

In the
Supreme Court of Ohio

CARL F. STETTER, <i>et al.</i> ,	:	Case No. 2008-0972
	:	
Plaintiffs-Petitioners,	:	
	:	
v.	:	On Review of Certified Questions from
	:	the United States District Court,
	:	Northern District of Ohio, Western
R.J. CORMAN DERAILMENT SERVICES	:	Division
LLC, <i>et al.</i> ,	:	
	:	
Defendants-Respondents.	:	District Court Case
	:	No. 3:07-CV-866
	:	

**MERIT BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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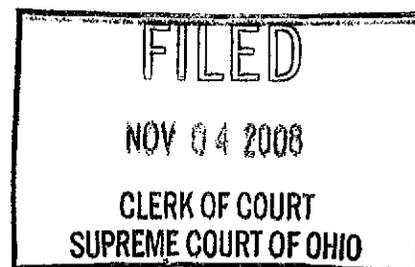


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INTRODUCTION

This case requires the Court to answer eight certified questions concerning the constitutionality and interpretation of R.C. 2745.01 (the “statute”), which alters the common-law cause of action for employer intentional torts. 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 and clarify that R.C. 2745.01 modifies, rather than eliminates, the common-law cause of action for employer intentional torts. Accordingly, the answer to each certified question is “no.”

As an initial matter, this Court should respond to the eighth certified question about the common law by clarifying that R.C. 2745.01 does not eliminate a cause of action for employer intentional torts. Instead, the statute modifies the common law by redefining “substantial certainty” in the context of employer intentional torts. See R.C. 2745.01(B); *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St. 3d 496, 2008-Ohio-937, ¶ 17 (“The General Assembly modified the common-law definition of an employer intentional tort by enacting R.C. 2745.01.”).

This Court should then resolve the seventh certified question about Article II, Sections 34 and 35 of the Ohio Constitution by holding that R.C. 2745.01’s enactment does not conflict with the General Assembly’s constitutional authority. Narrow factions of this Court invalidated two previous employer intentional tort statutes as unconstitutional, reasoning in part that Sections 34 and 35 did not provide a constitutional basis for the legislation. But the General Assembly does not need to rely on Sections 34 or 35 to enact an employer intentional tort statute; the General Assembly has legislative authority to modify a common-law cause of action pursuant to its Article II, Section 1 police power, so long as the law does not violate any other constitutional provision. See *Thompson v. Ford* (1955), 164 Ohio St. 74, 79.

R.C. 2745.01 does not violate Sections 34 or 35, because neither section imposes a constitutional barrier to modifying the common-law action for employer intentional torts. As

this Court has held, Section 34 is “a broad *grant* of authority to the General Assembly,” *Am. Ass’n of Univ. Professors v. Cent. State Univ.* (“AAUP”), 87 Ohio St. 3d 55, 61, 1999-Ohio-248, to enact laws related to “the comfort, health, safety and general welfare of all employees.” Ohio Const. art. II, § 34. 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. Ohio Const. art. II, § 35. Interpreting Sections 34 and 35 to prohibit R.C. 2745.01 would effectively transform these sections from grants of authority into restraints on legislative action, contradicting the text of the Ohio Constitution and this Court’s recent decisions interpreting these sections.

For these reasons, the Court should hold that R.C. 2745.01 does not violate Sections 34 or 35. In doing so, the Court should limit its earlier holdings invalidating Ohio’s first two employer intentional tort statutes to the specific statutes at issue in those cases, which differ meaningfully from R.C. 2745.01. See *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St. 3d 624; *Johnson v. BP Chems., Inc.*, 85 Ohio St. 3d 298, 1999-Ohio-267.

In the other six certified questions, the federal court seeks this Court’s guidance on whether R.C. 2745.01 violates the right to a jury trial, due process of law, equal protection of the law, the right to a remedy, the right to an open court, and separation of powers. With respect to each of these constitutional challenges, the Petitioners fail to explain how a statute that does nothing more than alter the intent element of an employer intentional tort violates a constitutional provision. Therefore, the Court should answer these questions in the negative as well.

For these and other reasons set forth below, R.C. 2745.01 is constitutional and this Court should answer each of the certified questions in the negative.

STATEMENT OF AMICUS INTEREST

The Ohio Attorney General, in her role as the defender of the constitutionality of Ohio's statutes, files this amicus brief in order to defend R.C. 2745.01's constitutionality. R.C. 2745.01, as enacted by H.B. 498 of the 125th General Assembly, alters the elements of the common-law action for employer intentional torts. Because the General Assembly has power to enact R.C. 2745.01, and the statute does not violate any provision of the Ohio Constitution, the Ohio Attorney General joins Respondents in urging this Court to answer the certified questions in favor of the statute's constitutionality.

STATEMENT OF THE CASE AND FACTS

Petitioner Carl Stetter was injured on March 13, 2006, while inflating a large truck tire in the course of his employment for Respondents R.J. Corman Derailment Services, LLC, and/or R.J. Corman Railroad Group, LLC (collectively "R.J. Corman") in Wood County, Ohio. Compl. ¶¶ 8-9 (attached as App. Ex. 1). Stetter alleges permanent injuries to his ribs, vertebrae, face, ankle, and foot. *Id.* ¶ 22. Stetter applied for and received workers' compensation benefits for his injuries. Certification Order at 2.

Stetter and his wife (collectively "Petitioners" or "Stetter") filed suit in the Wood County Court of Common Pleas asserting an employer intentional tort claim against R.J. Corman and a products liability action against the tire manufacturer. Certification Order at 2. According to Stetter, R.J. Corman did not comply with OSHA regulations and Ohio Administrative Code provisions that require employers to provide training in tire inflation, as well as to make a safety tire rack or cage available to employees for use during tire inflation or servicing. Compl. ¶¶ 12-15.

R.J. Corman removed the action to the U.S. District Court for the Northern District of Ohio, Western Division. Certification Order at 2. In its amended answer, R.J. Corman argued that R.C. 2745.01, which took effect on April 7, 2005, governs Stetter's intentional tort claim.

The parties jointly moved the district court for an order certifying the constitutional questions to this Court. *Id.* This Court accepted the certified questions and subsequently amended its certification order to correct references to an incorrect bill number. This brief reorders the certified questions in order to address the issues in a more logical order, and combines the second and third questions into a single proposition of law.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law No. 1:

R.C. 2745.01, as amended by H.B. 498, effective April 7, 2005, modifies but does not eliminate the common-law cause of action for employer intentional tort.

A. The General Assembly enacted R.C. 2745.01 to define the intent required to commit an employer intentional tort.

R.C. 2745.01 should be read against the backdrop of past legislative efforts to modify employer intentional torts in Ohio. When considered in historical context, the General Assembly's reason for enacting the statute becomes clear—to establish a standard of intent for employer intentional torts that courts can apply consistently. As discussed in more detail below, R.C. 2745.01 substantially alters one of the two recognized tests for establishing the intent element of an employer intentional tort, but does not eliminate the common-law cause of action for employer intentional torts.

In *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St. 3d 608, 613-14, this Court recognized a common-law cause of action for employer intentional torts, finding that the creation of a workers' compensation system did not abolish all remedies available to employees against their employers at common law. Although *Blankenship* did not prescribe the

limits of such claims, the Court later defined an “intentional tort” as “an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.” *Jones v. VIP Dev. Co.* (1984), 15 Ohio St. 3d 90, syllabus ¶ 1. Some commentators criticized *Jones*’s substantial-certainty prong as difficult to apply and as out-of-line with most other States’ positions regarding employer intentional torts. See, e.g., Case Comment: *Brady v. Safety-Kleen Corp.: Tipping Ohio’s Workers’ Compensation Scale in Favor of the Employee*, 54 Ohio St. L.J. 837, 852, 854-55 (Summer 1993). In fact, Ohio practitioners struggled to apply the substantial-certainty prong. See *Fyffe v. Jenos* (1991), 59 Ohio St. 3d 115, 117 (noting that after several decisions some trial courts and attorneys were “still in a quandary” about what facts present intentional tort issues for the trier of the fact); *Talik*, 2008-Ohio-937, ¶ 16 (“The standard of ‘substantial certainty’ in the intentional tort arena caused confusion.”).

Before R.C. 2745.01’s enactment, an employer committed a common-law intentional tort when the employer’s conduct met the definition of intent provided by Section 8A of the Restatement (Second) Torts (1965). See *Fyffe*, 59 Ohio St. 3d 115, syllabus ¶ 1. Under this definition, any consequence that an actor desires to bring about is intended. Restatement § 8A cmt. b. “If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.” *Id.* “However, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent.” *Fyffe*, 59 Ohio St. 3d 115, syllabus ¶ 2.

On two previous occasions, the General Assembly enacted statutes to alter the scope of employer intentional torts in Ohio. First, the General Assembly passed former R.C. 4121.80, which redefined substantial certainty, required the Industrial Commission to calculate damages for employer intentional torts, removed liability determinations from the jury, and capped

damages at \$1 million. See *Brady*, 61 Ohio St. 3d at 627-628. A plurality of the Court invalidated the statute, holding that the provisions regarding damages calculation and liability violated the right to trial by jury, and that the damages cap violated due process for the reasons set forth in *Morris v. Savoy* (1991), 61 Ohio St. 3d 684, which concerned a damages cap in medical malpractice actions. *Brady*, 61 Ohio St. 3d at 641 (Brown, J., concurring). The General Assembly then passed former R.C. 2745.01, which made an employer liable only if an employee proves “by clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort.” See *Johnson*, 85 Ohio St. 3d at 302 n.2 (quoting Section 1, Am. H.B. No. 103, 146 Ohio Laws, Pt. I, 756-57). In a closely divided decision, the *Johnson* majority held that former R.C. 2745.01 violated Article II, Sections 34 and 35 of the Ohio Constitution. *Id.* at 308.

The General Assembly enacted R.C. 2745.01 against this backdrop. The text of the statute provides:

(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 tortuous 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, disease, a condition, or death.

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.

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.

R.C. 2745.01.

To answer the eighth certified question, this Court must determine the effect of R.C. 2745.01 on the common law of employer intentional torts. Petitioners argue that R.C. 2745.01 leaves the common-law cause of action unaltered, and also recognizes a new statutory cause of action for employer torts committed with deliberate intent. To the contrary, the statute alters the common-law cause of action by requiring direct proof of an employer's intent—as opposed to inferred intent, which was permitted at common law. As the Court said in *Talik*, R.C. 2745.01 *modifies* the common-law definition of employer intentional torts, “reject[ing] the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct.” 2008-Ohio-937, ¶ 17. In the end, reading subsections A, B, and C together, liability does not attach under R.C. 2745.01 merely because an employee alleges that an injury was substantially certain to occur. The statute does establish, however, a rebuttable presumption of an employer's intent to injure when an employee shows that his or her employer *deliberately* removed an equipment safety guard or made misrepresentations regarding a toxic or hazardous substance. See R.C. 2745.01(C). Accordingly, as this Court recognized in *Talik*, the General Assembly enacted R.C. 2745.01 to modify the common law regarding “substantial certainty” employer intentional torts.

B. Stetter's strained interpretation of R.C. 2745.01 is not in keeping with the statute's plain language or any other rule of statutory construction.

Stetter posits a unique interpretation of R.C. 2745.01, which does not follow from the statute's text or its context. Although Stetter cites six rules of statutory construction in support of his interpretation, he misapplies those rules and ignores others.

Petitioners argue that the definition of “substantial certainty” in R.C. 2745.01(B) has no effect on existing common-law employer intentional tort actions. According to Petitioners, R.C. 2745.01(A) accomplishes two things: (1) it acknowledges the existing common-law standard for employer intentional torts, as stated in *Jones*, without attempting to change it, R.C. 2745.01(A), clause 1; and (2) it creates a new statutory cause of action governing an employer’s tortious acts committed “with the belief that the injury was substantially certain to occur,” R.C. 2745.01(A), clause 2. Pet’rs’ Br. at 4. Petitioners contend that the statutory definition of “substantial certainty” is relevant only to the new statutory cause of action. Pet’rs’ Br. at 19-20. In support of this interpretation, Petitioners contend that only this interpretation is consistent with *Brady* and *Johnson*, and thus it is the only possible constitutional interpretation of the statute. Pet’rs’ Br. at 20-21, 26-28. Stetter is not only incorrect about the constitutionality of his statutory interpretation, see discussion of Proposition of Law No. 2 below, he also ignores the statute’s plain text, disregards the circumstances surrounding the statute’s enactment, and fails to read the statute’s subsections in *pari materia*.

First, and most important, Stetter’s interpretation ignores the statute’s plain text. Where, as here, “the meaning of the statute is unambiguous and definite,” the Court does not interpret the statute further, but gives effect to its terms. See, e.g., *State ex rel. Savarese v. Buckeye Local Sch. Dist. Bd. of Educ.* (1996), 74 Ohio St. 3d 543, 545, 1996-Ohio-291. Stetter fails to explain how R.C. 2745.01 is ambiguous. The statute expressly defines “substantial certainty,” R.C. 2745.01(B), and Stetter happens to disagree with the merits of the definition. Rather than have this Court apply the unambiguous statute as written, Stetter advocates an interpretation that ignores the statute’s express words.

R.C. 2745.01 cites both prongs of *Jones*'s definition of employer intentional torts—direct intent and substantial certainty—and quotes from the first paragraph of the *Jones* syllabus. Stetter does not dispute that the *Jones* Court intended both prongs of the definition to have effect. In fact, this Court subsequently has referred to direct intent and substantial certainty as two different types of employer intentional tort actions. See *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St. 3d 227, 2003-Ohio-3373, ¶ 31 (referring to both “direct-intent and substantial-certainty employer intentional torts”). Nevertheless, Stetter argues that the entire *Jones* test is encapsulated in the first prong of *Jones*, and thus in the first clause of R.C. 2745.01(A). Stetter then argues that R.C. 2745.01(B)'s express definition of “substantial certainty” applies only to the newly created statutory cause of action for employer torts committed with deliberate intent. This interpretation ignores the plain text of R.C. 2745.01(A) and (B).

Stetter's interpretation fails also because it disregards this Court's duty to give effect to every portion of a statute. “It is a fundamental rule of statutory construction that statutes relating to the same subject matter should be construed together” and “[i]n construing such statutes in *pari materia*, they should be harmonized so as to give full application to the statutes.” *State ex rel. Thurn v. Cuyahoga County Bd. of Elections* (1995), 72 Ohio St. 3d 289, 294. Even though the statute includes both prongs of the *Jones* definition and defines “substantial certainty,” Stetter argues that the first prong of *Jones*, as quoted in the statute, includes the entire *Jones* test, and that the statutory definition of substantial certainty does not apply to the *Jones* test. Stetter's interpretation thus effectively would write out of the statute R.C. 2745.01(A)'s second prong and R.C. 2745.01(B)'s definition.

Finally, Stetter draws the wrong conclusion from the circumstances leading to R.C. 2745.01's enactment. Stetter relies heavily on the Court's decisions in *Johnson* and *Brady* but

ignores decisions in which members of this Court expressed concerns about applying the *Jones* substantial-certainty prong. See, e.g., *Fyffe*, 59 Ohio St. 3d at 117 (noting that after several decisions some trial courts and attorneys were still in a quandary as to what facts present intentional tort issues for the trier of the fact); *Talik*, 2008-Ohio-937, ¶ 16 (“The standard of ‘substantial certainty’ in the intentional tort arena caused confusion.”). Moreover, Stetter ignores the fact that the General Assembly has tried to enact statutes altering this common-law tort twice before, except to say that the General Assembly was not trying to do so when it enacted R.C. 2745.01. To the contrary, the General Assembly’s prior attempts to legislate standards for employer intentional torts strengthen, rather than weaken, the argument that the General Assembly intended to alter the common law by enacting R.C. 2745.01. Under the circumstances, it is more reasonable to conclude that R.C. 2745.01—a statute that does not contain the provisions identified as problematic in *Brady* and *Johnson*—was the General Assembly’s third attempt to clarify the common law of employer intentional torts. See *Brady*, 61 Ohio St. 3d at 640-41 (Brown, J., concurring).

Accordingly, this Court should reject Stetter’s proposed statutory interpretation, and in response to the eighth certified question, hold that R.C. 2745.01 altered, but did not eliminate, the common-law action for employer intentional tort.

Amicus Curiae Attorney General’s Proposition of Law No. 2:

R.C. 2745.01, as enacted by House Bill 498, effective April 7, 2005, does not conflict with the legislative authority granted to the General Assembly by Article II, Sections 34 and 35 of the Ohio Constitution.

As explained below, the General Assembly validly exercised its Article II, Section 1 power to modify common-law causes of action when it enacted R.C. 2745.01. Because the General Assembly relied on its Section 1 power to enact the statute, this Court need not identify a basis for the statute in Article II, Sections 34 or 35. Moreover, R.C. 2745.01 does not conflict with

Sections 34 or 35. Because the statute currently before the Court is readily distinguishable from the employer intentional tort statutes previously considered by this Court, the Court should limit its holdings in *Brady* and *Johnson* to the specific statutes they invalidated.

A. The General Assembly has broad authority to modify common-law causes of action, such as employer intentional tort actions, 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 exceeds legislative power only if the Constitution *clearly prohibits* it. *State ex rel. 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, unless prohibited by constitutional limitations, 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). 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 or abolish 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. And, as described in the discussion of Proposition of Law No. 1 above, the purpose of R.C. 2745.01 is to modify the common law regarding certain employer intentional torts.

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 the common law. As “the ultimate arbiter of public policy,” the General Assembly may “refine[] Ohio’s tort law to meet the needs of our citizens.” *Groch 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 employee-related legislation; it does not bar the General Assembly from enacting an employer intentional torts statute.

R.C. 2745.01 is consistent with Article II, Section 34 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.”) (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 Employment Relations Bd.* (1989), 43 Ohio St. 3d 1, 13 (“*Rocky River IV*”). The Court diverged from this understanding, however, 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 by 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, syllabus ¶ 2, but the Court was 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 benefit 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 639-40 (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, which provided that the Industrial Commission would determine damages and liability for employer intentional torts, 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 *Brady* plurality's reasoning as a basis for striking the General Assembly's second employer intentional tort 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 that burdens 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 *AAUP* 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 all would be subject to constitutional challenges because they arguably burden 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* refused to read Section 34 as a restriction on the General Assembly’s power, directly undermining the reasoning upon which *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 contradicted explicitly by this Court’s subsequent decision in *AAUP*. Because Section 34 does not limit the General Assembly’s exercise of its Article II, section 1 police power, R.C. 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 consistent 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 limit 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 long have been able to recover for an employer's intentional tort at common law. This Court has recognized that employer intentional tort actions are not within Section 35's ambit. *Blankenship*, 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. Prior to the enactment of R.C. 2745.01, this Court held that the common-law action for employer intentional torts extends to injuries resulting from acts committed either with direct intent or with a belief that injury is "substantially certain to result." *Fyffe*, 59 Ohio St. 3d at 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." *Johnson*, 85 Ohio St. 3d at 305 (quoting *Brady*, 61 Ohio St. 3d at 634). 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: If employer intentional torts are outside the reach of Section 35, then laws modifying them should not need to be specifically authorized by Section 35. See *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 statute does not disrupt the employee's 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. While R.C. 2745.01 undoubtedly limits 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 still cannot assert traditional tort defenses to evade compensating employees injured on the job. Instead, R.C. 2745.01 reflects a legislative policy judgment regarding which claims are so egregious that workers should be able to raise them *outside* the workers' compensation system.

The General Assembly does not need a Section 35 basis to modify common-law employer intentional tort actions 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 codify and alter the common-law cause of action for employer intentional torts under Article II, Section 1.

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 from 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-546 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 modify employer intentional tort law, but did not approve of the *particular statute* before the court. *Id.* at 640. Because former R.C. 4121.80 had constitutional defects that are not at issue in R.C. 2745.01, this Court should limit *Brady*'s scope to the statute at issue in *Brady*.

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) because 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 Section 35 basis for the employer intentional tort statute at issue. As in *Johnson*, no Section 34 or Section 35 basis exists for the General Assembly’s enactment of R.C. 2745.01. For the reasons explained above, however, the General Assembly had another source of constitutional authority to enact R.C. 2745.01—Article II, Section 1.

Moreover, several differences exist 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 former R.C. 2745.01(B), Section 1, Am. H.B. No. 103, 146 Ohio Laws, Pt. I, 756-57). The statute also provided that a plaintiff’s claim could survive a defendant’s motion for summary judgment only 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, 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 as extreme as its predecessor. R.C. 2745.01 does not establish a “clear and

convincing” standard at all, let alone 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.”)

In the end, while R.C. 2745.01 will limit some employees’ ability to seek recovery outside of the workers’ compensation system, the statute does not upset the fundamental balance of Ohio’s workers’ compensation system. Instead, it reflects a legislative policy judgment regarding which claims are so egregious that employees should be able to file claims outside of the workers’ compensation system. Because that judgment is within the General Assembly’s authority and does not violate Sections 34 or 35, this Court should answer the second certified question in the negative.

Amicus Curiae Attorney General’s Proposition of Law No. 3:

R.C. 2745.01, as amended by H.B. 498, effective April 7, 2005, does not violate the right to trial by jury.

R.C. 2745.01 alters the legal standards that govern when an employee may recover damages from an employer who commits an intentional tort. The statute does not intrude upon any of a jury’s traditional functions, most notably a jury’s responsibility to find facts and weigh

evidence. As such, R.C. 2745.01 is distinguishable from statutes that this Court has found to intrude upon the traditional function of a jury and does not violate the constitutional right to trial by jury.

Both the Ohio and U.S. Constitutions provide a right to a trial by jury. Article I, Section 5 of the Ohio Constitution, guarantees the right to a 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.

Ohio Const., art. I, § 5. When interpreting the right to a trial by jury under the Ohio Constitution, this Court follows the U.S. Supreme Court's interpretation of the parallel right granted by the U.S. Constitution, relying on U.S. Supreme Court decisions as persuasive authority. See *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 560, 1994-Ohio-461 (Wright, J., dissenting) (citing *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St. 3d 657 n. 1, 662); *Arbino*, 2007-Ohio-6948, ¶ 41.

The right to trial by jury “prevent[s] government oppression” and “promotes the fair resolution of factual issues.” *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St. 3d 539, 544, 2006-Ohio-3257, ¶ 21 (citing *Colgrove v. Battin* (1973), 413 U.S. 149, 157). However, “[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.” *Tull v. United States* (1987), 481 U.S. 412, 426 (internal quotation omitted); see also *Galloway v. United States* (1943), 319 U.S. 372, 392 (“[T]he [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements.”). The right to trial by jury therefore applies only in cases in which the right to a jury existed before Article I, Section 5 was adopted, and only to the fundamental attributes of the jury system. See *Arbino*, 2007-Ohio-6948, ¶¶ 32, 34.

Stetter contends that all employee-victims of employer intentional torts have a right to have a jury determine damages. Pet'rs' Br. at 42. According to Stetter, by altering the intent standard for employer intentional torts, R.C. 2745.01 unconstitutionally infringes upon this right because "any deprivation of the right to bring a civil action amounts to ipso facto deprivation of right to trial by jury." *Id.* But the right to trial by jury does not guarantee that a court will apply the legal standard most favorable to a claimant; it guarantees only that a jury will determine issues of fact. See *Arbino*, 116 Ohio St. 3d at 475, ¶ 34. In this case, Petitioners fail to identify any aspect of R.C. 2745.01 that intrudes upon the traditional province of the jury. Accordingly, the answer to the first certified question is "no."

Amicus Curiae Attorney General's Proposition of Law No. 4:

R.C. 2745.01, as amended by H.B. 498, effective April 7, 2005, does not violate the right to a remedy or Ohio's open courts provision.

R.C. 2745.01 does not, simply by altering the common-law elements of a tort, unconstitutionally infringe upon an injured employee's right to access the courts or seek a remedy. Only laws that arbitrarily cut off a plaintiff's right to seek redress violate these constitutional guarantees. Here, R.C. 2745.01 applies only to future plaintiffs' causes of action for certain employer intentional torts. Moreover, injured employees who cannot state a claim for an employer's intentional tort under R.C. 2745.01 still have access to the workers' compensation system.

The Ohio Constitution provides that "[a]ll 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; see *Hardy v. VerMeulen* (1987), 32 Ohio St. 3d 45, 47 (appellant's right to a remedy was violated when his claim was extinguished before he knew of or could have reasonably discovered his

injury). As this Court said in *Arbino*, the definition of the rights to an open court and a remedy “prohibit[s] statutes that effectively prevent individuals from pursuing relief for their injuries.” 2007-Ohio-6948, ¶ 44. An individual is constitutionally entitled to “an opportunity [for remedy] granted at a meaningful time and in a meaningful manner.” *Hardy*, 32 Ohio St. 3d at 47. Any law that infringes upon a person’s right to a judgment or a properly rendered verdict in a lawsuit is unconstitutional. See *Arbino*, 2007-Ohio-6948, ¶ 45.

R.C. 2745.01 does not infringe upon an employee’s right to judgment; it merely draws a line between injuries compensable in an employer intentional tort action and injuries compensable only through the workers’ compensation system. Stetter incorrectly asserts that R.C. 2745.01 infringes upon his right to access the courts or receive a remedy; the Workers’ Compensation Act, codified at R.C. 4123, provides relief for employer torts that do not satisfy R.C. 2745.01’s intent requirement and also allows for judicial review of the Industrial Commission’s decisions. Here, an injured plaintiff has recourse and a remedy one way or the other—either through the tort system or the workers’ compensation system. Thus, the statute “neither forecloses [plaintiffs’] ability to pursue a claim at all nor ‘completely obliterates the entire . . . award.’” *Id.* (quoting *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 426, 1994-Ohio-38). As such, R.C. 2745.01 does not deny any injured employees a meaningful remedy or legal recourse. Consequently, this Court should answer certified questions two and three in the negative.

Amicus Curiae Attorney General’s Proposition of Law No. 5:

R.C. 2745.01, as amended by H.B. 498, effective April 7, 2005, satisfies the Due Process Clause.

Stetter next asserts that R.C. 2745.01 violates the Due Process Clause. Article I, Section 16 of the Ohio Constitution provides that “[a]ll 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.” This provision is equivalent to the “due process of law” protections in the U.S. Constitution. See *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 544; *Sorrell*, 69 Ohio St. 3d at 422-23. Contrary to Stetter’s assertion, the statute does not violate due process because it is reasonably related to a legitimate legislative goal.

Stetter urges this Court to apply strict scrutiny, arguing that the General Assembly failed to demonstrate a compelling government interest that justifies infringing upon an intentional tort victim’s fundamental rights to a jury trial and a remedy. But unless a statute limits fundamental rights, this Court applies a rational-basis test to determine whether an Ohio statute satisfies due process. *Arbino*, 2007-Ohio-6948, ¶ 44. The rights identified by Stetter—the right to a jury trial and a remedy—are unquestionably fundamental rights. However, as explained above, R.C. 2745.01 does not limit these fundamental rights because it does not infringe upon the jury’s fact-finding role or deprive any claimant of a meaningful remedy. Therefore, the Court should apply rational-basis review. Accordingly, R.C. 2745.01 will survive Stetter’s due process challenge “if it (1) bears a real and substantial relation to the public health, safety, morals or general welfare of the public and (2) if it is not unreasonable or arbitrary.” *Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, 274 (quoting *Benjamin v. Columbus* (1957), 167 Ohio St. 103, syllabus ¶ 5); *Arbino*, 2007-Ohio-6948, ¶ 49.

R.C. 2745.01 is a reasonable means of legislating for the public’s general welfare. Specifically, it is part of Ohio’s statutory mechanism for distributing the costs of industrial accidents and compensating injured employees. Indeed, Stetter does not even argue that the statute cannot satisfy rational-basis review; his entire due process argument rests on the incorrect assumption that strict scrutiny applies because R.C. 2745.01 violates a fundamental right. See

Pet'rs' Br. at 43. Under these circumstances, the Court should hold that the statute does not violate due process because it is reasonably related to a legitimate legislative goal, and should answer the fourth certified question in the negative.

Amicus Curiae Attorney General's Proposition of Law No. 6:

R.C. 2745.01, as amended by H.B. 498, effective April 7, 2005, satisfies the Equal Protection Clause.

Stetter contends that R.C. 2745.01 violates the Equal Protection Clause by distinguishing between two classes of intentional tort victims—employee victims and non-employee victims. Pet'rs' Br. at 39. Because this classification does not implicate a suspect class or a fundamental right, however, it does not trigger heightened equal protection scrutiny. Because R.C. 2745.01 is rationally related to a legitimate government interest—promoting and preserving the compromise struck by the workers' compensation system—the statute satisfies the Equal Protection Clause.

“A statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio or United States Constitutions if it bears a rational relationship to a legitimate governmental interest.” *Menefee v. Queen City Metro* (1990), 49 Ohio St. 3d 27, 29; see also *Groch*, 2008-Ohio-546, ¶ 82; *Arbino*, 2007-Ohio-6948, ¶¶ 63, 64. As explained above, Stetter's argument that the statute violates his fundamental constitutional rights, such as his right to trial by jury and right to a remedy, fails. Moreover, Stetter does not even argue that the statute involves a suspect class. Accordingly, the Court must determine only whether the classification employed in R.C. 2745.01 is rationally related to a legitimate government interest.

Rational basis review is a deferential standard, requiring a court to uphold a statute “if there exists any conceivable set of facts under which the classification rationally further[s] a legitimate legislative objective.” *Morris*, 61 Ohio St. 3d at 689 (quoting *Schwan v. Riverside Methodist*

Hosp. (1983), 6 Ohio St. 3d 300, 301). “If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.” *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6505, ¶ 8 (internal quotations and citations omitted).

Stetter fails to demonstrate that the classification made by R.C. 2745.01 either is unreasonable or fails to serve a legitimate legislative objective. R.C. 2745.01 is rationally related to the State’s legitimate interest in ensuring that all workers receive compensation for their injuries by preserving the balance struck in Ohio’s workers’ compensation system. This Court has referred to Ohio’s workers’ compensation system as “The Great Compromise.” *Holeton*, 92 Ohio St. 3d at 118. Prior to the adoption of Article II, Section 35 in 1912, injured employees had to prevail on a common-law tort action to receive any compensation for a work-related injury. An employee had to show that his or her employer owed a duty of care to its employees and overcome an employer’s affirmative defenses, such as contributory negligence, the fellow servant rule, and assumption of risk. See *id.* at 118-19 (describing historical basis for adopting Section 35). Ohio concluded that the common-law system did not fairly distribute economic losses borne by injured Ohio workers and their families, and chose to adopt Section 35 so those losses could be charged to industry, without regard to fault or wrongdoing, instead of to an individual or society as a whole. *Id.* at 119. Accordingly, Ohio’s system of workers’ compensation “represents a social bargain in which employers and employees exchange their respective common-law rights and duties for a more certain and uniform set of statutory benefits and obligations.” *Id.* For this compromise to work, “employees relinquish their common law remedy and accept lower benefit levels coupled with greater assurance of recovery and

employers give up their common law defenses and are protected from unlimited liability.” *Id.* (citing *Blankenship*, 69 Ohio St. 2d at 614).

Because Ohio has a workers’ compensation system, Ohio employees suffering job-related injuries are not similarly situated to other tort victims. Consequently, R.C. 2745.01’s limitation on an employee’s ability to pursue certain intentional tort claims against his employer is reasonable. This Court has traditionally upheld the distinctions drawn by the General Assembly in the workers’ compensation area as reasonable and legitimate. See, e.g., *State ex rel. Yaple v. Creamer* (1912), 85 Ohio St. 349, 405 (limitation of Workers’ Compensation Act’s applicability to workers, operators, and certain employers was not an improper classification), *superseded by statute as stated in Thornton v. Duffy* (1918), 29 Ohio Dec. 13. This Court also has held that statutes applying only to the recovery available to workers’ compensation claimants do not violate the Equal Protection Clause. See *Holeton*, 92 Ohio St. 3d at 131.

Moreover, this Court expressly rejected Stetter’s equal protection argument in *Holeton*, which concerned a subrogation statute that applied only to workers’ compensation claimants. In *Holeton*, the plaintiffs argued that a subrogation statute violated the Equal Protection Clause because it created “arbitrary classifications of tort-victims—employees injured on the job and employees injured off the job.” *Id.* (internal quotation omitted). The Court held that tort victims injured on the job, who receive compensation and medical benefits under the Workers’ Compensation Act, “can hardly be said” to be similarly situated to other tort victims, who are not assured any recovery. *Id.* Accordingly, the subrogation statute did not violate the Equal Protection Clause simply because it applied only to workers’ compensation claimants. *Id.* at 132 (finding, however, that the statute violated equal protection on other grounds because it

inappropriately distinguished between victims receiving judgments and victims settling out-of-court).

Here, R.C. 2745.01 reasonably distinguishes between employees who have and do not have access to a remedy pursuant to the Workers' Compensation Act. Because these two classes of persons are not similarly situated, the law can treat them differently to further the State's legitimate interest in maintaining the balance of Ohio's workers' compensation system. Therefore, the Court should find that R.C. 2745.01 satisfies the Equal Protection Clause and answer the fifth certified question in the negative.

Amicus Curiae Attorney General's Proposition of Law No. 7:

R.C. 2745.01, as amended by H.B. 498, effective April 7, 2005, does not violate the separation of powers.

Stetter argues that R.C. 2745.01 violates separation of powers by modifying the intent element of employer intentional torts. Pet'rs' Br. at 44. But this Court has made clear that the General Assembly has authority to modify, or even abolish, common-law rights of action. *Thompson*, 164 Ohio St. at 79. Because R.C. 2745.01 in no way violates the judiciary's right to hear and decide cases, this Court should answer the sixth certified question in the negative.

First, as discussed in greater detail above, this Court has held in multiple cases that "the legislative branch of government, unless prohibited by constitutional limitations, may modify or entirely abolish common-law actions and defenses." *Id.*; see also *Johnson*, 85 Ohio St. 3d at 303 ("We do not dispute the long-standing principle that the General Assembly has the authority, within constitutional limitations, to change the common law by legislation"), citing *Thompson*, 164 Ohio St. at 79; *Brady*, 61 Ohio St. 3d at 640 (Brown, J., concurring) (the General Assembly's police power includes the authority to modify employee intentional torts). Stetter's argument that the General Assembly violates the separation of powers by enacting a statute that

modifies the common-law action for employer intentional torts is not in keeping with this precedent.

Second, contrary to Stetter's argument, see Pet'rs' Br. at 44, nothing about limiting a common-law cause of action violates the judicial power granted by the Constitution. Article IV, Section 1 of the Ohio Constitution vests the judicial power of the State 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. Other constitutional provisions then grant specific jurisdiction to this Court, the courts of appeals, and the courts of common pleas. *Id.* §§ 2-4. Notably, nothing in Article IV textually supports the conclusion that the Ohio Constitution, as a matter of separation of powers, requires courts to have unlimited discretion to determine the elements of tort actions.

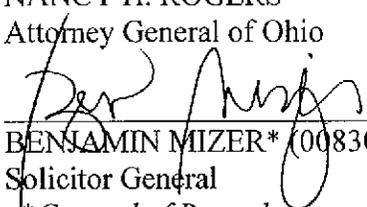
Finally, Stetter is simply wrong when he asserts that R.C. 2745.01 "appears to delegate to the Industrial Commission of Ohio the exclusively judicial function of adjudicating the civil recovery of certain intentional tort victims." Pet'rs' Br. at 44. The statute defines the intent element of employer intentional torts, in accordance with *Thompson*, 164 Ohio St. at 79. But it leaves intact the courts' power to adjudicate any claims filed with the courts, including their power to interpret and apply R.C. 2745.01 to those claims. Accordingly, R.C. 2745.01 does not violate the judiciary's constitutional power.

CONCLUSION

For the above reasons, this Court should uphold R.C. 2745.01 as a constitutional exercise of legislative authority that does not violate any other provision of the Ohio Constitution. Furthermore, the Court should hold that R.C. 2745.01 does not eliminate the common-law cause of action for employer intentional torts. Accordingly, this Court should answer each of the certified questions in the negative.

Respectfully submitted,

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Attorney General of Ohio



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Nancy H. Rogers in Support of Defendants-Respondents was served by U.S. mail this 4th day of November, 2008, upon the following counsel:

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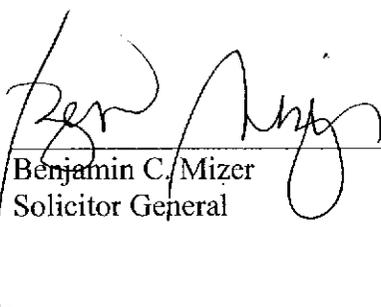
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FILED
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IN THE COURT OF COMMON PLEAS, WOOD COUNTY, OHIO

Carl F. Stetter)
7630 Reitz Road, Lot 98)
Perrysburg, Ohio 43551)
and)
Doris Stetter)
7630 Reitz Road, Lot 98)
Perrysburg, Ohio 43551)
Plaintiffs,)

Case No. 2007 CV0192

Hon. JUDGE MAYBERRY

COMPLAINT WITH JURY DEMAND
ENDORSED HEREON

vs.)
R.J. Corman Derailment Services LLC)
101 R.J. Corman Drive)
Nicholasville, Kentucky 40340)
Please Serve As Statutory Agent:)
Kenneth D. Adams)
One Jay Station)
Nicholasville, Kentucky 40356)
and)
R.J. Corman Railroad Group, LLC)
a/k/a R.J. Corman Railroad Group)
101 R.J. Corman Drive)
Nicholasville, Kentucky 40340)

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EXHIBIT 1

Please Serve as Statutory Agent:)

Kenneth D. Adams)
One Jay Station)
Nicholasville, Kentucky 40356)

and)

John Doe Company No. 1)
(address unknown))

John Doe Company No. 2)
(address unknown))

and)

John Doe Company No. 3)
(address unknown))

and)

John Doe/Jane Doe No. 1)
(address unknown))

and)

John Doe/Jane Doe No. 2)
(address unknown))

Defendants.)

Now come Plaintiffs, Carl F. Stetter and Doris Stetter (hereinafter "Plaintiffs"), by and through counsel, and for their Complaint against Defendants, R.J. Corman Derailment Services LLC (hereinafter "Corman Derailment Services"), R.J. Corman Railroad Group, LLC, a/k/a R.J. Corman Railroad Group (hereinafter "Corman Railroad Group"), John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe/Jane Doe No. 1 and John Doe/Jane Doe No. 2, allege and aver as follows:

1. Corman Railroad Group is a Kentucky limited liability company, with its principal place of business in Nicholasville, Kentucky, which owns and/or is the parent company of several business entities that provide a wide array of services in the rail industry, including, but not limited to, railroad construction, railroad material management, distribution services, ownership and operation of short line railroads, derailment services, equipment rental fleet, ownership and operation of historic train(s), and ownership and operation of private jet aircraft and helicopters.

2. Corman Derailment Services is a limited liability company, and is related to Corman Railroad Group, either as a wholly owned subsidiary, partially owned subsidiary, sister company, or is otherwise related, and has a principal place of address in Nicholasville, Kentucky. (Corman Derailment Services provides emergency response service that handles derailling and clearing of freight cars and locomotives.

3. Corman Derailment Services has various locations/divisions throughout the United States, including a location/division located at 3884 Rockland Circle, Millbury, Wood County, Ohio 43447 (Corman Derailment Services and Corman Railroad Group are hereinafter referred to collectively as "R.J. Corman").

4. R. J. Corman has substantial contacts and does a substantial amount of business in Ohio, including Wood County, Ohio'

5. Carl F. Stetter ("Stetter") and Doris Stetter reside in Wood County, Ohio.

6. On or about March 13, 2006, and at all times relevant hereto, Carl Stetter was an employee of R. J. Corman, acting within the course and scope of his employment.

7. On March 13, 2006, and at all times relevant hereto, Doris Stetter was the wife of Carl Stetter. (Carl Stetter and Doris Stetter are sometimes also referred to collectively as "Plaintiffs.>").

FIRST CAUSE OF ACTION

8. Plaintiffs incorporate the allegations contained in the preceding paragraphs of this Complaint as though fully rewritten herein.

9. On March 13, 2006, Stetter was inflating a truck tire (hereinafter, , the "Tire") in the course and scope of his duties and employment with R. J. Corman, when suddenly and without warning, the Tire exploded and/or separated from the rim (the aforesaid tire and rim are referred to hereinafter as the "Tire").

10. The force of the explosion and trajectory of the tire and/or rim violently struck Stetter.

11. Stetter was required to change truck tires on a routine basis during the course and scope of his duties as an employee of R. J. Corman. Other employees of R. J. Corman were also required to routinely change truck tires in the course and scope of their duties as employees of R. J. Corman.

12. Paragraph 29 CFR Ch. XVII, §1910.177 required the following:

That R. J. Corman provide a program to train Stetter and other employees who inflated and/or serviced truck tires on the hazards of servicing truck tires and the safety procedures to be followed; that R. J. Corman assure that no employees ever inflated a tire and/or serviced a truck tire unless the employee had been trained and instructed in the safe operations and proper procedures; that R. J. Corman assure that Carl Stetter and any other employee that inflated and/or serviced truck tires demonstrated and maintained the ability to inflate and/or service truck tires safety, including

the use of restraining devices such as a tire cage or other proper barrier when inflating or servicing truck tires.

That R. J. Corman furnish a restraining device, such as a tire cage or other appropriate barrier to Stetter and other employees who inflated and/or serviced truck tires; that R. J. Corman develop and establish a safe operating procedure for Stetter and other employees on how to safely inflate and/or service truck tires; that R. J. Corman provide informational charts and post the informational charts in the service area depicting safe operating procedures for Stetter and other employees while inflating and/or servicing truck tires.

13. Ohio Administrative Code §4123:1-5-13, also required R.J. Corman to provide a safety tire rack or cage for use by Stetter and other employees while inflating and/or servicing truck tires.

14. The aforesaid OSHA Standards and Ohio Administrative Code Standards applied to Corman and the inflation of the Tire by Stetter.

15. R. J. Corman did not comply with the aforesaid OSHA Standards and the Ohio Administrative Code Standards and did not provide any training, the required tire cage or other protective devices for use by Stetter and other employees while inflating the Tire and other tires.

16. R. J. Corman had knowledge of the existence of a dangerous process, procedure, instrumentality or condition within its business operation, which included, but was not limited to, the failure to train employees on the proper inflation and servicing procedures for truck tires; the failure to provide employees with a tire cage or proper restraints and devices for use while inflating and/or servicing truck tires; the failure to provide informational charts and manuals and display the same in the service area regarding the proper procedure for employees to inflate and/or service truck tires.

17. R. J. Corman knew that if Stetter was subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to Stetter was substantially certain to occur.

18. R. J. Corman, under such circumstances and with such knowledge, did act and/or require Stetter to continue to perform the dangerous task of inflating and/or servicing truck tires, including the Tire, without proper training and without required safety cage.

19. R. J. Corman committed an intentional tort against Stetter by acting and failing to act as aforesaid, and it committed said intentional tort with the deliberate intent to cause Stetter to suffer injury and/or with the belief that injury was substantially certain to occur.

20. The aforesaid risk/exposure that R. J. Corman placed Stetter in was so egregious that it knew with substantial certainty that Stetter would be injured if the Tire did explode, and that it was substantially certain that the Tire would explode.

21. The aforesaid risk/exposure that R. J. Corman placed Stetter in was so egregious, and the probability that the Tire would explode was so great, that the deliberate intent to injury Stetter can be inferred.

22. As a direct and proximate result of said intentional tort of R. J. Corman, Stetter suffered injuries and damages, including, but not limited to, multiple rib fractures; comminuted/compound fracture of his left ankle and foot; multiple contusions and abrasions; comminuted fracture of the right occipital condyle; a left orbital wall fracture; head injuries; concussion; fractures of his vertebra; fractures of his facial bones; he has endured and will continue to endure great pain, suffering mental anguish, and emotional distress; his injuries are permanent in nature; he has incurred hospital and medical costs; he will be required to incur additional hospital

and medical costs in the future; his injuries are permanent; his abilities to carry on his activities of daily living have been seriously injured and damaged and will continue into the future; and he has suffered a loss of wages and earning capacity, and will continue to suffer lost wages and earning capacity into the future, all to his damage.

23. By acting and failing to act as aforesaid, R. J. Corman failed to provide a safe work place for Stetter.

24. The aforesaid conduct of R. J. Corman was willful, wanton, reckless, malicious and/or in reckless disregard for the rights of Stetter, warranting an award of punitive damages, attorneys fees and costs.

SECOND CAUSE OF ACTION

25. Plaintiffs incorporate the allegations contained in the preceding paragraphs of this Complaint as though fully rewritten herein.

26. The following cause of action is in addition to, or in the alternative to, the aforesaid causes of action.

27. Defendants, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe/Jane Doe No. 1 and/or John Doe/Jane Doe No. 2 are manufacturers, as defined by Ohio Revised Code §2307.71, which designed, produced, created, made, constructed and/or assembled the Tire.

28. The Tire was defective in manufacture pursuant to the provisions of Ohio Revised Code §2307.74.

29. In addition and/or in the alternative, the Tire was defective in design pursuant to the provisions of Ohio Revised Code §2307.75.

30. In addition and/or in the alternative, the Tire was defective due to inadequate warning or instruction, pursuant to the provisions of Ohio Revised Code §2307.76.

31. In addition and/or in the alternative, the Tire was defective because it did not conform, when it left the control of said Defendants, to a representation made by said Defendants, pursuant to the provisions of Ohio Revised Code §2307.77.

32. The aforesaid defects in the Tire caused it to explode and were a direct and proximate result of the aforesaid harm and damages to Plaintiffs, for which Plaintiffs seek to recover compensatory damages pursuant to Ohio Revised Code §2307.73 and/or the common law.

33. Further, as a direct and proximate result of the explosion of the tire and its defective nature, Plaintiffs suffered greater injury than they would have otherwise suffered.

34. Further, as a direct and proximate result of Defendant manufacturers action as alleged hereinabove, for which they are strictly liable to Stetter, Stetter suffered severe and permanent injuries, including, but not limited to multiple rib fractures; comminuted/compound fracture of his left ankle and foot; multiple contusions and abrasions; comminuted fracture of the right occipital condyle; a left orbital wall fracture; head injuries; concussion, fractures of his vertebra; fractures of his facial bones; he has endured and will continue to endure great pain, suffering mental anguish, and emotional distress; his injuries are permanent in nature; he has incurred hospital and medical costs; he will be required to incur additional hospital and medical costs in the future; his injuries are permanent; his abilities to carry on his activities of daily living have been seriously injured and damaged and will continue into the future; and he has suffered a

loss of wages and earning capacity, and will continue to suffer lost wages and earning capacity into the future, all to his damage.

35. The harm for which Stetter is entitled to recover compensatory damages was a result of the misconduct of the Defendants that manifested a flagrant disregard for the safety of Stetter and all persons who might be harmed by the Tire.

THIRD CAUSE OF ACTION

36. Plaintiffs incorporate the allegations contained in the preceding paragraphs of this Complaint as though fully rewritten herein.

37. The following cause of action is in addition to, or in the alternative to the aforesaid causes of action.

38. The Defendants, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe/Jane Doe No. 1 and/or John Doe/Jane Doe No. 2 are suppliers, as defined by Ohio Revised Code §2307.71, that sold, distributed, leased, prepared, blended, packaged, labeled or otherwise participated in the placing of the Tire into the stream of commerce.

39. Said Defendants were negligent, which negligence includes, but is not limited to, the fact that the Tire was defective, was not packaged or labeled correctly, did not have the adequate warnings, and said suppliers' negligence was the direct and proximate cause of the damages and harm suffered by Stetter as alleged hereinabove.

FOURTH CAUSE OF ACTION

40. Plaintiffs incorporate the allegations contained in the preceding paragraphs of this Complaint as though fully rewritten herein.

41. The following cause of action is in addition to, or in the alternative to the aforesaid causes of action.

42. The aforesaid Defendant suppliers are subject to strict liability because they owned, or when they supplied the Tire, they were owned, in whole or in part, by the manufacturer of the Tire and/or they altered, or failed to maintain the Tire after it came into their possession and before it left their possession, and the alteration, modification or failure to maintain the tire rendered defective.

43. As a direct and proximate result of said Defendants' actions as aforesaid, Stetter suffered the aforesaid damages and injuries.

FIFTH CAUSE OF ACTION

44. Plaintiffs incorporate the allegations contained in the preceding paragraphs of this Complaint as though fully rewritten herein.

45. The following cause of action is in addition to, or in the alternative to, the aforesaid causes of action.

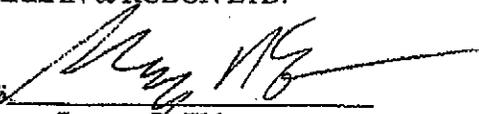
46. As a direct and proximate result of the aforesaid injuries, damages and other losses suffered by her husband, and as a direct and proximate result of the aforesaid wrongful conduct of Defendants, Plaintiff Doris Stetter has suffered a loss of her husband's companionship, society and consortium.

WHEREFORE, Plaintiffs Carl F. Stetter and Doris Stetter, demand judgment against Defendants, R.J. Corman Derailment Services LLC, R.J. Corman Railroad Group, LLC, a/k/a R.J. Corman Railroad Group, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe/Jane Doe No. 1 and John Doe/Jane Doe No. 2, jointly and severally, as follows:

- A. For damages in an amount in excess of Twenty-Five Thousand Dollars (\$25,000.00);
- B. For punitive damages in an amount in excess of Fifty Thousand Dollars (\$50,000.00);
- C. For Plaintiffs' costs, including reasonable attorneys fees in bringing this lawsuit;
- D. For pre-judgment and post-judgment interest; and
- E. For all the relief to which they may be entitled.

Respectfully submitted,

BARKAN & ROBON LTD.

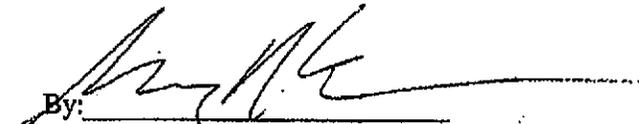
By: 
Gregory R. Elder

JURY DEMAND

Plaintiffs hereby demand a trial by jury on all issues so triable.

Respectfully submitted,

BARKAN & ROBON LTD.

By: 
Gregory R. Elder