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I. INTRODUCTION

This case concerns the constitutionality of R.C. 2745.01, Ohio's fourth attempt at an intentional tort statute in two decades. In this brief, through the vehicle of eight questions certified from the United States District Court for the Northern District of Ohio,¹ Respondents will demonstrate that the Ohio General Assembly has at last achieved its long-standing goal of providing a meaningful intentional tort cause of action to employees who are injured in situations where the employer's conduct is so egregious that it occurs outside of the scope and course of employment thus justifying a recovery separate and in addition to that provided by the workers' compensation system, while at the same time limiting employer intentional torts to those cases where the injured employee can establish deliberate intent on the part of the employer.

II. STATEMENT OF THE CASE

Petitioner Carl Stetter is a former employee of Respondent R.J. Corman Derailment Services LLC. On March 13, 2006, while in the course and scope of that employment, Carl Stetter was inflating a truck tire when an accident occurred causing him injuries. Carl Stetter filed a workers' compensation claim and was granted compensation and benefits under the Ohio workers' compensation system.

On March 12, 2007, Carl Stetter and his wife, Doris Stetter, filed a complaint in the Common Pleas Court of Wood County, Ohio. (Respondents' Appendix at 1-12.)² The complaint named several defendants: R.J. Corman Derailment Services LLC and R.J. Corman Railroad Group LLC (collectively referred to herein as Respondents) and five John or Jane Doe

¹ In their brief, Petitioners address the questions in an order different from that in which they were certified to and accepted by this Court.

² Respondents' Appendix is hereinafter referred to as "R-APX."

defendants. The first cause of action was pled against Respondents and attempted to state an intentional tort cause of action. The second, third and fourth causes of action pled various products liability claims against the John and Jane Does defendants. The fifth cause of action set forth a loss of consortium claim on behalf of Doris Stetter. Hence, the matter before this Court concerns only the first cause of action.

Respondents timely removed the case based on diversity jurisdiction to the United States District Court for the Northern District of Ohio. After initially answering the complaint on April 13, 2007, Respondents filed an amended answer on February 29, 2008, in which they raised a defense based on R.C. 2745.01 and Carl Stetter's inability to establish deliberate intent. (R-APX-19.) On March 17, 2008, Petitioners moved to strike that defense on the grounds that R.C. 2745.01 is unconstitutional. (R-APX-32.) The parties then filed a Joint Motion to Certify Constitutional Questions to the Supreme Court of Ohio. (R-APX-33-36.) The District Court responded by certifying the following eight questions, (R-APX-37, 41.) which this Court accepted:

1. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to trial by jury?
2. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to a remedy?
3. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to an open court?
4. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to due process of law?
5. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to equal protection of the law?
6. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the separation of powers?
7. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for conflicting with the legislative authority granted to the General Assembly by §34 and §35, Article II, of the Ohio Constitution?

8. Does R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, do away with the common law cause of action for employer intentional tort?³

(R-APX-45.)

III. ARGUMENT

A. **R.C. 2745.01, AS AMENDED BY HOUSE BILL 498, EFFECTIVE APRIL 7, 2005, ELIMINATES THE COMMON LAW CAUSE OF ACTION FOR EMPLOYER INTENTIONAL TORT.**⁴

I. ***R.C. 2745.01 Does Not Codify the Common Law Cause of Action for Intentional Tort and Add an Additional Cause of Action for “Deliberately Intended” Intentional Torts.***

Petitioners offer an extensive analysis of the history of intentional tort legislation in Ohio, premised on the notion that the current version of R.C. 2745.01 *is constitutional* and that it sets forth two separate causes of action, one that codifies the common law cause of action and one with a higher burden of proving “deliberate intent.” Petitioners argue that the current version of R.C. 2745.01 represents the legislature’s “long-overdue acceptance” of this Court’s pronouncements in *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St 3d 298, 717 N.E.2d 1107, and *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722. Petitioners dramatically suggest that, by enacting the current statute, the legislature has “waived a white, though tattered, flag to this Court’s now-settled-precedent.” (Petitioners’ Merit Brief at 4.) Respondents urge this Court to reject such a counter-intuitive and unsupported theory of R.C. 2745.01.

³ On August 6, 2008, this Court certified eight questions which referred to Senate Bill 80. On September 8, 2008, the District Court submitted amended questions to correct the reference from Senate Bill 80 to House Bill 498. The amended questions were certified by this Court on September 11, 2008.

⁴ See Certified Question No. 8.

Before addressing the specifics of Petitioners' argument, however, Respondents point out that, in changing their position from arguing that R.C. 2745.01 is *unconstitutional* to now conceding that it is *constitutional*, Petitioners have altered the underlying dispute in this case and mooted the issues that they asked this Court to address. At the District Court level, Respondents (then-defendants) included in their Amended Answer the following affirmative defense: "Plaintiffs' claims against Defendant Derailment Services and Defendant Railroad Group are governed by R.C. 2745.01, effective April 7, 2005, which requires that plaintiff prove these defendants acted with deliberate intent to cause Plaintiff Carl Stetter an injury, disease, condition, or death. Plaintiffs' claims against these defendants are barred because plaintiffs are unable to establish any deliberate intent on the part of these defendants to cause plaintiffs' injuries." (R-APX-19.) The inclusion of that defense prompted Petitioners to file a "Motion to Strike and/or for Declaratory Judgment" in which they moved to strike the above-quoted affirmative defense "for the reason that Ohio Revised Code 2745.01 is unconstitutional, unenforceable, and void/voidable." (R-APX-21.) Thereafter, the District Court certified eight questions to this Court, stating in its order that, "To fully adjudicate this matter and determine the rights and liabilities of each party, this Court needs a determination by the Ohio Supreme Court *regarding the constitutionality* of R.C. 2745.01 under the Ohio Constitution." (R-APX-38, 42.) (Emphasis added.) On that basis, this Court accepted the certified questions. Petitioners failed to file the preliminary statement required by S.Ct. Prac. R. XVIII(6), and instead simply filed a brief in which they claim for the first time that R.C. 2745.01 is, in fact, *constitutional*. In so doing, Petitioners have changed the fundamental tenor of this case from that of determining the constitutionality of R.C. 2745.01 to that of interpreting the statute. Respondents suggest that, had that been the question before the district court, the Court may not have certified the case,

much less the precise questions before this Court. Moreover, had that been the question presented at the outset or in a preliminary memorandum, this Court may not have accepted this case for review. In essence, Petitioners have mooted the question they placed before the court – that of the constitutionality of R.C. 2745.01.

Assuming that this Court chooses to address Petitioners' assertion that R.C. 2745.01 is a constitutional statute that codifies the common law and adds an additional cause of action, this Court must find that such an argument lacks merit and is wholly unsupported. This Court has already indicated its understanding that R.C. 2745.01 *modified* the common law cause of action for intentional tort rather than codifying and adding to it. In *Talik v. Fed'l Marine Terminals, Inc.*, 117 Ohio St. 3d 496, 2008 – Ohio – 937, 885 N.E.2d 204, this Court stated:

The General Assembly *modified* the common-law definition of an employer intentional tort by enacting R.C. 2745.01, effective April 7, 2005. The statute provides that in an action for intentional tort, an employee must prove that "the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur." A belief that injury is substantially certain to occur exists when the employer "acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." R.C. 2745.01(B). The new statute, therefore, rejects the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct as defined in *Universal Concrete*, 130 Ohio St. 567, 5 O.O. 214, 200 N.E. 843, paragraph two of the syllabus. Because the accident in this case predated enactment of R.C. 2745.01, however, the *Fyffe* standard still applies.

Talik at ¶17 (emphasis added). Petitioners are arguing that the new statute is, in effect, a codified version of the standard set forth in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E. 2d 1108. This Court has implicitly rejected such a notion in stating in *Talik* that because the injury at issue predated the new statute, *Fyffe* standard "still" applies. Were the new statute simply a codification of the common law cause of action, such a statement would not make sense.

This Court's understanding of R.C. 2745.01 as demonstrated in *Talik*, while admittedly *dicta*, is absolutely correct. An examination of the history of the intentional tort cause of action in Ohio clearly demonstrates that the current version of R.C. 2745.01 is the result of a process that began with the passage of former R.C. 4121.80 in 1986 and continued through several additional versions of intentional tort legislation, all with the goal of limiting the intentional tort cause of action to truly egregious situations. To suggest that the General Assembly, in enacting R.C. 2745.01, maintained and codified the underlying cause of action and added a second cause of action is to ignore, in general, the history of intentional tort litigation in Ohio and to ignore, in particular, the legislative history of the current statute.

The Ohio General Assembly began its attempts to codify the intentional tort cause of action in 1986 in response to this Court's decisions in *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572; *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90, 472 N.E.2d 1046; and *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489. The first attempt at intentional tort legislation was former R.C. 4121.80 which sought to remove liability for intentional torts from the court system. (Petitioners' Appendix at APX-16.) That legislation created a compulsory intentional tort fund and a hybrid system that permitted a court (but not a jury) to determine liability for intentional tort claims, while giving the Industrial Commission original jurisdiction over the amount of an award for such a claim. Former R.C. 4121.80 also contained caps on damages that could be awarded.

This Court addressed former R.C. 4121.80 in *Brady v. Safety Kleen Corp.*, *supra*. *Brady* was a plurality decision in which three justices concurred in one opinion and a fourth justice, Justice Brown, voted to find the statute unconstitutional for reasons different from the

plurality's reasons. For this reason, the only law emanating from *Brady* is its syllabus, which states 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*, paragraph 2 of syllabus. While the plurality reasoned that the statute was unconstitutional because it removed a right to a remedy under common law in violation of Section 34, Justice Brown rejected such a notion, instead basing his vote on the view that R.C. 4121.80 violated the right to trial by jury and imposed an unconstitutional cap on damages. *Id.* at 640-641.

In response to *Brady*, the General Assembly tried again to pass a constitutional intentional tort statute. In 1993, it enacted House Bill 107 which included the first version of R.C. 2745.01. (R-APX-47-48.) That version of R.C. 2745.01 was quickly struck down as violating the "one subject rule" contained in Section 15(D), Article II of the Ohio Constitution. *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 1994-Ohio-1, 631 N.E.2d 552.

Following the *Voinovich* decision, the Ohio General Assembly passed Amended House Bill 103 in 1995, enacting a new version of R.C. 2745.01. (Petitioners' Appendix at APX-15, R-APX-49-51.) The 1995 version of R.C. 2745.01 abandoned R.C. 4121.80's intentional tort fund, its removal of claims from a jury, its damages cap, and its transfer of jurisdiction to the Industrial Commission. It also addressed only intentional torts, thereby avoiding further conflicts with the one-subject rule. The new R.C. 2745.01 explicitly stated that an employer "shall not be liable to respond in damages at common law or by statute for an intentional tort that occurs during the course of employment." Further, it dictated that an employer is liable only if the employee or his or her dependent survivors prove "by clear and

convincing evidence” that the employer deliberately committed all of the elements of an intentional tort. The statute went so far as to mandate summary judgment unless the plaintiff sets forth “specific facts supported by clear and convincing evidence” to establish the intentional tort. The statute contained strict requirements regarding the signing of documents, putting the signers at risk of personal sanctions. Moreover, at the same time that the General Assembly enacted former R.C. 2745.01, it also enacted former R.C. 2305.112, which provided a one-year statute of limitations for intentional torts.

This Court declared former R.C. 2745.01 unconstitutional in its entirety in *Johnson v. BP Chemicals Inc., supra*. The Court found the requirements of the statute “so unreasonable and excessive that the chance of recovery of damages by employees for intentional torts committed by employers in the workplace is virtually zero.” *Id.* at 307. Further, the *Johnson* Court stated that because the statute imposed “excessive standards (deliberate and intentional act) with a heightened burden of proof (clear and convincing evidence), it is certainly not ‘a law that furthers *** comfort, health, safety and general welfare of all employees.’” *Id.* at 308 (citing *Brady*).

Thus, the post-*Johnson* world was one in which the General Assembly had tried and failed three times to enact an intentional tort statute that would both limit intentional tort claims and be declared constitutional by this Court. Petitioners suggest that, at that point, the General Assembly simply gave up its two decade-long quest to enact employer-friendly intentional tort legislation, “waved the white flag,” and decided to *expand* the existing common law intentional tort cause of action. Such a suggestion is counter-intuitive, ignores the progression of the laws just reviewed and, more importantly, ignores the legislative history of the current version of R.C. 2745.01. (Petitioners’ Appendix at APX-14.)

In reviewing the current statute, this Court must be mindful that the primary purpose of the judiciary in the interpretation or construction of statutes is to give effect to the intention of the General Assembly, as gathered from the provisions enacted, by the application of well-settled rules of interpretation, the ultimate function being to ascertain the legislative will. *See, e.g., Henry v. Central Nat'l Bank* (1968), 16 Ohio St.2d 16 at paragraph 2 of the syllabus, 242 N.E.2d 342. To the extent a statute is ambiguous, the court may consider such matters as the object sought to be attained, the circumstances under which the statute was enacted, and the legislative history of the statute. R.C. 1.49(A), (B) and (C). (R-APX-65.) Consideration of these matters clearly demonstrates that the General Assembly did not intend to expand the common law intentional tort claim into two causes of action. Indeed, its goal was precisely the opposite: to limit intentional tort claims.

House Bill 498, which eventually became the current version of R.C. 2745.01, had its first hearing on August 25, 2004. At that hearing and at others following it, sponsor testimony indicated that Ohio employers are facing the uncertainty of being sued by employees for workplace injuries. Ohio Capitol Connection, Minutes of House Commerce & Labor Committee (Aug. 25, 2004) 1. (R-APX-54-58.) Further, there was testimony that Supreme Court decisions have “opened the door for employees to continue to sue employers for workplace injuries in addition to availing themselves of the ‘no fault’ workers’ compensation system.” (R-APX-57.) Concern was expressed that “the standard for proving an intentional tort has been essentially reduced to a negligence-based standard that is far below any reasonable definition of an intentional tort.” *Id.* Thus, a new version of R.C. 2745.01 was proposed and ultimately passed.

House Bill 498 moved forward and was considered by the Senate Insurance, Commerce and Labor Committee on November 30, 2004, at which time the committee heard testimony from the National Federation of Businesses of Ohio that House Bill 498 “helps offset rulings that the Ohio Supreme Court have created avenues for recovery of workplace injuries outside the Bureau of Workers’ Compensation.” Ohio Capitol Connection Bill History for House Bill 498, 125th General Assembly 2. (R-APX-55.) The Committee also heard from the Ohio Academy of Trial Lawyers to the effect that House Bill 498 would place workers in harmful situations and force them to meet higher standards for burden of proof. (R-APX-55.) Clearly, no one involved in the passage of House Bill 498 believed it to be a broadening of the intentional tort cause of action.

House Bill 498 passed and, on January 6, 2005, Governor Robert Taft signed it into law on the same day and at the same signing ceremony that he signed Senate Bill 80, a tort reform legislation package that has already been found constitutional by this Court in *Arbino v. Johnson & Johnson* (2007) 116 Ohio St.3d 468, 2007-Ohio-6948, 850 N.E.2d 420. At that ceremony, Governor Taft commented that “lawsuit reform is a cornerstone of our job creation agenda.” 74 Ohio Reporter No. 4, Gongwer News Serv. (Jan. 6, 2005) 1. (R-APX-64.) Further, the sponsor of House Bill 498 described it as having been enacted “to offset previous Ohio Supreme court rulings that allowed injured workers to sue employees for damages on top of workers’ compensation benefits.” *Id.* In contrast to the Governor’s enthusiasm for House Bill 498, the president of the Ohio Academy of Trial Lawyers lamented the passage of the new laws. *Id.* at 2. Were Petitioners correct that R.C. 2745.01 expanded employees’ available intentional tort causes of action, there is no reason to believe the head of the Ohio Academy of Trial Lawyers would decry its passage.

In short, the legislative history of R.C. 2745.01 is replete with testimony that all involved in it intended and believed House Bill 498 to be a response to *Brady* and *Johnson* and an attempt to limit the intentional tort cause of action rather than expand it. Ohio Capitol Connection, Bill History of House Bill 498, 125th General Assembly 3. In the face of such clear legislative history, Petitioners posit that the General Assembly, in drafting House Bill 498, was attempting to create a statute that would recognize employer intentional torts without limiting employer liability. To the contrary, the General Assembly's intent in enacting R.C. 2745.01 was clear: it was attempting, yet again, to undo the effect of *Blankenship* and its progeny as well as the *Brady* and *Johnson* decisions by replacing the common law cause of action for intentional tort with a statutory one that would limit intentional tort claims while at the same time avoid immunizing employers from any intentional tort liability when such immunization had been declared unconstitutional in *Brady* and *Johnson*. To suggest any other legislative goal is to disingenuously foist an untenable and unsupported reading onto R.C. 2745.01. Accordingly, this Court must reject Petitioners' notion that the current version of R.C. 2745.01 is an expansion of the common law intentional tort claim.

2. *Rejection of Petitioners' Dual Cause of Action Theory Does Not Necessitate the Conclusion That R.C. 2745.01 is Unconstitutional.*

Petitioners suggest that, if R.C. 2745.01 does not create two causes of action, then it must be unconstitutional. Respondents disagree. Petitioners rely heavily on the appellate decisions in *Kaminski v. Metal & Wire Products Co.*, 175 Ohio App. 3d 227, 2008-Ohio-1521, 886 N.E.2d 262, and *Barry v. A.E. Steel Erectors, Inc.*, 2008-Ohio-3676. First, as set forth below, those decisions rely on *Johnson*, and *Johnson* is an untenable and incorrect decision. Moreover, however, even without overruling *Johnson*, R.C. 2745.01 can be found constitutional

because it is significantly different from the version of R.C. 2745.01 considered by the *Johnson* court.

The version of R.C. 2745.01 considered in *Johnson* contained several provisions that immunized employers from liability. First, former R.C. 2745.01 included a clear and convincing burden of proof not only at the trial stage of an intentional tort action, but also at the summary judgment phase of the case. Such a burden of proof is incredibly difficult for a plaintiff to meet. Second, former R.C. 2745.01 set forth strict requirements regarding the signing of documents related to an intentional tort claim that put the signer at risk of personal sanctions. Third, at the same time as passing former R.C. 2745.01, the General Assembly passed R.C. 2305.112, which imposed a one-year statute of limitations on intentional tort claims. Those elements, taken together, led the *Johnson* court to conclude that the cause of action offered in former R.C. 2745.01 was “illusory” and offered “virtually zero” chance of recovery by plaintiffs in intentional tort causes of action. *Johnson* at 307.

In response to *Johnson*, the General Assembly changed the intentional tort claim codified in the new R.C. 2745.01. It abandoned the elements that the *Johnson* Court found objectionable – the clear and convincing burden of proof, the summary judgment requirements, the signing requirements and sanctions, and the one year statute of limitations. The General Assembly was also mindful of avoiding the provisions that the *Brady* Court found constitutionally objectionable – the intentional tort fund, the shift of jurisdiction to the Industrial Commission, the damages cap, and the removal of issues from jury consideration. Instead, the new statute is more succinct, using some language from former R.C. 4121.80 that the *Brady* Court did not find objectionable. The resulting statute is, in this Court’s own language,

“sufficiently different from previous enactments to avoid the blanket application of stare decisis and to warrant a fresh review of [its] merits.” *Groch v. General Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶ 147 (quoting *Arbino* at ¶ 24.) When this Court engages in that required “fresh review” of the current statute, it will find a statute that replaces the common law cause of action, one that limits the definition of intentional tort to include only those where the employer acted with the intent to injure another or with the belief that injury was “substantially certain” to occur, and one that avoids immunizing employers from liability. This Court will find in R.C. 2745.01 a statute that successfully treads the line between providing a viable cause of action to workers injured by intentional torts and alleviating employers’ uncertainty of being sued by employees for workplace injuries that are properly covered by the workers’ compensation system. In short, this Court will find in R.C. 2745.01, at long last, a *constitutional* intentional tort statute.

3. ***R.C. 2745.01 Abrogates the Common Law Cause of Action for Intentional Tort.***

Given Petitioners’ shift to claiming that R.C. 2745.01 is, in fact, constitutional, they do not squarely address the question that was certified to this Court – i.e. does the new statute do away with the common law cause of action for intentional tort? Respondents urge this Court to answer this question affirmatively because any other answer would do violence to the intent of the General Assembly in enacting R.C. 2745.01.

As set forth above, the legislative history demonstrates that, in enacting R.C. 2745.01, the General Assembly was reacting to previous Ohio Supreme Court decisions and intending to provide employers with a surer footing in terms of intentional tort law. To suggest that they intended to leave the common law cause of action as it existed and to add a statutory cause of action under R.C. 2745.01 fails on the same grounds as did Petitioners’ argument that

the statute itself creates two causes of action. This General Assembly was attempting to constitutionally limit the intentional tort cause of action, not to broaden it. Leaving the common law cause of action intact and adding to it would have done the opposite. As detailed above, such a theory is simply not borne out in the legislative history.

Moreover, in enacting a statute, it is presumed that a “just and reasonable result is intended.” R.C. 1.47(C). When the General Assembly codifies the law on a subject, the statute governs unless there is a clear legislative intention, expressed or implied, that the statutory provisions are merely cumulative. *Bolles v. The Toledo Trust Co.* (1944), 144 Ohio St. 195, paragraph 13 of the syllabus, 58 N.E.2d 381, rev’d on other grounds, *Smyth v. Cleveland Trust Co.* (1961), 172 Ohio St. 489, 179 N.E. 2d 60. There is no such clear legislative intention in the instant case. Indeed, all evidence of legislative intent demonstrates that the General Assembly wished to replace the common law cause of action with the statutory one provided in R.C. 2745.01. The establishment of a second and duplicative cause of action for the same tort is cumulative and is neither just nor reasonable. Hence this Court should find that R.C. 2745.01 did in fact abrogate the common law cause of action for intentional tort and should answer Certified Question No. 8 in the affirmative.

B. 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 SECTIONS 34 AND 35, ARTICLE II OF THE OHIO CONSTITUTION.⁵

Having refuted Petitioners’ assertion that R.C. 2745.01 is a constitutional expansion of the intentional tort cause of action, Respondents will proceed to address Certified Questions 1 through 7, albeit in the order those questions are addressed in Petitioners’ brief.

⁵ See Certified Question No. 7.

Petitioners relying upon the Seventh Appellate District’s opinion in *Kaminski, supra*, argue that R.C. 2745.01 is unconstitutional because it conflicts with the authority granted to the General Assembly in Sections 34 and 35, Article II of the Ohio Constitution.⁶ The *Kaminski* court relied upon *Brady* and *Johnson* in finding that Sections 34 and 35, Article II prohibited the Legislature from enacting laws involving employer intentional torts because “it attempts to regulate an area that is beyond the reach of its constitutional empowerment.” *Kaminski* at 235 quoting *Brady* at 634. Petitioners’ reliance on *Kaminski* and, in turn, *Johnson* and *Brady*, is misplaced for several reasons. First, the *Brady* Court interpreted Section 34, Article II as *limiting* the powers granted to the legislature, when in fact it is a broad *grant* of authority to the Legislature. See, *Am. Assn. of Univ. Professors Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 717 N.E.2d 286. Second, Section 35, Article II is not implicated by the employer intentional tort, which arises outside the scope of employment. See, *Blankenship*, 69 Ohio St.2d at 613. Finally, R.C. 2745.01 is distinguishable from the statutes found unconstitutional by *Brady* and *Johnson* and, therefore, stare decisis does not prevent this Court from finding R.C. 2745.01 constitutional.

1. Section 34, Article II, of the Ohio Constitution did not prevent the Legislature from enacting R.C. 2745.01.

The Legislature has the authority to change the common law by legislation within constitutional limits. *Johnson* at 303. Restrictions on the power to legislate are the exception rather than the rule and the Legislature may exercise its legislative power unless the Ohio Constitution clearly prohibits it. *State ex rel. Poe v. Jones* (1955), 51 Ohio St. 492, 504, 37 N.E.2d 492. “An enactment of the General Assembly is presumed to be constitutional, and

⁶ This Court has accepted *Kaminski* for review. *Kaminski v. Metal & Wire Products Co.* Case No. 2008-0857. Proposition of Law No. 2 submitted by the Defendant-Appellant is “R.C. 2745.01 does not violate Section 34, Article II of the Ohio Constitution, or Section 35, Article II of the Ohio Constitution, and is therefore constitutional on its face.” (Defendant-Appellant Metal & Wire Products Company’s Merit Brief, filed October 24, 2008).

before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph 1 of the syllabus, 128 N.E.2d 59. “There 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 v. Ford* (1955), 164 Ohio St. 74, 79, 128 N.E.2d 111.

There was no need for the Legislature to rely upon Section 34, Article II when enacting R.C. 2745.01. The Legislature had its authority under the police powers to enact such legislation. See, Ohio Const. Section 1, Article II. Moreover, Section 34, Article II permitted the Legislature to enact legislation, it did not restrict the Legislature. In its entirety, Section 34, Article II provides (emphasis added):

Laws *may* be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

The *Brady* plurality opinion held that Section 34, Article II did not permit the Legislature to enact laws restricting benefits to employees. *Brady* at 633. (“A legislative enactment that attempts to remove a right to a remedy under the common law that would otherwise benefit the employee cannot be held to be a law that furthers the ‘* * * comfort, health, safety, and general welfare of all employees * * *.’”) The *Johnson* Court relied upon that statement in finding former R.C. 2745.01 unconstitutional. *Johnson* at 305. However, just six months after *Johnson* was decided, this Court held the following:

This court has 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. See, e.g., *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1, 14, 539 N.E.2d 103, 114. AAUP’s position would require Section 34 to be

read as a limitation, in effect stating: “No law shall be passed on the subject of employee working conditions unless it furthers the comfort, health, safety and general welfare of all employees.” Under that approach, however, Section 34 would prohibit all legislation imposing any burden whatsoever on employees, regardless of how beneficial to the public that legislation might be. The invalidity of this position becomes strikingly apparent when viewed in the context of existing employment-related laws.

American Ass’n of Univ. Professors v. Central State Univ. (1999), 87 Ohio St. 3d 55, 61, 717 N.E.2d 286 (herein referred to as “*AAUP*”). This inconsistency between *Johnson* and *AAUP* should not go unnoticed. *AAUP* clearly found that employment-related laws *may* be enacted that restrict the rights of employees and not violate Section 34, Article II. This Court should follow *AAUP*’s lead and do the same.

The Legislature, under its police power, decided that it was the will of the people to codify the employer intentional tort in order to limit the filing of employer intentional tort lawsuits to truly egregious situations. Section 34, Article II did not prevent the Legislature from taking such action.

2. Section 35, Article II is not implicated by R.C. 2745.01.

The *Brady* plurality also found that former R.C. 4121.80 exceeded the scope of the Legislature’s authority of Section 35, Article II. *Brady* at 634. The reasoning behind this holding, however, is puzzling and troublesome. The *Brady* plurality found (and *Johnson* Court accepted) that employer intentional torts are “totally unrelated to the fact of employment. When an employer intentionally harms his employee, that act effects a complete breach of the employment relationship.” *Brady* at 634.⁷ Therefore, the *Brady* plurality concluded that in enacting R.C. 4121.80, which gave certain adjudication powers to the Ohio Industrial

⁷ This, of course, is another reason why Article II, Section 34 is not implicated when the Legislature enacted R.C. 2745.01 (See Argument B1, above).

Commission, the Legislature exceeded its authority under Section 35, Article II because the employer intentional tort is outside the employment relationship and Section 35, Article II only authorizes legislation for injuries occurring within the employment relationship. *Brady* at 634. In adopting this convoluted and irreconcilable argument from the *Brady* plurality opinion, the *Johnson* Court erred.

Section 35, Article II places no restriction on laws that may be passed *outside* of the employment relationship. Section 35, Article II provides that all injuries occurring *in the course and scope of employment* will be covered through the workers' compensation fund. Either the employer intentional tort occurs within the course and scope of employment and, therefore, the employee is entitled to workers' compensation benefits, or it is outside the employment relationship and the employee may file suit against his or her employer. It cannot be both. *See, Johnson* at 313 (Cook, J., dissenting). The *Brady* and *Johnson* Court's inability to reconcile these ideas lead to the irreconcilable *Johnson* holding.

R.C. 2745.01 is constitutional because it does not address injuries that occur within the course and scope of employment. Therefore, Section 35, Article II, which only addresses injuries within the course and scope of employment, is not implicated and the Legislature did not exceed its authority in enacting R.C. 2745.01.

3. *R.C. 2745.01 is sufficiently different and, therefore, the holdings in Brady and Johnson do not prevent it from being constitutional.*

When R.C. 2745.01 was enacted by House Bill 498, the Legislature used its legislative authority to create a cause of action while taking care to avoid the constitutional issues it encountered in prior versions of the intentional tort statute. Further, in enacting House Bill 498, the Legislature was mindful of the precedent set by *Brady* and *Johnson* and as a result,

R.C. 2745.01, as enacted by House Bill 498, is markedly different from the intentional tort statutes struck down by *Brady* and *Johnson*. Therefore, “the blanket application of stare decisis” is not warranted. *Arbino*, 116 Ohio St.3d at 472. “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.” *Id.*

R.C. 4121.80, which was found unconstitutional by *Brady*, gave the right to determine liability to the court (not a jury) and once liability was determined by the court gave the right to ascertain a capped damage amount to the Industrial Commission. *Brady* at 640-41. Justice Brown in his concurring opinion in *Brady* explained that R.C. 4121.80 was unconstitutional because it violated the right to a trial by jury. *Brady* at 641 (Brown, J., concurring). Importantly, Justice Brown *did not* side with the plurality in its finding that the Legislature had no power to modify the employer intentional tort law, he instead merely held that R.C. 4121.80 was unconstitutional because it removed the right to a jury trial and delegated the damages determination to the Industrial Commission. *Id.* R.C. 2745.01, as enacted by House Bill 498, does neither.

Former R.C. 2745.01, which was struck down by *Johnson*, required the plaintiff in response to a motion for summary judgment to “set forth specific facts supported by clear and convincing evidence to establish the employer committed an employment intentional tort against the employee.” *Johnson* at 306. Former 2745.01 also placed a set of pleading requirements on the plaintiff and any person that did not comply with requirements at risk for sanctions including expenses and attorneys fees. *Id.*

The current version of R.C. 2745.01 removed the heightened burden of proof, so employees only need to establish employer intentional torts by a preponderance of the evidence.

Moreover, there is no requirement for the plaintiff to establish “clear and convincing evidence” in order to avoid summary judgment. There are also specific no pleading requirements. Therefore, the changes in R.C. 2745.01, enacted by House Bill 498 heeded the *Brady* and *Johnson* Courts’ decisions and differentiated the statute sufficiently to warrant a fresh look at the statute rather than simply striking it down because it is a codification of the employer intentional tort.

The Seventh District’s reliance upon *Brady* and *Johnson* in *Kaminski* failed to take into account the substantive differences in R.C. 2745.01, as enacted by House Bill 498, and simply held that because it was a Legislative attempt to codify the employer intentional tort, it must fail. Since Section 34, Article II has been found to be a broad grant of legislative authority, *AAUP* at 61, and since Section 35, Article II does not involve laws outside of the employment relationship and does not preempt common-law or statutory actions for employer intentional torts, *Blankenship* at syllabus, the General Assembly has the authority to legislate in this area and R.C. 2745.01 is constitutional.

C. **R.C. 2745.01, AS ENACTED BY HOUSE BILL 498, EFFECTIVE APRIL 7, 2005, DOES NOT VIOLATE THE RIGHT TO EQUAL PROTECTION OF THE LAW.**⁸

Section 2, Article I of the Ohio Constitution is equivalent to the federal Equal Protection Clause. *Arbino* at 481. In the instant case, because no fundamental right or suspect class is implicated by R.C. 2745.01, the Court must review the intentional tort statute under the rational basis test. See, e.g., *Groch* at 82. Under this test, a challenged statute will be upheld if the classifications it creates bear a rational relationship to a legitimate government interest or are grounded “on a reasonable justification, even if the classifications are not precise.” *Groch* at

⁸ See Certified Question No. 5.

206; *Arbino* at 481. It is presumed that a legislative classification is reasonable, fair, and is based on a legitimate distinction. *State, ex rel. Lourin v. Indus. Comm.* (1941), 138 Ohio St. 618, 21 O.O. 490, 37 N.E.2d 595.

Petitioners argue R.C. 2745.01 divides intentional tort victims into two classes: “non-employee-victims” and “employee-victims.” (Petitioners’ Merit Brief at 39.) Petitioners allege “employee-victims” are denied the right to recover from their employers unless they can establish that the employer acted with “deliberate intent.” *Id.* This argument ignores the fact that “employee-victims” may recover workers’ compensation benefits while “non-employee-victims” must proceed in court to recover from the tortfeasor. The legislative differentiation between employees and non-employees is included in Section 35, Article II of the Ohio Constitution. An employee may recover workers’ compensation benefits as a result of an injury at an employer’s business that a non-employee injured in the same manner may not. In that regard, employee-victims are granted *more* protection than non-employee-victims because of the establishment of the workers’ compensation system. Furthermore, R.C. 2745.01 merely defines the standard of an employer intentional tort. Employee-victims that meet this standard may recover. Therefore, Petitioners’ argument that employee-victims are denied equal protection must fail.

The Legislature’s decision to treat employee-victims differently than non-employee-victims is based on the reasonable justification of protecting Ohio businesses from the possibility of civil liability for injuries to employees as a result of negligence. In an effort to provide speedy recovery to injured employees and stability to Ohio businesses, Ohio voters passed a constitutional amendment which provides immunity to Ohio employers for injuries resulting to employees while in the course and scope of employment. See, *Blankenship* at 614. Subsequent case law held that employees may recover damages *in addition to* workers’

compensation for those injuries which result from an employer's intentional acts. *Jones v. VIP Development Co.*, at paragraph two of the syllabus. Because of the erosion of the "intentional" standard throughout the years to a "negligence" standard, the Legislature decided that it was in the interest of Ohio's economy to provide a statutory cause of action to limit employer intentional tort actions to those actions where the employee-victim can establish deliberate intent. Ohio Capitol Connection, Minutes of House Commerce & Labor Committee (Aug. 25, 2004). (R-APX-57.) R.C. 2745.01 was designed to provide certainty to Ohio businesses that they will not face lawsuits in addition to paying rising workers' compensation premiums while providing a statutory cause of action for employees injured as a result of intentional acts by employers. *Id.* The Legislature's reasonable justification for differentiating between employee-victims and non-employee victims is, therefore, constitutional.

The equal protection of the laws is not violated by R.C. 2745.01. Employee-victims are provided an opportunity to recover for employer intentional torts provided the employee-victim establishes the employer's deliberate intent. If the employee-victim is unable to establish deliberate intent, workers' compensation coverage provides the employee with relief. This classification is reasonably related to the Legislature's legitimate interest of protecting Ohio's businesses from double liability for injuries resulting from negligence while also providing employees with an avenue to recover for workplace injuries committed by employers with deliberate intent.

D. **R.C. 2745.01, AS ENACTED BY HOUSE BILL 498, EFFECTIVE APRIL 7, 2005, DOES NOT VIOLATE THE RIGHT TO A REMEDY.**⁹

⁹ See Certified Question No. 2.

The right to a remedy is found in Section 16, Article 1 of the Ohio Constitution. “An injured party has the right to a means of action for recovery from an injury, not the right to a particular means of action.” *Parks v. Rice*, 157 Ohio App. 3d 190, 2004 Ohio 2477, ¶17, 809 N.E.2d 1192, citing *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 138 N.E.2d 660. “It is a general rule that there is no vested right in an existing remedy and that a statute subsequently passed may alter, modify or curtail such remedy provided a reasonable time is given for the assertion of the remedy.” *Lash v. Mann* (1943), 141 Ohio St. 577, 582-583, 49 N.E.2d 689. R.C. 2745.01 does not eliminate the right to a remedy, it defines a cause of action for which employees may recover for intentional injuries. See, *Johnson* at 317 (Lundberg Stratton, J. dissenting).

R.C. 2745.01 provides a cause of action whereby employees may recover for injuries resulting from employers’ deliberate intent to injure. R.C. 2745.01 does not violate a right to a remedy because any employee that cannot establish the deliberate intent standard remains eligible for workers’ compensation benefits. *Jones*, 15 Ohio St.3d paragraph 2 of the syllabus. Petitioners argue that workers’ compensation is not a meaningful remedy. That is an argument for another day. The simple fact is that the right to a remedy was designed to “prohibit statutes that effectively prevent individuals from pursuing relief for their injuries.” *Arbino* at 477. R.C. 2745.01 does not prevent an employee from pursuing relief for injuries; it provides the standard that employees must establish before they obtain relief *in addition to* their workers’ compensation benefits. Accordingly, the right to a remedy is not violated by R.C. 2745.01.

E. R.C. 2745.01, AS ENACTED BY HOUSE BILL 498, EFFECTIVE APRIL 7, 2005 DOES NOT VIOLATE THE RIGHT TO AN OPEN COURT.¹⁰

¹⁰ See Certified Question No. 3.

The right to an open court is well known: “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.” Section 16, Article I, Ohio Constitution. R.C. 2745.01 is in accord with the right to an open court.

Petitioners rely upon the Eleventh District’s finding in *Kaminski* that an employer may be guilty of criminal assault and yet not liable for an employer intentional tort under R.C. 2745.01 to argue R.C. 2745.01 violates the right to an open court. (Petitioners’ Merit Brief at 41.) To come to this conclusion, the *Kaminski* court quoted the Ohio Supreme Court in *Johnson* interpreting the *former* R.C. 2745.01. *Kaminski*, 175 Ohio App.3d at 236. The statute that the *Johnson* Court struck down required employees to establish an intentional tort *by clear and convincing evidence*. *Johnson* at 307. The *Kaminski* court was interpreting the new R.C. 2745.01 enacted by House Bill 498, which does not contain this heightened standard. Employees alleging an intentional tort under the new R.C. 2745.01 face only the traditional “preponderance of the evidence” standard. To establish criminal assault, proof “beyond a reasonable doubt” is required. Therefore, Petitioners’ argument is misplaced and R.C. 2745.01 does not violate the right to an open court.

Furthermore, the fact that deliberate intent is required to establish an intentional tort does not violate the right to an open court even if it is more stringent than the elements of criminal assault. If an employee is unable to establish an intentional tort under R.C. 2745.01, the employee remains eligible for workers’ compensation benefits. R.C. 2745.01 does not restrict employees’ ability to recover for workplace injuries, it merely defines a standard for recovery if damages in addition to workers’ compensation benefits. As this Court has repeatedly recognized, workers’ compensation laws were designed as a mutual compromise between

employee and employer. See, *Arrington v. DaimlerChrysler Corp.* (2006), 109 Ohio St.3d 539, 543; 2006-Ohio-3257, ¶19, 849 N.E.2d 1004.¹¹ The right to an open court is not violated because employees are restricted to recovery to the workers' compensation system except for defined situations of egregious deliberate conduct. Therefore, R.C. 2745.01 is constitutional and does not interfere with the right to an open court.

F. **R.C. 2745.01, AS ENACTED BY HOUSE BILL 498, EFFECTIVE APRIL 7, 2005 DOES NOT VIOLATE THE RIGHT TO A TRIAL BY JURY.**¹²

Section 5, Article I of the Ohio Constitution guarantees the right to a jury trial. Previous attempts at codifying the intentional tort cause of action were found to have denied a plaintiff a right to a jury with respect to damages. See, *Ulman v. Clyde Super Value* (1989), 62 Ohio App. 3d 858, 577 N.E.2d 717 (finding R.C. 4121.80 violated the right to trial by jury by limiting findings of damages to the Ohio Industrial Commission). See also, *Brady* at 640-641 (Brown, J. concurring). R.C. 2745.01, enacted by House Bill 498, defines the elements of an employer intentional tort but in no way removes the right to recover for an intentional tort from being decided by a jury. Therefore, R.C. 2745.01 is constitutional.

Petitioners argue that R.C. 2745.01 deprives victims of so-called “non-deliberate intentional torts” from the right to a trial by jury. Perhaps that phrase more than any other demonstrates Petitioners’ fundamental misunderstanding of the nature of an *intentional* tort. A “non-deliberate intentional tort” is an oxymoron and in essence means negligence. Section 35,

¹¹ “Ohio workers’ compensation scheme must therefore be recognized as ‘a balance of mutual compromise between the interests of the employer and the employee whereby the employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up the common law defenses and are protected from unlimited liability.’ *Arrington* at 543, quoting *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St.2d 608, 23 O.O. 3d 504, 433 N.E. 2d 572.

¹² See Certified Question No. 1.

Article II of the Ohio Constitution has already provided a means of recovery for employees injured as a result of negligence – i.e. the workers’ compensation system.

Petitioners argue that employees who cannot meet the deliberate intent legal threshold are being denied the right to a trial by jury. There is no constitutional right to survive summary judgment and “[a] person’s constitutional right to a jury trial is not abridged by the proper granting of a motion for summary judgment.” *Penix v. Boyles*, 2003-Ohio-2856, ¶38 (Ohio Ct. App., Lawrence County May 28, 2003), citing *Houk v. Ross* (1973), 34 Ohio St.2d 77, 83-84, 296 N.E.2d 266. Conversely, employees establishing a question of fact as to whether an employer deliberately intended their injuries will be permitted to submit their claims to a jury. Therefore, R.C. 2745.01 does not invade the right to a trial by jury and is constitutional.

G. R.C. 2745.01, AS ENACTED BY HOUSE BILL 498, EFFECTIVE APRIL 7, 2005 DOES NOT VIOLATE DUE PROCESS OF LAW.¹³

In addition to the right to open courts and the right to a remedy, Section 16, Article I of the Ohio Constitution provides for the right of due process of law. When reviewing a statute on due process grounds, courts apply a rational basis test unless the statute restricts the exercise of fundamental rights. *Arbino*, at 478; *Sorrel v. Thevenir* (1994), 69 Ohio St.3d 415, 423, 633 N.E.2d 504; *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 688-89, 576 N.E. 2d 765. Because, as set forth above, R.C. 2745.01 violates neither the right to a jury trial nor the right to a remedy, this Court must find it valid under a rational basis test (1) if it 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, 503 N.E. 2d 717 (citations omitted).

¹³ See Certified Question No. 4.

Looking at the first prong of this test, this Court must determine whether R.C. 2745.01 bears a real and substantial relation to the public health, safety, morals or general welfare of the public. House Bill 498, which enacted R.C. 2745.01, was passed and signed into law in an effort to address concerns that Ohio businesses were at a competitive disadvantage with neighboring states who do not permit double recovery for workplace injuries. Ohio Capital Connection, Minutes of House Commerce & Labor Committee (Nov. 9, 2005). (R-APX-56.) At the same time as House Bill 498, Senate Bill 80 was passed out of a concern that Ohio's civil litigation system represents a challenge to the economy of the State of Ohio. *Arbino*, 116 Ohio St.3d at 479. The General Assembly reviewed evidence showing that the uncertainty relating to the existing civil litigation system and rising costs associated with it were harming the economy and therefore the general welfare of the public. *Id.* There is a clear connection between limiting intentional tort recoveries and the economic problems demonstrated in the evidence reviewed by the General Assembly. In seeking to correct the economic problems brought on by Ohio's civil litigation system, the General Assembly acted in the public's interest, which is all that is required under the first prong of the due process analysis. *Id.* at 480.

Under the second prong of the due process analysis, the court must determine whether the statute in question is arbitrary or unreasonable. R.C. 2745.01 is neither. A review of *Arbino* is instructive. The *Arbino* court found that R.C. 2315.18 alleviated the *Sheward* and *Morris* courts' concerns that damage caps imposed the cost of the intended public benefit solely upon the most severely injured by permitting limitless noneconomic damages for those suffering catastrophic injuries, stating that, at some point, the General Assembly must be able to make a policy decision to achieve a public good. *Arbino* at 482. The same logic mandates the conclusion that R.C. 2745.01 is neither arbitrary nor unreasonable. The General Assembly, in

R.C. 2745.01, allows recovery in egregious situations where the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur, as that term is defined by R.C. 2745.01(B). Just as the General Assembly in R.C. 2315.18 made a policy decision to achieve a public goal, so too did it make such a decision in R.C. 2745.01 – the decision to allow recovery in an intentional tort action only when the employer acts “with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” R.C. 2745.01(B). Like the decision in drafting R.C. 2315.18, this decision is tailored to maximize benefits to the public while limiting recovery to litigants. That logic, as the court held in *Arbino*, is neither unreasonable nor arbitrary. Hence, R.C. 2745.01 does violate the right to due process of law and is constitutional.

H. R.C. 2745.01, AS ENACTED BY HOUSE BILL 498, EFFECTIVE APRIL 7, 2005 DOES NOT VIOLATE THE SEPARATION OF POWERS.¹⁴

The separation of powers found in Section 32, Article II of the Ohio Constitution is not infringed upon by R.C. 2745.01. Petitioners argue that R.C. 2745.01 violates the separation of powers by relegating to the Ohio Industrial Commission the adjudication of the claims of “certain intentional tort victims.” (Petitioners’ Merit Brief at 44.) R.C. 2745.01 defines an employer intentional tort. In so doing, the Legislature determined that employees should only be permitted to recover for an intentional tort, in addition to collecting workers’ compensation benefits, for those acts that are so egregious that the employer deliberately intended to injure the employee. An injured employee who does not satisfy the deliberate intent standard is not an “intentional tort victim” and is provided the right to file for workers’ compensation benefits. Therefore, R.C. 2745.01 does not delegate the judicial function to

¹⁴ See Certified Question No. 6.

determine civil recovery for “intentional tort victims” to the Ohio Industrial Commission. “Intentional tort victims,” those employees that meet the elements of R.C. 2745.01, are permitted to proceed in court. Only those employees that are not “intentional tort victims” but are injured in the course and scope of employment are “relegated” to the workers’ compensation system. Therefore, R.C. 2745.01 does not violate the separation of powers.

IV. CONCLUSION

In enacting House Bill 498, the Ohio General Assembly has finally succeeded in passing a constitutional intentional tort statute. Accordingly, and for the reasons set forth in this brief, Respondents respectfully request that this Court answer Certified Questions 1 through 7 in the negative and Certified Question 8 in the affirmative, thereby finding that R.C. 2745.01 is constitutional and provides the exclusive remedy for employer intentional torts.

Respectfully submitted,

EASTMAN & SMITH LTD.



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R.J. Corman Railroad Group, LLC

V. PROOF OF SERVICE

A copy of the foregoing Merit Brief of Defendants-Respondents has been sent by ordinary U.S. Mail this 3rd day of November, 2008 to R. Ethan Davis, Esq., Joseph R. Dietz, Esq. and James M. Tuschman, Esq., Barkan & Robon Ltd., 1701 Woodlands Drive, Suite 100, Maumee, OH 43537 attorney for plaintiffs-petitioners.


Attorney for Defendants-Respondents
R.J. Corman Derailment Services LLC and
R.J. Corman Railroad Group, LLC

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COMMON PLEAS COURT

2007 MAR 12 P 1:45

REBECCA E. BHAER

IN THE COURT OF COMMON PLEAS, WOOD COUNTY, OHIO

Case No. 2007 CV 0192

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

and)

Doris Stetter)
7630 Reitz Road, Lot 98)
Perrysburg, Ohio 43551)

Plaintiffs,)

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)

Hon. JUDGE MAYBERRY

COMPLAINT WITH JURY DEMAND
ENDORSED HEREON

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R-APX- 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 derailing 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.

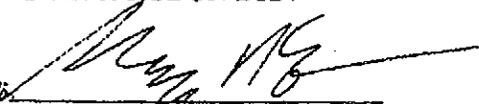
46. As a direct and proximate result of the aforesaid injuries, damages and other losses suffered by her husband, and as a direct and proximate result of the aforesaid wrongful conduct of Defendants, Plaintiff Doris Stetter has suffered a loss of her husband's companionship, society and consortium.

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

COURT OF COMMON PLEAS, WOOD COUNTY OHIO

SUMMONS ON COMPLAINT

Rule 4 1970 Ohio Rules of Civil Procedure

Case Number: 2007CV0192

Judge Alan R Mayberry

Carl F Stetter et al vs. R J Corman Derailment Services LLC et al

Carl F Stetter

7630 Reitz Road, Lot 98

Perrysburg, OH 43551

Plaintiff

vs.

R J Corman Derailment Services LLC

101 R.J. Corman Drive

NICHOLASVILLE, KY 40340

Defendant

To the above named defendant:

You are hereby summoned that a complaint (a copy of which is hereto attached and made a part hereof) has been filed against you in Wood County Court of Common Pleas, Wood County Courthouse, Bowling Green, OH 43402, by the Plaintiff(s) named herein.

You are required to serve upon the Plaintiff(s) attorney, or upon the Plaintiff if he/she has no attorney of record, a copy of your answer to the complaint within 28 days after service of this summons upon you, exclusive of the day of service. Said answer must be filed with this Court within three days after service on Plaintiff(s) attorney.

The name and address of the Plaintiff(s) Attorney is as follows:

GREGORY R ELDER 34626

1701 WOODLANDS DRIVE

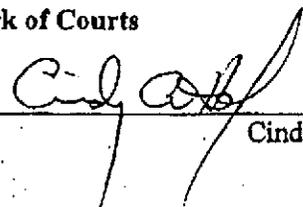
MAUMEE, OH 43537

(419)-897-6500

If you fail to appear and defend within 28 days, judgment by default will be taken against you for the relief demanded in the complaint.

I, Rebecca E. Bhaer, Clerk of the Court of Common Pleas, hereby certify that the attached is a true copy of the original papers filed in the above-entitled case.

Rebecca E. Bhaer
Clerk of Courts

By: 

Cindy Ann Hofner
Deputy Clerk

March 13, 2007

Certified Mail

3. Defendants admit the averments set forth in paragraph 3 of the complaint.

4. Defendants admit that Derailment Services does business in Wood County, Ohio but deny the remaining averments set forth in paragraph 4 of the complaint.

5. Defendants admit, upon information and belief, the averments set forth in paragraph 5 of the complaint.

6. Defendants admit that on March 13, 2006, Carl Stetter was employed by Derailment Services but deny the remaining averments set forth in paragraph 6 of the complaint.

7. Defendants admit, upon information and belief, the averments set forth in paragraph 7 of the complaint.

FIRST CAUSE OF ACTION

8. Answering paragraph 8, Defendants replead the admissions, averments and denials set forth in the preceding paragraphs 1 through 7.

9. Defendants admit upon information and belief that on March 13, 2006 Carl Stetter was inflating a truck tire when an incident occurred causing Carl Stetter injuries but deny the remaining averments set forth in paragraph 9 of the complaint.

10. Defendants deny the averments set forth in paragraph 10 of the complaint.

11. Defendants deny the averments set forth in paragraph 11 of the complaint.

12. Paragraph 12 of the complaint sets forth legal conclusions to which Defendants are not required to respond. To the extent paragraph 12 sets forth averments of fact, Defendants deny those averments.

13. Paragraph 13 of the complaint sets forth legal conclusions to which Defendants are not required to respond. To the extent paragraph 13 sets forth averments of fact, Defendants deny those averments.

14. Paragraph 14 of the complaint sets forth legal conclusions to which Defendants are not required to respond. To the extent paragraph 14 sets forth averments of fact, Defendants deny those averments.

15. Defendants deny the averments set forth in paragraph 15 of the complaint.

16. Defendants deny the averments set forth in paragraph 16 of the complaint.

17. Defendants deny the averments set forth in paragraph 17 of the complaint.

18. Defendants deny the averments set forth in paragraph 18 of the complaint.

19. Defendants deny the averments set forth in paragraph 19 of the complaint.

20. Defendants deny the averments set forth in paragraph 20 of the complaint.

21. Defendants deny the averments set forth in paragraph 21 of the complaint.

22. Defendants admit that Carl Stetter was injured on March 13, 2006 but deny the remaining averments set forth in paragraph 22 of the complaint.

23. Defendants deny the averments set forth in paragraph 23 of the complaint.

24. Defendants deny the averments set forth in paragraph 24 of the complaint.

SECOND CAUSE OF ACTION

25. Answering paragraph 25, Defendants replead the admissions, averments and denials set forth in the preceding paragraphs 1 through 24.

26. Paragraph 26 does not require a response.

27. Defendants deny, for lack of knowledge, the averments set forth in paragraph 27 of the complaint.

28. Defendants deny, for lack of knowledge, the averments set forth in paragraph 28 of the complaint.

29. Defendants deny, for lack of knowledge, the averments set forth in paragraph 29 of the complaint.

30. Defendants deny, for lack of knowledge, the averments set forth in paragraph 30 of the complaint.

31. Defendants deny, for lack of knowledge, the averments set forth in paragraph 31 of the complaint.

32. Defendants deny, for lack of knowledge, the averments set forth in paragraph 32 of the complaint.

33. Defendants deny, for lack of knowledge, the averments set forth in paragraph 33 of the complaint.

34. Defendants deny, for lack of knowledge, the averments set forth in paragraph 34 of the complaint.

35. Defendants deny, for lack of knowledge, the averments set forth in paragraph 35 of the complaint.

THIRD CAUSE OF ACTION

36. Answering paragraph 36, Defendants replead the admissions, averments and denials set forth in the preceding paragraphs 1 through 35.

37. Paragraph 37 does not require a response.

38. Defendants deny, for lack of knowledge, the averments set forth in paragraph 38 of the complaint.

39. Defendants deny, for lack of knowledge, the averments set forth in paragraph 39 of the complaint.

FOURTH CAUSE OF ACTION

40. Answering paragraph 40, Defendants replead the admissions, averments and denials set forth in the preceding paragraphs 1 through 39.

41. Paragraph 41 does not require a response.

42. Defendants deny, for lack of knowledge, the averments set forth in paragraph 42 of the complaint.

43. Defendants deny, for lack of knowledge, the averments set forth in paragraph 43 of the complaint.

FIFTH CAUSE OF ACTION

44. Answering paragraph 44, Defendants replead the admissions, averments and denials set forth in the preceding paragraphs 1 through 43.

45. Paragraph 45 does not require a response.

46. Defendants deny, for lack of knowledge, the averments set forth in paragraph 46 of the complaint.

SECOND DEFENSE

47. Defendants deny each and every averment and part thereof set forth in the complaint which is not expressly admitted herein.

THIRD DEFENSE

48. Plaintiffs have failed to state a claim or cause of action against Defendants upon which relief can be granted.

FOURTH DEFENSE

49. All or some of the claims asserted in the complaint are barred by the applicable statute or period of limitations.

FIFTH DEFENSE

50. The losses and damages claimed by plaintiffs are the direct and proximate result of the intervening and superseding acts of independent third parties or events which were not under Defendants' control.

SIXTH DEFENSE

51. Plaintiff Carl Stetter voluntarily assumed the risk of all injuries and damages which plaintiffs may claim.

SEVENTH DEFENSE

52. The losses and damages claimed by plaintiffs were directly and proximately caused, in whole or in part, by plaintiffs' own acts and conduct and should be reduced or barred in accordance with the principles of comparative negligence or fault.

EIGHTH DEFENSE

53. Plaintiff Carl Stetter was employed by Defendant Derailment Services and at all times material to this action, Defendant Derailment Services was in compliance with the workers' compensation laws of the State of Ohio and, by virtue of Section 35, Article II of the Ohio Constitution and R.C. §4123.74, and is immune from all of plaintiffs' claims.

NINTH DEFENSE

54. Defendants are not liable or responsible for the actions of John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, and/or John Doe/Jane Doe No. 1 and John Doe/Jane Doe No. 2.

TENTH DEFENSE

55. Plaintiffs have failed to mitigate their claimed damages.

ELEVENTH DEFENSE

56. At all time relevant, Defendant Derailment Services and Defendant Railroad Group acted in good faith and implemented or attempted to implement appropriate and reasonable safety practices and procedures at its Wood County, Ohio facility.

TWELFTH DEFENSE

57. In the event plaintiffs receive other sums in compensation for their damages, said amounts constitute satisfaction in full for plaintiffs' claims or, in the alternative, *pro tanto* satisfaction of plaintiffs' claims, thereby extinguishing a liability in tort, entitling these defendants to a monetary offset for the full amount of any such payments.

THIRTEEN DEFENSE

58. These defendants are entitled to all benefits, privileges and immunities of Ohio's tort reform laws.

FOURTEENTH DEFENSE

59. Plaintiffs' noneconomic damages, if any, are capped or limited by the provisions of R.C. 2315.18.

FIFTEENTH DEFENSE

60. Plaintiffs' claims against Defendant Derailment Services and Defendant Railroad Group are governed by R.C. 2745.01, effective April 7, 2005, which requires that plaintiff prove these defendants acted with deliberate intent to cause Plaintiff Carl Stetter an injury, disease, condition, or death. Plaintiffs' claim against these defendants are barred because plaintiffs are unable to establish any deliberate intent on the part of these defendants to cause plaintiffs' injuries.

WHEREFORE, having fully answered the complaint, Defendants R.J. Corman Derailment Services LLC and R.J. Corman Railroad Group, LLC pray that the complaint be dismissed with prejudice at plaintiffs' costs and that they recover their costs of suit, including reasonable attorney's fees.

Respectfully submitted,

EASTMAN & SMITH, LTD.

/s/ Sarah E. Pawlicki

Robert J. Gilmer, Jr. (0002287)

RJGilmer@eastmansmith.com

Sarah E. Pawlicki (0076201)

SEPawlicki@eastmansmith.com

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Telephone: (419) 241-6000

Facsimile: (419) 247-1777

Attorneys for Defendants

R.J. Corman Derailment Services LLC and

R.J. Corman Railroad Group, LLC

PROOF OF SERVICE

A copy of the foregoing **Amended Answer of Defendants R.J. Corman Derailment Services LLC and R.J. Corman Railroad Group, LLC** has been electronically filed and sent by ordinary U.S. Mail this 29th day of February, 2008 to Gregory R. Elder, Esq., R. Ethan Davis, Esq., and James M. Tuschman, Esq., Barkan & Robon Ltd., 1701 Woodlands Drive, Suite 100, Maumee, Ohio 43537 attorneys for plaintiffs Carl and Doris Stetter.

/s/ Sarah E. Pawlicki

Attorneys for Defendants

R.J. Corman Derailment Services LLC and

R.J. Corman Railroad Group, LLC

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION**

Carl Stetter, et al.,)	Case No. 3:07-cv-866
)	
Plaintiffs,)	
)	Hon. James G. Carr
vs.)	
)	
R. J. Corman Derailment Services LLC, et)	
el.,)	
)	
Defendants.		

**PLAINTIFFS' MOTION TO STRIKE AND/OR
FOR DECLARATORY JUDGMENT**

Now come Plaintiffs, by and through counsel, and pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, and Move to Strike the Fifteenth Affirmative Defense of Defendants' Amended Answer. Plaintiffs move to strike said affirmative defense for the reason that Ohio Revised Code §2745.01 is unconstitutional, unenforceable, and void/voidable. Plaintiffs further move for a declaratory judgment, declaring that R.C. §2745.01 did not abrogate the common law intentional tort claim.

Further arguments in support of this Motion are contained in the attached Memorandum.

Respectfully submitted,

BARKAN & ROBON LTD.

By: s/ Gregory R. Elder

Gregory R. Elder (00034626)

BARKAN & ROBON LTD.

1701 Woodlands Drive, Suite 100

Maumee, Ohio 43537

Phone: (419) 897-6500

FAX: (419) 897-6200

bar-rob@accesstoledo.com

MEMORANDUM

I. INTRODUCTION AND SUMMARY OF CASE

This lawsuit involves an injury to Plaintiff Carl Stetter (“Plaintiff”), while he was working in the course and scope of his employment for his employer, Defendant R. J. Corman Derailment Services, LLC, et al. (collectively, “Defendants”). There is no dispute that Defendants procured workers’ compensation coverage which was in effect on the date of the subject incident.

Plaintiff’s Complaint contends that Defendants committed an intentional tort, which has long been recognized as an exception to workers’ compensation immunity if the requisite elements are established. Defendants have asserted, in their Fifteenth Affirmative Defense to their Amended Answer, that newly enacted Ohio Revised Code §2745.01 applies to this case, which redefined the necessary elements for proving an intentional tort claim. For the reasons that follow, Plaintiffs believe that Revised Code §2745.01 is unconstitutional, and therefore, move to strike said affirmative defense. Further, Plaintiff believes that even if it were constitutional, it did not abrogate the long recognized common law intentional tort claim.

II. STATEMENT OF FACTS

Defendants are numerous related companies with offices throughout the United States, which provide, among other things, railroad construction and derailment services. Plaintiff was an employee of Defendants, and worked out of their derailment services facility in Millbury, Wood County, Ohio.

On March 13, 2006, while Plaintiff was inflating a large truck tire in the course and scope of his employment for Defendants, the tire separated from the rim. The force of the separation caused

the tire/rim to rocket over twenty (20) feet into the air and strike the ceiling of the building in which the tire was being inflated. Plaintiff was, unfortunately, caught in the trajectory of the exploding tire and rim, resulting in him suffering severe and permanent personal injuries.

On or about March 12, 2007, Plaintiff filed a Complaint against Defendants, in the Court of Common Pleas of Wood County, Ohio, which was eventually removed to this Court by Defendants. Plaintiff specifically alleged that Defendants violated OSHA regulations and provisions of the Ohio Administrative Code, which Plaintiff contends require Defendants to provide tire cages, certain notices, and training for inflating truck tires due to the high incidents and high risk of tire/rim separation when inflating truck tires. Plaintiff further specifically alleged that Defendants “committed an intentional tort against Stetter by acting and failing to act as aforesaid, and it committed said intentional tort with a deliberate intent to cause Stetter to suffer injury and/or with the belief that injury was substantially certain to occur.” (Complaint, ¶20).

On or about February 29, 2008, Defendants filed an Amended Answer, which contained a Fifteenth Affirmative Defense, asserting that all claims are governed by newly enacted Ohio Revised Code §2745.01. Ohio Revised Code §2745.01 was essentially the Ohio Legislature’s attempt to redefine the elements of an employee’s intentional tort claim, and overrule the long-standing common law established by the Ohio Supreme Court regarding the elements of proof for intentional tort claims. The most startling and prominent change by the Ohio Legislature, was the redefinition of “substantially certain” to mean “that an employer acts with deliberate intent to cause an employee to suffer an injury . . .”. Previously, under the common law, “substantially certain” did not require proof of intent to injure.

R.C. §2745.01 creates standards that are simply illusory. Under the definitional requirements of “substantial certainty”, an employer’s conduct, in order to create civil liability, must possess intent to injure. As a result, an employee must prove essentially that an employer had the criminal intent to commit a battery. Under this standard, an employer could possibly be guilty of criminal battery, but be exempt from civil liability under R.C. §2745.01.

As a result, the requirements of R.C. §2745.01 are so excessive that the chance of recovery of damages by employees for intentional torts committed by employers in the workplace is almost zero. The end result is the creation of an obstacle for victims of employment intentional torts that cannot be hurdled.

III. LAW AND ARGUMENT

A. History of Intentional Tort Law

As a general rule, an employer complying with workers’ compensation laws is immune from suit for damages suffered by an employee. (**Ohio Constitution Article 2, §35**); **Schump v. Firestone Tire & Rubber Co.** (1989), **44 Ohio St.3d 148**; and **O.R.C. §4123.74**. As stated previously, Defendant appears to have been a compliant employer in terms of providing workers’ compensation coverage at the time of the subject injury.

However, for many years, the Ohio Supreme Court has recognized that there is a common law exception to workers’ compensation immunity, where the employer commits an intentional tort. As stated in **Bunger v. Lawson Co.** (1998), **80 Ohio St.3d 463**, workers injured as a result of intentional tort are not required to seek redress exclusively from the Workers’ Compensation system. An employer is not immune from civil liability under the Ohio’s Workers’ Compensation

Act for employee injuries caused by the employer's intentional tortuous conduct in the work place, since such conduct necessarily occurs outside the employment relationship. **Conley v. Brown Corp. of Waverly, Inc. (1998), 82 Ohio St.3d 470.**

Under the common law, an employee properly sets forth a claim for common-law intentional tort sufficient to survive a motion to dismiss by alleging that the employee was exposed to a dangerous situation at work and that the employer knew that such exposure would be "substantially certain" to cause injury. **Johnson v. BP Chemicals, Inc. (1990), 85 Ohio St.3d 298.**

The Ohio Legislature then made two (2) attempts to overrule the common law and create its own standard for intentional tort. The Ohio Legislature enacted O.R.C. §4121.80, effective 12/1/92, governing claims of employees against employers for intentional torts. That statute was found unconstitutional by the Ohio Supreme Court in **Brady v. Safety-Kleen Corp. (1991), 61 Ohio St.3d 624,** which held that the legislature cannot enact legislation governing intentional torts that occur within the workplace, since intentional tortuous conduct will always take place outside the employment relationship. **(Blankenship v. Cincinnati Milacron Chemicals, Inc. (1982), 69 Ohio St.2d 608, approved and followed).**

The Ohio Legislature then enacted O.R.C. §2745.01, on November 1, 1995, again addressing intentional tort claims. In **Johnson v. BP Chemicals, Inc. (1999), 85 Ohio St.3d 298,** the Supreme Court of Ohio found the new statute to be unconstitutional because it imposed excessive standards of a deliberate and intentional act, with a heightened burden of proof, and did not further the comfort, health, safety, and general welfare of employees.

Thereafter, in 2004, the Ohio Legislature enacted numerous "tort reform" statutes, including the subject R.C. §2745.01, which was its third attempt to rewrite the common law. R.C. §2745.01

now requires that Plaintiff to prove “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”. However, the statute defines “substantially certain” to mean “that an employer actually deliberately intended to cause an employee to suffer injury . . .”.

As a result, the Ohio Legislature basically did away with Blankenship, and its prodigy, as a viable cause of action and required an actual intent to injure in order for an employee to bring suit against an employer complying with workers’ compensation laws. This essentially gives employers a free license to ignore safety laws and regulations and expose their employees to unreasonable risks of harm provided they do not actually intend to injure the employees.

B. R.C. §2745.01 Did Not Do Away With the Common Law Cause of Action For Intentional Tort

R.C. §2745.01 was part of much broader tort reform legislation covering a whole array of different subjects and claims. As part of the legislation, the General Assembly changed the standard of proof regarding products liability claims. R.C. §2307.71 specifically provides that:

“Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability claims or causes of action.”

However, when enacting R.C. §2745.01, the Ohio Supreme Court did not indicate that it was doing away with common law intentional tort employment claims. Under the doctrine of strict statutory construction, there is no basis to conclude that the Ohio Legislature did away with the common law intentional tort claim. Therefore, Plaintiffs respectfully request a declaratory judgment that the common law intentional tort claim and its “substantial certainty” test, was not abrogated by R.C. §2745.01.

C. R.C. §2745.01 Violates the Separation of Powers

Both the Ohio and United States Supreme Court recognize the importance of the distinct roles of the separate branches of government, and legislation which encroaches on the independent powers of the judiciary are unconstitutional. Historically, James Madison cautioned against legislative encroachment on the judicial power. See, *e.g.*, The Federalist No. 47 at 301, 302. An independent judiciary, co-equal with the other branches and possessing authority that may not be exercised by the political branches is a distinctly American invention. See, Gerhard Casper, Separating Power: Essays on the Founding, (1997), **Plaut v. Spendthrift Farms, 514 U.S. 211, 221 (1995)**; The Federalist No. 81, p. 44. IT is long been recognized that juries are considered a part of the judicial branch of government. See, No. 2 The Complete Anti-Federalist at 249-50. (H.J. Storing, Ed., 1981) (Federal Farmer).

The attempt by the Ohio Legislature to rewrite the common law is a violation of the separation of powers.

D. R.C. §2745.01 Violates the Ohio Open Courts' Provision of the Ohio Constitution, Article 1, Section 16

Article 1, Section 16 of the Ohio Constitution requires that all courts shall be open and that all citizens shall have remedy by due course of law and shall have justice administered without denial or delay for any injury to lands, goods, person or reputation. The Ohio Supreme Court has used the Open Courts Provision in striking aspects of previous legislative provisions containing limits on juridical remedies. **State ex rel. OATL v. Sheward (1999), 86 Ohio St. 451; Morris v. Savoy (1991), 61 Ohio St. 3d 584; and Sorrell v. Thevenir (1994), 69 Ohio St. 3d 415.** Likewise, the attempts by the Ohio Legislature to redefine the standard for intentional torts, in a manner that practically immunizes

employers from any liability for intentionally exposing employees to known hazards, violates the Open Courts' Provision of the Ohio Constitution.

E. R.C. §2745.01 Violates the Right to Trial by Jury

Section 4, Article 1 of the Ohio Constitution establishes the right to trial by jury. The right to trial by jury is a fundamental constitutional right. The right to trial by jury applies where the right existed at common law. The Seventh Amendment to the United States Constitution protects the right to jury trial for claims recognized at common law. "Since Justice Story's day, we have understood that 'the right of trial by jury thus preserved is the right which existed under the English common law when the [seventh] Amendment was adopted.'" **Baltimore & Carolina Line, Inc. v. Redman, 297 U.S. 654, 657 (1935).**

The right to bring an intentional tort claim, and the common law standard of "substantial certainty" has been part of Ohio common law for years. By attempting to redefine the standard for approving an intentional tort case, in a manner that immunizes employers from intentionally exposing their employees to hazardous conditions, violates the right to trial by jury.

F. R.C. §2745.01 Violates Equal Protection

Both the Ohio and United States Constitutions bar legislative classifications which arbitrarily discriminate among classes of litigants. There are two (2) types of equal protection analysis.

Generally, a legislative enactment treating citizens differently will be deemed valid if it bears a rational and substantial relationship to public health, safety, or general welfare and it is not unreasonable or arbitrary, *i.e.*, it has a rational basis.

Ordinary citizens who are injured as a result of reckless, intentional, willful, wanton conduct have a right to bring a claim against their tortfeasor. An intentional tort by an employer against an employee has long been considered to occur outside of the employment relationship. **Brady v. Safety-Kleen Corp.** (1991), 61 Ohio St.3d 624. And yet, R.C. §2745.01 effectively prevents an employee from bringing suit against an employer for such an intentional tort. As a result, R.C. §2745.01 lacks any rational basis and violates equal protection, by effectively precluding an employee from recovery for conduct that occurs outside the employment relationship, while allowing non-employees to bring claims for the same wrongful conduct.

R.C. §2745.01 is also arguably subject to a strict scrutiny standard. Ohio Courts have long recognized that were legislation treats litigants or citizens differently with respect to fundamental constitutional rights, the burden is on government to demonstrate compelling justification for the discrimination involved. The right to a trial by a jury is considered a fundamental constitutional right. **Morris v. Savoy** (1991), 61 Ohio St.3d 584.

R.C. §2745.01 both interferes with the right to trial by jury of intentional tortuous misconduct, and access to Courts, that it should be subject to strict scrutiny. Under the strict scrutiny standard, the state's interest is not necessary to achieve a compelling interest. For this additional reason, the statute should be deemed an unconstitutional violation of equal protection.

G. R.C. 2745.01 Exceeds and Conflicts with the Legislative Authority Granted to the General Assembly Pursuant to §34 and 35, Article 2 of the Ohio Constitution

Section 34, Article 2 of the Ohio Constitution provides:

“Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety, and general

welfare of all employees; and no other provision of the Constitution shall impair or limit this power.”

Further, Section 35, Article 2 of the Ohio Constitution states, in relevant part:

“For the purpose of providing compensation to workmen and their dependents, for death, injuries, or occupational disease, occasioned in the course of such . . . workmen’s employment, . . .”.

R.C. §2745.01 does not further the “. . . comfort, health, safety, and general welfare of all employees . . .”, since it attempts to remove a right to a remedy that has been available under common law in the State of Ohio for decades for the benefit of employees who are victimized by egregious conduct by an employer.

The plain meaning of these constitutional provisions are that the purpose of workers’ compensation is to create a source of compensation for workers who are injured or killed in the course of employment. Injuries resulting from employers’ intentional torts have long been held not to be in the course and scope of employment. **Brady v. Safety-Kleen (1991), 61 Ohio St.3d 624**. Therefore, R.C. §2745.01 exceeds the scope of authority granted to the Ohio General Assembly, and should be deemed void as improper exercise of legislative power.

Further, R.C. §2745.01 represents an invalid exercise of legislative authority. This is because intentional torts occur outside of the employment relationship and Section 35, Article 2, only grants authority to legislature to enact legislation dealing with injuries that occur within the workplace.

IV. CONCLUSION

For these reasons, Plaintiffs respectfully request the Court strike Defendants’ Fifteenth Affirmative Defense, and/or declare that R.C. §2745.01 did not do away with the common law standard for intentional tort, which remains viable and applicable to the case at hand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 17th day of March, 2008, a copy of the foregoing Plaintiffs' Motion to Strike was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's Electronic Filing System. The parties may access this filing through the Court's Electronic Filing System.

Respectfully submitted,

BARKAN & ROBON LTD.

By: s/ Gregory R. Elder
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2745.01, as revised by Senate Bill 80, effective April 7, 2005. Furthermore, whether or not R.C. 2745.01 is constitutional may be determinative of the case pending before this Court. Accordingly, the parties jointly request that this Court issue a certification order certifying the requested questions.

This case deals with an employer intentional tort action arising from a March 13, 2006 incident in which Plaintiff Carl Stetter was injured while employed by Defendant R.J. Corman Derailment Services. Pursuant to R.C. 2745.01, to recover for an employer intentional tort, plaintiffs must establish that “the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.” R.C. 2745.01(B) defines “substantially certain” as when “an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” On February 29, 2008, pursuant to an order of this Court, Defendants filed an Amended Answer in which they asserted that Plaintiffs are unable to establish any deliberate intent by the Defendants to cause Plaintiffs’ injuries and therefore Plaintiffs’ claims are barred by R.C. 2745.01. On March 17, 2008, pursuant to an Order of this Court, Plaintiffs filed their Motion to Strike and/or For Declaratory Judgment asserting that R.C. 2745.01 is unconstitutional.

Because there is no Ohio Supreme Court precedent on the constitutionality of R.C. 2745.01 as amended by Senate Bill 80 effective April 7, 2005, the parties jointly request that the Court certify the following questions of law:

1. Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for violating the right to trial by jury?
2. Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for violating the right to a remedy?
3. Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for violating the right to an open court?

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

Certifying the above questions of law satisfies Ohio Supreme Court Rule of Practice 18(I) and will provide an "authoritative response" on a question of constitutionality that has not yet been decided by the Ohio Supreme Court. *Arizona for Official English v. Arizona* (1997), 520 U.S. 43, 76.

A proposed Order is submitted herewith for the convenience of the Court.

Respectfully submitted,

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Attorneys for Defendants
R.J. Corman Derailment Services LLC and
R.J. Corman Railroad Group, LLC

R-APX- 35

PROOF OF SERVICE

A copy of the foregoing **Joint Motion to Certify Constitutional Questions to the Ohio Supreme Court** has been electronically filed and sent by ordinary U.S. Mail this 15th day of April, 2008 to Gregory R. Elder, Esq., Barkan & Robon Ltd., 1701 Woodlands Drive, Suite 100, Maumee, Ohio 43537 attorney for plaintiffs Carl and Doris Stetter.

/s/ Robert J. Gilmer, Jr.
Attorneys for Defendants
R.J. Corman Derailment Services LLC and
R.J. Corman Railroad Group, LLC

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B. Brief Statement of the Facts.

The Complaint alleges that on March 13, 2006, while employed by Defendant R.J. Corman Derailment Services LLC, Plaintiff Carl Stetter was injured while working in the course and scope of his employment. Plaintiff Carl Stetter applied for and received workers' compensation benefits as a result of the injuries he sustained on March 13, 2006.

Plaintiffs' filed their Complaint in the Wood County Common Pleas Court. Defendants removed the action to the United States District Court for the Northern District of Ohio, Western Division. Federal jurisdiction is based upon 28 U.S.C. § 1332 because there is diversity between the parties and the amount in controversy exceeds \$75,000.

Plaintiffs' Complaint alleges that Defendants committed an employer intentional tort. On February 29, 2008, pursuant to an order of this Court, Defendants filed an Amended Answer in which they asserted that Plaintiffs are unable to establish any deliberate intent by the Defendants to cause Plaintiffs' injuries and therefore Plaintiffs' claims are barred by R.C. 2745.01. On March 17, 2008, pursuant to an Order of this Court, Plaintiffs filed their Motion to Strike and/or For Declaratory Judgment asserting that R.C. 2745.01 is unconstitutional. To fully adjudicate this matter and determine the rights and liabilities of each party, this Court needs a determination by the Ohio Supreme Court regarding the constitutionality of R.C. 2745.01 under the Ohio Constitution. The Supreme Court of Ohio has not yet had opportunity to issue a decision on the constitutionality of R.C. 2745.01, as amended by Senate Bill 80 effective April 7, 2005. Therefore, this Court certifies the following questions 1 through 6 to the Ohio Supreme Court.

C. The Certified Questions.

1. Is R.C. §2745.01, as amended by Senate Bill 80, effective April 7, 2005, unconstitutional for violating the right to trial by jury?

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

D. Counsel for the Parties.

Counsel for each party is provided below:

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E. Moving Party.

The Plaintiffs Carl and Doris Stetter are designated as the moving party.

Hon. James G. Carr

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versus Defendants R.J. Corman Derailment Services LLC and R.J. Corman Railroad Group LLC, John Doe Company 1 through 3 and John/Jane Doe 1-2.²

B. Brief Statement of the Facts.

The Complaint alleges that on March 13, 2006, while employed by Defendant R.J. Corman Derailment Services LLC, Plaintiff Carl Stetter was injured while working in the course and scope of his employment. Plaintiff Carl Stetter applied for and received workers' compensation benefits as a result of the injuries he sustained on March 13, 2006.

Plaintiffs' filed their Complaint in the Wood County Common Pleas Court. Defendants removed the action to the United States District Court for the Northern District of Ohio, Western Division. Federal jurisdiction is based upon 28 U.S.C. § 1332 because there is diversity between the parties and the amount in controversy exceeds \$75,000.

Plaintiffs' Complaint alleges that Defendants committed an employer intentional tort. On February 29, 2008, pursuant to an order of this Court, Defendants filed an Amended Answer in which they asserted that Plaintiffs are unable to establish any deliberate intent by the Defendants to cause Plaintiffs' injuries and therefore Plaintiffs' claims are barred by R.C. 2745.01. On March 17, 2008, pursuant to an Order of this Court, Plaintiffs filed their Motion to Strike and/or For Declaratory Judgment asserting that R.C. 2745.01 is unconstitutional. To fully adjudicate this matter and determine the rights and liabilities of each party, this Court needs a determination by the Ohio Supreme Court regarding the constitutionality of R.C. 2745.01 under the Ohio Constitution. The Supreme Court of Ohio has not yet had opportunity to issue a decision on the constitutionality of R.C. 2745.01, as enacted by House Bill 498 effective April 7, 2005.

This Court previously certified eight questions to the Supreme Court of Ohio, which

² Plaintiffs allege a products liability claim against the manufacturer of the tire that was the subject of the March 13, 2006 incident and named John Doe Company 1 through 3 and John/Jane Doe 1 and 2. The products liability action is not based upon the statute at issue for certification.

were accepted on August 6, 2008. The previously certified questions incorrectly referred to Senate Bill 80. This Court amends its previously certified questions to correctly refer to House Bill 498, the legislation which enacted R.C. 2745.01.

C. The Certified Questions.

1. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to trial by jury?
2. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to a remedy?
3. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to an open court?
4. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to due process of law?
5. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to equal protection of the law?
6. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the separation of powers?
7. Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for conflicting with the legislative authority granted to the General Assembly by §34 and §35, Article II, of the Ohio Constitution?
8. Does R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, do away with the common law cause of action for employer intentional tort?

D. Counsel for the Parties.

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Counsel for Defendants
R.J. Corman Derailment Services LLC and R.J. Corman Railroad Group, LLC

E. Moving Party.

The Plaintiffs Carl and Doris Stetter are designated as the moving party.

S/Hon. James G. Carr
Chief Judge

The Supreme Court of Ohio

FILED

SEP 11 2008

CLERK OF COURT
SUPREME COURT OF OHIO

Carl Stetter, et al.

Case No. 2008-0972

v.

ENTRY

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

On May 16, 2008, an order certifying a number of state law questions was filed by the United States District Court, Northern District of Ohio, Western Division. On August 6, 2008, this Court issued an order accepting the certified state law questions. On September 8, 2008, the United States District Court, Northern District of Ohio, Western Division filed an amended order indicating that the original certification order cited an incorrect Senate Bill and amending the questions certified to instead indicate the correct House Bill. Accordingly,

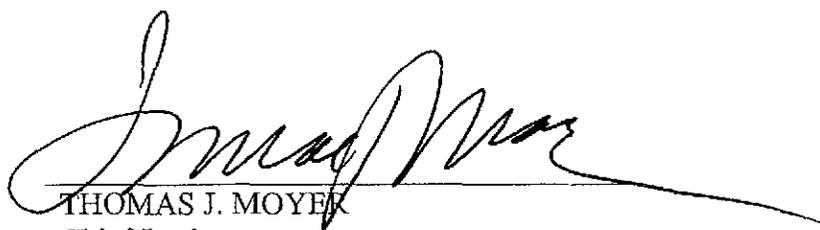
It is determined that the Court will answer the following amended questions:

1. "Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to trial by jury?"
2. "Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to a remedy?"
3. "Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to an open court?"
4. "Is R.C. §2745.01, as enacted by House Bill 498; effective April 7, 2005, unconstitutional for violating the right to due process of law?"
5. "Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the right to equal protection of the law?"
6. "Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for violating the separation of powers?"
7. "Is R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, unconstitutional for conflicting with the legislative authority granted to the General Assembly by §34 and §35, Article II, of the Ohio Constitution?"

The Supreme Court of Ohio

8. "Does R.C. §2745.01, as enacted by House Bill 498, effective April 7, 2005, do away with the common law cause of action for employer intentional tort?"

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



THOMAS J. MOYER
Chief Justice

OHIO ADVANCE LEGISLATIVE SERVICE



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OHIO 120TH GENERAL ASSEMBLY -- 1993-94 REGULAR SESSION

HOUSE BILL 107

1993 Ohio HB 107

* * *

[A] SEC. 2305.112. (A) AN ACTION FOR AN EMPLOYMENT INTENTIONAL TORT UNDER SECTION 2745.01 OF THE REVISED CODE SHALL BE BROUGHT WITHIN ONE YEAR OF THE EMPLOYEE'S DEATH OR THE DATE ON WHICH THE EMPLOYEE KNEW OR THROUGH THE EXERCISE OF REASONABLE DILIGENCE SHOULD HAVE KNOWN OF THE INJURY, CONDITION, OR DISEASE. <A]

[A] (B) AS USED IN THIS SECTION, "EMPLOYEE" AND "EMPLOYMENT INTENTIONAL TORT" HAVE THE SAME MEANINGS AS IN SECTION 2745.01 OF THE REVISED CODE. <A]

[A] SEC. 2745.01. (A) AN EMPLOYER IS SUBJECT TO LIABILITY TO AN EMPLOYEE OR THE DEPENDENT SURVIVORS OF A DECEASED EMPLOYEE IN AN CIVIL ACTION FOR DAMAGES FOR AN EMPLOYMENT INTENTIONAL TORT. <A]

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

[A] (C) IN AN ACTION BROUGHT UNDER THIS SECTION, BOTH OF THE FOLLOWING APPLY: <A]

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

[A] (2) NOTWITHSTANDING ANY LAW OR RULE TO THE CONTRARY PLEADING, MOTION, OR OTHER PAPER OF A PARTY REPRESENTED BY AN ATTORNEY SHALL BE SIGNED BY AT LEAST ONE ATTORNEY OF RECORD IN THE ATTORNEY'S INDIVIDUAL NAME AND IF THE PARTY IS NOT REPRESENTED BY AN ATTORNEY, THAT PARTY SHALL SIGN THE PLEADING, MOTION, OR PAPER. FOR THE PURPOSES OF THIS SECTION, THE SIGNING BY THE ATTORNEY OR PARTY CONSTITUTES A CERTIFICATION THAT THE SIGNER HAS READ THE PLEADING, ACTION, OR OTHER PAPER; THAT TO THE BEST OF THE SIGNER'S IS

KNOWLEDGE, INFORMATION, AND BELIEF FORMED AFTER REASONABLE INQUIRY IT IS WELL GROUNDED IN FACT OR A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW; AND THAT IT IS NOT INTERPOSED FOR ANY IMPROPER PURPOSE, INCLUDING, BUT NOT LIMITED TO, SING OR CAUSING UNNECESSARY DELAY OR NEEDLESS INCREASE IN THE COST OF THE ACTION. IF A PLEADING, MOTION, OR OTHER PAPER IS NOT SIGNED AS REQUIRED BY DIVISION (C)(2) OF THIS SECTION, THE COURT SHALL STRIKE THE PLEADING, MOTION, OR OTHER PAPER UNLESS THE ATTORNEY OR PARTY PROMPTLY SIGNS IT AFTER THE OMISSION IS CALLED TO HIS ATTENTION IF A PLANNING, MOTION, OR OR PAPER IS SIGNED IN VIOLATION OF DIVISION (2)(2) OF THIS SECTION, THE COURT, UPON MOTION OR UPON ITS OWN INITIATIVE, SHALL IMPOSE UPON THE PERSON WHO SIGNED IT OR THE REPRESENTED PARTY OR BOTH, AN APPROPRIATE SANCTION, INCLUDING BUT NOT LIMITED TO, AN ORDER TO PAY TO THE OTHER PARTY THE AMOUNT OF THE REASONABLE EXPENSES INCURRED DUE TO THE FILING OF THE PLEADING, MOTION, OR OTHER PAPER, INCLUDING REASONABLE ATTORNEY'S AS USED IN THIS SECTION: <A]

[A> (1) "EMPLOYMENT INTENTIONAL TORT" MEANS AN ACT COMMITTED BY AN EMPLOYER IN WHICH THE EMPLOYER DELIBERATELY AND INTENTIONALLY INJURES, CAUSES AN OCCUPATIONAL DISEASE, OR DEATH OF AN EMPLOYEE. <A]

[A> (2) "EMPLOYER" MEWS ANY PERSON WHO EMPLOYS AN INDIVIDUAL. <A]

[A> (3) "EMPLOYEE" MEANS ANY INDIVIDUAL EMPLOYED BY AN EMPLOYER. <A]

[A> (4) "EMPLOY" MEANS TO PERMIT OR SUFFER TO WORK. <A]

* * *

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OHIO 121ST GENERAL ASSEMBLY -- 1995-96 REGULAR SESSION

HOUSE BILL NO. 103

1995 Ohio HB 103

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT To enact new sections 2305.112 and **2745.01** and to repeal sections 2305.112 and **2745.01** of the Revised Code creating an employment intentional tort.

NOTICE:

[A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]

To view the next section, type .np* TRANSMIT.

To view a specific section, transmit p* and the section number. e.g. p*1

Be it enacted by the General Assembly of the State of Ohio:

[*1] SECTION 1. That new sections 2305.112 and **2745.01** of the Revised Code be enacted to read as follows:

[A> SEC. 2305.112. (A) AN ACTION FOR AN EMPLOYMENT INTENTIONAL TORT UNDER SECTION **2745.01** OF THE REVISED CODE SHALL BE BROUGHT WITHIN ONE YEAR OF THE EMPLOYEE'S DEATH OR THE DATE ON WHICH THE EMPLOYEE KNEW OR THROUGH THE EXERCISE OF REASONABLE DILIGENCE SHOULD HAVE KNOWN OF THE INJURY, CONDITION, OR DISEASE. <A]

[A> (B) AS USED IN THIS SECTION, "EMPLOYEE" AND "EMPLOYMENT INTENTIONAL TORT" HAVE THE SAME MEANINGS AS IN SECTION **2745.01** OF THE REVISED CODE. <A]

[A> SEC. **2745.01**. (A) EXCEPT AS PROVIDED IN THIS SECTION, AN EMPLOYER SHALL NOT BE LIABLE TO RESPOND IN DAMAGES AT COMMON LAW OR BY STATUTE FOR AN INTENTIONAL TORT THAT OCCURS DURING THE COURSE OF EMPLOYMENT. AN EMPLOYER ONLY SHALL BE SUBJECT TO LIABILITY TO AN EMPLOYEE OR THE DEPENDENT SURVIVORS OF A DECEASED EMPLOYEE IN A CIVIL ACTION FOR DAMAGES FOR AN EMPLOYMENT INTENTIONAL TORT. <A]

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

[A> (C) IN AN ACTION BROUGHT UNDER THIS SECTION, BOTH OF THE FOLLOWING APPLY: <A]

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

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

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

[A> (D) AS USED IN THIS SECTION: <A]

[A> (1) "EMPLOYMENT INTENTIONAL TORT" MEANS AN ACT COMMITTED BY AN EMPLOYER IN WHICH THE EMPLOYER DELIBERATELY AND INTENTIONALLY INJURES, CAUSES AN OCCUPATIONAL DISEASE OF, OR CAUSES THE DEATH OF AN EMPLOYEE. <A]

[A> (2) "EMPLOYER" MEANS ANY PERSON WHO EMPLOYS AN INDIVIDUAL. <A]

[A> (3) "EMPLOYEE" MEANS ANY INDIVIDUAL EMPLOYED BY AN EMPLOYER. <A]

[A> (4) "EMPLOY" MEANS TO PERMIT OR SUFFER TO WORK. <A]

[*2] SECTION 2. That sections 2305.112 and 2745.01 of the Revised Code are hereby repealed.

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

[*4] SECTION 4. If any provision of a section of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

HISTORY:

Approved by the Governor August 2, 1995

SPONSOR:

Thompson

2003 Ohio HB 498, *

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OHIO 125TH GENERAL ASSEMBLY -- 2003-04 REGULAR SESSION

HOUSE BILL NO. 498

2003 Ohio HB 498

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT To enact new section **2745.01** and to repeal sections 2305.112 and **2745.01** of the Revised Code to replace the existing statutory provisions on employment intentional torts with a requirement that the plaintiff in a civil action based on an employment intentional tort prove that the employer acted with intent to injure another or in the belief that the injury was substantially certain to occur.

NOTICE:

[A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]

To view the next section, type .np* TRANSMIT.

To view a specific section, transmit p* and the section number. e.g. p*1

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

[*1] Section 1. That new section **2745.01** of the Revised Code be enacted to read as follows:

[A> SEC. **2745.01**. (A) IN AN ACTION BROUGHT AGAINST AN EMPLOYER BY AN EMPLOYEE, OR BY THE DEPENDENT SURVIVORS OF A DECEASED EMPLOYEE, FOR DAMAGES RESULTING FROM AN INTENTIONAL TORT COMMITTED BY THE EMPLOYER DURING THE COURSE OF EMPLOYMENT, THE EMPLOYER SHALL NOT BE LIABLE UNLESS THE PLAINTIFF PROVES THAT THE EMPLOYER COMMITTED THE TORTIOUS ACT WITH THE INTENT TO INJURE ANOTHER OR WITH THE BELIEF THAT THE INJURY WAS SUBSTANTIALLY CERTAIN TO OCCUR. <A]

[A> (B) AS USED IN THIS SECTION, "SUBSTANTIALLY CERTAIN" MEANS THAT AN EMPLOYER ACTS WITH DELIBERATE INTENT TO CAUSE AN EMPLOYEE TO SUFFER AN INJURY, A DISEASE, A CONDITION, OR DEATH. <A]

[A> (C) DELIBERATE REMOVAL BY AN EMPLOYER OF AN EQUIPMENT SAFETY GUARD OR

DELIBERATE MISREPRESENTATION OF A TOXIC OR HAZARDOUS SUBSTANCE CREATES A REBUTTABLE PRESUMPTION THAT THE REMOVAL OR MISREPRESENTATION WAS COMMITTED WITH INTENT TO INJURE ANOTHER IF AN INJURY OR AN OCCUPATIONAL DISEASE OR CONDITION OCCURS AS A DIRECT RESULT. <A]

[A> (D) THIS SECTION DOES NOT APPLY TO CLAIMS ARISING DURING THE COURSE OF EMPLOYMENT INVOLVING DISCRIMINATION, CIVIL RIGHTS, RETALIATION, HARASSMENT IN VIOLATION OF CHAPTER 4112. OF THE REVISED CODE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS NOT COMPENSABLE UNDER CHAPTERS 4121. AND 4123. OF THE REVISED CODE, CONTRACT, PROMISSORY ESTOPPEL, OR DEFAMATION. <A]

[*2] Section 2. That sections Sec. 2305.112. and Sec. 2745.01. of the Revised Code are hereby repealed.

HISTORY:

Approved by the Governor on January 6, 2005

SPONSOR:

Faber



**CAPITOL CONNECTION BILL HISTORY FOR HB498
125th General Assembly**

HB498 EMPLOYMENT INTENTIONAL TORT (FABERK) To replace the existing statutory provisions on employment intentional torts with a requirement that the plaintiff in a civil action based on an employment intentional tort prove that the employer acted with intent to injure another or in the belief that the injury was substantially certain to occur.

12/08/2004 House concurred in Senate amendments; Vote 70-24

House Ohio House of Representatives (Floor Sessions) 12/08/2004

HB498 EMPLOYMENT INTENTIONAL TORT (FABER K) Regarding employment intentional tort.

CONCURRED 68-23

BILLS FOR THIRD CONSIDERATION

12/07/2004 Passed Senate; Vote 18-10

12/07/2004 Senate Committee recommends as amended; Vote 5-3

Senate Insurance, Commerce and Labor 12/07/2004

HB498 EMPLOYMENT INTENTIONAL TORT (FABER K) Regarding employment intentional tort. Second hearing/AMENDMENTS/POSSIBLE VOTE.

REPORTED OUT AS AMENDED. The bill was amended to list the types of employment-related claims to which the bill does not apply -- such as discrimination, civil rights, retaliation, etc.

Senate Insurance, Commerce and Labor 11/30/2004

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HB498 EMPLOYMENT INTENTIONAL TORT (FABER K) Regarding employment intentional tort. First hearing/all testimony.

Shawn Combs, assistant state director for the National Federation of Independent Businesses of Ohio (NFIB/Ohio), said the bill helps offset rulings that the Ohio Supreme Court that have created avenues for recovery of workplace injuries outside the Bureau of Worker's Compensation. Combs also asked committee members to read the written testimony by Ray Gonzales of A.V.C. Corporation who cited an example of a workplace injury that caused the company to spend dollars that would not have been spent had the bill been in effect.

11/16/2004 Referred to Senate Insurance, Commerce/Labor

Senate Insurance, Commerce and Labor 11/16/2004

HB498 EMPLOYMENT INTENTIONAL TORT (FABER K) Regarding employment intentional tort. Informal hearing/sponsor/all testimony/pending referral.

The sponsor, as he did in the House, said the bill will alleviate "the uncertainty of being sued by employees for workplace injuries" and that the bill "will clarify the existing statutory provisions on employment intentional torts with a requirement that the plaintiff in a civil action based on an employment intentional tort prove that the employer acted with intent to injure another or in the belief that the injury was substantially certain to occur."

Others to testify as proponents were Preston Garvin, special counsel to the Ohio Chamber of Commerce and Tim Headrick, a safety specialist for WCI Steel who also spoke on behalf of the Ohio Manufacturers's Association. Both said the bill would go a long way to eliminate buoy Ohio's competitiveness by eliminate frivolous lawsuits that subject the employer to litigation over workplace injuries that are covered by the OHio Bureau of Worker's Compensation.

Speaking in opposition to the bill was Phil Fulton, who spoke for the Ohio Academy of Trial Lawyers, saying similar bills have been rejected three times before by the Supreme Court of Ohio, and this bill would be no different. Echoing testimony rendered recently by Fred Gittes in the House, Fulton said the bill also lacks definitions of key terms, which only opens up the door for interpretations by the courts.

11/10/2004 Passed House; Vote 60-34

11/09/2004 House Committee recommends 6-4

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House Commerce and Labor 11/09/2004

HB498 EMPLOYMENT INTENTIONAL TORT (FABER K) Regarding employment intentional tort. Third hearing/all testimony/POSSIBLE VOTE.

Following majority and minority caucuses respectfully, proponent testimony was heard from Tim Headrick, a 30-year safety engineer for WCI Steel who said competition from overseas steel manufacturers was so fierce that, in addition to the the \$2 million he spends yearly in worker's compensation payments, WCI spends hundreds of thousands on lawyers to defend the company from worker litigation that would better be spent updating the plant with new machinery. Speaking on behalf of the Ohio Manufacturers' Association as the chairman of its Workers Compensation Committee, Headrick said of the litigious conditions WCI operates under, "The state's tort system is so tempting that workers are more and more frequently bringing their claims to court with the hope of landing the big jackpot of unlimited damages." He then took on trial lawyers, saying, "There are interests in the legal profession who offer up their services to workers as an antidote to this complexity." He said the bill is a simple one that seeks to accomplish only one statutory change, which will address the problem by "tightening the effective definition of intentional tort in response to court actions over the years."

Fred Gittes, a civil rights and employment law attorney who spoke for the Ohio Academy of Trial Lawyers, said the bill "will place workers in harmful situations" and force workers to meet "higher standards for burden of proof" that represents a shift from the employer to the employee in proving intentional torts. Gittes said the bill lacks definitions for "injury" and intentional tort," two deficiencies he said will "give a green light to the worst employers in the county" and "send the wrong message for Ohio."

Robert Minor, an attorney with the Columbus law firm of Vorys, Sater, Seymour and Pease LLP who spoke on behalf of the Ohio Self-Insurers Association (OSIA), said that, under the Constitution, "it is the legislative prerogative to decide what conduct will, or will not, give rise to civil liability" and that the Ohio legislature, in passing the bill, will "restore Ohio's law so that our system for remedying both accidents and intentional torts in the workplace has the balance enjoyed by other states."

He said the OSIA are not "asking you to create a system which, when compared with other states, could be called anti-employee, anti-safety, or even anti-lawyer...the OSIA only asks that Ohio employers be put on the same footing with employers in other states -- namely that workers' compensation will be the exclusive remedy for all workplace accidents."

Minor was clear to state that there is no "accident" when intent to harm is undertaken by an employer and that the workers' compensation system should "not shield a person who engages in such conduct." Contending that Ohio employers are "subjected to second guessing by lawyers who can argue that the employer knew or should have known that harm was likely to occur and failed to take appropriate steps," Minor concluded that Ohio's "maverick rule" places Ohio employers at a competitive disadvantage and asked that the committee "level the playing field by passing HB 498."

Following the defeat of three amendments by Rep. Timothy DeGeeter along party lines, the bill was then passed out of committee, again, along party lines.

Although not present, written testimony in support of the bill was provided by the Ohio Chapter of the National Federation of Independent Businesses and the Construction Employers Association that urged support and passage of the bill.

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House Commerce and Labor 09/07/2004

HB498 EMPLOYMENT INTENTIONAL TORT (FABER K) Regarding employment intentional tort. Second hearing.

See story above.

House Commerce and Labor 08/25/2004

HB498 EMPLOYMENT INTENTIONAL TORT (FABER K) Regarding employment intentional tort. First hearing.

Cory Noonan, Rep. Keith Faber's legislative aide, gave sponsor testimony.

Noonan told committee members that Ohio employer are facing the uncertainty of being sued by employees for workplace injuries. He said, "In addition to paying workers' compensation premiums twice a year for the 'no fault' workers' comp system and the cost of doing their best to provide a safe work environment, employers may also face a lawsuit from their employees for the same workplace injury."

He said the workers' compensation system was designed to eliminate lawsuits against employers and allow for the payment of benefits to injured employees regardless of fault.

He said Supreme Court decisions have opened the door for employees to continue to sue employers for workplace injuries in addition to availing themselves of the "no fault" workers' compensation system. He said the bill would clarify the definition of an intentional tort. He said the standard for proving an intentional tort has been essentially reduced to a negligence-based standard that is far below any reasonable definition of an intentional tort. He also said the bill would not bar intentional tort suits if they met the new definition.

The definition of intentional tort in this bill says the plaintiff must prove that the employer acted with intent to injure another or in the belief that the injury was substantially certain to occur. "Substantially certain" is defined as an employer acting with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

05/26/2004 Referred to House Commerce and Labor

05/13/2004 Introduced

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Capitol Connection Bill History is a comprehensive document of committee meeting reports and bill status entries arranged chronologically backwards. This document is an exclusive information product of Rotunda, Inc., Capitol Connection and Hannah News Service.

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Galen Avery > Toledo Law Association Logout?

Wednesday, October 29, 2008

Senate Dems Take On Mental Health Parity

HB331, HB225, HB498, HB432

Senate Democrats Tuesday tried to help House Republican Lynn Olman (Maumee) move his mental health parity bill, HB225, through the upper chamber by proposing amending it into HB331 -- the mammography bill. But the effort fell short as Senate majority members voted, for the most part, to table the amendment, citing the governor's opposition to any further insurance mandates.

Referencing similarities with the mammography issue ten years ago when insurance companies were first mandated to cover those tests, Sen. Eric Fingerhut (D-Cleveland) said that mental illness likewise touches nearly everyone and needs to be addressed through more than the \$550 limit insurance policies currently have on mental health care.

Other Democrats urged their colleagues to invoke their prerogative as one of three branches of government and pass the bill despite the "threat" from the governor. However, debate on the issue was cut off with the motion to table the amendment, which passed 16-12. Two Republicans, Sens. Spada and Schuring, voted with the Democrats against tabling.

The remainder of the Senate calendar went relatively quickly -- as fast as deliberations on nine other bills, one concurrence and one resolution can. The only other party-line vote came on HB498, the bill addressing intentional torts, which cleared the Senate 18-10.

However, Sen. Marc Dann (D-Youngstown) predicted the bill would follow the fate of three similar bills over the last 15 years: that the Supreme Court would find it unconstitutional.

Wrapping up the afternoon's work, senators insisted on their amendments to HB432 which deals with construction and demolition debris and asked for a conference committee. They also approved SR1970 (WHITE) permitting the Ohio Electoral College to conduct its official vote for President and Vice President in the Senate chamber on Monday, December 13.

Story originally published in *The Hannah Report* on December 7, 2004. Copyright 2004 Hannah News Service, Inc.

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Galen Avery > Toledo Law Association Logout?

Wednesday, October 29, 2008

House Agrees to Study Commission on Death Penalty

Hb190,hb172,hb477,hb498

Anything can happen in a lame duck legislative session and it did Wednesday as the House amended a bill increasing the mandatory minimum sentence for sexually-motivated kidnappings (HB 190-Trakas) to include Rep. Shirley Smith's (D-Cleveland) bill (HB 172). Her bill calls for the creation of a Capital Case Commission to study the way the death penalty is imposed and administered in Ohio.

Rep. Jim Hughes (R-Columbus), who said he had prosecuted numerous death penalty cases, warned that the amendment represented nothing less than the "first wedge in getting rid of the death penalty." But the vote -- 55-27 -- was a clear win for Smith, who has championed the idea through two legislative sessions.

Conservative Republicans, both pro- and anti-death penalty, joined Democrats, especially Ohio Legislative Black Caucus members, in supporting the measure. The amendment was offered by Rep. Tom Brinkman (R-Cincinnati), who said he was motivated by his "pro-life" beliefs.

Brinkman clarified that the amendment would not "end the death penalty" but would "let us be certain it is the best punishment for the crime."

One of his Southeast area colleagues, Rep. Jean Schmidt (R-Loveland), seconded Brinkman, saying, "We must put the brakes on capital punishment."

The vote on Trakas' HB190, as amended, was 77-8.

The lame duck raised its glossy head again when Minority Leader Chris Redfern (D-Catawba Island) attempted to amend the Senate-passed version of VLT legislation into HB477 -- Rep. Larry Flowers bill that would establish a gambling addiction program. His effort was far less successful, garnering only 6 votes, with 83 voting against the amendment.

Rep. Bill Seitz (R-Cincinnati), who made a valiant late-night effort to get VLT legislation passed last May, said Redfern's amendment "put the cart before the horse." The amendment would put the enabling legislation for VLTs into law, before passage of the constitutional amendment needed to make that possible, he explained. Flowers' bill, minus VLTs, passed unanimously, 91-0.

A bill (HB498-Faber) that would require the plaintiff in a civil action based on an employment intentional tort to prove that his employer acted with intent to injure or in the belief that injury was

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substantially certain to occur passed by a largely party line vote of 59-34.

Rep. Ed Jerse (R-Euclid), citing Democrats' uneasiness with certain aspects of the bill, attempted to amend it to clarify that the bill is restricted to physical injury and does not affect cases of sexual or racial harassment.

His amendment was tabled after Rep. Keith Faber (R-Celina) told the House that referencing workers' compensation and mentioning specific areas that the bill does not cover would only complicate matters.

House Speaker Larry Householder ended the session with an appreciation of veterans and particularly members of the House who had served in the armed forces.

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Wednesday, October 29, 2008

Ohio Chamber and Trail Lawyers Square Off Over Intentional Tort Bill

hb498

The Ohio House Commerce and Labor Committee Tuesday heard from a representative of the Ohio Chamber of Commerce and the chairman-elect of the Ohio Trial Lawyers Association (OTLA) as they made their case for and against HB498-Faber, a bill designed to reduce lawsuits brought by injured workers who claim their employers, through negligent or deliberate actions, created an unsafe work environment.

Preston J. Garvin, a long-time attorney who has been active on every tort reform bill since 1982, said that the state's workers' compensation system, which employers have paid into since its creation in 1912 and that has been found to be constitutional by the Supreme Court of Ohio, is the agreed-upon venue for worker claims. But, Garvin said, lawsuits arising from "intentional tort" cases have proliferated in recent times, sometimes over minor incidents like slipping on ice in a company parking lot.

As a result of the 1912 amendment to the Ohio Constitution that created the state's workers' compensation program -- a no-fault system -- Garvin said employees were given access to compensation in place of filing lawsuits against their employers. But in 1982 the Court held in *Blankenship v. Cincinnati Milllicron Chemicals* that an employee is not precluded by the Constitution from suing an employer for an intentional tort.

Then in 1984, Garvin said the Court in *Jones v. VIP Development Company* held that an intentional tort is an "act committed with the intent to injure another or committed with the belief that such injury is 'substantially certain to occur.'" The decision also enabled an employee to pursue a common law action against an employer that also allowed the worker to collect workers' compensation benefits as well. And according to Garvin, the decision further prevented a jury from knowing that a worker was receiving workers' compensation benefits for the same injury that is the subject of the lawsuit.

Over the years, the Ohio General Assembly has sought to take corrective action, but each effort -- 1986, 1993 and 1995 -- was struck down by the Court.

Garvin argued that the bill "does not eliminate intentional tort lawsuits," but does provide that when an employer deliberately removes an equipment safeguard or deliberately misrepresents a toxic or hazardous substance, then there is a "rebuttable presumption" that the injury or occupational disease occurred as a direct result of the employer's action. "This legislation will give certainty as to what constitutes an intentional tortuous act," he said.

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"Intentional tort lawsuits have a killing effect on business in Ohio," said Garvin, who noted that employers are facing hundreds of intentional tort lawsuits that result in millions of dollars in costs.

Philip J. Fulton, speaking on behalf of the OTLA, said the fact that the Court has struck down three previous legislative attempts to raise the bar so high that employees are effectively prevented from claiming intentional tort actions is reason enough to oppose this legislation, which he said contains essentially the same language as previous bills.

Characterizing the new heights contained in the bill as standards that approximate those found in murder cases, Fulton said that 99.9 percent of Ohio employers do not seek to hurt, injure or kill their employees, and therefore would likely not be subject to lawsuits claiming intentionality.

Fulton said Ohio's workers' compensation system is a good one, which has been used as a model by other states.

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Volume #74, Report #4 --Thursday, January 6, 2005

[<< back](#)**GOVERNOR TAFT SIGNS BILL LIMITING RECOVERY IN PERSONAL INJURY LAWSUITS AS 'CORNERSTONE' OF JOB CREATION AGENDA; TRIAL LAWYERS- 'IT'S A SAD DAY FOR OHIO'**

Governor Bob Taft visited a small metal fabricating company on the west side of Columbus to sign into law Thursday the latest business-backed plan to restrict a personal injury lawsuit system seen as stifling the state's economy.

"Lawsuit reform is a cornerstone of our job creation agenda," Mr. Taft said as he affixed his signature-for the first time in 2005-to two pieces of legislation: [SB 80](#) and [HB 498](#). "By signing Senate Bill 80 we take a huge step toward ending the frivolous, runaway litigation that is threatening Ohio's jobs and even the entire economy of our state," he said.

The bill signing ceremony took place at Accurate Fabrication Inc., a company that produces custom metal work for pharmaceutical and research laboratories, among other customers. The firm employs 38 union workers. Gerald Miller, its president, is chairman of Ohio Citizens Against Lawsuit Abuse and is a member of the National Federation of Independent Business.

Senator Steve Stivers (R-Columbus) sponsored SB 80, a sweeping overhaul of the injury lawsuit system. The measure limits the amount of money juries may award for pain and suffering and other non-economic damages, limits punitive damages, allows disclosure to juries of some other sources of compensation for plaintiffs, and sets a time limit for filing suits over faulty products and construction services.

Rep. Keith Faber (R-Celina) sponsored HB 498 to offset previous Ohio Supreme Court rulings that allowed injured workers to sue employers for damages on top of workers' compensation benefits. The measure requires an employee in such a lawsuit to prove an employer acted with intent to injure, or in the belief that an injury was substantially certain to occur.

Governor Taft described SB 80 as a carefully written law that would create "a fair, equitable, predictable, reliable system" of settling disputes. He said it would remove obstacles to conducting business that arise because of excessive litigation. "It will allow injured parties to fully recover their losses without forcing employers into bankruptcy or, worse yet, putting businesses out of business forever. It sends a strong message that we welcome job creation and new business investment in our state," he said.

Mr. Taft acknowledged it would take time for the bills to have a significant impact on the overall cost of doing business in the state. "Insurance companies, businesses, will be looking to see how the courts respond," he said. "I believe the legislature has drafted a bill that will withstand constitutional scrutiny and will be upheld."

Citing the previous enactment of legislation imposing damage caps in medical malpractice cases, along with the wider provisions of SB 80, Mr. Taft indicated there were no plans to offer new proposals in those areas. "I think we're done for the time being because we passed malpractice reform to deal with the doctors who are having to leave the practice, and now we have a comprehensive lawsuit reform bill," the governor said. "I think now we're in the implementation stage. And we're, of course, hoping that both of these laws will be upheld in the courts of Ohio. That's really the next step."

Previous attempts to restrict injury lawsuits have been struck down in the Ohio Supreme Court, but Mr. Taft said the current measure was drafted with those prior rulings in mind. Nonetheless, he conceded the difficulty in predicting how justices would act. "I believe that we have a court that will interpret the law and provide a greater respect for the discretion and the judgment of our legislators. But it's very hard to predict what any one justice will do on any one case," he said.

Ty Pine, state director of the NFIB/Ohio, applauded Mr. Taft's commitment in seeking the enactment of meaningful lawsuit change. "His signature today on Senate Bill 80 sends a signal that Ohio is open for business," said Mr. Pine. "Small business depends on a fair playing field to grow the economy, and this bill goes a long way toward establishing fairness by reining in frivolous lawsuits." Mr. Pine also chaired the Ohio Alliance for Civil Justice, the coalition of business, industry, medical and other trade associations that sought passage of the measure.

Ohio Citizens Against Lawsuit Abuse (OCALA) said that while SB 80 would cap liability for non-economic damages at \$350,000 per person in jury awards for non-catastrophic injuries, it would not limit recovery for lost wages, medical bills and other economic damages. Mr. Miller said his employees at Accurate Fabrication had been with him for years, and were dedicated to their craft. "It would be unfair to them to lose their livelihood due to one frivolous lawsuit," Mr. Miller said. "We thank the General Assembly and the Governor for this legislation."

Trial Lawyers Response: Not all were pleased with the new laws. The Ohio Academy of Trial Lawyers assailed Governor Taft for starting the new year by signing legislation that it said would expose Ohio families to dangerous products and practices that threaten their lives and livelihood. President Fred Gittes said SB 80 and HB 498 would protect polluters, con artists, drunken drivers, rapists, child molesters and manufacturers of dangerous products.

"Once again, our governor has demonstrated that he puts corporate profits above the welfare of the people," Mr. Gittes said in a news release. "These laws close the courthouse doors to citizens in order to put more money in the pockets of corporate executives and insurance companies. It is a sad day for Ohio."

Mr. Gittes said that even before the bills were signed, insurance companies said they would not lower insurance rates charged to consumers. "With these two pieces of legislation, Ohioans will no longer be able to hold the most dishonest businesses and dangerous individuals fully accountable. And for what? To make insurance companies more profitable," he said.

Constitutional Amendment: Separately, Ohio Citizens Against Lawsuit Abuse raised the possibility of seeking a change in the Ohio Constitution that would specify the General Assembly is authorized to set caps on awards for non-economic damages in medical malpractice and other lawsuits. Such an amendment would block courts from striking down statutory restrictions on constitutional grounds.

"I think that's something that's definitely on our agenda to start talking about and looking into. There's no plan in place for it yet. There's just talk at this point, but I think it's something we'd be

interested in," said Jeff Longstreth, OCALA executive director. "The amendment would say that the legislature has the ability to set caps. We need our premiums to come down now, and the only way that happens is with a constitutional amendment."

Mr. Longstreth indicated talk of an amendment grows out of concern over the fate of the business community's last attempt at capping awards in 1996. The Supreme Court rejected the measure. No amendment text has been written, and no determination made about whether to propose it through legislative action or a petition drive. "I think it's high time that we do something to help our medical community and our business community, and I think that a constitutional amendment is something that we certainly want to talk about."

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HOUSE SENDS WIRELESS 911 FEE, 'INTENTIONAL TORT' AND OTHER BILLS TO TAFT FOR SIGNING; CAPITAL BILL DECLARED DEAD FOR SESSION

In a stop-and-start session marked by turmoil over the Senate president's plans to wrap up business for the year, the House completed work on numerous bills that are now headed to Governor Bob Taft's desk for his signature. Those included a measure that imposes cell phone fees for 911 services and a bill that limits an injured employee's ability to sue an employer.

The House, which cleared its calendar for the day, plans to return next Tuesday to concur in Senate amendments to several bills that the upper chamber processed late Wednesday. The chamber also looks to adopt a conference report on a bill regarding construction and demolition debris landfills ([HB 432](#)).

Among the measures left in the lurch with the Senate's earlier-than-expected departure is the capital appropriations measure that had been set for introduction in the House early next week. Chairman Charles Calvert (R-Medina) canceled a Monday hearing on the bill planned for the Finance & Appropriations Committee.

Speaker Larry Householder (R-Glenford) said the capital bill would only be processed if Governor Taft sets a special session for it along with the session he plans for campaign finance reform. "We've got it all ready. It's pretty much done," he said.

Senate President Doug White (R-Manchester) was more assured of the bill's demise. "No," he said when asked about the prospects for the bill this year. "There will be only campaign finance reform" in the special session.

Wednesday's marathon House session was lengthened considerably by 11th-hour negotiations that produced Republican agreement on a measure long sought by business interests ([SB 80](#)) that includes wholesale changes to the state's civil justice laws. (*See separate story*) Given Senate President White's sudden decision to sine die in that chamber, the House was also pushed to complete action on a raft of other Senate bills Wednesday evening that otherwise would have died for purposes of the current General Assembly.

While somewhat controversial, both of the aforementioned measures passed with no debate as the House concurred in Senate amendments.

The 911 measure ([HB 361](#)), which passed 79-14, would impose through 2008 a 32 cents-per-month fee on wireless phone users to fund equipment and training for the development of wireless enhanced 911 services.

Rep. John Hagan (R-Alliance) objected to the Senate's inclusion of a provision allowing funds to be used for personnel costs once equipment and training costs have been covered, but he decided not to seek a vote against concurrence because of the Senate abrupt exit for the session.

"This legislation was never intended to pay for personnel," Mr. Hagan said, adding that he had an agreement with the bill's sponsor, Rep. Larry Flowers (R-Canal Winchester) to address the issue through legislation next year.

The House concurred with no vocal objections to Senate amendments to the "intentional tort" bill (HB 498) by a 68-23 vote. The bill requires an injured plaintiff to prove that an employer "acted with intent to injure" or believed that the injury "was substantially certain to occur."

Prior to a lengthy recess, the House also concurred in Senate amendments to bills that: allow certain townships to present referendum petitions at specified special elections (HB 256); increase the cap on what health care plans pay for mammography screenings (HB 331); streamline the process for governments to access land for sewer upgrades in the event the EPA identifies problems (HB 411); establish "agricultural security areas" and provide for certain tax exemptions (HB 414), and; allow a retirant who is reemployed in a position covered under a state retirement system to take a refund of contributions in lieu of benefits (HB 449).

Rep. Tom Brinkman (R-Cincinnati) cast the only vote in opposition to Senate changes to the agricultural security area bill. Senate amendments to the mammography screening bill were accepted 91-2, with Reps. Brinkman and Diana Fessler (R-New Carlisle) in opposition.

After returning late in the evening, the House also passed and sent to the Senate for concurrence several other bills. (*See Senate Activity Report*)

And continuing a series of farewells to members who are leaving the House at the end of the year for one reason or another, good-byes were delivered to Reps. Marilyn Slaby (R-Akron), Mary Cirelli (D-Canton), Nancy Hollister (R-Marietta), Jamie Callender (R-Willowick) and Charlie Wilson (D-St. Clairsville)

Volume #73, Report #233 --Tuesday, December 7, 2004

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SENATE OK'S INCREASE IN MAMMOGRAPHY REIMBURSEMENT RATES; ELIMINATES 29 STATE BOARDS

Senators unanimously Tuesday approved legislation that increases the reimbursement rates given to health care providers who perform mammograms. The unanimous vote came on a bill that also includes emergency language adjusting the rates patients and others will pay to obtain copies of medical records.

However, prior to voting overwhelmingly for the bill (HB 331), members tabled by a 16-12 vote a controversial amendment that would have required health care providers to offer mental health coverage as part of their insurance products.

Separately, senators approved legislation that abolishes 29 state boards or commissions and sets the salaries for Senate leaders in the next session (HB 568); specifies that Ohioans need not provide their Social Security cards when renewing driver's licenses (SB 246), establishes new standards to prove employer intentional tort (HB 498) and empowers certain local governments to take property through eminent domain in a more expedited manner (HB 411).

The mental health coverage amendment drew considerable debate. Senator Eric Fingerhut (D-Cleveland) urged his colleagues to support the proposal, saying the treatment of brain diseases is critical to the well being of thousands of Ohioans affected by mental problems.

Senator Louis Blessing (R-Cincinnati) said the Senate should table the amendment, noting that Governor Bob Taft had made it "crystal clear" that he would veto the measure if it included the mental health coverage language. The practical effect, he said, would be that lawmakers wouldn't get the mammography rate increase or the medical records provisions enacted.

Senator Robert Hagan (D-Youngstown) argued against the tabling, suggesting that members owe the citizens a full debate on the matter. He said the legislature as a whole should stand up to the governor and challenge his veto threat. "One member of your party used to say, 'Bring it on,'" he said.

Lawmakers also unanimously approved a measure that streamlines and updates the state's mine subsidence insurance program ([HB 425](#)). The bill picked up an amendment earlier Tuesday that extends Ohio's coal tax credit, a proposal opposed earlier by the Taft administration.

Senator Scott Nein (R-Middletown), who has announced plans to join an insurance industry organization after he leaves the legislature in January, recused himself from the vote mine insurance bill. He also did not participate in the mental health parity vote.

Senator Marc Dann (D-Liberty Twp.) urged defeat of the intentional tort bill. He predicted that the measure would be found unconstitutional, eliminating the stability that Senator Lynn Wachtmann (R-Napoleon) said the bill would bring to the state's business community. Nevertheless, the bill was approved by an 18-10 margin.

Senators also sent to Mr. Taft a bill that establishes a new uniform child custody jurisdiction and custody act ([SB 185](#)).

Senators also passed measures that:

--permit the establishment of agricultural security areas ([HB 414](#));

--update laws dealing with local government mergers ([HB 256](#));

--allow metropolitan park districts to expand their boards from three to five members ([HB 367](#)), and;

--designate Lancaster as the state's Pressed Glass Capitol ([HCR 36](#)).

Volume #73, Report #228 --Tuesday, November 30, 2004

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SENATE COMMITTEE HEARINGS

INSURANCE, COMMERCE & LABOR

[HB 225](#) MENTAL HEALTH INSURANCE (Olman) Prohibits discrimination in group health care policies, contracts, and agreements in the coverage provided for the diagnosis, care, and treatment of biologically based mental illnesses. [Full Text](#)

[CONTINUED](#) (See separate story)

[HB 498](#) INTENTIONAL TORT (Faber) Replaces the existing statutory provisions on

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employment intentional torts with a requirement that the plaintiff in a civil action based on an employment intentional tort prove that the employer acted with intent to injure another or in the belief that the injury was substantially certain to occur. [Full Text](#)

CONTINUED

The Ohio Chapter of the National Federation of Independent Business said the bill was needed to offset a series of Ohio Supreme Court rulings. Shawn Combs, assistant director, said the court opinions had created an additional avenue for recovery through litigation over employee injuries that should fall under the exclusive remedy of workers' compensation. "While Ohio's employers continue to face a system that encourages lawsuits related to workplace accidents, other states have gained a competitive advantage," Mr. Combs said. "Many competitor states...have already passed legislation strictly limiting intentional tort lawsuits, and some don't allow for any avenues beside the workers' compensation system."

HB 425 MINE SUBSIDENCE INSURANCE (Stewart, J.) Removes current limits on mine subsidence coverage and changes provisions governing deductibles, removes the cap on the amount of reinsurance coverage that the mine subsidence underwriting association may offer, ends the annual distribution of excess moneys in the mine subsidence insurance fund to policyholders, permits a representative to be elected to the mine insurance governing board without a meeting of the members, and specifies the Ohio counties in which mine subsidence insurance must be offered in connection with property and homeowners insurance. [Full Text](#)

CONTINUED

Chairman Jay Hottinger (R-Newark) said a substitute bill was being drafted to incorporate several amendments.

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SENATE COMMITTEE HEARINGS

INSURANCE, COMMERCE & LABOR

HB 498 INTENTIONAL TORT (Faber) Replaces the existing statutory provisions on employment intentional torts with a requirement that the plaintiff in a civil action based on an employment intentional tort prove that the employer acted with intent to injure another or in the belief that the injury was substantially certain to occur. [Full Text](#)

CONTINUED

Rep. Keith Faber (R-Celina), who won 60-34 House passage of the proposal last week, said the legislation would offset previous Ohio Supreme Court rulings that allowed injured workers to sue employers for damages on top of workers' compensation benefits. He said the bill would require an employee in such a lawsuit to prove an employer acted with intent to injure or in the belief that an injury was substantially certain to occur. "House Bill 498 will not bar suits; it simply provides a definition of 'intentional.' I believe that this legislation brings the system back into balance," Rep. Faber said.

Preston Garvin, special counsel to the Ohio Chamber of Commerce, said employers face hundreds of intentional tort lawsuits in which plaintiffs are seeking millions of dollars. "Intentional tort lawsuits have a killing effect on business in the state of Ohio," Mr. Garvin said. Steel executive Tim Headrick, testifying on behalf of the Ohio Manufacturers' Association, said industry is driven by competitors and customers to control costs. "We look to the state to do its share in aggressive cost control of workers' compensation costs," Mr. Headrick said.

President-elect Philip Fulton of the Ohio Academy of Trial Lawyers pointed out the Ohio Supreme Court had three times previously struck down similar legislation as unconstitutional. "We cannot support a bill we believe is unconstitutional," Mr. Fulton said. He voiced concern over the lack of a definitional section in the one-page bill, and said its effects might unintentionally extend beyond workers' compensation to employment discrimination and other areas of litigation. Chairman Scott Nein (R-Middletown) acknowledged the past court rulings, the most recent of which occurred in 1999. "This is a different court," Senator Nein said, referring to current composition of the bench.

SB 254 PRISON LABOR USE (Dann) Eliminates the use of prison labor by public and private entities for employment in construction and in trade industries on jobs subject to competitive bidding requirements. [Full Text](#)

CONTINUED

Senator Marc Dann (D-Niles) delivered sponsor testimony in which he said the bill would limit the use of state money spent on contracts awarded to Ohio Penal Industries. The measure would prohibit use of prison labor for contracts that are subject to competitive bidding requirements in the construction and trade industry fields. "This comes down to a simple choice: a choice between law-abiding, hard-working citizens and incarcerated felons. I ask this committee to choose the law-abiding citizens," he said.

SB 261 INTERIOR DESIGNERS (Armbruster) To permit interior designers who meet certain requirements to be certified as Ohio Certified Interior Designers by the State Board for Certified Interior Designers, which is created. [Full Text](#)

CONTINUED

Sponsoring Senator Jeff Armbruster (R-N. Ridgeville) said individuals still could work as interior designers in Ohio under the bill even without registering with a proposed licensing board. However, they would not be allowed to call themselves "state certified" or "state licensed." Senator Armbruster said consumers rely on the government to ensure that business people meet a certain professional standard. "When consumers are paying a good deal of money to have someone come in and make major and sometimes permanent changes to their home, they have a right to know whether or not the interior designer they are employing is good enough to be licensed by the state," he said.

SB 263 UNIVERSAL HEALTH CARE (Hagan, R.) Establishes and operates the Ohio Health Care Plan to provide universal health care coverage to all Ohio residents. [Full Text](#)

CONTINUED (See separate story)

SB 266 INSURANCE COMPANY LIABILITY (Miller, R.) Asserts that an insurer is liable for its agent's misfeasance and malfeasance when committed within the agent's apparent authority and that insureds have the right to access their insurers' financial records. [Full Text](#)

SCHEDULED BUT NOT HEARD (Sponsor request)

HB 425 MINE SUBSIDENCE INSURANCE (Stewart, J.) Removes current limits on mine subsidence coverage. [Full Text](#)

CONTINUED (No testimony)

HB 424 ELEVATOR WORKER REGULATION (McGregor) Requires the superintendent of industrial compliance to regulate elevator mechanics and elevator contractors and makes changes to the laws governing elevator serving and inspections. [Full Text](#)

CONTINUED

Gregg Rogers, a national coordinator for the Elevator Industry Work Preservation Fund, voiced support for the measure. "What the bill does is establish minimum standards that all parties who perform this type of work must meet in order to be registered with the state," Mr. Rogers said. "It requires contractors to carry minimum liability and property damage insurance and register with the state." It also would require inspectors to be qualified and insured. Mr. Rogers said the program would rely on income from fees instead of tax revenue to operate.

Governors' Appointments: The committee unanimously recommended confirmation of gubernatorial appointments listed on the agenda.

Volume #73, Report #217 --Wednesday, November 10, 2004

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HOUSE ADDS DEATH PENALTY STUDY TO SEXUAL PREDATOR SENTENCING BILL, REJECTS SLOTS AMENDMENT TO GAMBLING ADDICTION FUND

A retreat of a struck down law limiting lawsuits against employers was expected to garner the most debate of three measures on the House floor Wednesday. But bills to increase penalties for sexual crimes and create a gambling addiction program drew controversial amendments and subsequently extensive discussions in their own right.

Perhaps the most surprising result was the acceptance of an amendment offered by Rep. Tom Brinkman (R-Cincinnati) to the bill that would lengthen mandatory prison terms for sexually motivated kidnapping and rape convictions ([HB 190](#)). Mr. Brinkman's amendment, adopted on a nonpartisan 64-30 vote, would create a commission to study the death penalty process in Ohio.

More predictable was the rejection of an amendment by the House minority leader, Rep. Chris Redfern (D-Catawba Island) rolled snake eyes with his long-shot provision to force slot machines on the Ohio Lottery Commission; only six members voted in favor.

Patterned after legislation ([HB 172](#)) sponsored by Rep. Shirley Smith (D-Cleveland), a longtime capital punishment critic, Mr. Brinkman's amendment does not halt the death penalty in Ohio, the "100% pro-life" lawmaker stressed. "All this does is let us study the manner in which these death penalty cases are decided."

Ms. Smith and Reps. Jamie Callender (R-Willowick) and Jean Schmidt (R-Loveland) spoke in support of the amendment, with Ms. Schmidt suggesting there was some "divine intervention" at play because two visitors in the chamber with vested interest had come to the Statehouse not knowing that the amendment was in the works.

Rep. Jim Hughes (R-Columbus) opposed the amendment as the first "wedge" in eliminating capital punishment and offered some examples of heinous crimes that he has seen prosecuted as examples of why the death penalty is necessary. "Think about what this amendment does to the victims. What message does this amendment send them," he said in questioning why a "victims" study wasn't included.

Rep. James Trakas (R-Independence), who supported the amendment, said his bill seeks to solidify recent attempts to shore up sentencing guidelines for sex offenders. It increases the minimum sentence to 10 years for rape with a sexually violent predator specification and eight years for kidnapping with a sexual motivation specification, he said.

Mr. Redfern's amendment would have required the Ohio Lottery Commission to issue licenses to operate slot machines at horse racetracks. Patterned after the Senate version of a now-defunct

constitutional amendment, it would have split the state's share of proceeds between school building projects and college scholarships.

One of the failed slots plan's biggest supporters, Rep. Bill Seitz (R-Cincinnati), found several faults with the amendment in urging its rejection. "This is a case of putting the cart before the horse," he said. However, the lawmaker also asked that members join him in getting the resolution "spiffed up" over the next few weeks and "teed up" for the November 2005 ballot.

Mr. Redfern's amendment failed on a 6-83 vote, but the House unanimously passed the bill (HB 477) to create a set-aside in OLC's budget for a gambling addiction program. Sponsored by Rep. Larry Flowers (R-Canal Winchester), the measure calls for OLC to work with the Department of Alcohol and Drug addiction Services in creating the program, which would be funded at \$285,000 a year from the commission's advertising budget.

A relatively brief but contrasting debate ensued on the measure (HB 498) that would force an employee to prove "intent to injure another" when suing an employer over a workplace injury. Rep. Keith Faber (R-Celina) said an Ohio Supreme Court that "decided it would create expansion of liability for workplace damages" prompted his bill. He argued that its passage would make Ohio more competitive in attracting businesses from other states that limit or don't allow such "intentional tort" actions.

Rep. Ed Jerse (D-Euclid) offered an amendment to clarify that the bill would not inhibit an employee's ability to file suit for workplace harassment, but it was tabled on a 52-42 vote. Rep. Dale Miller (D-Cleveland) motioned to re-refer the measure to committee, but the move was rejected on a 37-57 vote.

Rep. Scott Oelslager (R-Canton), chairman of the House Judiciary Committee, read from the high court decision that struck down a nearly identical law as unconstitutional in 1991. (See Gongwer Ohio Report, November 9, 2004) He noted that the ruling found the standard of proof to be too high for an injured worker, and that under the law an employer could be convicted of "criminal assault" but still have "virtually zero" chance of being liable for claims under an intentional tort.

Mr. Faber rose to respond, but Speaker Larry Householder (R-Glenford) called for the roll and the bill passed 59-34.

During Wednesday's session, the House adopted resolutions in memory of former member and Supreme Court Justice Robert Edward Holmes of Columbus (HR262) and former member John O. Baker of Coshocton (HR265).

Senate session: Senators unanimously approved legislation (SB 234) that authorizes a number of transfers of state properties determined to be unneeded. Senator Larry Mumper (R-Marion), the bill's author, said transfers are authorized for 34 properties under the control of the Adjutant General's office and the Departments of Rehabilitation and Correction, Mental Health and Job and Family Services as well as parcels currently under the jurisdiction of the Attorney General's office and the Ohio School Facilities Commission. The vote was 31-0.

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SPLIT HOUSE PANEL RECOMMENDS BILL AIDING EMPLOYERS WHO FACE 'INTENTIONAL TORT' LAWSUITS FROM INJURED WORKERS

A House panel set the stage Tuesday for the third legislative attempt in 18 years to blunt an Ohio

Supreme Court ruling that allows employees hurt on the job to sue their employers for "intentional" injury on top of workers' compensation benefits.

The House Commerce and Labor Committee recommended for passage on a party line vote a measure (HB 498) that business proponents contend would restore predictability to the workers' compensation system. Opponents argue the bill would impose "an extreme definition of intentional tort" that would make it harder for injured workers to prove their cases. The bill was scheduled for a vote by the full House on Wednesday.

The committee reported the bill on a 6-4 vote after Republicans tabled two Democratic amendments. One would have defined the term "injury" to exclude such non-physical matters as employment discrimination and sexual harassment. The other would have included an Occupational Safety and Health Administration finding of a willful act as presumption of an employer's intent to injure.

Sponsoring Rep. Keith Faber (R-Celina) traced terms in the bill to former Democratic House Speaker Vernal G. Riffe Jr. "What we need to do is try to level the playing field," Rep. Faber said. "Actually this is language that was essentially first introduced by Vern Riffe under a Democratic-controlled House. What we're trying to do is narrow this issue to what 'intentional' means, to actually have intentional mean intentional in the intentional tort setting."

Rep. Faber said the measure would help reaffirm the basic tenet of workers' compensation, the insurance system in which injured workers recover damages without the need to demonstrate employer fault. "If you're injured at work you collect under workers' compensation," he said. "The intentional tort law is something that takes it outside the workers' compensation system."

Attorney Robert Minor, representing the Ohio Self-Insurers' Association, said the balance in the no-fault, no lawsuit system was upset in 1982 with an Ohio Supreme Court ruling (*Blankenship v. Cincinnati Milacron Chem., Inc.*). Justices said an employee could bring a direct lawsuit against an employer for allegedly committing an intentional tort.

"The idea that an intentional tort was not a workplace accident that would be compensated under workers' compensation was not out of line with a few other jurisdictions," Mr. Minor told the committee. "However, the Supreme Court's examples of conduct that might give rise to a finding of an intentional tort, and the court's holding that there may be a double or triple recovery, have made Ohio a maverick among the states and have encouraged lawsuits."

The General Assembly responded in 1986 with enactment of a statute to offset the court decision. Justices struck down the measure in 1991 as unconstitutional. Legislators tried again in 1995 with a new definition of employment intentional tort, or injury. Justices declared the measure unconstitutional in 1999. Philosophical, as well as political, composition of the court has since changed to produce what Governor Bob Taft has called a more business-friendly bench. He supports the pending legislation.

Tim Headrick of Warren, a steel company executive testifying on behalf of the Ohio Manufacturers' Association, said the legislation would tighten the effective definition of intentional tort in response to the previous court decisions. "The state's tort system is so tempting that workers are more and more frequently bringing their claims to court with the hope of landing the big jackpot of unlimited damages," Mr. Headrick said. He said his employer, WCI Steel, spends "several hundred thousand" dollars annually to defend against such lawsuits, in addition to the \$2 million spent annually through workers' compensation.

Fred Gittes, president of the Ohio Academy of Trial Lawyers, opposed the legislation, pointing out it failed to define the terms "injured" or "intentional tort" while changing the burden of proof injured workers must meet. He said the measure could be interpreted as all-encompassing, and not limited to physical injury which advocates maintain is the intent. Mr. Gittes said workers currently must prove employers knowingly placed them in situations substantially certain to produce injury. "That is not an easy burden to prove. There are not many of these cases being filed," Mr. Gittes said. He said the legislation "gives a green light to the worst among the business community."

The Ohio Chapter of the National Federation of Independent Business endorsed the measure as a way to restore balance to the workers' compensation system while still allowing injured parties to file suit in the event an employer acted intentionally to harm a worker. "While Ohio's employers continue to face a system that encourages lawsuits related to workplace accidents, other states have gained a competitive advantage," said Ty Pine, NFIB state director. "Many competitor states including Alabama, Georgia, Virginia, California, Florida, North Carolina, New York and other neighboring states like Pennsylvania, Michigan, and Indiana have already passed legislation strictly limiting intentional tort lawsuits, and some don't allow for any avenues beside the workers' compensation system."

Rep. George Distel of Conneaut, the ranking Democrat on the committee, said after six hearings on the legislation that he remained unclear how the proposed definition differed from previous versions declared unconstitutional. Rep. Dale Miller (D-Cleveland) said both proponents and opponents had offered persuasive testimony. "I think when in doubt we need to err on the side of injured workers in this state," he said.

Volume #73, Report #214 --Friday, November 5, 2004

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TAFT ADMINISTRATION SEES BUSY LAME DUCK SESSION LEADING INTO CHALLENGING YEAR, POTENTIALLY CROWDED BALLOTS

It's no wonder that before ticking off a lengthy list of short- and long-term goals for Governor Bob Taft's administration, including some difficult and strenuous budget choices to be tackled next spring, Chief of Staff Jon Allison reminded a post-election conference in feigned amazement that he had signed on to help the lame duck regime through its final years.

Following a hectic two months of action in the Legislature's lame duck session, Mr. Allison foresaw a flurry of activity for the first of Mr. Taft's last two years in office that could be capped by a "crowded" November 2005 general election ballot.

With House and Senate sessions set to begin next Tuesday and Wednesday, Mr. Taft and legislative leaders are gearing up for a sprint to the finish of the 125th General Assembly. Session days for both chambers are also set for Nov. 16, 17 & 30, and Dec. 1, 7 & 8. The House and Senate set Dec. 14, 15 & 16 for sessions "if necessary."

"We believe the lame duck session will bear fruit," Mr. Allison said. His list of priorities was similar to those of the Republican majority in the House and Senate.

"Tort reform," which could entail movement on one or more bills, the workers' compensation intentional tort measure ([HB 498](#)) and campaign finance reform ([SB 214](#)), were at the top of Mr. Allison's wish list, as was the passage of a "very modest" capital appropriations measure.

Noticably absent from legislative leaders' slate of short-term goals is "tax reform," a business

version of which ([HB 58](#)) remains stalled in the House Ways & Means Committee. Unlike most House standing committees, the tax panel did not schedule a meeting for next week.

Jon Husted (R-Kettering), the presumed House speaker-elect, and Senator Bill Harris (R-Ashland), the soon-to-be Senate president, both commented Thursday that tax reform needs to be discussed in the context of the penny sales tax increase that's slated to expire July 1, 2005. (See [Gongwer Ohio Report, November 4, 2004](#))

Similarly, Mr. Allison discussed tax reform more as a challenge for next year that along with school funding and Medicaid spending could serve to complicate the two-year budget deliberations. "It will be time for tough choices," he said.

Lawmakers expect to have Mr. Taft's bonded project proposals late in November or early December, but requests for local "community project" funding in the capital bill have already exponentially exceeded available funding levels. The administration plans to stay within the constitutional 5% state debt limit based on the prior year's government spending. (See [Gongwer Ohio Report, October 6, 2004](#))

Underscoring the importance of properly managing the state's debt, House Finance Chairman Charles Calvert (R-Medina) said at a post-election conference in Columbus that he views that as a key component of the panel's work in the coming months. "We do have a fairly large amount of debt out there," he said. "Debt service does have to be taken care of."

Nonetheless, the Taft administration has indicated that it plans to revisit the "Third Frontier" plan to issue more state debt for economic development and research efforts. The 10-year, \$500 million ballot issue that failed in November 2003 exempted that debt from the limits.

Along with a new Third Frontier issue, Mr. Allison said next year could bring some "crowded" ballots for the state as several state and citizen initiatives move forward. Those include potential ballot issues on universal health care, medical malpractice, gambling, government tax and spending limits, and any other referenda that may pop up.

Additionally, Mr. Allison said the state would return to the ballot next November with the renewal of "Issue 2" bonds for local infrastructure projects. Funded through the Ohio Public Works Commission, the popular 10-year program is slated to expire next year.

Volume #73, Report #172 --Tuesday, September 7, 2004

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HOUSE COMMITTEE HEARINGS

COMMERCE & LABOR

[HB 498](#) INTENTIONAL TORT (Faber) Replaces the existing statutory provisions on employment intentional torts with a requirement that the plaintiff in a civil action based on an employment intentional tort prove that the employer acted with intent to injure another or in the belief that the injury was substantially certain to occur. [Full Text](#)

[CONTINUED](#)

Preston Garvin, a lawyer representing the Ohio Chamber of Commerce, presented proponent testimony and Phil Fulton, president-elect of the Ohio Academy of Trial Lawyers, offered opponent testimony.

Mr. Garvin presented a detailed history of the legislature's actions dealing with employer R-APX- 75

intentional tort, noting that the Ohio Supreme Court has on several occasions struck down bipartisan legislative acts on the subject. As a result of the rulings, he said, businesses are subject to suits from injured employees who also receive workers' compensation benefits. He said the bill would provide employers certainty in regard to intentional tort suits, which he said bring significant litigation costs and damage the state's economy.

Mr. Garvin told the panel that the state's workers' compensation system was designed to cover employer negligence, but said juries often have a difficult time distinguishing between negligence and intentional tort. He further told the committee that the number of intentional tort suits has increased in Ohio over the past ten years, adding that many of the new complaints are based on minor injuries.

Mr. Fulton said Ohio's current intentional tort standard already exceeds the national baseline, noting that it requires that employers have knowledge that an exact danger might occur. The bill, he said, imposes a "very extreme" definition of intentional tort that imposes a higher burden on plaintiffs, adding that the Ohio Supreme Court has repeatedly found legislative actions on the subject unconstitutional.

Chairman Ron Young (R-Painesville) said he views the court's directives not as a ban on legislative action, but a statement advising lawmakers not to completely shut off intentional tort cases. Mr. Fulton said, however, that the definition in the bill would all but close off such actions. The witness added that regularly tells clients that their workers' compensation cases are confined to actions at the BWC and said he has come across very few cases that he thought might have qualified as intentional tort.

HB 507 CONTRACTOR COMPLIANCE (Stewart, J.) Requires public authorities, contractors, and subcontractors to obtain proof of compliance with specified laws from contractors, subcontractors, and lower tier subcontractors before contracting for public improvements; prohibits the approval of building plans without proof of compliance with specified laws; and establishes criminal penalties for contractors and subcontractors who contract with subcontractors and lower tier subcontractors who violate specified laws and for employers who employ illegal aliens. [Full Text](#)
[CONTINUED \(No testimony\)](#)

The committee heard no testimony but accepted a Legislative Service Commission memo detailing current laws and applicable contracting requirements. The memo notes that contractors submitting false affidavits could be subject to three crimes - falsification, filing a false affidavit or tampering - which carry penalties ranging from a first-degree misdemeanor to a third-degree felony.

The document indicates that some of the requirements outlined in the as-introduced version of the bill are already mandated. Chairman Young indicated that the bill's sponsor is considering other ways to get at the underlying problem.

Volume #73, Report #164 --Wednesday, August 25, 2004

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HOUSE COMMITTEE HEARINGS

COMMERCE & LABOR

HB 498 INTENTIONAL TORT (Faber) Replaces the existing statutory provisions on employment intentional torts with a requirement that the plaintiff in a civil action based on an employment intentional tort prove that the employer acted with intent to injure another or in

the belief that the injury was substantially certain to occur. [Full Text](#)

CONTINUED

Cory Noonan, aide to Rep. Keith Faber (R-Celina), told the panel the bill clarifies statutes regarding employer intentional tort, giving employers more certainty about the ability of employees to bring suits against them. Mr. Noonan said the state's workers' compensation system was established to relieve employers of fears driven by employee suits, but noted that rulings of the Ohio Supreme Court have "opened the door" to such suits. He said the bill more specifically defines what constitutes an intentional tort.

HB 507 CONTRACTOR COMPLIANCE (Stewart, J.) Requires public authorities, contractors, and subcontractors to obtain proof of compliance with specified laws from contractors, subcontractors, and lower tier subcontractors before contracting for public improvements; prohibits the approval of building plans without proof of compliance with specified laws; and establishes criminal penalties for contractors and subcontractors who contract with subcontractors and lower tier subcontractors who violate specified laws and for employers who employ illegal aliens. [Full Text](#)

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Rep. Jimmy Stewart (R-Athens) offered sponsor testimony, telling the panel that enactment would protect construction employees while helping assure political subdivisions that they are hiring public works contractors that are in compliance with a handful of state laws. Mr. Stewart said the bill would require contract bidders to provide certificates showing compliance with key workers' compensation, tax and personnel laws.

Responding to committee questions, Mr. Stewart said the measure is not intended penalize contractors who have reconciled problems with state agencies.

Rep. Jim McGregor (R-Gahanna) observed that political subdivisions might want to hire contractors that owe tax revenues as a way to recoup some of those funds.

Rep. George Distel (D-Conneaut) said contractors are already required to be in compliance with the laws, noting that the proposal simply furthers protections that are in place. Similarly, Chairman Ron Young (R-Painesville) questioned whether it would be "repetitive" to require the certificates and raised concerns that state agencies could subjectively hold certificates due to "poor relationships" they might have had with contractors. "This bill does just smell a little bit of the potential for over-regulation," he said.

Larry Sowers, political director for the Ohio and Vicinity Regional Council of Carpenters and Gary Dwyer of the Ohio State Building & Construction Trades Council, both testified in favor of the bill.

Mr. Sowers said the bill would discourage unscrupulous employers from exploiting workers. Further, he said, it would eliminate the competitive advantage enjoyed by contractors that don't comply with applicable laws. Mr. Sowers said the state is facing a growing problem with some contractors intentionally misclassifying workers, which allows them to avoid paying fringe benefits and workers' compensation costs.

Mr. Dwyer also touched on the misclassification issue. He said the process essentially rewards bad acting contractors, noting that the bill is needed to give good actors an equal shot at winning projects.

Following committee, Chairman Young said he's uncertain about the committee's schedule on the

bills for the rest of the year, but said he doesn't expect that either will be enacted by the end of the session.

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1.49**Statutes and Session Law****GENERAL PROVISIONS****CHAPTER 1: DEFINITIONS; RULES OF CONSTRUCTION****1.49 Determining legislative intent.**

1.49 Determining legislative intent.

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

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