

IN THE SUPREME COURT OF OHIO

CARL F. STETTER, et al.,)	
)	
Petitioners)	Case No. 2008-0972
)	
v.)	On Certified Question from the
)	Northern District of Ohio,
R.J. CORMAN DERAILMENT)	Case No. 3:07CV866
SERVICES LLC, et al.,)	
)	
Respondents.)	

AMICUS CURIAE BRIEF OF THE OHIO COUNCIL OF RETAIL MERCHANTS
IN SUPPORT OF RESPONDENTS R.J. CORMAN DERAILMENT SERVICES
LLC, ET AL.

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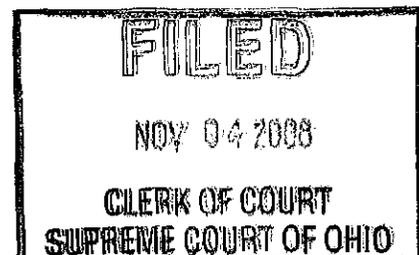


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INTRODUCTION

This brief addresses the two most important certified questions—numbers seven and eight—and provides needed context to the passage of R.C. 2745.01 and Sections 34 and 35, Article II of the Ohio Constitution.

Petitioners' brief combines a novel statutory interpretation of R.C. 2745.01 with an ahistoric theory of Sections 34 and 35 of Article II of Ohio's Constitution. Both arguments, however, ignore the actual language of R.C. 2745.01 and Sections 34 and 35, and are disembodied from relevant context that makes this Court's interpretive task far easier than distinguishing "dynamic" from "static" codifications. [Pet. Br. at 21] The answers to the certified questions are straightforward when viewed in light of the circumstances surrounding the enactment of R.C. 2745.01 and the debates about Sections 34 and 35. Revised Code 2745.01 did not preserve the common law of substantial-certainty torts. Likewise, the framers of Sections 34 and 35 intended to empower, not limit, the General Assembly in its dealing with workplace injuries.

Only by removing R.C. 2745.01 and Sections 34 and 35 from their historical contexts could the Court answer the certified questions as Petitioners desire. Viewed in the proper historical context, R.C. 2745.01 returns Ohio's workers' compensation system to the intended balance between employee compensation and employer responsibility without transgressing the Ohio Constitution.

STATEMENT OF AMICUS CURIAE INTEREST

The Ohio Council of Retail Merchants is an alliance of leading trade associations representing the spectrum of businesses in Ohio. Members of the Council include thousands of individual businesses ranging from food franchises to retail banks. The Council has an interest in preserving the proper balance between workers and employers in resolving workplace-injury claims.

STATEMENT OF THE CASE AND FACTS

The Ohio Council of Retail Merchants adopts the statement of facts and statement of the case in Respondents' brief.

ARGUMENT IN SUPPORT OF RESPONDENTS

Regarding Certified Question No. 8:

Ohio courts have erased the line between intentional and to accidental injuries by stretching the intentional-tort exception to workers' compensation. By enacting R.C. 2745.01, the General Assembly has remediated the problems that arise from an overbroad definition of intent under the "substantial certainty" test, just as other states have recently done.

Petitioners' urge an overbroad construction of R.C. 2745.01 that ignores the specific language of R.C. 2745.01(B) and tries to fold into the statute both true intentional torts and an expanding universe of substantial-certainty torts. That interpretation ignores the context provided by the General Assembly's efforts intended to scale back the intrusion of negligence theories into workers' compensation law. Petitioners' interpretation is also at odds with the context provided by reform efforts in other states. Like Ohio, other state legislatures have restored the distinction between true intentional torts and accidental injuries in the workers' compensation context.

A. The General Assembly enacted R.C. 2745.01 against a backdrop of cases permitting employee recovery for types of negligence despite the workers' compensation bargain immunizing employers from liability for workplace injuries.

Over time, Ohio courts have stretched the intentional-tort exception to workers' compensation to encompass negligent or reckless conduct by employers, and in the process have erased the line between intentional and accidental injuries. Revised Code 2745.01 must be interpreted in light of the progressive erosion of employer fault in substantial-certainty cases. In the hands of Ohio's judges, the pliable "substantial certainty" test no longer focuses on whether the employer believed that the harm was substantially certain to occur. Instead, courts have compressed the familiar hierarchy of culpability—negligence, recklessness, substantial certainty—into an elastic exception to the employer immunity conferred by the workers' compensation system. Examples of this compression are legion, and all set the stage for the General Assembly's reform eliminating the common-law substantial certainty tort by enacting R.C. 2745.01 and including a clear and unambiguous definition of the phrase "substantial certainty."

The blurring of the distinction between an "intentional" tort and an accidental injury can be seen both in decisions from this Court and in decisions of the courts of appeals. In *Bradfield v. Stop-N-Go Foods, Inc.*, this Court held that a convenience store owner took actions that he was substantially certain would lead to his store being robbed and his employee being fatally shot. (1985), 17 Ohio St.3d 58, 477 N.E.2d 621. The evidence of substantial certainty was the employer's decision to use a fake security camera instead of the real thing to deter potential criminals. The majority's conclusion that the employer knew—to a substantial certainty—that the premises would be robbed and an employee killed because he chose a fake security camera illustrates the

malleability of the substantial certainty test. Justice Holmes recognized this problem: “This utter nonsense clearly points to the horizon of counsel’s imagination that will be perpetrated on the judicial system of this state, such cases leaning upon the crutch of *Blankenship* and *Jones*. Where will it end? What is next to be considered an ‘intentional tort?’” *Id.* at 60 (Holmes, J., dissenting).

Likewise, Ohio’s courts of appeals began to undermine any clear distinction between what constituted an intentional tort and what constituted an accidental injury. In *Stockum v. Rumpke Container Service, Inc.*, the First District considered the scope of “substantial certainty.” (1985), 21 Ohio App.3d 236, 486 N.E.2d 1283. *Stockum* involved the death of an employee who was struck and killed by a landfill compactor driven by a fellow employee. *Id.* at 237. As in *Bradfield*, the majority elevated arguable negligence to substantial certainty by pointing to a malfunctioning safety device. *Id.* at 238. Again, a dissenter balked: “I cannot conceive of the instant accident and ensuing injuries and death as being ‘substantially certain’ to result from the non-functioning of the back-up signal and the failure to have a spotter.” *Id.* at 238 (Keefe, J., dissenting) (emphasis added).

Negligence masquerading as substantial certainty is not a phenomenon confined to the early cases. For example, the Eighth District reversed a trial court’s grant of summary judgment in favor of an employer despite facts more in line with negligence than an intentional tort. See *Lawrence v. LTV Steel Co., Inc.* (Ohio App. 8 Dist. Dec. 7, 2000), No. 77560, 2000 WL 1803236. The employee was injured when a crane malfunctioned and knocked over a steel structure. Setting aside the employee’s role in contributing to the accident, the court reversed a judgment for the employer. Again, a

dissent expressed disbelief that the majority could equate (at most) negligence with an intentional tort. “The majority opinion effectively permits plaintiffs to create a genuine issue of fact in an employment intentional tort case merely by producing evidence of negligence on the part of the employer in failing to remedy machine defects, even where there is no reason to believe that the employer had knowledge or a belief that the malfunctioning would likely lead to serious injury.” *Id.* at * 7 (Corrigan, J., dissenting).

The “substantial certainty” test has opened the door to intentional-tort suits for injuries that are properly compensable only through the workers’ compensation system. By compressing negligence, recklessness, and substantial certainty into a single catch-all exception to workers’ compensation immunity, Ohio courts effectively undid the intended employer-employee balance of that system. In enacting R.C. 2745.01, the General Assembly provided an unambiguous definition of “substantial certainty” and restored balance between employers’ and employees’ rights regarding workplace injuries.

B. Other states have taken similar legislative action to reverse the judicial erosion of workers’ compensation immunity.

The General Assembly’s enactment of R.C. 2745.01 also draws inspiration from the experience of other states. Contrary to Petitioners’ suggestion that the statute retains the horizonless world of *Blankenship* and *Fyffe*, R.C. 2745.01 should be interpreted in light of sister states’ efforts to reverse judicial expansion of exceptions to workers’ compensation immunity.

All but a few states limit exceptions to workers’ compensation immunity to instances where the employer truly intended to injure the employee. See, e.g., 6 Larson, *Workers’ Compensation Law* (2007) 103-2 to 103-4, Section 103.01 and 103-7 to 103-8, Section 103.03. In contrast, only 12 states, including Ohio, have permitted a “substantial

certainty” or similarly broad exception to immunity. *Id.* at 103-10 to 103-11, Section 103.04[1]. Recognizing the potential for abuse, a number of these states have limited or eliminated the “substantial certainty” test, thereby bringing their state’s intentional-tort exceptions to the workers’ compensation system more in-line with the national consensus.

Perhaps the most emphatic action was taken in Michigan, where the Supreme Court had adopted the “substantial certainty” test. *Beauchamp v. Dow Chem. Co.* (1986), 427 Mich. 1, 25, 398 N.W.2d 882. Within a year, the legislature amended the relevant statute, and “rejected the ‘substantially’ certain test previously announced in *Beauchamp* * * * and adopted the more rigorous ‘true intentional tort’ test.” *Shipman v. Fontaine Truck Equip. Co.* (1990), 184 Mich.App. 706, 715, 459 N.W.2d 30.

In Florida, the Supreme Court had likewise extended the intentional-tort exception to conduct that was substantially certain to result in injury or death. *Turner v. PCR, Inc.* (Fla.2000), 754 So.2d 683. Three years later, the legislature “overruled *Turner* in part” by “among other things, replac[ing] the ‘substantial certainty’ standard with the higher standard of ‘virtually certain.’” *FCCI Ins. Co., v. Horne* (Fla.App.2004), 890 So.2d 1141, 1143, n.5.

Similarly, in Montana, the Supreme Court had also recognized intentional-tort lawsuits grounded in a showing of “indifference to a high probability of injury.” *Sherner v. Conoco* (1999), 298 Mont. 401, 995 P.2d 990. The legislature subsequently amended the relevant statute “in reaction to” the decision in *Sherner*. *Wise v. CNH American, LLC* (2006), 333 Mont. 181, 184, 142 P.3d 774. Now, an injured employee has a cause of action “only if the employer or fellow employee causes an intentional injury.” *Id.*

Ohio's General Assembly passed R.C. 2745.01 to reverse the dilution of workers' compensation immunity and to bring Ohio law in line with the vast majority of states. Any interpretation of R.C. 2745.01 divorced from this background risks misinterpreting the General Assembly's will.

Regarding Certified Question No. 7:

Sections 34 and 35, Article II of the Ohio Constitution were enacted to expand, not limit, the General Assembly's power.

Petitioners—relying on lower appellate decisions like *Kaminski* and *Barry*—argue that Sections 34 and 35, Article II of the Constitution limit the General Assembly's legislative power. History shows, however, that Petitioners' ahistoric gloss is wrong; these sections were passed to expand legislative power. These sections of the Constitution were enacted to protect certain labor reforms, including a compulsory workers' compensation system, from a judicial doctrine hostile to these reforms—economic substantive due process. The framers of Sections 34 and 35 wanted to insulate the labor reforms from judicial hostility by expanding the General Assembly's power to deal with labor issues. Any suggestion that Sections 34 and 35 limit legislative power turns a blind eye to history.

A. Section 34, Article II of the Ohio Constitution was intended to provide the General Assembly with specific authority to enact labor laws.

Section 34 empowers the General Assembly to regulate working conditions. The language leaves no doubt that the section confers power on the General Assembly. The original language of the section—as found in Proposal 122 of the 1912 Constitutional Convention—stated:

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.

2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1913), at 1338 (emphasis added).

The transcripts of the debate reinforce the language and confirm that the primary motive behind this amendment was to ensure that the legislature had the power to enact a mandatory minimum wage. *Id.* at 1328. Although the police power already allowed for such legislation, supporters of the amendment voiced concern that recent court decisions applying economic substantive due process could invalidate the laws. The following conversation illustrates:

Mr. Hoskins: What provision of the present constitution forbids them [from passing a minimum wage]?

Mr. Dwyer: The power is not granted.

Mr. Hoskins: No, but is not our constitution a constitution of prohibitions and can not the legislature do whatever it is not prohibited from doing in the constitution?

Mr. Dwyer: I want the power given expressly so there will not be any question. You all recognize the necessity.

Id. at 1334. Section 34 was promulgated expressly to give power to the General Assembly, not to curtail that power. Petitioners' argument to the contrary ignores the legislation-enabling language of the amendment and its intended purpose.¹

¹ Petitioners' argument also indulges another historical oversight. The concern that motivated amending the Constitution to include Section 34 was a fear that a court may invalidate labor reforms by applying economic substantive due process. But economic substantive due process has been discredited since the Depression. See, e.g., *West Coast Hotel v. Parrish* (1937), 300 U.S. 379. Contrary to Petitioners' argument, Section 34 is more of a historical footnote than a robust limit on the General Assembly's power.

B. Section 35, Article II of the Ohio Constitution was intended to provide the General Assembly with specific authority to enact a mandatory workers' compensation system.

Like Section 34, Section 35, Article II was enacted to allay concerns that courts would invalidate labor reforms by applying then-prevalent ideas about economic substantive due process. Again, the language of the amendment conveys the framers' intent that the General Assembly be empowered to enact a workers' compensation system. Proposal No. 24 of the 1912 Convention provided, in part, that:

[L]aws may be passed establishing a fund to be created and administered by the state and by compulsory contribution thereto by employers; determining the terms and conditions upon which payment shall be made therefrom and taking away any or all rights of action or defenses from employees.

2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1913), at 1347 (emphasis added).

At the time of this proposal, Ohio already had a statutorily created voluntary workers compensation system. See 102 Ohio Laws 524, et seq. Before passage of Section 35, the Ohio Supreme Court upheld the system against a constitutional challenge:

We think it clear that the objects and purposes as above set forth, which the Legislature contemplated passage of the law in question, are sufficient to sustain the exercise of the police power, and the participation of the state in the manner provided.

State ex. rel. Yaple v. Creamer (1912), 85 Ohio St. 349, 391-392, 97 N.E. 602.

Nonetheless, just as with the minimum wage, the framers wanted to enshrine in the Constitution the legislative power to create a workers' compensation system so as to "make it possible to continue this beneficial measure without any further fear of a constitutional question being raised again on this matter." 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1913), at 1346.

As with Section 34, the framers had concerns about judicial invalidation of labor reforms. For Section 35, the concern arose because, “[i]n upholding the constitutionality of the first [workers’ compensation] law, [the] court emphasized the voluntary nature of the Act and strongly suggested that coercive legislation would contravene constitutional provisions.” *Taylor v. Academy Iron & Metal Co.* (1988), 36 Ohio St.3d 149, 522 N.E.2d 464 n.1, overruled on other grounds by *Conley v. Brown Corp. of Waverly, Inc.* (1998), 82 Ohio St.3d 470, 696 N.E.2d 1035.

The framers’ concerns that, without a constitutional amendment, a court might strike down a compulsory workers’ compensation law were justified, as shown by the experience in New York. New York’s mandatory workers’ compensation system was struck down under the theory that imposing liability without fault constituted a taking of property without due process of law. *Ives v. South Buffalo Ry. Co.* (1911), 201 N.Y. 271, 94 N.E. 431. In response, New York’s legislature passed a constitutional amendment permitting a mandatory system. See 1 Larson, *Workers’ Compensation Law* (2007) 2-14 to 2-15, Section 2.07.

The Court should not ignore this history through reflexive reliance on the decisions in *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722 or *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107. As the Court recently emphasized, it “will not apply stare decisis to strike down legislation enacted by the General Assembly merely because it is similar to previous enactments that we have deemed unconstitutional. To be covered by the blanket of stare decisis, the legislation must be phrased in language that is substantially the same as that which we have previously invalidated.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-

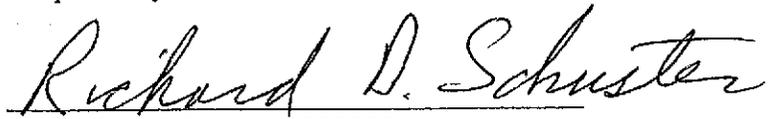
6948, 880 N.E.2d 420, ¶23 (emphasis added). Current 2745.01 is not “substantially the same” as the statutes invalidated in *Brady* and *Johnson*. This case should be resolved by applying the relevant history of Sections 34 and 35 to the current statute.

History shows that Petitioners’ constitutional arguments regarding R.C. 2745.01 and Sections 34 and 35 are unfounded. Against the backdrop of history, these sections are properly interpreted as responses to fears of a judicial threat to labor reforms. These sections were meant to empower the General Assembly to enact reforms. Therefore, Petitioners’ suggestion that these sections limit legislative power is wrong and should be rejected by this Court.

Conclusion

Context matters when interpreting statutes and constitutions. The historic context of R.C. 2745.01 and Sections 34 and 35, Article II of the Constitution shows that Petitioners’ suggested answers to the certified questions are wrong. The historic context makes the answers easy because it renders unnecessary both Petitioners’ interpretive acrobatics regarding R.C. 2745.01 and their ahistorical interpretation of Sections 34 and 35, Article II. Accordingly, this Court should answer certified question 8 “yes” and question 7 “no.”

Respectfully submitted,

A handwritten signature in black ink that reads "Richard D. Schuster". The signature is written in a cursive style and is positioned above a horizontal line.

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