separation of powers?”
7. “Is R.C. §2745.01, as amended by Senate Bill 80 [sic], effective April 7, 2005, unconstitutional for conflicting with the legislative authority granted to the General Assembly by §34 and §35, Article II, of the Ohio Constitution?”
8. Does R.C. §2745.01, as amended by Senate Bill 80 [sic], effective April 7, 2005, do away with the common law cause of action for employer intentional tort?”

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<sup>1</sup> The District Court’s First Order Certifying Questions to this Court, filed on May 16, 2008, mistakenly referred to the bill which re-enacted R.C. 2745.01 on April 7, 2005, as “Senate Bill 80.” The certified questions instead should have referred to “House Bill 98.” The mistake by the District Court was inadvertently incorporated into this Court’s Order accepting the Certified Questions. On September 8, 2008, the District Court entered an Amended Order Certifying Questions to this Court to correct the error. As of the date of this Brief, this Court has not issued an amended Order accepting the Certified Questions. This brief discusses the constitutionality of the re-enactment of R.C. 2745.01 made effective on April 7, 2005, by House Bill 498.

## ARGUMENT

### **I. R.C. §2745.01, AS AMENDED BY HOUSE BILL 498, EFFECTIVE APRIL 7, 2005, DOES NOT DO AWAY WITH THE COMMON LAW CAUSE OF ACTION FOR EMPLOYER INTENTIONAL TORT.**

The 125<sup>th</sup> General Assembly's enactment of Amended House Bill 498 represented the legislature's long-overdue acceptance of this Court's constitutional pronouncements in *Brady v. Safety-Kleen Corporation* (1991), 61 Ohio St. 3d 624, 576 N.E.2d 722, and *Johnson v. B.P. Chemicals, Inc.* (1999), 85 Ohio St. 3d 298, 707 N.E.2d 1107, that "any statute created to provide employers with immunity from liability for their intentional tortuous conduct cannot withstand constitutional scrutiny." *Johnson*, 85 Ohio St. 3d at 304. By re-enacting R.C. 2745.01 in its new form, the legislature has waved a white, though tattered, flag to this Court's now-settled precedent and extended an olive branch, albeit a contorted one, to the state judiciary.

In modifying the prior, unconstitutional, version of R.C. 2745.01 as it did, the General Assembly did not attempt to govern or regulate intentional torts that occur within the employment relationship. Rather, through the codification of the disjunctive definition of intentional tort handed down by this Court in *Jones v. VIP Development Co.* (1984), 15 Ohio St. 3d 90, 472 N.E. 2d 1046, the legislature has simply acknowledged and affirmed the common law cause of action for employer intentional tort. Without limiting the common law standard, the General Assembly also created a new, statutory, cause of action for those torts that "deliberately intend" to cause injury by providing a specialized definition for "substantially certain" in R.C. 2745.01(B).

Admittedly, this construction is only one of two possible ways to read the new version of R.C. 2745.01 that was created by House Bill 498. The alternative approach is to read the statute in isolation, without regard to the prior versions of the statute or this Court's prior decisions.

This construction, though initially appealing, has a major problem: it leads to the inescapable conclusion that the statute is redundant and unconstitutional. The correct approach to R.C. 2745.01 is to read it in light of the statute's legal and historical context. Using this approach, it becomes clear that by enacting House Bill 498, the legislature intended to recognize both the common law action for employer intentional tort and a new statutory cause of action for *deliberately intended* employer intentional torts. When read in its correct context, R.C. §2745.01 can readily be identified for what it is – a statute that finally recognizes employer intentional torts without violating the Ohio Constitution.

A. *A Brief History of R.C. 2745.01*

1. Former Revised Code Section 4121.80.

In 1986, the General Assembly made its first attempt to address employer intentional torts with the passage of Senate Bill 307, creating former Revised Code Section 4121.80. Under former R.C. §4121.80, an employee who was injured by an employer intentional tort was limited to recovery through the state's workers' compensation program pursuant to Revised Code Chapter 4123. *See former R.C. §4121.80 (repealed 1992)*. Such an employee was also entitled to bring a cause of action against his employer "for an excess of damages over the amount received or receivable under Chapter 4123." *Former R.C. §4121.80(A)*. That statute further provided, however, that the court hearing such an action was "limited to a determination as to whether or not the employer is liable for damages on the basis that the employer committed an intentional tort." *Id.* at 4121.80(D). The determination of the amount of damages to be awarded to the employee was left to the industrial commission with the proviso that the industrial commission consider the compensation and benefits payable to the employee under Chapter

4123 and refrain, in any case, from awarding damages in excess of three times the compensation recoverable under that chapter. *Id.*

In addition to the foregoing provisions, former R.C. §4121.80 also included a specific statutory definition for “intentional tort” as the term was used in that statute. That definition provided:

‘Intentional tort’ is an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.

Deliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance is evidence, the presumption of which may be rebutted, of an action committed with the intent to injure another if injury or an occupational disease or condition occurs as a direct result.

‘Substantially certain’ means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.

*Former* R.C. §4121.80(G)(1). This subdivision of former R.C. §4121.80 thus bore significant similarities to the version of R.C. §2745.01 that is presently before this Court. In particular, the definition of “intentional tort” is nearly identical to the apparent scope of intentional torts for which employers may be liable under current R.C. §2745.01(A). Also, the definition of “substantially certain” from former R.C. §4121.80 is repeated almost verbatim by the current version of R.C. §2745.01(B).

Questions concerning the application of former R.C. §4121.80 quickly arose, and on April 13, 1988, this Court handed down a pair of decisions answering the limited question of whether R.C. §4121.80(G)(1) could be given the retroactive application apparently intended by

the legislature.<sup>2</sup> This Court did not, in either case, consider the question of whether the statute could pass constitutional muster as a matter of general application, but only examined the narrow question of whether it could be given the retroactive application sought by the parties then before the Court.

The specific question in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 522 N.E. 2d 489, was whether “retroactive application of the definition of the term ‘substantially certain,’ found within R.C. §4121.80(G)(1), is constitutionally permissible.” *Id.* at 108. In answering this question, the *Van Fossen* decision analyzed the statutory definition of “substantially certain” in isolation from the rest of the statute, and even from the rest of the statutory subdivision. The Court simply compared the definition of “substantially certain” set forth in the statute with the “intentional tort requirement of substantial certainty, as set forth by this court in *Jones v. VIP Development Co.*” that “a specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is *substantially certain* to occur.” *Id.* at 108-109, citing *Jones v. VIP Development Co.* (1984), 15 Ohio St. 3d 90, 95, 472 N.E. 2d 1046, 1051 (internal citations omitted) (emphasis *sic*).

Because rule from *Jones* was the standard at the time the *Van Fossen* Plaintiff’s cause of action accrued, the Court held as follows:

It therefore becomes apparent that R.C. 4121.80(G)(1) would remove appellees’ potentially viable, court-enunciated cause of action by imposing a new, more difficult statutory restriction upon appellees’ ability to bring the instant action. We therefore hold that this result constitutes a limitation, or denial of, a substantive

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<sup>2</sup> Former R.C. §4121.80(H) provided: “This section applies to and governs any action based upon a claim that an employer committed an intentional tort against an employee pending in any court on August 22, 1986 and all claims or actions filed on or after that date, notwithstanding any provisions of any prior statute or rule of law of this state.”

right, and consequently causes the statute to fall within the ban against retroactive laws established by Section 28, Article II of the Ohio Constitution.

*Van Fossen*, 36 Ohio St. 3d at 109. Thus, without considering whether it might be possible to construe the statute so as to maintain its constitutionality, the Court held that, in any case, the *retroactive* application of the new definition of “substantially certain” would be unconstitutional.

The other case this Court decided that day, *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St. 3d 135, 522 N.E. 2d 477, answered an almost identical question to that raised in *Van Fossen*. The *Kunkler* decision, however, was arguably broader than that rendered in *Van Fossen* because the *Kunkler* opinion did not focus as narrowly on the statutory definition of “substantially certain” but instead seemed to deal with the entirety of the statutory subdivision set forth in former R.C. §4121.80(G)(1). Still, the question was purely about retroactive application. The Court stated that Section 28, Article II, of the Ohio Constitution’s “proscription against retroactivity applies to laws affecting substantive rights but not to the procedural or remedial aspects of such laws.” *Kunkler*, 36 Ohio St. at 137 *citing French v. Dwiggins* (1984), 9 Ohio St. 3d 32, 458 N.E. 2d 827. The Court then applied the rule from *State ex. rel. Holdridge v. Indus. Commission* (1967), 11 Ohio St. 2d 175, 178, 228 N.E. 2d 621, that “substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress.” *Id.* In light of the *Holdridge* standard, the Court had no trouble determining that R.C. §4121.80(G)(1) was substantive law and that it therefore could not be applied to intentional tort causes of action arising prior to the effective date of the statute.

An interesting aspect of the *Kunkler* case is that the employer in that action apparently admitted to the Court that the definition of “intentional tort” set forth in R.C. §4121.80(G)(1),

and similar to the provisions at issue here, did **not** do away with the common law action for intentional tort set forth in *Jones v. VIP Development Co.* (1984), 15 Ohio St. 3d 90, 472 N.E. 2d 1046. *See Kunkler* at 138. Thus in *Van Fossen*, where the “substantial certainty” definition was examined in isolation, all parties apparently assumed that it abrogated the common law. Yet in *Kunkler*, where the validity of R.C. §4121.80(G)(1) **as a whole** was at issue, the **employer** even confessed that §4121.80(G)(1) was consistent with the common law stated in *Jones*. The Court, however, dismissed the employer’s concession as disingenuous, apparently because it was contained in the employer’s reply brief, filed only after a merit brief that had presumably resisted the very same notion. *See Kunkler* at 138.

Three years after the decisions in *Van Fossen* and *Kunkler*, this Court allowed another appeal based on nearly the same issue in *Fyffe v. Jenos Inc.* (1991), 59 Ohio St. 3d 115, 570 N.E. 2d 1108. The Court, apparently motivated by a desire to clarify portions of its syllabus holding in *Van Fossen*, once again examined the retroactive application of R.C. §4121.80(G)(1). *See id.* at 118. The specific issue in *Fyffe*, however, was not as broad as that in *Kunkler* nor the same as that presented in *Van Fossen*. Rather, the question presented by *Fyffe* was whether the “rebuttable presumption” created by the middle paragraph of former R.C. §4121.80(G)(1) could be applied retroactively without violating the Section 28, Article II of the Ohio Constitution. *See id.* at 119. Unsurprisingly, the Court answered this question in the negative, relying heavily on its precedent in *Van Fossen* and *Kunkler*. *Id.*

The feature of the *Fyffe* decision that is important to the case at bar, however, is the Court’s implicit acknowledgement in that case that the definition of “intentional tort” provided by former R.C. 4121.80(G)(1) set forth two distinct causes of action. Specifically, the definition of “intentional tort” included: (1) “an act committed with the intent to injure another; and (2) an

act “committed with the belief that the injury is substantially certain to occur.” The “deliberate removal” paragraph of former R.C. §4121.80(G)(1) created a rebuttable presumption **only** of “an act committed with the intent to injure another.” According to the statute, such “deliberate removal” did **not** create a rebuttable presumption of a “belief that injury is substantially certain to occur.” Thus, incorporating the statute’s own definition of “substantially certain,” such “deliberate removal” did not create a rebuttable presumption that the employer acted with “deliberate intent to cause...an injury.”

By evaluating the “deliberate removal” clause of R.C. §4121.80(G)(1) separately, the Court in *Fyffe* acknowledged that the definition of “intentional tort” provided by the statute included two causes of action, and that the “deliberate removal” clause applied only to the first one. *See id.* Had the Court viewed former R.C. §4121.80(G)(1) as creating only a single cause of action that required “deliberate intent to cause an injury,” there would have been no need to assess the “deliberate removal” clause on its own merits. The Court would simply have stated that the case was governed by the result in *Van Fossen*. Thus, when confronted with the definition of R.C. §4121.80(G)(1), this Court recognized the existence of two distinct causes of action, each potentially subject to their own limitations, as included in that statute’s definition of “intentional tort.”

## 2. The Decision in *Brady v. Safety-Kleen Corporation*.

Not long after *Fyffe* was decided, this Court held in *Brady v. Safety Kleen Corporation* (1991), 61 Ohio St. 3d 624, 576 N.E. 2d 722, “that R.C. 4121.80 exceeds and conflicts with the legislative authority granted to the General Assembly pursuant to Sections 34 and 35, Article II, of the Ohio Constitution, and is therefore unconstitutional *in toto*.” *Id.* at 635. Without specifically addressing, or even mentioning, the definition of “intentional tort” set forth in R.C.

4121.80(G)(1), the Opinion of the Court in *Brady* found that R.C. 4121.80, as a whole, was “totally repugnant” to Section 34, Article II of the Ohio Constitution which empowers the legislature to pass laws for the “comfort, health, safety, and general welfare of all employees.” *Id.* at 633 *citing* OHIO CONST. §34, ART. II.

The crux of the decision in *Brady* was this Court’s determination that Section 35, Article II, of the Ohio Constitution “defines, *inter alia*, the scope and limits of the General Assembly’s power in the creation and development of the worker’s compensation system.” *Id.* Specifically, the “scope and limits” were set by the constitutional language of Section 35, Article II that laws may be passed “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...**” *Id. citing* OHIO CONST. §35, ART. II (emphasis added). The Court also drew on its prior holding in *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St. 2d 608, 433 N.E. 2d 572, that “An employee is not precluded by Section 35, Article II of the Ohio Constitution...from enforcing his common law remedies against his employer for an intentional tort.” *Id.* at syllabus. Restating this holding in *Brady*, the Court stated that, “the legislature cannot, consistent with Section 35, Article II, enact legislation governing intentional torts that occur within the employment relationship, because such intentional tortious conduct will always take place outside that relationship.” *Brady*, 61 Ohio St. 3d at 634.

Thus, after *Brady*, three propositions of law seemed clear: First, that the legislature’s power to regulate the compensation of workmen for occupational injury was limited to regulation concerning injuries that occurred during “the course of such workmen’s employment” under Section 35, Article II. Second, that a disease or injury that resulted from an employer’s intentional tort, by definition, could never be occasioned within the “course of employment”

limits of the General Assembly's legislative power under Section 35. Third, that the General Assembly therefore could not enact legislation regulating intentional torts that occur within the employment relationship.

As the whole purpose of R.C. §4121.80 was unmistakably to enact legislation regulating intentional torts that occurred within the employment relationship, the Opinion of the Court struck the statute down *in toto* without offering much of any explanation as to how the specific provisions of the statute were flawed. It was perhaps this lack of specific application in *Brady* that opened the door for the General Assembly's enactment of the first version of R.C. 2745.01 in Am. House Bill 103, effective November 1, 1995.

### 3. The Short Life of Former R.C. 2745.01

Following this Court's rejection of former R.C. §4121.80 in *Brady*, and almost ten years after that statute's initial passage, the General Assembly enacted Am. House Bill 103, effective November 1, 1995, to create an entirely new worker's compensation intentional tort statute, former R.C. §2745.01. This new statute lacked many of the features that were complained of by the concurring justices in *Brady*, such as the cap on damages recoverable and the provision that such damages be calculated by the industrial commission. *Cf. Former R.C. §4121.80; former R.C. 2745.01; Brady* 61 Ohio St. at 636-639 (Douglas, J., concurring). However, the most striking element of this first version of R.C. 2745.01 was that it contained a rigid new definition of "employer intentional tort."

R.C. 2745.01(A) provided as follows:

(A) Except as provided in this section, an employer shall not be liable to respond in damages at common law or by statute for an intentional tort that occurs during the course of employment. An employer only shall be subject to liability to an employee or the dependent survivors of a deceased employee in a civil action for damages for an employment intentional tort.

Former R.C. 2745.01(A) (repealed 2005). The definition for “employment intentional tort,” in turn, was provided by R.C. §2745.01(D)(1):

(D)(1) “Employment Intentional Tort” means 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.

In stark contrast to R.C. §4121.80(G)(1), the new definition for “employment intentional tort” stated in R.C. §2745.01(D)(1) set forth only one kind of intentional tort claim for employees against their employers. Thus, under former R.C. 2745.01, an employer could be held liable for an intentional tort committed against an employee **only if** the employer acted with **deliberate intent** to injure, cause an occupational disease of, or cause the death of an employee. This version of the statute did not allow a cause of action for any other type of intentional tort and did not even use the words “substantially certain.”

At first blush, the statute’s new definition of “employer intentional tort,” smacked of contempt for this Court’s decision in *Brady*. This tone was underscored by the General Assembly’s declaration of a legislative intent to supersede the effect of several decisions of this Court including *Blankenship*, *Jones*, *Van Fossen*, and *Fyffe*, *supra*. *See*, Am. Sub. House Bill 103, Section 3, 146 Ohio Laws, Part I, 758. The enrolled act further provided that it was meant “to completely and solely control all causes of actions not governed by Section 35, Article II of the Ohio Constitution, for physical or psychological conditions, or death, brought by employees or the survivors of deceased employees against employers.” *Id.*

When it came time for the constitutionality of former 2745.01 to be evaluated, in *Johnson v. B.P. Chemicals Inc.* (1999), 85 Ohio St. 3d 298, 707 N.E. 2d 1107, this Court emphatically ruled that the statute did not pass constitutional muster. The Court stated:

In *Brady*, the court invalidated former R.C. 4121.80 in its entirety, and, in doing so, we thought that we had made it abundantly clear that any statute created to provide employers with immunity from liability for their intentional tortious 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 again state our holdings in *Brady* and hopefully put to rest any confusion that seems to exist with the General Assembly in this area.

*Id.* at 304 (internal citations omitted). The Court’s description of R.C. 2745.01 pinpointed the statute’s most fatal flaw. “Specifically, R.C. 2745.01(A) provides that an employer is not generally subject to liability for damages at common law or by statute for an intentional tort that occurs during the course of employment, but that an employer is subject to liability only for an ‘employment intentional tort’ as defined.” *Id.* at 306. Indeed, the Court noted in a footnote that R.C. 2745.01(A) appears to be internally inconsistent.

Not only did R.C. 2745.01(A) appear to be internally inconsistent, it appeared to completely restrict the universe of intentional torts that an employee could bring against his employer to those where the employee could prove that the employer acted with deliberate intent to injure. *See id.* For that reason (along with the fact that the statute required clear and convincing evidence), the Court held that R.C. 2745.01 contradicted the constitutional limit of Section 34, Article II, that the legislature shall make laws that “provide for the comfort, health, safety and general welfare of all employees.” *See id.* at 308. “Furthermore, because R.C. 2745.01 [was] an attempt by General Assembly to govern torts that occur within the employment relationship, [it] ‘[could] not logically withstand constitutional scrutiny, inasmuch as it [attempted] to regulate an area that is beyond the reach of constitutional empowerment.’” *Id.*

The critical defect in former R.C. 2745.01 was the fact that, in enacting it, the General Assembly appeared to completely miss the point that the *Brady* decision was solely about the legislature's constitutional authority. The key holding in *Brady* was that "the legislature **cannot**, consistent with Section 35, Article II, enact legislation governing intentional torts that occur within the employment relationship." *Brady*, 61 Ohio St. 3d at 634. Yet, the very first sentence of former R.C. 2745.01 **did just that**, stating, "Except as provided in this section, an employer **shall not be liable** to respond in damages at common law or by statute for an intentional tort that occurs during the course of employment." *Former R.C. §2745.01(A)*.

The language of R.C. §2745.01 seems to suggest that the legislature didn't realize that abrogating employment intentional torts counted as "enacting legislation that governed intentional torts that occurred within the employment relationship." In fact, it almost seems as though the General Assembly took the Court's statement in *Brady* (rooted in *Blankenship*) that "intentional tortious conduct will always take place outside that [employment] relationship" to be a metaphysical observation that ought to be formalized with legislation. However, the "employment relationship" outside of which all intentional torts *ipso facto* occur under *Brady* was not the metaphysical or social relationship between two persons as employer and employee, but was simply "the course of such workmen's employment" relationship under Section 35, Article II, *i.e.* the constitutional standard that circumscribes the General Assembly's very power to regulate in that field.

As former R.C. 2745.01 attempted in its very first sentence to regulate a cause of action over which the General Assembly had no constitutional power, none of the sentences that followed could restore the statute's constitutionality. One member of this honorable Court has observed that the last sentence of former R.C. §2745.01(A) did not remove a right to a remedy,

but rather *codified* the cause of action for an “employment intentional tort” committed with deliberate intent as defined by subdivision (D)(1). *Johnson*, 85 Ohio St. 3d at 317 (Lundberg Stratton, J., dissenting). Yet even if former R.C. 2745.01 did codify the cause of action for “employment intentional tort” as defined, it did so only after first removing all other employer intentional tort causes of action. The causes of action that were codified by the last sentence of former R.C. §2745.01(A) were only a small subset of the causes of action that were removed by the first sentence of that division. Abrogating an entire class of civil actions and then restoring a small subset of that class by codification is the epitome of legislative efforts to “regulate an area” of law. *Brady*, 61 Ohio St. 3d at 634. Because that area of law was “beyond the reach of [the General Assembly’s] constitutional empowerment,” the regulation was unconstitutional. *Id.*

*B. Codification Without Regulation in Current R.C. 2745.01*

1. An Overview of the Statute

The statute presently before this Court, current R.C. 2745.01, was enacted by the 125<sup>th</sup> General Assembly in Amended House Bill No. 498, effective April 7, 2005. The statute, in its entirety, provides as follows:

(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

(B) As used in this section, “substantially certain” means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to

injure another if an injury or an occupational disease or condition occurs as a direct result.

(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

After *Johnson*, it was “abundantly clear” to the legislature that it could not create a statute to provide employers with immunity from liability for their intentional tortious conduct. *Johnson*, 85 Ohio St. 3d at 304. With that admonition in mind, the General Assembly crafted Amended House Bill 498 to create a statute that would recognize employer intentional torts without limiting employer liability – a statute that would codify without regulating. What resulted from this effort is a statute that bears little resemblance to the former R.C. 2745.01 struck down in *Johnson*.

Division (A) of current R.C. 2745.01 avoids the fatal flaw of its predecessor statute by simply stating the common law standard for employer intentional torts as stated by this Court in *Jones v. VIP Development Co.* (1984), 15 Ohio St. 3d 90, 472 N.E. 2d 1046 at ¶1 of syllabus. While the prior version of the statute began by abolishing employer intentional torts and then making an exception to this abolition, division (A) of the new R.C. 2745.01 appears to simply acknowledge the common law cause of cause of action by incorporating, almost verbatim, the first paragraph of this Court’s syllabus in *Jones*. That holding stated, “An intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.” *Id.* Taken on its own, division (A) of the new R.C. 2745.01 effectively says the exact same thing.

Division (B) of the statute provides a definition of the term “substantially certain,” and in so doing, threatens to obscure the function of the statute. The definition of “substantially certain” provided by R.C. 2745.01(B) is in fact very similar to the definition of that same term that was furnished by former R.C. 4121.80(G)(1). Both statutes defined “substantially certain” to mean, *for the purposes of the statute*, “that an employer acts with deliberate intent to cause an employee to suffer [an] injury, [a] disease, [a] condition, or death.”

Division (C) of the statute also echoes a provision once found in former R.C. 4121.80. R.C. 2745.01(C) states that an employer’s “deliberate removal” of a safety guard or “deliberate misrepresentation of a toxic or hazardous substance” creates a “rebuttable presumption” that the removal or misrepresentation was committed “with the intent to injure another” if an injury or occupational disease or condition occurs as a direct result. It is important to note that the “deliberate removal” or “deliberate misrepresentation” referred to in R.C. 2745.01(C) does not create a “rebuttable presumption” that such action was taken with the belief that direct injury was “substantially certain” to occur. Rather, such “deliberate removal” or “deliberate misrepresentation” only creates a rebuttable presumption that the employer acted with the “intent to injure another.”

Finally, division (D) of the statute specifically provides that the statute does not apply to certain tort actions including those involving discrimination, civil rights, retaliation, harassment, intentional infliction of emotional distress, defamation, and contract or quasi-contract actions. Again, it is worth noting that R.C. §2745.01(D) does nothing to prevent or regulate any cause of action; it only serves to limit the application of the statute itself.

## 2. The Effects of R.C. 2745.01(B) & R.C. 2745.01(C).

The key to understanding R.C. 2745.01 is understanding the effects of R.C. §2745.01(B) and R.C. 2745.01(C). While it is important to have an appreciation for what these divisions do, it is even more important to recognize what these divisions do not do. R.C. 2745.01(B) and R.C. 2745.01(C) **do** demonstrate that R.C. 2745.01(A) acknowledges two different types of civil action for employer intentional tort. R.C. 2745.01(B) and R.C. 2745.01(C) **do not**, however, abrogate, regulate, or govern the common law cause of action for employer intentional tort.

R.C. 2745.01(A) states that an employer shall be liable for an intentional tort committed against an employee under either of two different theories: (1) when the employer committed the tortious act “with the intent to injure another”; **OR** (2) when the employer committed the tortious act with the belief that injury “was substantially certain to occur.” The existence of two different theories of liability in R.C. §2745.01(A) is proven by the fact that R.C. 2745.01(B) and R.C. 2745.01(C) each describe a different one of these two theories. R.C. §2745.01(B) provides a definition of “substantially certain” that informs division (A)’s second theory of liability, while R.C. 2745.01(C) offers a rebuttable presumption applicable only to division (A)’s first theory of liability.

The definition provided by Division (B) has a more significant effect on the statute as a whole than does the rebuttable presumption included in Division (C). By specifying a particular definition for “substantially certain” as that term is used in R.C. 2745.01(A), division (B) effectively alters division (A)’s second theory of liability. After incorporating the definition of “substantial certainty” provided by division (B), division (A) essentially provides as follows:

(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the

employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another OR with the deliberate intent to cause the employee to suffer an injury, a disease, a condition, or death.

By substituting the definition of “substantially certain” for the term itself, it becomes clear that the second theory of liability for employer intentional torts contained in R.C. 2745.01(A) is an entirely new type of civil action.

Heretofore, Ohio courts have never formally recognized a separate cause of action for those employer intentional torts committed with a “deliberate intent to cause the employee to suffer an injury.” Rather, torts committed with this very high level of scienter were simply included in the general common law cause of action for intentional torts, *i.e.*, as “acts committed with the intent to injure another or with the belief that such injury is substantially certain to occur.” *See Jones, supra.* at ¶1 of syllabus. In light of current R.C. §2745.01, those intentional torts committed with a “deliberate intent” to cause injury may now be pled as a separate cause of action arising under the new statute.

While division (A)’s second theory of liability based on “substantially certain” injuries is specifically defined by division (B) of the statute to mean “deliberately intended” injuries, division (A)’s first theory of liability, for acts committed with a mere “intent to injure” goes without further statutory definition. This is no mere oversight, but is in fact an intentional omission designed to preserve the constitutionality of the statute under *Brady* and *Johnson*. The statute purposely declines to provide a definition for “intent to injure” so that the definition can instead be supplied by this Court’s incorporation of the common law rule.

Indeed, it is the “intent to injure” theory of liability provided in the first half of R.C. 2745.01(A)’s disjunctive theories of employer intentional tort liability that acknowledges and codifies the common law cause of action for intentional tort. While at first blush, the entire

disjunction of R.C. 2745.01 appears to merely restate the common law cause of action for intentional tort state by this Court in *Jones*, it is in fact only the **first** disjunct, *i.e.* the “intent to injure” theory of liability, that actually codifies the common law. Ironically, but appropriately, the common law cause of action is not codified by the statute’s recitation of the entire disjunction of the *Jones* holding, but is actually codified only by the first disjunct’s implication of this Court’s holding in *Blankenship v. Cincinnati Milacron Chemicals* (1982), 69 Ohio St. 2d 608, 433 N.E. 2d 572. That is, by just acknowledging that a cause of action exists when an employer acts with “an intent to injure another,” the statute manifests the General Assembly’s recognition that “An employee...may [enforce] his common law remedies against his employer for an intentional tort.” *Id.* at syllabus.

In this way, the undefined use of the “intent to injure” language in R.C. 2745.01(A) accomplishes a **dynamic** codification of the common law cause of action for employer intentional tort. By contrast, the definition of “substantial certainty” in R.C. 2745.01(B) accomplishes a **static** codification of the new statutory cause of action for “deliberately intended” employer intentional torts in the second disjunct of division (A). In order to create the new statutory cause of action for “deliberately intended” employer intentional torts in the second disjunct of division (A), the legislature had to be clear about the fact that it was not creating this new cause of action to the exclusion of the common law employer intentional tort. At the same time, this Court’s prohibitions in *Brady* and *Johnson* against attempting “to regulate an area that is beyond the reach of its constitutional empowerment” served to deter the legislature from saying too much about the common law employer intentional tort. Thus, in order for the legislature to create the new statutory cause of action for “deliberately intended” employer intentional torts, it had to walk a fine line and carefully refrain from “regulating” the common

law action for employer intentional tort. The outcome of this legislative tightrope walk is the current version of R.C. 2745.01.

The use of the simple and undefined phrase “intent to injure” to acknowledge the common law in R.C. §2745.01(A)’s first theory of liability reveals the legislative strategy for creating a new statutory cause of action while simultaneously codifying, but not regulating, the common law on the topic. By stating that an employee can bring a cause of action against his employer whenever he can prove the employer’s “intent to injure another,” the statute says only that an employee can bring an intentional tort action against his employer. The legislature has thereby left it up to the courts to supply the common law definition for “intent to injure” as that term is used in R.C. 2745.01(A). Thus, R.C. 2745.01 codifies the common law of employer intentional tort - whatever that law happens to be. In this way, the codification is dynamic; when and if this Court changes the common law standard for an employer intentional tort in Ohio, the statutory acknowledgement of that common law rule will follow automatically.

The effect of R.C. 2745.01(C) on the rest of the statute is far less dramatic. Structurally, the fact that R.C. 2745.01(C) applies only to the “intent to injure” theory of liability and not to the “deliberate intent” theory, demonstrates the legislative intent to acknowledge two different theories of liability in division (A). Substantively, division (C) creates a “rebuttable presumption” of “intent to injure” in cases where an employer engages in certain kinds of deliberate misrepresentation or in the deliberate removal of a safety device. This provision does not, in any way, reduce, increase, or in any way alter the requirements for stating a cause of action for employer intentional tort. Indeed, Ohio’s common law already held that when evidence exists that an employer’s removal of a safety guard has caused an injury to the plaintiff, such evidence should be considered in deciding a motion for summary judgment. *Fyffe v. Jenos*

*Inc.* (1991), 59 Ohio St. 3d 115, 570 N.E. 2d 1108 at ¶3 of syllabus. The rule does not affect the theory of liability, but only directs the weighing of evidence in an action brought under the “intent to injure” theory. Given the existing law under *Fyffe*, division (C)’s most important effect is structural: it proves that R.C. 2745.01(A) lists two different theories of liability.

### 3. The Constitutionality of R.C. 2745.01 Under *Brady*.

The codification and creation accomplished by R.C. 2745.01 does not itself contradict *Brady* because the recognition of the common law and creation of an additional cause of action does not constitute the forbidden “governing” or “regulation” of employer intentional torts as those terms are used in *Brady*. The prohibited “governing” and “regulation” of employer intentional torts under *Brady* refers only to “provid[ing] employers with immunity for their intentional tortious conduct.” *Johnson*, 85 Ohio St. 3d at 304.

*Brady*’s ban on “governing” employer intentional torts does not prevent the General Assembly from enacting any legislation whatsoever about employment intentional torts. Such an understanding of *Brady* would be in conflict with Ohio courts’ continued application of this Court’s holding in *Jones v. VIP Development Co.*, that an employee may both pursue an employment intentional tort and receive worker’s compensation benefits. *Jones*, 15 Ohio St. 3d 90 at ¶2 of syllabus; *see also, Fry v. Surf City Inc.*, 137 Ohio Misc. 2d 6, 851 N.E. 2d 573. If *Brady* meant that the General Assembly could make no law having any effect at all on the compensation of workers who were injured by intentional torts, then the application of any of the workers compensation provisions contained in Revised Code Chapter 4123 would be unconstitutional. This is clearly not the case. The law that “governing” and “regulation” lies outside the legislature’s authority under *Brady* does not prevent the codification of the common law and creation of an additional cause of action in R.C. 2745.01.

#### 4. The Present State of the Law Under R.C. 2745.01

In order to know the present requirements for proving an employer intentional tort under current R.C. 2745.01, one must know the necessary elements under both the “intent to injure” theory of liability and the “deliberate intent” theory of liability.

The requirements for the “deliberate intent” theory of liability are straightforward. Everything one needs to know is provided by the statute. An employer will be liable for damages to his employee where the plaintiff employee can prove that the employer acted with a deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death. R.C. §2745.01(B).

To know the present requirements for an employer intentional tort under the “intent to injure” theory of liability, however, one must look to the current state of the common law. Specifically, one must look to the common law to find the definition of “intent to injure” as that term is used in R.C. 2745.01(A). This Court has repeatedly turned to the Restatement of the Law of Torts in order to ascertain the intent required for an intentional tort. *See, e.g., Kunkler*, 36 Ohio St. 3d at 139, n.3; *Van Fossen*, 36 Ohio St. 3d at 101. “The word ‘intent’ is used throughout the Restatement of [Torts] to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” 1 Restatement of the Law, 2d, Torts (1965) 15, §8A. Thus, looking simply to the Restatement, to impose liability under the “intent to injure” theory of R.C. 2745.01(A), the plaintiff must show either that the employer desired to cause the consequences of his act, or that the employer believed that the consequences were substantially certain to result.

Ohio first applied this common law rule to employer intentional torts in *Jones v. VIP Development Co.*, *supra*, with the basic holding noted above that “An intentional tort is an act

committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.” *Id.* at ¶1 of syllabus. Thereafter, this Court made a more detailed application of the rule in *Van Fossen, supra.*, and based on a concern that the *Van Fossen* syllabus was being misunderstood, modified that application in *Fyffe, supra.* Thus, the present common law rule in Ohio governing employment intentional torts is as follows:

Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed.1984), in order to establish “intent” for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

*Fyffe*, 59 Ohio St. 3d at 115, ¶1 of syllabus. Because the meaning of “intent to injure” under R.C. §2745.01 is supplied by Ohio’s common law, the above-recited test from *Fyffe* is the standard for establishing an “intent to injure” employer intentional tort under R.C. 2745.01(A).

The irony of R.C. §2745.01(A) is priceless. In accordance with its plain language, the statute does recognize two theories of liability for an employer intentional tort. An employer will be liable in such a tort action when “the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.” The comic irony, however, is that, as a matter of statutory construction, it is the “intent to injure” language in the first disjunct that refers to liability for injury that was substantially certain to occur, and it is the “substantially certain” language in the second disjunct that refers to liability for injury that employer actually intended. R.C. 2745.01(A)’s apparent recital of the old *Jones* standard offers a linguistic clue to the fact that the statute acknowledges,

but does not regulate, the common law of employer intentional tort. The statute presents a syntactical paradox, but syntactical paradox beats unconstitutional any day of the week.

*C. Any Alternative Construction of R.C. 2745.01 Would Be Unconstitutional*

Reading R.C. 2745.01 in isolation from its historical context might tempt one to reach the conclusion that the statute only recognizes one theory of liability for employment intentional tort. This temptation arises when one mechanically substitutes the definition of “substantial certainty” provided by R.C. 2745.01(B) for statute’s use of the term itself in R.C. 2745.01(A). The result of such substitution is a statute providing that an employer shall be liable for an intentional tort when he committed the tortious act “with the intent to injure another or with [deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death].” If one does not look more closely at the statute, it may appear to allow intentional torts only where an employer acts with either *intent* or *deliberate intent* to injure. This over-simplified construction creates a statute that is painfully redundant and, worse, unconstitutional.

Ohio’s Seventh District Court of Appeals appears to have taken this approach to construing the current version of R.C. 2745.01. That court, in *Kaminski v. Metal & Wire Products Co.* (2008), 175 Ohio App. 3d 227, 886 N.E. 2d 262, evaluated the statute as follows:

When we consider the definition of “substantial certainty,” it becomes apparent that an employee does not have two ways to prove an intentional tort claim as R.C. 2745.01(A) suggests. The employee's two options of proof become: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure. Thus, under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury. The *Johnson* court held that this type of action was simply illusory.

*Id.* at 235. Based on that construction of R.C. §2745.01 as offering only one way to prove an intentional tort claim, the court in *Kaminski* reached the inevitable conclusion that R.C. §2745.01 is unconstitutional. If R.C. §2745.01 provides, as the *Kaminski* court suggests, that the only way

an employee can recover is if the employer acted with the deliberate intent to cause injury, then the statute is inescapably unconstitutional under *Brady* and *Johnson*. As stated in *Kaminski*:

Pursuant to the Ohio Supreme Court's holdings in *Brady*, supra, and *Johnson*, supra, and consistent with Sections 34 and 35, Article II of the Ohio Constitution, we must conclude that R.C. 2745.01 is unconstitutional. Because of its excessive standard of requiring proof that the employer intended to cause injury, "it is clearly not 'a law that furthers the " \* \* \* comfort, health, safety and general welfare of all employe [e]s." ' " *Johnson*, 85 Ohio St.3d at 308, 707 N.E.2d 1107, quoting *Brady*, 61 Ohio St.3d at 633, 576 N.E.2d 722, quoting Section 34, Article II of the Ohio Constitution. Additionally, "because R.C. 2745.01 is an attempt by the General Assembly to govern intentional torts that occur within the employment relationship, R.C. 2745.01 'cannot logically withstand constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of constitutional empowerment.' " *Id.*, quoting *Brady*, 61 Ohio St.3d at 634, 576 N.E.2d 722.

*Id.* at 236.

The Eighth District Court of Appeals, citing *Kaminski*, utilized a similar construction as the *Kaminski* court in evaluating R.C. 2745.01. In *Barry v. A.E. Steel Erectors* (2008), 2008-Ohio-3676, 2008 WL 2835425 (8<sup>th</sup> Dist. App. No. 90436), that court stated:

As in *Kaminski*, we find no distinction between the two methods of proof. To prevail under either method an employee must demonstrate a deliberate intent to injure. Such requirements create an insurmountable burden for employees and thus an illusory cause of action.

*Id.* at ¶25. Like the *Kaminski* court, the *Barry* court also reached the same conclusion that unavoidably follows from this type of statutory construction: R.C. 2745.01 is unconstitutional.

As the *Barry* court put it:

By creating a cause of action that is merely illusory, R.C. 2745.01 has eliminated an employee's right to a cause of action for an employer intentional tort that would otherwise benefit the employee. Thus, R.C. 2745.01 conflicts with Section 34, Article II of the Ohio Constitution, as it does not further the "comfort, health, safety and general welfare of all employe[e]s." Furthermore, by creating an illusory cause of action, the legislature has immunized employers from liability. As the Ohio Supreme Court has made clear, however, "any statute created to

provide employers with immunity from liability for their intentional tortious conduct cannot withstand constitutional scrutiny.” *Johnson* at 304.

*Id.* at ¶27.

Given the construction employed by the courts in *Kaminski* and *Barry* that R.C. 2745.01 recognizes only one cause of action for employer intentional tort, the unconstitutionality of the statute is undeniable. Unless R.C. 2745.01 codifies the common law cause of action for intentional tort without regulating it, the statute is undoubtedly unconstitutional under this Court’s established precedent in *Brady* and *Johnson*. Fortunately, the statutory construction urged by the courts in *Kaminski* and *Barry* is mistaken; R.C. 2745.01 does acknowledge the common law cause of action for employer intentional tort and does not regulate an area beyond the reach of the legislature’s power.

*D. Six Strong Additional Reasons That R.C. 2745.01 Must Be Construed As Recognizing Both the Common Law Theory and the Deliberate Intent Theory of Liability for Employer Intentional Torts.*

1. The Presumption of Constitutionality

As explained at length above, a proper construction of R.C. §2745.01 in light of its historical context elucidates the fact that the statute recognizes both the common law cause of action for employer intentional torts as well as the new “deliberate intent” cause of action for employer intentional torts, created by the statute itself. However, the appellate courts in *Kaminski, supra*, and *Barry, supra*, failed to consider this construction of R.C. 2745.01, and, interpreting the statute as creating a single cause of action, held that it was unconstitutional.

“An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” *State ex rel. Dickman v.*

*Defenbacher* (1955), 164 Ohio St. 142, 128 N.E. 2d 59 at ¶1 of syllabus. As explained above, if this Court were to construe R.C. 2745.01 in the manner adopted by the lower courts in *Kaminski* and *Barry*, there would be no question that the statute is unconstitutional under this Court's holdings in *Brady* and *Johnson*. In this case, then, the presumption of constitutionality that is granted to all legislative enactments furnishes a strong reason to construe R.C. 2745.01 as recognizing both the common law cause of action and the "deliberate intent" cause of action for employer intentional torts.

## 2. Statutes are Presumed to be Consistent with the Common Law

"In Ohio, '[n]ot every statute is to be read as an abrogation of the common law.'"

*Danziger v. Luse* (2004), 103 Ohio St. 3d 337, 339, 815 N.E. 2d 658. Rather, this Court has recognized that:

Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention.

*Id.* quoting *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 90 N.E. 146 at ¶3 of syllabus. In the case at bar, the strong presumption that statutes are in accord with the common law weighs heavily in favor of a construction of R.C. §2745.01 that acknowledge the common law cause of action for employer intentional tort in addition to the "deliberate intent" cause of action created by the statute.

Under the rule quoted from *Morris, supra*, a statute will not be presumed to abrogate the common law unless it expressly states an intent to do so. In the case of current R.C. 2745.01, enacted by Am. House Bill 498, the legislature did not express an intent to supersede the common law. This is especially noteworthy in light of the fact that Am. House Bill 103, which

enacted the **prior** version of R.C. 2745.01, contained the following unequivocal expression of legislative intent:

The General Assembly hereby declares its intent in enacting sections 2305.112 and 2745.01 of the Revised Code **to supersede the effect of the Ohio Supreme Court decisions** in *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608 [23 O.O.3d 504, 433 N.E.2d 572] (decided March 3, 1982); *Jones v. VIP Development Co.* (1982 [ sic, 1984]), 15 Ohio St.3d 90 [15 OBR 246, 472 N.E.2d 1046](decided December 31, 1982 [ sic, 1984]); *Van Fossen v. Babcock & Wilcox* (1988), 36 Ohio St.3d 100 [522 N.E.2d 489] (decided April 14 [ sic, 13], 1988); *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124 [522 N.E.2d 511] (decided April 13, 1988); *Hunter v. Shenango Furnace Co.* (1988), 38 Ohio St.3d 235 [527 N.E.2d 871] (decided August 24, 1988); and *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115 [570 N.E.2d 1108] (decided May 1, 1991), **to the extent that the provisions of sections 2305.112 and 2745.01 of the Revised Code are to completely and solely control all causes of actions not governed by Section 35 of Article II, Ohio Constitution**, for physical or psychological conditions, or death, brought by employees or the survivors of deceased employees against employers.

Am. H.B. 103, Section 3, 146 Ohio Laws, Part I, 758 (emphasis added).

If the legislature had intended, as it did with *former* R.C. 2745.01, to supersede the common law of employer intentional torts, it would have made an expression of legislative intent to that effect when enacting current R.C. 2745.01. However, the legislature made no such statement in enacting the current version of the statute. Accordingly, the presumption that statutes are consistent with the common law has strong persuasive force when applied to current R.C. 2745.01. The weight of this presumption is only a further reason that this Court should construe the statute as acknowledging both the common law cause of action and the “deliberate intent” cause of action.

3. The Differences Between Former R.C. 2745.01 and Current 2745.01 Indicate that the Current Version of the Statute is Intended to Recognize Two Theories of Liability.

One of the aspects of former R.C. 2745.01 which this Court found unconstitutional in *Johnson* was its definition of “employment intentional 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.” *Former R.C. 2745.01(D)(1)*. One of the most fundamental changes made to R.C. 2745.01 in its subsequent re-enactment is that it defines the scope of employer intentional torts by use of a disjunction in which *one of the disjuncts* is virtually the same as the definition provided by former R.C. 2745.01(D)(1) while *the other disjunct* is totally different. Thus, while the type of employer intentional tort recognized in the prior version of the statute is still present in the current version, the distinctive difference in the current version is that this “deliberate intent” cause of action is no longer alone.

If the legislature had not intended to acknowledge both the common law cause of action for employer intentional tort as well as the new statutory cause of action for “deliberately intended” employer intentional torts, there would have been no reason to use a disjunction to define the scope of employer intentional torts. Had the legislature intended to recognize just the single cause of action for deliberately intended employer intentional torts, then it could have left the “substantially certain” language out of the statute entirely. The General Assembly, however, chose not to do so. R.C. 2745.01(A) clearly provides that an employer can be held liable if he committed the tortious act (1) with the intent to injure another OR (2) with the belief that the injury was substantially certain to occur. The only rational explanation for the General Assembly’s decision to mention alternative causes of action in the new version of the statute is

that the legislature intended to recognize the common law cause of action alongside the new statutory theory of liability.

#### 4. Statutes Should Be Construed to Avoid Redundancy

“A basic rule of statutory construction is that ‘words in statutes should not be construed to be redundant, nor should any words be ignored.’ *D.A.B.E. Inc. v. Toledo-Lucas County Bd. Of Health* (2002), 96 Ohio St. 3d 250, 256, 773 N.E. 2d 536 *citing E. Ohio Gas v. Pub. Util Commission* (1988), 39 Ohio St. 3d 295, 299, 530 N.E. 2d 875. “Statutory language must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid a construction that renders a provision meaningless or inoperative.” *Id. citing State ex rel. Myers v. Bd. of Education* (1917), 95 Ohio St. 367, 372-73, 116 N.E. 516.

The appellate courts in *Kaminski* and *Barry* that construed R.C. 2745.01 as essentially recognizing only one cause of action apparently made no effort to heed these fundamental canons of construction. On the contrary, these courts reached the same conclusion that this Court reached in *Johnson*, namely, that “this type of action was simply illusory.” *Kaminski*, 175 Ohio App. 3d at 235 *citing Johnson, supra*. If these courts had looked more closely at the statute, they might have seen past the supposed illusion.

Applying the canon that statutes should be construed so as to avoid redundancy, it becomes clear that the “intent to injure” in the first disjunct of R.C. 2745.01(A) and the “deliberate intent” in R.C. 2745.01(B) are not the same. While the “deliberate intent” of R.C. §2745.01(B) creates the standard for the new statutory cause of action in the second disjunct of R.C. 2745.01(A), the “intent to injure” language in the first disjunct of division (A) is just a linguistic vehicle for delivering the dynamic quality of the common law of employer intentional

tort to the statute. Therefore, the statute should not be construed so as to render it redundant; it should be construed as acknowledging both the common law employer intentional tort as well as the new statutory action for “deliberately intended” torts by employers.

5. Current R.C. 2745.01 Is More Clearly a Codification of the Common Law Than Former R.C. 2745.01.

In *Johnson v. B.P. Chemicals Inc.*, *supra*, one member of this honorable Court reasoned that the language at the end of former R.C. 2745.01(A) stating that “An employer \*\*\* shall be *subject* to liability to an employee \*\*\* for damages for an employment intentional tort,” did not remove a right to a remedy, but rather codified it. *Johnson*, 85 Ohio St. 3d at 317 (Lundberg Stratton, J., dissenting). As that Justice prudently noted, “Codification is not removal.” *Id.* If former R.C. 2745.01(A) was a codification of the common law of employer intentional tort, then current R.C. 2745.01 is *a fortiori* a codification of that common law as well.

The above-quoted language of former R.C. 2745.01(A) providing that “An employer \*\*\* shall be subject to liability” appeared only after the statute’s opening sentence stated generally that “Except as provided in this section, an employer shall not be liable to respond in damages \*\*\* for an intentional tort\*\*\*.” *Former R.C. 2745.01(A)*. Because not every tort that was abrogated in the first sentence of the statute was resurrected in the later sentence quoted by Justice Lundberg-Stratton, the codification that took place in the prior version of the statute was necessarily a limited one.

If the treatment of employer intentional torts attempted by former R.C. 2745.01(A) could be deemed a codification, rather than a removal, of the common law causes of action, then the current version of R.C. 2745.01 must be viewed as an even better codification of the common law on the subject. As noted above, current R.C. §2745.01 does not abolish any rights of action

against employers for intentional torts that were available under the common law. Instead, the statute creatively uses the language from this Court's syllabus in *Jones v. VIP Development Co.*, *supra* to recognize both the common law actions for employer intentional torts as well as the new statutory cause of action for employer intentional torts that are "deliberately intended." If the prior version of R.C. 2745.01 could be construed as a codification of common law, this Court should have no trouble seeing the codification of common law that occurs under the current version.

6. There is a Reason to Recognize Both the Common Law Theory and Deliberate Intent Theory of Liability for Employer Intentional Torts.

The legislature's decision to *both* codify the common law of employer intentional tort *and* create a new statutory cause of action for those employer intentional torts that are "deliberately intended" gives rise to an interesting question: Why? After all, any cause of action for an intentional tort committed by an employer with "deliberate intent" to injure his employee would certainly have been recognized under the common law standards enunciated in *Jones* and *Fyffe* and incorporated in the first disjunct of R.C. 2745.01(A). What difference does it make if the legislature enacts a new statutory cause of action that only covers a small subset of the most egregious torts still recognized in the common law cause of action?

The answer is that the statutory cause of action for an employer intentional tort committed with "deliberate intent" under the second disjunct of R.C. 2745.01(A) will be governed by a different statute of limitations than that applicable to employer intentional torts under the common law. In *Funk v. Rent-All Mart, Inc.* (2001), 91 Ohio St. 3d 78, 742 N.E. 2d 127, this Court held that, generally, a common law employer intentional tort that results in bodily

injury will be governed by the two-year statute of limitations for personal injury claims established in R.C. 2305.10. *Id.* at 80. Specifically, the Court's syllabus stated:

**Unless the circumstances of an action clearly indicate a battery or any other enumerated intentional tort in the Revised Code**, a cause of action alleging bodily injury as a result of an intentional tort by an employer pursuant to *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St.2d 608, 23 O.O.3d 504, 433 N.E.2d 572, will be governed by the two-year statute of limitations established in R.C. 2305.10.

*Id.* at syllabus (emphasis added).

By creating a separate, statutory, cause of action for the most egregious employer intentional torts - those committed with "deliberate intent" - the General Assembly appropriately moved those causes of action outside of this Court's holding in *Funk*. As a result, the statute of limitations applicable to the new statutory cause of action created in the second disjunct of R.C. 2745.01(A) is that set forth in R.C. §2305.09(D). That section provides that:

An action for any of the following causes shall be brought within **four** years after the cause thereof accrued...

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code.

R.C. 2305.09(D) (emphasis added).

The creation of a separate, statutory cause of action in the second disjunct of R.C. 2745.01(A) brought the action for "deliberately intended" employer intentional torts into the sphere of those "other enumerated intentional tort[s] in the Revised Code" under *Funk*. Accordingly, the only statute of limitations applicable to this new cause of action is the catch-all statute for miscellaneous torts provided by R.C. 2305.09(D). This results in a just distinction between the generic employer intentional tort alleged in a common law cause of action and those particularly outrageous offenses that are committed with a "deliberate intent" to injure one's

employee. Thanks to R.C. 2745.01, employees who are the victims of such heinous acts at the hands of their employers shall have a full four years in which to bring their cause of action. In this way, R.C. 2745.01 can be considered the employer intentional tort statute that finally fulfills the legislature's duty to "provide for the comfort, health, safety, and general welfare of all employees" under Section 34, Article II of the Ohio Constitution.

#### *E. Conclusion*

At last, the legislature has managed to enact a valid employer intentional tort statute by recognizing its constitutional impotence to regulate or govern that area of law, and thus crafting a statute that *both* establishes a new cause of action *and* acknowledges the common law. Although the lower courts have already demonstrated that the statute is susceptible to misinterpretation, a proper construction of the statute in light of its legal and historical context reveals that it successfully walks the constitutional tightrope necessary for the codification of a new statutory cause of action alongside the common law action for employer intentional tort. The statute's recognition of the "substantial certainty" test of the common law through the use of the words "intent to injure." combined with the creation of a "deliberate intent" cause of action through the words "substantial certainty" results in a truly a remarkable syntactical paradox. However, a statute that is syntactically paradoxical and constitutional is always better than redundant and unconstitutional.

## II. *ALTERNATIVE PROPOSITON OF LAW NO. 1*

**R.C. §2745.01, AS AMENDED BY H.B. 498, EFFECTIVE APRIL 7, 2005, IS UNCONSTITUTIONAL FOR CONFLICTING WITH THE LEGISLATIVE AUTHORITY GRANTED TO THE GENERAL ASSEMBLY BY §34 AND §35, ARTICLE II, OF THE OHIO CONSTITUTION.**

As discussed in greater detail above, in section I-C of this brief, R.C. §2745.01 is inescapably unconstitutional for conflicting with the grant of legislative authority contained in Sections 34 and 35 of the Ohio Constitution if this Court chooses to interpret the statute in like manner as the courts of appeal in *Kaminski v. Metal and Wire Products Co.* (2008), 175 Ohio App. 3d 227, 886 N.E.2d 262 and *Barry v. A.E. Steel Erectors* (2008), 2008-Ohio-3676, 2008 WL 2835425, Ct. App. Case No. 90436 (8<sup>th</sup> District).

The courts in *Kaminski* and *Barry* chose to interpret R.C. 2745.01 as offering only one method by which a plaintiff might prove an intentional tort claim and stated that the statute created an “illusory cause of action.” *Barry* at ¶25; *see also, Kaminski* at 235. If the statute is construed as failing to recognize the common law action for employer intentional tort, then the statute cannot possibly pass constitutional muster. As the court in *Kaminski* concluded:

Pursuant to the Ohio Supreme Court's holdings in *Brady*, *supra*, and *Johnson*, *supra*, and consistent with Sections 34 and 35, Article II of the Ohio Constitution, we must conclude that R.C. 2745.01 is unconstitutional. Because of its excessive standard of requiring proof that the employer intended to cause injury, “it is clearly not ‘a law that furthers the “ \* \* \* comfort, health, safety and general welfare of all employe [e]s.” ’ ” *Johnson*, 85 Ohio St.3d at 308, 707 N.E.2d 1107, quoting *Brady*, 61 Ohio St.3d at 633, 576 N.E.2d 722, quoting Section 34, Article II of the Ohio Constitution. Additionally, “because R.C. 2745.01 is an attempt by the General Assembly to govern intentional torts that occur within the employment relationship, R.C. 2745.01 ‘cannot logically withstand constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of constitutional empowerment.’ ” *Id.*, quoting *Brady*, 61 Ohio St.3d at 634, 576 N.E.2d 722.

*Id.* at 236. If the *Kaminski* court is right about the construction of R.C. 2745.01, the court is undeniably also correct about its constitutionality. Thus, as a first alternative to this brief's main proposition of law, Petitioner respectfully requests that this Court hold R.C. 2745.01 unconstitutional in violation of Sections 34 and 35, Article II, of the Ohio Constitution.

### III. **ALTERNATIVE PROPOSITION OF LAW NO. 2**

#### **R.C. §2745.01, AS AMENDED BY H.B. 498, EFFECTIVE APRIL 7, 2005, IS UNCONSTITUTIONAL FOR VIOLATING THE RIGHT TO EQUAL PROTECTION OF THE LAW.**

Article I, Section 2 of the Ohio Constitution states that "All political power is inherent in the people. Government is instituted for their equal protection and benefit \*\*\* and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly." OHIO CONST. ART. I, §2. The Ohio Supreme Court has consistently held that this equal protection clause of the Ohio Constitution is to be interpreted consistently with the Fourteenth Amendment to the United States Constitution in prohibiting differential treatment of similarly situated classes of persons absent a legitimate government interest. *See, e.g., Keaton v. Ribbeck* (1979), 58 Ohio St. 2d 443, 445, 391 N.E. 2d 307. Accordingly, any legislative classification that causes similarly situated persons to receive differential treatment must bear a rational relationship to a legitimate government interest. *Id.* at 445. "Although equal protection does not totally prevent legislative classification, it does require the existence of reasonable grounds for making a distinction between those within and those outside a designated class." *Beatty v. Akron City Hosp.* (1981), 67 Ohio St. 2d 483, 491, 424 N.E. 2d 586.

If this Court should interpret R.C. §2745.01 as did the appellate courts in *Kaminski* and *Barry, supra*, to do away with the common law cause of action for employer intentional tort and

only allow employer intentional torts upon a showing of “deliberate intent” to injure, then R.C. 2745.01 would violate Ohio’s Equal Protection Clause. In that case, the statute would effectively divide all victims of intentional torts into the classifications of “employee-victim” and “non-employee-victim.” According to this classification, “non-employee-victims” would be allowed to allege an intentional tort whenever the tortfeasor acted with the belief that injury to the victim was substantially certain to occur. By contrast, “employee-victims” would be precluded from recovery unless they were able to show that the tortfeasor acted with “deliberate intent” to cause injury. The General Assembly could not possibly have a legitimate interest in treating “employee-victims” of intentional torts differently from “non-employee-victims” of intentional torts, and therefore the statute would violate the Equal Protection Clause of Ohio’s Constitution.

Accordingly, in the alternative to this Court’s accepting the first and second propositions of law set forth in this brief, Petitioner requests that this Court hold R.C. 2745.01 unconstitutional for violating the right to equal protection in Article I, Section 2 of the Ohio Constitution.

#### **IV. *ALTERNATIVE PROPOSITION OF LAW NO. 3***

##### **R.C. 2745.01, AS AMENDED BY H.B. 498, EFFECTIVE APRIL 7, 2005, IS UNCONSTITUTIONAL FOR VIOLATING THE RIGHT TO A REMEDY.**

Article I, Section 16 of the Ohio Constitution provides that “All courts shall be open and every person for an injury done him in his land, goods, person, or reputation, shall have a remedy by due course of law, and shall have justice administered without denial or delay.” OHIO CONST. ART. I, §16. This Court has held that that “[w]hen the constitution speaks of remedy and injury

to person, property, and reputation, it requires an opportunity be granted at a meaningful time and in a meaningful manner.” *Gaines v. PreTerm-Cleveland, Inc.* (1987), 33 Ohio St. 3d 54, 60, 514 N.E. 2d 709.

If R.C. 2745.01 is interpreted by this Court as it was interpreted by the appellate courts in *Kaminski* and *Barry, supra*, to do away with the common law cause of action for employer intentional tort and only allow employer intentional torts upon a showing of “deliberate intent” to injure, then R.C. 2745.01 would violate the right to a remedy guaranteed by Article I, Section 16 of the Ohio Constitution. Under the construction adopted in *Kaminski* and *Barry*, R.C. 2745.01 flatly denies any meaningful remedy for employees whose employer commits an intentional tort against them without a “deliberate intent” to cause injury. Employees whose employer commits a tortious act against them with the belief that injury is substantially certain to occur would be relegated to the worker’s compensation system to seek a remedy for their injury. For one who is intentionally injured by his employer, participation in a compensation program designed for those who were hurt in accidents is simply **not** a meaningful remedy. The right to bring a civil action for damages is the only meaningful remedy for an intentional tort in any context, including the context of employment.

Accordingly, if this Court rejects the other propositions of law set forth above, Petitioner respectfully requests that the Court hold R.C. 2745.01 unconstitutional for violating the right to a remedy granted by Article I, Section 16 of the Ohio Constitution.

V. **ALTERNATIVE PROPOSITION OF LAW NO. 4**

**R.C. 2745.01, AS AMENDED BY H.B. 498, EFFECTIVE APRIL 7, 2005, IS UNCONSTITUTIONAL FOR VIOLATING THE RIGHT TO AN OPEN COURT.**

Article I, Section 16 of the Ohio Constitution provides that “All courts shall be open and every person for an injury done him in his land, goods, person, or reputation, shall have a remedy by due course of law, and shall have justice administered without denial or delay.” OHIO CONST. ART. I, §16. A statute need not “completely abolish the right to open courts” to violate Article I, Section 16. *See Sorrell v. Thevenir* (1994), 69 Ohio St. 3d 415, 426, 633 N.E. 2d 504.

If R.C. 2745.01 is construed to abolish, rather than codify, the common law cause of action for employer intentional tort, the statute will effectively close Ohio’s courts to those persons who are the victim of an intentional tort committed by an employer who lacks the “deliberate intent” to cause injury. Under such a construction of the statute, the employer’s conduct would have to be both *deliberate* and *intentional* in order to give rise to intentional tort liability. The Ohio Court of Appeals for the Eighth District believed that this Court’s analysis in *Johnson* would apply with equal force to the current version of R.C. 2745.01 under this construction of the statute:

[I]n order to prove an intentional tort \* \* \* the employee, or his or her survivors, must prove, at a minimum, that the actions of the employer amount to criminal assault. In fact, given the elements imposed by the statute, it is even conceivable that an employer might actually be guilty of a criminal assault but exempt from civil liability under [former] R.C. 2745.01(D)(1).

*Kaminski*, 175 Ohio App. 3d at 236 quoting *Johnson*, 85 Ohio St. 3d at 308.

If R.C. §2745.01 is interpreted to eliminate the common law cause of action for employer intentional tort and require a showing of “deliberate intent” on the part of employer-tortfeasors, the statute would require a higher degree of culpability to attain a civil recovery than to attain a

criminal conviction for the same conduct. Such a circumstance would thus close the doors of Ohio's civil courts to a substantial percentage of the state's intentional tort victims.

Accordingly, if this Court rejects the other propositions of law set forth above, Petitioner respectfully requests that the Court hold R.C. 2745.01 unconstitutional for violating the right to an open court granted by Article I, Section 16 of the Ohio Constitution.

**VI. ALTERNATIVE PROPOSITION OF LAW NO. 5**

**R.C. 2745.01, AS AMENDED BY H.B. 498, EFFECTIVE APRIL 7, 2005, IS UNCONSTITUTIONAL FOR VIOLATING THE RIGHT TO TRIAL BY JURY.**

Article I, Section 5 of the Ohio Constitution provides, "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." OHIO CONST. ART. I, §5.

If R.C. 2745.01 is construed so as to eliminate the common law cause of action for employment intentional tort and require employee plaintiffs to show "deliberate intent" to injure on the part of an employer-tortfeasor, then the statute would deprive the victims of non-deliberate intentional tortfeasors of their right to trial by jury. Any deprivation of the right to bring a civil action amounts to an *ipso facto* deprivation of the right to trial by jury. Thus, by removing the right of certain victims of employer intentional torts to bring a civil action for damages, the statute would deprive such citizens of the right to trial by jury.

Accordingly, if this Court rejects the other propositions of law set forth above, Petitioner respectfully requests that the Court hold R.C. 2745.01 unconstitutional for violating the right to trial by jury granted by Article I, Section 5 of the Ohio Constitution.

## VII. *ALTERNATIVE PROPOSITION OF LAW NO. 6*

### **R.C. 2745.01, AS AMENDED BY H.B. 498, EFFECTIVE APRIL 7, 2005, IS UNCONSTITUTIONAL FOR VIOLATING THE RIGHT TO DUE PROCESS OF LAW.**

Article I, Section 16 of the Ohio Constitution provides that “All courts shall be open and every person for an injury done him in his land, goods, person, or reputation, shall have a remedy by due course of law, and shall have justice administered without denial or delay.” OHIO CONST. ART. I, §16. The “due course of law” clause of Section 16, Article I is considered the equivalent of the “due process of law” provision in the Fourteenth Amendment to the United States Constitution. *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 544, 38 N.E. 2d 70. According to the principles of due process, governmental actions which limit the exercise of “fundamental” constitutional rights are subject to the highest level of judicial scrutiny. *See, e.g., NAACP v. Alabama ex rel. Patterson* (1958), 357 U.S. 449, 78 S. Ct. 1163, 2 L.Ed. 2d 1488. A statute limiting fundamental rights will be held unconstitutional unless the limitation is shown to be necessary to promote a compelling governmental interest. *See, e.g., Shapiro v. Thompson* (1969), 394 U.S. 618, 634, 89 S. Ct. 1322, 1331, 22 L.Ed. 2d 600.

The rights to an open court and a remedy under Article I, Section 16 of the Ohio Constitution are unquestionably fundamental rights. Additionally, the right to a trial by jury as guaranteed by Article I, Section 5 of the constitution is also a fundamental right. As argued above, R.C. 2745.01 threatens to violate each of these fundamental rights if it is regarded as replacing the common law cause of action for employer intentional tort with an exclusively statutory action requiring proof of “deliberate intent” to injure on the part of the tortfeasor. No compelling governmental interest is furthered by this limitation of fundamental rights, and therefore, R.C. §2745.01 violates the right to due process under the Ohio Constitution.

Accordingly, if this Court rejects the other propositions of law set forth above, Petitioner respectfully requests that the Court hold R.C. 2745.01 unconstitutional for violating the right to due process of law granted by Article I, Section 16 of the Ohio Constitution.

**VIII. ALTERNATIVE PROPOSITION OF LAW NO. 7**

**R.C. 2745.01, AS AMENDED BY H.B. 498, EFFECTIVE APRIL 7, 2005, IS UNCONSTITUTIONAL FOR VIOLATING THE SEPARATION OF POWERS.**

Section 32, Article II, of the Ohio Constitution provides that “The General Assembly shall grant no divorce, nor, exercise any judicial power not herein expressly conferred.” However, if R.C. 2745.01, is construed to set the exclusive standard of proof in actions alleging an employer intentional tort, such action would constitute a legislative exercise of the judicial power to weigh proof and rule on evidence in civil actions.

Similarly, Section 1, Article IV of the Ohio Constitution requires that “The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.” OHIO CONST. ART. IV, §1. R.C. 2745.01, if construed to eliminate the common law cause of action for employer intentional tort, appears to delegate to the Industrial Commission of Ohio the exclusively judicial function of adjudicating the civil recovery of certain intentional tort victims. Such a result would therefore also violate the separation of powers doctrine.

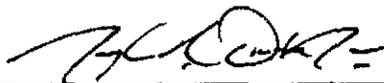
Accordingly, if this Court rejects the other propositions of law set forth above, Petitioner respectfully requests that the Court hold R.C. 2745.01 unconstitutional for violating the separation of powers.

## IX. CONCLUSION

The General Assembly had to navigate its way through a constitutional minefield in order to create a statute that both acknowledged the common law cause of action for employer intentional tort and simultaneously recognized a new statutory cause of action for those egregious torts which employers commit with deliberate intent. A proper construction of R. C. §2745.01 reveals that the General Assembly has accomplished its mission and succeeded in adopting a dynamic codification of the common law alongside a new statutory cause of action protecting employees from deliberately intended torts. All that remains of this issue is for this Court to endorse the General Assembly's efforts and identify R. C. §2745.01 as constitutionally codifying both the common law and the new cause of action. Petitioner therefore respectfully requests that this Court construe R. C. §2745.01 in its proper context and close the final chapter on the legislature's employer intentional tort codification project.

Respectfully submitted,

BARKAN & ROBON LTD.

By:   
Joseph R. Dietz, Jr.

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Merit Brief of Plaintiffs-Petitioners was served this 12<sup>th</sup> day of September, 2008 via ordinary U.S. Mail upon the following:

Robert J. Gilmer, Jr., Esq.  
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Of Counsel

## APPENDIX

- \* Entry Accepting Certified Questions – APX-1
- \* Ohio Constitution Article I, Section 2 – APX-3
- \* Ohio Constitution, Article I, Section 5 – APX-4
- \* Ohio Constitution, Article I, Section 16 -- APX-5
- \* Ohio Constitution, Article II, Section 32 – APX-6
- \* Ohio Constitution, Article II, Section 34 – APX-7
- \* Ohio Constitution, Article II, Section 35 – APX-8
- \* Ohio Constitution, Article IV, Section 1 – APX-9
- \* Revised Code §2305.09 – APX-10
- \* Revised Code §2305.10 – APX-11
- \* Revised Code §2745.01 – APX-14
- \* Former Revised Code §2745.01 – APX-15
- \* Former Revised Code §4121.80 – APX-16

# The Supreme Court of Ohio

Carl Stetter, et al.

Case No. 2008-0972

v.

ENTRY

R.J. Corman Derailment Services LLC, et  
al.

This cause is pending before the Court on the certification of a state law question from the United States District Court, Northern District of Ohio, Western Division. Upon review of the preliminary memoranda pursuant to S.Ct.Prac.R. XVIII(6),

It is determined that the Court will answer the following questions:

1. "Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for violating the right to trial by jury?"
2. "Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for violating the right to a remedy?"
3. "Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for violating the right to an open court?"
4. "Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for violating the right to due process of law?"
5. "Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for violating the right to equal protection of the law?"
6. "Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for violating the separation of powers?"
7. "Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for conflicting with the legislative authority granted to the General Assembly by §34 and §35, Article II, of the Ohio Constitution?"
8. "Does R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, do away with the common law cause of action for employer intentional tort?"

It is ordered by the Court that the petitioners shall file their merit brief within 40 days of the date of this entry and the parties shall otherwise proceed in accordance with S.Ct.Prac.R. VI, and S. Ct.Prac.R. XVIII(7).



THOMAS J. MOYER  
Chief Justice

**Westlaw.**

OH Const. Art. I, § 2

Page 1

**C**

Baldwin's Ohio Revised Code Annotated Currentness  
Constitution of the State of Ohio (Refs & Annos)  
▣ Article I. Bill of Rights (Refs & Annos)

→ **O Const I Sec. 2 Equal protection and benefit**

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

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APX-3

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OH Const. Art. I, § 5

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**C**

Baldwin's Ohio Revised Code Annotated Currentness  
Constitution of the State of Ohio (Refs & Annos)  
    ▣ Article I. Bill of Rights (Refs & Annos)

→ **O Const I Sec. 5 Right of trial by jury**

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

CREDIT(S)

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

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OH Const. Art. I, § 16

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Constitution of the State of Ohio (Refs &amp; Annos)

▣ Article I. Bill of Rights (Refs &amp; Annos)

**→ O Const I Sec. 16 Redress for injury; due process**

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

CREDIT(S)

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

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OH Const. Art. II, § 32

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Baldwin's Ohio Revised Code Annotated Currentness  
Constitution of the State of Ohio (Refs & Annos)  
Article II. Legislative (Refs & Annos)

→ **O Const II Sec. 32 Legislature not to grant divorce or exercise judicial power**

The general assembly shall grant no divorce, nor, exercise any judicial power, not herein expressly conferred.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

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OH Const. Art. II, § 35

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Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs &amp; Annos)

▣ Article II. Legislative (Refs &amp; Annos)

→ **O Const II Sec. 35 Workers' compensation**

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, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the general assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

CREDIT(S)

(110 v 631, am. eff. 1-1-24; 1912 constitutional convention, adopted eff. 1-1-13)

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OH Const. Art. IV, § 1

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Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs & Annos)

Article IV. Judicial (Refs & Annos)

→ **O Const IV Sec. 1 Judicial power vested in courts**

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.

CREDIT(S)

(1973 SJR 30, am. eff. 11-6-73; 132 v HJR 42, am. eff. 5-7-68; 1912 constitutional convention, am. eff. 1-1-13; 80 v 382, am. eff. 10-9-1883; 1851 constitutional convention, adopted eff. 9-1-1851)

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R.C. § 2305.09

Page 1



Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

▣ Chapter 2305. Jurisdiction; Limitation of Actions (Refs &amp; Annos)

▣ Limitations--Torts

→ 2305.09 Four years; certain torts (later effective date)

&lt;Note: See also version(s) of this section with earlier effective date(s).&gt;

Except as provided for in division (C) of this section, an action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud, except when the cause of action is a violation of section 2913.49 of the Revised Code, in which case the action shall be brought within five years after the cause thereof accrued;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code;

(E) For relief on the grounds of a physical or regulatory taking of real property.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

## CREDIT(S)

(2008 H 46, eff. 9-1-08; 2004 H 161, eff. 5-31-04; 1994 S 147, eff. 8-19-94; 129 v 13, eff. 7-1-62; 1953 H 1; GC 11224)

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## Baldwin's Ohio Revised Code Annotated Currentness

## Title XXIII. Courts--Common Pleas

- ▣ Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)

- ▣ Limitations--Torts

- **2305.10 Product liability, bodily injury or injury to personal property; when certain causes of action arise**

(A) Except as provided in division (C) or (E) of this section, an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues. Except as provided in divisions (B)(1), (2), (3), (4), and (5) of this section, a cause of action accrues under this division when the injury or loss to person or property occurs.

(B)(1) For purposes of division (A) of this section, a cause of action for bodily injury that is not described in division (B)(2), (3), (4), or (5) of this section and that is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(2) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to chromium in any of its chemical forms accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(3) For purposes of division (A) of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(4) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(5) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to asbestos accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the

plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(C)(1) Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section or in section 2305.19 of the Revised Code, no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

(2) Division (C)(1) of this section does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

(3) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the accrual of the cause of action, has not expired in accordance with the terms of that warranty.

(4) If the cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section but less than two years prior to the expiration of that period, an action based on the product liability claim may be commenced within two years after the cause of action accrues.

(5) If a cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, an action based on the product liability claim may be commenced within two years after the disability is removed.

(6) Division (C)(1) of this section does not bar an action for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(7)(a) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product if all of the following apply:

(i) The action is for bodily injury.

(ii) The product involved is a substance or device described in division (B)(1), (2), (3), or (4) of this section.

(iii) The bodily injury results from exposure to the product during the ten-year period described in division (C)(1) of this section.

(b) If division (C)(7)(a) of this section applies regarding an action, the cause of action accrues upon the date on which the claimant is informed by competent medical authority that the bodily injury was related to the exposure to the product, or upon the date on which by the exercise of reasonable diligence the claimant should have known that the bodily injury was related to the exposure to the product, whichever date occurs first. The action based on the product liability claim shall be commenced within two years after the cause of action accrues and

shall not be commenced more than two years after the cause of action accrues.

(D) This section does not create a new cause of action or substantive legal right against any person involving a product liability claim.

(E) An action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, as defined in section 2305.111 of the Revised Code, shall be brought as provided in division (C) of that section.

(F) As used in this section:

(1) "Agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

(2) "Ethical drug," "ethical medical device," "manufacturer," "product," "product liability claim," and "supplier" have the same meanings as in section 2307.71 of the Revised Code.

(3) "Harm" means injury, death, or loss to person or property.

(G) This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after April 7, 2005, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to April 7, 2005.

#### CREDIT(S)

(2006 S 17, eff. 8-3-06; 2004 S 80, eff. 4-7-05; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97 (See Historical and Statutory Notes); 1984 H 72, eff. 5-31-84; 1982 S 406; 1980 H 716; 1953 H 1; GC 11224-1)

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R.C. § 2745.01

Page 1

▶  
Baldwin's Ohio Revised Code Annotated Currentness  
Title XXVII. Courts--General Provisions--Special Remedies  
■ Chapter 2745. Employment Intentional Tort

→ **2745.01 Requirements for employer liability**

(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

(B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

**CREDIT(S)**

(2004 H 498, eff. 4-7-05)

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Former R.C. §2745.01 provided:

(A) EXCEPT AS PROVIDED IN THIS SECTION, AN EMPLOYER SHALL NOT BE LIABLE TO RESPOND IN DAMAGES AT COMMON LAW OR BY STATUTE FOR AN INTENTIONAL TORT THAT OCCURS DURING THE COURSE OF EMPLOYMENT. AN EMPLOYER ONLY SHALL BE SUBJECT TO LIABILITY TO AN EMPLOYEE OR THE DEPENDENT SURVIVORS OF A DECEASED EMPLOYEE IN A CIVIL ACTION FOR DAMAGES FOR AN EMPLOYMENT INTENTIONAL TORT.

"(B) AN EMPLOYER IS LIABLE UNDER THIS SECTION ONLY IF AN EMPLOYEE OR THE DEPENDENT SURVIVORS OF A DECEASED EMPLOYEE WHO BRING THE ACTION PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE EMPLOYER DELIBERATELY COMMITTED ALL OF THE ELEMENTS OF AN EMPLOYMENT INTENTIONAL TORT.

"(C) IN AN ACTION BROUGHT UNDER THIS SECTION, BOTH OF THE FOLLOWING APPLY:

"(1) IF THE DEFENDANT EMPLOYER MOVES FOR SUMMARY JUDGMENT, THE COURT SHALL ENTER JUDGMENT FOR THE DEFENDANT UNLESS THE PLAINTIFF EMPLOYEE OR DEPENDENT SURVIVORS SET FORTH SPECIFIC FACTS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE TO ESTABLISH THAT THE EMPLOYER COMMITTED AN EMPLOYMENT INTENTIONAL TORT AGAINST THE EMPLOYEE;

"(2) NOTWITHSTANDING ANY LAW OR RULE TO THE CONTRARY, EVERY PLEADING, MOTION, OR OTHER PAPER OF A PARTY REPRESENTED BY AN ATTORNEY SHALL BE SIGNED BY AT LEAST ONE ATTORNEY OF RECORD IN THE ATTORNEY'S INDIVIDUAL NAME AND IF THE PARTY IS NOT REPRESENTED BY AN ATTORNEY, THAT PARTY SHALL SIGN THE PLEADING, MOTION, OR PAPER. FOR THE PURPOSES OF THIS SECTION, THE SIGNING BY THE ATTORNEY OR PARTY CONSTITUTES A CERTIFICATION THAT THE SIGNER HAS READ THE PLEADING, MOTION, OR OTHER PAPER; THAT TO THE BEST OF THE SIGNER'S KNOWLEDGE, INFORMATION, AND BELIEF FORMED AFTER REASONABLE INQUIRY IT IS WELL GROUNDED IN FACT OR A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW; AND THAT IT IS NOT INTERPOSED FOR ANY IMPROPER PURPOSE, INCLUDING, BUT NOT LIMITED TO, HARASSING OR CAUSING UNNECESSARY DELAY OR NEEDLESS INCREASE IN THE COST OF THE ACTION.

"IF THE PLEADING, MOTION, OR OTHER PAPER IS NOT SIGNED AS REQUIRED IN DIVISION (C)(2) OF THIS SECTION, THE COURT SHALL STRIKE THE PLEADING, MOTION, OR OTHER PAPER UNLESS THE ATTORNEY OR PARTY PROMPTLY SIGNS IT AFTER THE OMISSION IS CALLED TO THE ATTORNEY'S OR PARTY'S ATTENTION. IF A PLEADING, MOTION, OR OTHER PAPER IS SIGNED IN VIOLATION OF DIVISION (C)(2) OF THIS SECTION, THE COURT, UPON MOTION OR UPON ITS OWN INITIATIVE, SHALL IMPOSE UPON THE PERSON WHO SIGNED IT, OR THE REPRESENTED PARTY, OR BOTH, AN APPROPRIATE SANCTION. THE SANCTION MAY INCLUDE, BUT IS NOT LIMITED TO, AN ORDER TO PAY TO THE OTHER PARTY THE AMOUNT OF THE REASONABLE EXPENSES INCURRED DUE TO THE FILING OF THE PLEADING, MOTION, OR OTHER PAPER, INCLUDING REASONABLE ATTORNEY'S FEES.

"(D) AS USED IN THIS SECTION:

"(1) 'EMPLOYMENT INTENTIONAL TORT' MEANS 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.

"(2) 'EMPLOYER' MEANS ANY PERSON WHO EMPLOYS AN INDIVIDUAL.

"(3) 'EMPLOYEE' MEANS ANY INDIVIDUAL EMPLOYED BY AN EMPLOYER.

"(4) 'EMPLOY' MEANS TO PERMIT OR SUFFER TO WORK."

Former R.C. §4121.80 provided:

(A) If injury, occupational disease, or death results to any employee from the intentional tort of his employer, the employee or the dependents of a deceased employee have the right to receive workers' compensation benefits under Chapter 4123. of the Revised Code and have a cause of action against the employer for an excess of damages over the amount received or receivable under Chapter 4123. of the Revised Code and Section 35 of Article II, Ohio Constitution, or any benefit or amount, the cost of which has been provided or wholly paid for by the employer. The cause of action shall be brought in the county where the injury was sustained or the exposure primarily causing the disease alleged to be contracted occurred. The claim on behalf of the dependents of a deceased employee shall be asserted by the employee's estate. All defenses are preserved for and shall be available to the employer in defending against an action brought under this section. Any action pursuant to the section shall be brought within one year of the employee's death or the date on which the employee knew or through the exercise of reasonable diligence should have known of the injury, disease, or condition, whichever date occurs first. In no event shall any action be brought pursuant to this section more than two years after the occurrence of the act constituting the alleged intentional tort.

(B) It is declared that enactment of Chapter 4123. of the Revised Code and the establishment of the workers' compensation system is [ *sic* ] intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as herein expressly provided, and to establish a system which compensates even though the injury or death of an employee may be caused by his own fault or the fault of a co-employee; that the immunity established in Section 35 of Article II, Ohio Constitution, and sections 4123.74 and 4123.741 of the Revised Code is an essential aspect of Ohio's workers' compensation system; that the intent of the legislature in providing immunity from common law suit is to protect those so immunized from litigation outside the workers' compensation system except as herein expressly provided; and that it is the legislative intent to promote prompt judicial resolution of the question of whether a suit based upon a claim of an intentional tort prosecuted under the asserted authority of this section is or is not an intentional tort and therefore is or is not prohibited by the immunity granted under Section 35 of Article II, Ohio Constitution, and Chapter 4123. of the Revised Code.

(C) Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under Chapter 4123. of the Revised Code, the court shall dismiss the action:

"(1) Upon motion for summary judgment, if it finds, pursuant to Rule 56 of the Rules of Civil Procedure the facts required to be proved by division (B) of this section do not exist;

(2) Upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find the facts required to be proven.

(D) In any action brought pursuant to this section, the court is limited to a determination as to whether or not the employer is liable for damages on the basis that the employer committed an intentional tort. If the court determines that the employee or his estate is entitled to an award under this section and that determination has become final, the industrial commission shall, after hearing, determine what amount of damages should be awarded. For that purpose, the commission has original jurisdiction. In making that APX-16

determination, the commission shall consider the compensation and benefits payable under Chapter 4123. of the Revised Code and the net financial loss to the employee caused by the employer's intentional tort. In no event shall the total amount to be received by the employee or his estate from the intentional tort award be less than fifty per cent of nor more than three times the total compensation receivable pursuant to Chapter 4123. of the Revised Code, but in no event may an award under this section exceed one million dollars. Payments of an award made pursuant to this section shall be from the intentional tort fund. All legal fees, including attorney fees as fixed by the industrial commission, incurred by an employer in defending an action brought pursuant to this section shall be paid by the intentional tort fund.

(E) There is hereby established an intentional tort fund, which shall be in the custody of the treasurer of state. Every public and private employer, including self-insuring employers, shall pay into the fund annually an amount fixed by the administrator of workers' compensation with approval of the workers' compensation board. The assessment for public and private employers, except for self-insuring employers, shall be based upon the manner of rate computation established by section 4123.29 of the Revised Code. The administrator shall separately calculate each self-insuring employer's assessment in accordance with section 4123.35 of the Revised Code.

The fund shall be under the control of the administrator and the administrator shall adopt by rule procedures to govern the reception of claims against the fund pursuant to this section and disbursement from the fund.

(F) The commission shall make rules concerning the payment of attorney fees by claimants and employers in actions brought pursuant to this section and shall protect parties against unfair fees. The commission shall fix the amount of fees in the event of a controversy in respect thereto. The commission and the bureau of workers' compensation shall prominently display in all areas of an office which claimants frequent a notice to the effect that the commission has statutory authority to resolve fee disputes. The commission shall make rules designed to prevent the solicitation of employment in the prosecution or defense of actions brought under this section and may inquire into the amounts of fees charged employers or claimants by attorneys for services in matters relative to actions brought under this section.

(G) As used in this section:

(1) 'Intentional tort' is an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.

Deliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance is evidence, the presumption of which may be rebutted, of an action committed with the intent to injure another if injury or an occupational disease or condition occurs as a direct result.

'Substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.

(2) 'Employer,' 'employee,' and 'injury' have the same meanings given those terms in section 4123.01 of the Revised Code.

(H) This section applies to and governs any action based upon a claim that an employer committed an intentional tort against an employee pending in any court on August 22, 1986 and all claims or actions filed on or after that date, notwithstanding any provisions of any prior statute or rule of law of this state.