

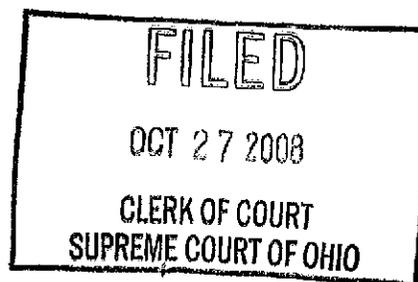
In the
Supreme Court of Ohio

ROSE KAMINSKI,	:	Case Nos. 2008-0857
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Columbiana County
v.	:	Court of Appeals,
	:	Seventh Appellate District
METAL & WIRE PRODUCTS COMPANY,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 07-CO-15
	:	

MERIT BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF DEFENDANT-APPELLANT
METAL & WIRE PRODUCTS COMPANY

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INTRODUCTION

This case requires the Court to determine the constitutionality of R.C. 2745.01, which modified the common-law cause of action for employer intentional torts.¹ For the reasons explained below, the Court should uphold R.C. 2745.01 as a constitutional exercise of the General Assembly's expansive legislative power under Article II, Section 1 of the Ohio Constitution.

In the absence of a specific constitutional limitation, the General Assembly has authority to enact statutes in furtherance of its general police power, including statutes that codify, alter, or abolish common-law causes of action. *Thompson v. Ford* (1955), 164 Ohio St. 74, 79. In this case, the General Assembly modified the common-law cause of action for employer intentional torts by enacting R.C. 2745.01, which imposes a higher burden on plaintiffs alleging employer intentional torts than existed at common law.

R.C. 2745.01 is the General Assembly's third attempt to exercise its legislative power to enact employer intentional tort legislation. Narrow factions of this Court held that the first two employer intentional torts statutes were unconstitutional, reasoning in part that Article II, Sections 34 and 35 of the Ohio Constitution did not provide a constitutional basis for the legislation. But the General Assembly does not need a Section 34 or 35 basis to enact an employer intentional torts statute; the General Assembly has authority to enact such a law pursuant to its Article II, Section 1 police power, as long as the law does not violate any other constitutional provision.

¹ This question is also before the Court as a certified question in *Stetter v. R.J. Corman Derailment Servs. LLC*, 119 Ohio St. 3d 1452, 2008-Ohio-4562 (order modifying certified questions). In addition, two other courts of appeals have held that the General Assembly lacked authority to enact R.C. 2745.01, and those decisions have been appealed to this Court. See *Barry v. A.E. Steel Erectors, Inc.* (8th Dist. July 24, 2008), 2008-Ohio-3676 (notice of appeal filed September 17, 2008); *Fleming v. AAS Service, Inc.* (11th Dist. Aug. 1, 2008), 2008-Ohio-3908 (notice of appeal filed September 18, 2008).

R.C. 2745.01 does not violate Section 34 or 35 because, contrary to this Court's decisions invalidating the Ohio's previous employer intentional tort statutes, neither section imposes a constitutional barrier to modifying the common-law cause of action for employer intentional torts. As this Court has held, Section 34 is "a broad *grant* of authority to the General Assembly," *Am. Assoc. of Univ. Professors, Central State Univ. Chapter v. Central State Univ.* ("AAUP") (1999), 87 Ohio St. 3d 55, 61, to enact laws related to "the comfort, health, safety and general welfare of all employees." Ohio Const. art. II, § 34. Interpreting the permissive language of Section 34 as a *limit* on legislative power would be irreconcilable with both its text and this Court's other Section 34 decisions. Similarly, Section 35 affirmatively *grants* legislative power, authorizing the General Assembly to establish a workers' compensation system to provide redress for injuries incurred during the course of employment. Interpreting Section 35 to prohibit R.C. 2745.01 would effectively transform Section 35 from a grant of authority into a restraint on legislative action, contradicting the text of Section 35 and this Court's related case law.

This Court's decisions invalidating Ohio's first two employer intentional tort statutes are not fully consistent with the plain meaning of Sections 34 and 35 and this Court's precedents. See *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St. 3d 624, and *Johnson v. BP Chem., Inc.* (1999), 85 Ohio St. 3d 298. The Court should limit the application of *Brady* and *Johnson* to the specific statutes invalidated, which differ significantly from R.C. 2745.01. The Court should accordingly reverse the Seventh District and, consistent with the Ohio Constitution and this Court's precedents, uphold R.C. 2745.01 as a valid exercise of the General Assembly's Article II, Section 1 power.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, the Ohio Attorney General has a strong interest in ensuring that Ohio statutes are upheld against constitutional challenges. By enacting R.C. 2745.01, the General Assembly exercised its police powers under Article II, Section 1 to modify a common-law cause of action. Neither Section 34 nor 35 of Article II limits the General Assembly's power to do so. Therefore, the Attorney General joins Appellant Metal & Wire Products Company ("Metal & Wire") in asking this Court to reverse the judgment of the Seventh District Court of Appeals. The Attorney General urges this Court to hold that R.C. 2745.01 is constitutional and to limit the reach of *Brady* and *Johnson* to the specific statutes invalidated by those decisions.

STATEMENT OF THE CASE AND FACTS

Rose Kaminski worked as a press operator at Metal & Wire's manufacturing facility in Salem, Ohio. *Kaminski v. Metal & Wire Prods. Co.* (7th Dist.), 175 Ohio App. 3d 227, 2008-Ohio-1521, ¶ 2. While on the job, Kaminski and a co-worker attempted to load a large metal coil into a press. During their attempt, the coil fell onto Kaminski's legs and feet, causing injury. *Id.*

Kaminski filed suit against Metal & Wire in the Columbiana Court of Common Pleas, alleging that Metal & Wire acted with intent to cause injury by requiring her to load the metal coil without using the proper safety systems. *Id.* at ¶ 3. Kaminski asserted her cause of action under both the common law governing employer intentional torts and R.C. 2745.01, Ohio's employer intentional tort statute. As part of her complaint, Kaminski contended that R.C. 2745.01 was unconstitutional. *Id.*

Metal & Wire counterclaimed, asking the court for a declaratory judgment that R.C. 2745.01 was constitutional, then filed a motion for summary judgment on the counterclaim. *Id.* at ¶¶ 4, 5. Kaminski filed a cross-motion for summary judgment on the counterclaim. *Id.* at ¶ 5.

The trial court granted Metal & Wire’s summary judgment motion, holding that (1) R.C. 2745.01 was constitutional, and (2) Kaminski did not have sufficient evidence to satisfy her statutory burden of proving that Metal & Wire acted either with the intent to injure Kaminski or with the belief that injury was substantially certain to occur. *Id.* at ¶¶ 6-7.

On appeal, the Seventh District Court of Appeals reversed, holding that R.C. 2745.01 exceeded the General Assembly’s power under Article II, Sections 34 and 35 of the Ohio Constitution. *Id.* at ¶ 38. The Seventh District’s reasoning relied heavily on this Court’s prior decisions invalidating other employer intentional tort statutes on the same grounds. *Id.* at ¶ 34 (“Pursuant to the Ohio Supreme Court’s holdings in *Brady* . . . and *Johnson* . . . and consistent with Sections 34 and 35, Article II of the Ohio Constitution, we must conclude R.C. 2745.01 is unconstitutional.”); see *Brady*, 61 Ohio St. 3d 624; *Johnson*, 85 Ohio St. 3d 298. The Seventh District then analyzed Kaminski’s claim under the common-law standard for employer intentional torts and identified genuine issues of material fact as to all three elements of that standard. *Kaminski*, 2008-Ohio-1521 at ¶ 84. Consequently, the court concluded that the trial court erred by granting Metal & Wire summary judgment, reversed the trial court’s judgment, and remanded for further proceedings. *Id.* at ¶ 85.

This Court accepted Metal & Wire’s appeal.

ARGUMENT

Amicus Attorney General’s Proposition of Law:

Because Article II, Sections 34 and 35 do not limit the General Assembly’s authority under Article II, Section 1 to alter the elements of the common-law cause of action for employer intentional torts, R.C. 2745.01 is constitutional.

As explained below, the General Assembly validly exercised its Article II, Section 1 power to modify common-law causes of action by enacting R.C. 2745.01. Moreover, R.C. 2745.01 does not conflict with Article II, Sections 34 or 35 of the Ohio Constitution. Because this

Court's decisions invalidating the General Assembly's two earlier employer intentional tort statutes incorrectly interpreted Sections 34 and 35, this Court should limit these holdings to the specific statutes that were invalidated.

A. The General Assembly has broad authority to modify common-law causes of action, such as the common-law action for employer intentional torts, under its Article II, Section 1 police power.

Article II, Section 1 of the Ohio Constitution vests the State's legislative power in the General Assembly. The General Assembly has broad police power to enact legislation subjecting people "to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state" *Marmet v. State* (1887), 45 Ohio St. 63, 71 (internal quotation omitted). In exercising this power, "the General Assembly may enact any law which is not prohibited by the Constitution." *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 603; see *Williams v. Scudder* (1921), 102 Ohio St. 305, 307. Moreover, because "[t]he power to legislate for all the requirements of civil government is the rule" and "a restriction upon the exercise of that power in a particular case is the exception," a statute only exceeds legislative power if it the Constitutional *clearly prohibits* it. *State v. Jones* (1894), 51 Ohio St. 492, 504. Any doubt about a statute's constitutionality "must be resolved in favor of the legislative power." *Id.*; see *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, syllabus ¶ 1 (Courts can declare a statute unconstitutional only if it "appear[s] beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible").

In keeping with the General Assembly's expansive power to legislate, "[t]here is no question that the legislative branch of the government . . . may modify or entirely abolish common-law actions and defenses." *Thompson*, 164 Ohio St. at 79; see *Johnson*, 85 Ohio St. 3d at 303; *Brady*, 61 Ohio St. 3d at 640 (Brown, J., concurring). This authority extends insofar as it is not "specifically and clearly limited in the constitution." *Champaign Cty. Bd. of Comm'rs v.*

Church (1900), 62 Ohio St. 318, 344; see also *Strock v. Pressnell* (1988), 38 Ohio St. 3d 207, 214 (citing *Thompson*). Put simply, the General Assembly does not need a specific grant of authority to modify the common law; the legislature has inherent authority under its police power to modify a common-law cause of action so long as the enacted statute does not violate any other constitutional provision. *Thompson*, 164 Ohio St. at 79.

R.C. 2745.01, the statute now before this Court, modifies the common-law cause of action for employees seeking redress outside of the workers' compensation system for intentional torts committed by employers. R.C. § 2745.01(A). A cause of action for employer intentional torts exists at common law. See *Blankenship v. Cincinnati Milacron Chems., Inc.* (1982), 69 Ohio St. 2d 608 (superseded by statute) (recognizing a common-law cause of action for employer intentional torts). An employee can recover for an employer's intentional tort at common law without demonstrating that the employer acted with specific intent to injure. *Jones v. VIP Devel. Co.* (1984), 15 Ohio St. 3d 90, 95. However, R.C. 2745.01 raises the burden of proof for employees alleging an employer's intentional tort, requiring an employee to demonstrate that his or her employer "committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur." R.C. § 2745.01(A). The statute defines "substantially certain" to mean that "an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." *Id.* at § 2745.01(B).

Regardless of the wisdom of imposing a higher burden on plaintiffs in employer intentional tort actions, the General Assembly has clear legislative authority to modify a common law burden. As "the ultimate arbiter of public policy," the General Assembly may "refine[] Ohio's tort law to meet the needs of our citizens." *Groch et al. v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶ 102 (internal quotations omitted). By enacting R.C. 2745.01, the General

Assembly made a policy judgment to set a high standard for employees to prevail in an employer intentional tort action. Accordingly, the General Assembly's modification of the common law is valid absent a determination that R.C. 2745.01 violates a specific constitutional provision. See *Thompson*, 164 Ohio St. at 79.

B. Article II, Section 34 is an affirmative grant of power authorizing legislation related to employment; it does not bar the General Assembly from enacting an employer intentional torts statute.

R.C. 2745.01 is not inconsistent with Article II, Section 34 of the Ohio Constitution because Section 34 grants, rather than limits, legislative power. Section 34 provides the constitutional foundation for much employee-related legislation by authorizing the General Assembly to pass laws “providing for the comfort, health, safety and general welfare of all employees.” Ohio Const. art. II, § 34. On its face, Section 34 is permissive, not restrictive. *Id.* (“Laws *may* be passed . . . and no other provision of the constitution shall limit this power.”) (emphasis added). Moreover, the language of Section 34 is consistent with its original purpose of empowering the General Assembly: Ohio citizens amended the Constitution to add Section 34, which positively declared the General Assembly could enact laws relating to employment, in the wake of claims that the legislature did not have authority to enact minimum wage laws. *Johnson*, 85 Ohio St. 3d at 310 (Cook, J., dissenting).

In keeping with Section 34's plain meaning and original purpose, this Court has repeatedly determined that the section is an affirmative grant of legislative power. See *AAUP*, 87 Ohio St. 3d at 61; *Rocky River v. State Emp. Relations Bd.* (“*Rocky River IV*”) (1989), 43 Ohio St. 3d 1, 13. However, the Court diverged from this understanding when it invalidated the General Assembly's first two employer intentional torts statutes. See *Brady*, 61 Ohio St. 3d 624; *Johnson*, 85 Ohio St. 3d 298.

This Court struck down the General Assembly's first employer intentional tort statute, former R.C. 4121.80, in *Brady*, 61 Ohio St. 3d 624. Because *Brady* was a plurality decision, "the only law emanating from [it] is contained in the syllabus." *Hedrick v. Motorists Mut. Ins. Co.* (1986), 22 Ohio St. 3d 42, 44, overruled on other grounds in *Martin v. Midwestern Group Ins. Co.*, 70 Ohio St. 3d 478, 1994-Ohio-407. The syllabus held 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 unconstitutional *in toto*," *Brady*, 61 Ohio St. 3d 624, syll. ¶ 2, but the Justices were not able to agree on the reasoning behind this holding. A three-justice plurality construed Section 34 to authorize the General Assembly to enact employment-related laws *only if* those laws benefited employees. *Id.* at 633. Reasoning that former R.C. 4121.80 did not benefit employees because it "remove[d] a right to a remedy under common law," the plurality found the statute violated Section 34. *Id.* (Sweeney, J., plurality). By contrast, Justice Brown, who provided the fourth vote to invalidate R.C. 4121.80, concluded that the mere fact that Sections 34 and 35 did not authorize the statute, standing alone, was not a basis for invalidating the statute. *Id.* at 639-640 (Brown, J., concurring). Justice Brown expressly recognized the General Assembly's authority to "modify intentional tort law by legislation . . . in the exercise of its police power," and then proceeded to find R.C. 4121.80 unconstitutional for two other reasons: the statute violated the right to trial by jury and imposed an unconstitutional cap on damages. *Id.* at 640, 641 (Brown, J., concurring).

In *Johnson*, a narrow majority of the Court relied extensively on the plurality's reasoning in *Brady* as a basis for striking the General Assembly's second employer intentional torts statute, former R.C. 2745.01. 85 Ohio St. 3d at 304-05. The Court reasoned that the statute "impose[d] excessive standards" and therefore did not further the safety, comfort, and general welfare of all

employees consistent with Section 34. *Id.* at 308. Because the statute imposed a burden on employees rather than advancing their general welfare, the Court concluded that it was not enacted pursuant to Section 34 and further that it unconstitutionally exceeded Section 34's grant of legislative power.

Whatever *Johnson* suggests about the meaning of Section 34, however, this Court has elsewhere firmly rejected the idea that Section 34 does not authorize legislation burdening employees. Only six months after deciding *Johnson*, the Court refused to construe Section 34 as a restriction on the General Assembly's authority to pass legislation burdening employees. *AAUP*, 87 Ohio St. 3d at 60-61. Instead, the Court noted that it had "repeatedly interpreted Section 34, Article II as a broad *grant* of authority to the General Assembly, not as a limitation on its power to enact legislation." *Id.* at 61. According to the Court, Section 34's text simply could not support an interpretation of it as a limitation on the General Assembly's authority. *Id.*; see also *Rocky River IV*, 43 Ohio St. 3d at 13 (Section 34 "constitutes a broad grant of authority to the legislature . . ."). The Court further determined that a constitutional interpretation permitting beneficial laws but striking allegedly burdensome laws would completely tie the hands of the General Assembly. *AAUP*, 87 Ohio St. 3d at 61. Laws that advance the public interest, such as certification tests, continuing education requirements, criminal record checks, and mandatory reporting statutes would all be subject to constitutional challenges because they arguably burdened individual employees. *Id.* at 61-62 ("[T]he public's interest in the regulation of the employment sector often requires legislation that burdens rather than benefits employees."). The Court in *AAUP* clearly refused to read Section 34 as a restriction on the General Assembly's power, directly undermining the reasoning upon which the Court's holding in *Johnson* hinged.

The *Brady* plurality's and *Johnson* majority's tenuous interpretation of Section 34 as a limit on legislative power is not supported by the section's text or original purpose and has been explicitly contradicted by this Court's subsequent decision in *AAUP*. Therefore, the interpretation of Section 34 set forth by the *Brady* plurality and the *Johnson* majority cannot remain good law. For these reasons, 2745.01 does not violate Section 34.

C. Article II, Section 35 is an affirmative grant of power authorizing a workers' compensation system; it does not bar the General Assembly from enacting an employer intentional torts statute.

R.C. 2745.01 is not inconsistent with Article II, Section 35 of the Ohio Constitution because, like Section 34, Section 35 affirmatively grants power to the General Assembly. Section 35 authorizes the General Assembly to enact laws providing a compensation system "for death, injuries or occupational disease, occasioned in the course of . . . employment" Ohio Const. art. II, § 35. The compensation system would provide redress to workers "in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease," and employers covered under the system would not be liable for other common law or statutory damages related to "such death, injuries or occupational disease." *Id.* As written, then, Section 35 establishes the workers' compensation system as the exclusive remedy for Ohio workers injured on the job. But Section 35 does not establish any limit on the General Assembly's authority to enact legislation governing torts that occur outside the context of employment.

In addition to recovering workers' compensation for work-related injuries, Ohio employees have long been able to recover for an employer's intentional tort at common law. This Court recognized an employee's common-law right of action for employer intentional torts in *Blankenship*, reasoning that such actions are not within Section 35's ambit. 69 Ohio St. 2d 608. Because an employer's intentional tort essentially terminates the employment relationship, it does not, as Section 35 requires, "arise out of employment." *Id.* at 613. This common-law right

of action extends to injuries resulting from acts committed either with direct intent or with a belief that injury is “substantially certain to result.” *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St. 3d 115, 118.

The *Brady* plurality and *Johnson* majority both cite the Court’s reasoning in *Blankenship*, explaining 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; *Johnson*, 85 Ohio St. 3d at 305 (quoting *Brady*). But after holding that Section 35 does not apply to employer intentional torts, the *Brady* plurality and the *Johnson* majority each proceeded to rely on Section 35 as a reason for striking an employer intentional torts statute. See *Johnson*, 85 Ohio St. 3d at 305; *Brady*, 61 Ohio St. 3d at 634. This reasoning is logically inconsistent: Employer intentional torts cannot simultaneously be outside the reach of Section 35 and invalid because they are not specifically authorized by Section 35. *Johnson*, 85 Ohio St. 3d at 311-12 (Cook, J., dissenting).

This Court elsewhere has upheld statutes that reduce an employee’s total recovery against his or her employer, as long as the statutes do not disrupt the workers access to workers’ compensation. In *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 2001-Ohio-109, the Court upheld a subrogation statute that would reduce a worker’s total recovery because it did “not disrupt any of the rights or obligations of the claimant and the employer with regard to the payment of statutory workers’ compensation benefits, and the balance of compromise upon which the viability of the workers’ compensation system depends remains intact.” *Id.* at 121. *Holeton* clearly distinguished between an employee’s workers’ compensation recovery and tort

recovery: “Regardless of whether and to what extent [the statute] impermissibly cuts into a claimant’s tort recovery, it does nothing to the claimant’s workers’ compensation.” *Id.* at 120.

Like the statute in *Holeton*, R.C. 2745.01 is consistent with Section 35 because it modifies the common law action for employer intentional torts without disrupting rights or obligations concerning statutory workers’ compensation benefits. While R.C. 2745.01 will limit some employees’ ability to seek recovery outside of the workers’ compensation system, it does not upset the balance of the compromise set forth within the workers’ compensation system—employers remain subject to liability for employer intentional torts, and they are still unable to assert traditional tort defenses in order to evade compensating employees injured on the job. Instead, R.C. 2745.01 reflects a policy judgment regarding which claims are so egregious that workers should be able to raise them *outside* of the workers’ compensation system.

The General Assembly does not need a Section 35 basis to modify the common-law cause of action for employer intentional torts because these torts are outside the scope of the workers’ compensation system authorized by Section 35. *Brady*, 61 Ohio St. 3d at 640 (Brown, J., concurring). Moreover, Section 35 does not impose any barrier to the enactment of employer intentional tort legislation. Therefore, this Court should uphold the constitutionality of R.C. 2745.01 as a valid exercise of the General Assembly’s power to modify the common-law cause of action for employer intentional torts under Article II, Section 1. See *id.*

D. This Court should limit the scope of *Brady* and *Johnson* to only the specific employer intentional tort statutes that they invalidated because those statutes are sufficiently different than R.C. 2745.01.

Although *Brady* and *Johnson* make broad statements about the unconstitutionality of employer intentional tort legislation, R.C. 2745.01 is “sufficiently different from the previous enactments to avoid the blanket application of stare decisis and to warrant a fresh review of [its] merits.” *Groch*, 2008-Ohio-547 at ¶ 147 (quoting *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d

468, 2007-Ohio-6948, ¶ 24). “To be covered by the blanket of stare decisis, the legislation must be phrased in language that is practically the same as that which we have previously invalidated.” *Id.* at ¶ 104 (internal quotation omitted).

The statute considered in *Brady*, former R.C. 4121.80, removed from the jury determinations of liability and damages in employer intentional tort actions and also capped the damages available to plaintiffs in these actions. *Brady*, 61 Ohio St. 3d at 640-41 (Brown, J., concurring). Justice Brown, who provided the crucial fourth vote in *Brady*, explained in his concurrence that these provisions made the statute unconstitutional. *Id.* He expressly recognized the General Assembly’s power to legislatively modify employer intentional tort law, but did not approve of the *particular statute* before the court. *Id.* at 640. Even though the plurality opinion developed a line of reasoning about Section 34 and 35 that seems to suggest that R.C. 2745.01 is unconstitutional, this Court could limit *Brady*’s scope to the statute at issue in *Brady*: Former R.C. 4121.80 had constitutional defects that are not at issue in R.C. 2745.01.

In *Johnson*, the Court held “that R.C. 2745.01 is unconstitutional in its entirety” for two reasons: (1) former R.C. 2745.01 did not further the “comfort, health, safety, and welfare of all employees” in keeping with the language of Section 34; and (2) the law “govern[ed] intentional torts that occur within the employment relationship . . . it cannot withstand constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of constitutional empowerment,” presumably under Section 35. 85 Ohio St. 3d at 308. The Court’s holding in *Johnson* therefore turns on the determination that there was no Section 34 or 35 basis for the employer intentional tort statute at issue. As in *Johnson*, there is no Section 34 or 35 basis for the General Assembly’s enactment of R.C. 2745.01. However, for the reasons explained above,

in this case the General Assembly had another source of constitutional authority to enacted R.C. 2745.01—Article II, Section 1.

Moreover, there are several differences between the former R.C. 2745.01, the statute invalidated in *Johnson*, and the current R.C. 2745.01 that justify limiting *Johnson* to the specific statute invalidated by the Court. Former R.C. 2745.01 required an employee to prove “by clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort.” *Johnson*, 85 Ohio St. 3d at 301 n.2 (emphasis added) (quoting the former R.C. 2745.01(B), Section 1, Am. H.B. No. 103, 146 Ohio Laws, Pt. I, 756-757). The statute also provided that a plaintiff’s claim could only survive a defendant’s motion for summary judgment if the plaintiff could “set forth specific facts supported by clear and convincing evidence to establish that the employer committed an employment intentional tort against the employee.” *Id.* (quoting former R.C. 2745.01(C)(1)). Finally, the statute required certification of all filings in employer intentional tort actions and put the person signing a filing at risk of sanctions. *Id.* (quoting former R.C. 2745.01(C)(2)). The *Johnson* Court determined that, read together, all of the statute’s provisions “created a cause of action that is simply illusory” and therefore found former R.C. 2745.01 unconstitutional. *Id.* at 306.

Even assuming the *Johnson* statute did create an “illusory” cause of action, the current R.C. 2745.01 is not nearly as extreme as its predecessor. R.C. 2745.01 does not establish a “clear and convincing” standard at all, let alone impose it on plaintiffs at the summary judgment stage. The *Johnson* Court sweepingly declared that “any statute created to provide employers with immunity from liability for their intentional tortious conduct cannot withstand constitutional scrutiny.” 85 Ohio St. 3d at 304. But the current R.C. 2745.01 does not effectively immunize employers from liability; it does not place as high a burden on plaintiffs as the former R.C.

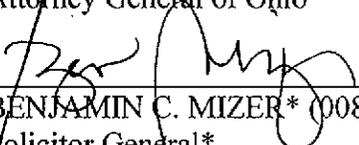
2745.01. Because of these key differences between the *Johnson* statute and R.C. 2745.01, the Court should refrain from applying its holding in *Johnson* in this case. *Arbino*, 2007-Ohio-6948 at ¶ 23 (“We will not apply stare decisis to strike down legislation enacted by the General Assembly merely because it is similar to previous enactments that we have deemed unconstitutional. To be covered by the blanket of stare decisis, the legislation must be phrased in language that is substantially the same as that which we have previously invalidated.”)

CONCLUSION

For all of the reasons set forth above, this Court should reverse the decision of the Seventh District Court of Appeals, uphold R.C. 2745.01 as a valid legislative enactment under Article II, Section 1 of the Ohio Constitution, and order that judgment be entered in favor of Metal & Wire.

Respectfully submitted,

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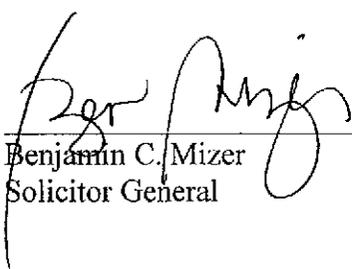
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