

IN THE SUPREME COURT OF OHIO

CARL F. STETTER, *et al.*, : Case No. 2008-0972
: :
Plaintiffs-Petitioners, : :
: :
v. : :
: :
R.J. CORMAN DERAILMENT : :
SERVICES LLC, *et al.*, : :
: :
Defendants-Respondents. : :

**MERIT BRIEF OF *AMICUS CURIAE* INTERNATIONAL
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RESPONDENTS R. J. CORMAN DERAILMENT SERVICES LLC, *ET AL.***

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INTRODUCTION

In this workers' compensation case, the United States District Court for the Northern District of Ohio certified eight questions to this Court. Specifically, the certification requests this Court's opinion on whether Ohio Revised Code Section 2745.01 (2005) ("§ 2745.01") (employer intentional tort exception to workers' compensation) violates provisions of the Constitution of the State of Ohio. This Court agreed to review all eight certified questions of law regarding § 2745.01.

Amicus Curiae the International Association of Defense Counsel ("IADC") supports the Respondents' position that the amendments are constitutional; that the Petitioners fail to show that § 2745.01 creates dual causes of action; and that the constitutionality of the legislation before this Court should be upheld. *Amicus* limits its focus to the single issue of whether, in light of this Court's previous rulings in *Brady* and *Johnson*, the General Assembly had the legal authority under the Ohio Constitution to enact § 2745.01. *Amicus* respectfully submits that the General Assembly had authority under Article II, Section 1 of the Ohio Constitution to enact § 2745.01 and that the present version of § 2745.01 is sufficiently different and distinct from the prior versions of the statute struck down in *Brady* and *Johnson* such that § 2745.01 is a constitutionally valid legislative act entitled to this Court's deference. *Amicus* submits that present § 2745.01 can be constitutionally upheld without overruling either *Brady v. Safety-Kleen Corp.* or *Johnson v. B.P. Chems., Inc.*

The IADC fully supports the provision of § 2745.01 that an employer in the State of Ohio shall not be liable in tort to an employee, "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."

INTEREST OF AMICUS CURIAE

The International Association of Defense Counsel (“IADC”) is an association of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable only for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. The IADC is also dedicated to promoting the consistent and predictable administration of justice and preserving the appropriate roles of both the legislature and the judiciary.

STATEMENT OF THE FACTS

Amicus Curiae concurs in the recitation of the Statement of Facts as set forth in the Brief of Respondents R.J. Corman Derailment Services LLC, *et al.*

ARGUMENT

Amicus Curiae IADC's Proposition of Law

- I. THE GENERAL ASSEMBLY HAS THE AUTHORITY UNDER ARTICLE II, SECTION 1 OF THE OHIO CONSTITUTION TO ALTER THE COMMON LAW CAUSE OF ACTION FOR EMPLOYER INTENTIONAL TORTS, AND, BECAUSE § 2745.01 IS SUFFICIENTLY DIFFERENT AND DISTINCT FROM § 4121.80 AND FORMER § 2745.01, UPHOLDING PRESENT § 2745.01 DOES NOT REQUIRE THIS COURT TO OVERRULE *BRADY* AND *JOHNSON*.**

The General Assembly has the inherent authority to modify the common law cause of action for employer intentional torts, which is exactly what the General Assembly used in enacting § 2745.01. However, in doing so, the General Assembly responded to this Court's holdings in *Brady* and *Johnson* in such a manner that the statute can be upheld without overturning those precedents.

- A. Present § 2745.01 Absorbs and Changes the Common Law Definition of Employer Intentional Tort by Addressing the Shortcomings of § 4121.80.**

It is important for the Court to remember that, “[i]n determining the constitutionality of legislative enactments...[the Court]...begins with the principle that all legislative enactments enjoy a strong presumption of constitutionality.” *Brady v. Safety-Kleen Co.* (1991), 61 Ohio St.3d 624, 631 (citation omitted). Where the General Assembly has the constitutional authority to act, “the General Assembly may enact any law which is not prohibited by the Constitution.” See *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 603. Article II, Section 1 of the Ohio Constitution vests the State’s legislative power in the General Assembly. “There is no question that the legislative branch of the government...may modify or entirely abolish common law actions and defense,” so long as it is not “specifically and clearly limited in the constitution.” See *Thompson v. Ford* (1955), 164 Ohio St. 74, 79; *Champaign Cty. Bd. of Comm’rs v. Church* (1900), 62 Ohio St. 318, 344.

In enacting § 4121.80, the General Assembly sought to modify the common law definition of employer intentional tort set forth in *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90. As recognized in *Brady*, the General Assembly failed because the legislation conflicted with a limitation contained in the Constitution. However, in order to properly appreciate how present § 2745.01 differs from § 4121.80 and *Brady*, it is necessary to understand the development of the intentional tort exception to workers' compensation and the context in which present § 2745.01 exists.

1. Section 4123.74 (1959) Did Not Provide an Exception for Employer Intentional Torts Until *Blankenship* Created the Exception in 1982.

The most recent version of the statute that established the workers' compensation system is § 4123.74. Section 4123.74 contained no provision that would allow an employee to sue for an intentional tort committed by an employer. *Blankenship v. Cincinnati Milacron Chems., Inc.* (1982), 69 Ohio St.2d 608, 612. Under the statutory terms of the workers' compensation program, a worker injured as a result of an employer intentional tort had no redress to bring an intentional tort cause of action against the employer. This Court recognized that “[t]he workers’ compensation system is based on the premise that an employer is protected from a suit in negligence in exchange for compliance with the Workers’ Compensation Act.” *Id.* at 614. Where the acts of the employer are not negligent or accidental, but instead intentional, the policy behind the workers’ compensation system would not be served by barring intentional tort actions. *Id.* While *Blankenship* introduced the concept of an intentional tort exception to the workers’ compensation scheme, the Court failed to provide a standard by which acts would be judged in order to determine whether they would be considered “intentional” for purposes of the exception. In essence, *Blankenship* created an exception with no standard.

When this Court decided *Jones* in 1984, it provided the standard that *Blankenship* did not provide. The *Jones* Court created the first common law definition of an “employer intentional tort” in the context of workers’ compensation. In light of the fact that there was no statutory definition of employer intentional tort, this Court logically adopted what was in existence at the time – the Restatement standard for proving intent in a common law intentional tort action. “[A]n 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.” *Jones*, 15 Ohio St.3d at 95 (citing 1 Restatement of the Law 2d, Torts (1965) 15, Section 8A). Until the General Assembly enacted § 4121.80, the definition of an employer intentional tort was the judicially-imposed common law definition of intentional tort created in *Jones*.

2. In 1986 The General Assembly Enacted § 4121.80 to Redefine the Intentional Tort Standard.

In 1986, the General Assembly reacted to the *Jones* decision by enacting § 4121.80. “Section 4121.80 was ultimately a legislative statement that the new liberal approach established by the judiciary in regard to workers’ compensation provisions was not appropriate.” Mark A. Claybon, Ohio’s “Employment Intentional Tort”: A Workers’ Compensation Exception, or the Creation of an Entirely New Cause of Action?, 44 Clev. St. L. Rev. 381, 394 (1996). With § 4121.80, the General Assembly defined an intentional tort as, “an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.” Ohio Rev. Code Ann. § 4121.80(G) (1986). This definition of an employer intentional tort was nearly identical to the common law definition laid out by the *Jones* Court. However, under § 4121.80, “substantially certain” was satisfied only when “an employer act[ed] with deliberate intent to cause an employee to suffer injury, disease, condition, or death.” § 4121.80(G)(1). The General Assembly, by first adopting the language of *Jones* and then altering the *Jones* definition

of “substantially certain,” showed their intent to change the common law definition of employer intentional torts and implement a higher standard for the workplace.

This legislative process is relevant to the present § 2745.01 because the General Assembly chose to use nearly the identical language of § 4121.80 when it created present § 2745.01. Present § 2745.01, like § 4121.80, provides that the intentional tort exception is satisfied when, “the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.” Ohio Rev. Code Ann. § 2745.01(A). “As used in this section, substantially certain means that an employer acts with deliberate intent to cause an employee to suffer an injury....” § 2745.01(B). This demonstrates that the General Assembly, just as it attempted to do with § 4121.80, was attempting to absorb and subsequently change the common law definition laid out in *Jones* when it enacted present § 2745.01. Even though this Court held § 4121.80 unconstitutional in *Brady*, it is necessary to understand how § 2745.01 differs from § 4121.80 in order to conclude that present § 2745.01 is constitutional.

3. *Brady v. Safety-Kleen Corp.* Is Not Applicable to Present § 2745.01 Because § 2745.01 Does Not Contain the Constitutional Defects of § 4121.80.

Brady held that § 4121.80 violated Sections 34 and 35 of the Ohio Constitution. The Court’s analysis, however, stopped short of recognizing that the General Assembly had the authority under Article II, Section 1 to enact § 4121.80. Justice Brown, in his concurring opinion, noted that the statute was an unconstitutional violation of the right to trial by jury and the right to equal protection under the laws. *Brady*, 61 Ohio St.3d at 640.

The *Brady* majority found § 4121.80 unconstitutional on two primary grounds. *Id.* at 634. The first constitutional deficiency that the Court found was that in enacting § 4121.80, the General Assembly exceeded their legislative power under Section 34, Article II, of the Ohio Constitution. *Id.* at 633. Section 34 provides that:

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.

Id. at n.8. The majority found that § 4121.80 attempted to remove a right to a remedy under the common law that would otherwise benefit the employee, and thus could not be said to further the comfort, health, safety and general welfare of employees. *Id.* at 633. The Court found that the heightened burden upon employees to succeed in an employer intentional tort claim that was found in § 4121.80 was equivalent to removing the remedy entirely, thereby creating employer immunity. *Id.*

While at the time, this analysis may have been sound, a later Court - the *Johnson* Court - demonstrated the type of legislation that actually did create employer immunity. In *Johnson*, the Court indicated that former § 2745.01 (the legislation enacted subsequent to § 4121.80) created an illusory cause of action. *Johnson v. B.P. Chems., Inc.* (1999), 85 Ohio St.3d 298, 306. Because that statute required employees to prove that an employer acted with a deliberate intent to harm by clear and convincing evidence, the Court held the statute violated Section 34 of the Ohio Constitution. *Id.* The *Johnson* Court specifically distinguished former § 2745.01 from § 4121.80 in its analysis that the statute created employer immunity. "In comparing former R.C. § 4121.80 with R.C. § 2745.01, it is apparent that R.C. § 2745.01 contains standards even more stringent (excessive) than those found in former R.C. § 4121.80(G)(1), which did not require clear and convincing evidence." *Id.* at n.11. *Johnson's* comparison of former § 2745.01 with § 4121.80 demonstrates that legislation that imposes the higher clear and convincing burden of proof creates employer immunity. Because *Johnson* shows that the clear and convincing burden of proof creates employer immunity, the lower preponderance of the evidence burden in § 4121.80 did not actually create employer immunity. Although *Johnson* did not specifically

overrule *Brady, Johnson* demonstrates that § 4121.80 did not actually violate Article II, Section 34 of the Ohio Constitution.

While the majority in *Brady* also held that the General Assembly did not have the authority to enact § 4121.80 under Section 35, Article II of the Ohio Constitution, Justice Brown's concurrence provides ample support for a source of authority for such an enactment. According to Brown, "[t]his does not mean, however, that the General Assembly has no power to modify the intentional tort law by legislation. The legislature may do so in the exercise of its police power." *Brady*, 61 Ohio St.3d at 640 (citing *State, ex rel. Yaple v. Creamer* (1912), 85 Ohio St. 349). Thus, as recognized by Justice Brown, the General Assembly is authorized to enact statutes such as § 4121.80 and current § 2745.01 based on Article II, Section 1 of the Ohio Constitution.

Rather than grounding his analysis in either Sections 34 or 35 of Article II, Justice Brown, instead, concurred with the majority in *Brady* because of two constitutional deficiencies. First, the statute violated the constitutional right to trial by jury because it delegated the determinations of liability and damages to the Industrial Commission rather than to a civil jury. *Id.* at 641. Second, Justice Brown noted that the \$1 million damages cap placed on employee awards in employer intentional tort actions violated the right to equal protection under the law. *Id.* In sharp contrast, present § 2745.01, while containing a very similar definition of employer intentional tort to that found in § 4121.80, does not contain any of the objectionable provisions – the elimination of a right to civil jury trial and a damages cap – that § 4121.80 contained.

Understanding the history of § 4121.80 is relevant to present § 2745.01 because in enacting present § 2745.01, the General Assembly utilized the language of § 4121.80 to absorb and change the common law while avoiding the constitutional deficiencies identified by the

Brady Court. As the preceding analysis has shown, the *Johnson* decision shows that the lower burden of proof contained in § 4121.80 did not create employer immunity and thus passes constitutional muster. Likewise, present § 2745.01 also contains this less-stringent standard. Present § 2745.01 does not contain the constitutional infirmities pointed out by Justice Brown because present § 2745.01 does not delegate liability and damage determinations to the Industrial Commission (thereby escaping the violation of the right to trial by jury) and it also avoids the equal protection problem that § 4121.80 encountered because it does not contain a damages cap. Thus, § 2745.01 both absorbs and changes the common law while avoiding the constitutional deficiencies pointed out in *Brady*.

B. Present § 2745.01 Does Not Require Proof by Clear and Convincing Evidence of Deliberate Intent to Injure and Thus Is Substantially Dissimilar to Former § 2745.01 and Not Unconstitutional Under *Johnson*.

As a result of the *Brady* holding, the state of the employer intentional tort exception reverted to the common law standard established in *Jones*. In 1995 the General Assembly, as it did prior to § 4121.80, addressed the concern that such a broad exception to workers' compensation exclusivity would undermine the workers' compensation system. As a result, the General Assembly enacted former § 2745.01 which defined an employer intentional tort as "an act committed by an employer in which the employer deliberately and intentionally injures, causes occupational disease of, or causes the death of an employee." Ohio Rev. Code Ann. § 2745.01(A) (1995). In creating former § 2745.01, the General Assembly implemented a heightened burden of proof for employer intentional tort actions which required employees alleging an employer intentional tort to demonstrate "by clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort." § 2745.01(B). *Johnson* held that this heightened standard effectively immunized employers from any intentional tort action brought by employees. *Johnson*, 85 Ohio St.3d at 305.

Unlike former § 2745.01, the present version of the statute does not contain this heightened burden of proof. Under present § 2745.01, employees are not required to prove the deliberate act of the employer by clear and convincing evidence. Present § 2745.01 also provides two additional elements for the purpose of preventing employer immunity. First, present § 2745.01 provides that “the deliberate removal by an employer of an equipment safety or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with the intent to injure another....” Ohio Rev. Code Ann. § 2745.01 (2005). Secondly, present § 2745.01 creates a two-year statute of limitations for employer intentional torts. These two provisions were created by the General Assembly as a means of ensuring that present § 2745.01 would not create employer immunity. As a result of the lower burden of proof, the rebuttable presumption, and the extended statute of limitations, the General Assembly created a statute that avoids infringing Section 34.¹ Thus, the Court can constitutionally uphold present § 2745.01 without overruling *Johnson*.

C. The Court Should Not Adopt Petitioners’ Proposed Interpretation of § 2745.01 As Doing So Would Create a Statutory Redundancy.

It is a basic tenet of statutory construction that words in statutes should not be construed to be redundant, nor should words be ignored. *E. Ohio Gas. Co. v. Pub. Util. Comm’n* (1988), 39 Ohio St.3d 295. Petitioners’ proffered interpretation of present § 2745.01 violates this canon of construction because it creates a statutory redundancy by creating two identical causes of

¹ It is also necessary to note that the *Johnson* Court found that former § 2745.01 violated Article II, Section 35 of the Ohio Constitution. Similar to Justice Brown’s *Brady* concurrence, Justice Lundberg Stratton noted in her dissent that the General Assembly does have the authority under Article II, Section 1 of the Ohio Constitution to legislate in the arena of employer intentional torts even if one accepts the proposition that Section 35 does not grant that power to the General Assembly. *Johnson*, 85 Ohio St.3d at 319-20 (Lundberg Stratton, J., dissenting) (emphasis added).

action in the same statute. Petitioners suggest that present § 2745.01 creates two separate causes of action: (1) a cause of action for an intentional tort committed with the intent to injure another; and (2) a cause of action for an act committed with deliberate intent to injure. (Petitioners' Brief at 20.) Petitioners appear to arrive at this unique notion by relying on two apparent differences in the two causes of action which, when fully analyzed, are distinctions without any significant difference.

First, Petitioners' notion that the rebuttable presumption of the intent to injure that is created when an employer deliberately misrepresents safety information or deliberately removes a safety device only applies to the "intent to injure" cause of action and not the "deliberate intent" to injure. (*Id.* at 22.) Even assuming this interpretation was correct, the effect of such an interpretation is meaningless. The rebuttable presumption can only be used to prove the cause of action that already has a lower burden of proof. Considering that, under Petitioners' interpretation, there is no possibility of greater damages under the more difficult to prove "deliberate intent" cause of action, there is no logical or strategic reason an employee would allege a "deliberate intent" cause of action, particularly when the evidence of "deliberate intent" already creates the rebuttable presumption of the lower "intent to injure" burden. Thus, the first distinction is meaningless.

Second, Petitioners suggest that the difference between the two causes of action is that the more serious "deliberate intent" cause of action has a four-year statute of limitations as opposed to the two-year statute of limitations applicable to "intent to injure" claims.² While this

² Petitioners rely on language in *Funk v. Rent-All Mart, Inc.* (2001), 91 Ohio St.3d 78, 80. In *Funk*, the Court stated that, "[u]nless the circumstances of an action clearly indicate a battery or any other enumerated intentional tort in the Revised Code...an intentional tort by an employer...will be governed by a two-year statute of limitations." *Id.* Petitioners argue that the second "deliberate intent" cause of action under present § 2745.01 is another

is certainly a creative argument, a look at the legislative history of present § 2745.01 defeats this argument. The legislative history of the bill specifically cites the language from *Funk* cited by Petitioners: “It appears, then, that the statute of limitations for an employment intentional tort is two years, unless a battery or any other enumerated tort occurs.” Am. H.B. 498 (2004). If the General Assembly intended “deliberate intent” causes of action to be different than “intent to injure” claims by providing them with a longer statute of limitations, the General Assembly would have provided that “deliberate intent” claims are “other enumerated torts” for purposes of invoking the longer statute of limitations. However, it did not do so.

Petitioners’ strained interpretation of present § 2745.01 leads to only one conclusion: there is no real difference between the claimed “intent to injure” and “deliberate intent to injure” causes of action. The elements under each would be the same. The potential damages would be the same. The statute of limitations would be the same. In effect, such an interpretation creates two identical causes of action in the same statute and violates a basic canon of statutory construction.

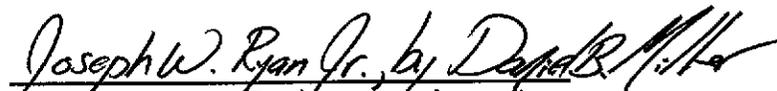
CONCLUSION

The General Assembly, by enacting § 2745.01 to define an employment intentional tort as “an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur,” succeeded in establishing a definition of the employer intentional tort that harmonized the goals of Ohio’s workers’ compensation system. Because § 2745.01 is uniquely different and distinct from § 4121.80 and former § 2745.01 and therefore does not suffer from the constitutional infirmities cited by the *Brady* and *Johnson* Courts, *Amicus*

“enumerated intentional tort” and is thus governed by a four-year statute of limitations. (Petitioners’ Brief at 35.)

Curiae IADC urges this Court to uphold the constitutionality of § 2745.01. *Amicus Curiae* also urges this Court to reject Petitioners' redundant statutory interpretation of § 2745.01.

Respectfully submitted,


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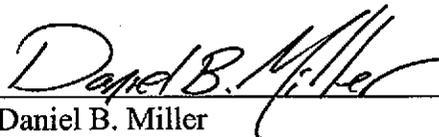
The undersigned attorney certifies that a true and correct copy of the above and foregoing Merit Brief of *Amicus Curiae* International Association of Defense Counsel in Support of Respondents R.J. Corman Derailment Services LLC, *et al.* was served by regular First Class United States Mail, postage prepaid, this 4th day of November, 2008, on the following:

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