

IN THE SUPREME COURT OF OHIO

CARL F. STETTER, et al., :
 :
 Plaintiffs-Petitioners, :
 :
 vs. : Case No. 08-0972
 :
 R.J. CORMAN DERAILEMENT :
 SERVICES LLC, et al., :
 :
 Defendants-Respondents. :

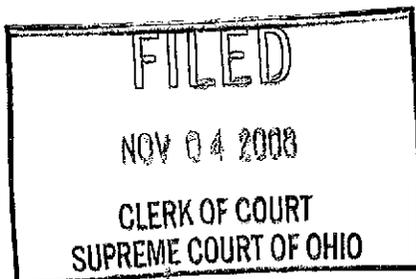
BRIEF OF AMICI CURIAE
OHIO CHAMBER OF COMMERCE,
OHIO SELF-INSURERS ASSOCIATION, AND OHIO CHAPTER OF THE
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
IN SUPPORT OF DEFENDANTS-RESPONDENTS
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	2
PROPOSITION OF LAW NO. 1.....	2
SECTION 35, ARTICLE II OF THE OHIO CONSTITUTION PRECLUDES AN EMPLOYEE FROM PURSUING COMMON LAW REMEDIES FOR WORKPLACE INJURIES AGAINST AN EMPLOYER FOR ANY CAUSE OF ACTION INCLUDING INTENTIONAL TORT	
PROPOSITION OF LAW NO. 2.....	7
IF OHIO EMPLOYERS MAY BE SUED FOR “EMPLOYMENT INTENTIONAL TORTS” IN SPITE OF THE CONSTITUTIONAL PROHIBITION, THEN OHIO REVISED CODE SECTION 2745.01, THE GENERAL ASSEMBLY’S INTENTIONAL TORT REFORM STATUTE IS CONSTITUTIONAL AND SHOULD BE GIVEN FULL AND COMPLETE EFFECT BY THE COURTS	7
CONCLUSION.....	9
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

CASES

<i>Bevis v. Armco Steel Corp.</i> (1951), 156 Ohio St. 295 at 300.....	3, 4
<i>Blankenship v. Cincinnati Milicron Chemicals, Inc.</i> (1982), 69 Ohio St. 2d 608	5, 6, 7
<i>Brady v. Safety Kleen</i> (1991), 61 Ohio St. 3d 624.....	7
<i>Greenwalt v. Goodyear Tire & Rubber Co.</i> (1955), 164 Ohio St. 1.....	4
<i>Gross v. Indus. Comm.</i> (2007), 115 Ohio St. 3d 249.....	6
<i>Johnson v. BP Chemicals, Inc.</i> (1999), 85 Ohio St. 3d 298.....	8
<i>Jones v. VIP Development Co.</i> , (1984), 15 Ohio St. 3d 90.....	8
<i>Roof v. Velsical Chemical Corp.</i> , (1974), 380 F. Supp. 1373 (N.D. Ohio)	5
<i>State ex rel. Engle v. Indus. Comm.</i> , (1944), 142 Ohio St. 425	3
<i>State ex rel. Gross v. Indus. Comm.</i> (2006), 112 Ohio St. 3d 65.....	5, 6
<i>State ex rel. Ohio AFL-CIO v. Voinovich</i> (1994), 69 Ohio St. 3d 225	8

STATUTES

G.C. 1465-70.....	4
G.C. 1465-76.....	3
R.C. 4123.35	4
R.C. 4123.74	4

CONSTITUTIONAL PROVISIONS

Section 35, Article II of the Ohio Constitution.....	2, 3, 8, 9
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STATEMENT OF INTEREST

The Ohio Chamber of Commerce (OCC) is a trade association of businesses and professional organizations in the State of Ohio with direct business membership in excess of 4,500 business firms and individuals. A non-profit corporation organized and existing under the laws of the State of Ohio, the OCC represents business, trade, and professional organizations doing business within the State and has frequently participated as amicus curiae.

The Ohio Self-Insurers Association (OSIA) was formed in 1974 to represent Ohio's self-insuring employers in workers' compensation and employer liability issues. It is the only statewide organization that represents self-insured employers exclusively and is devoted to the issue of workers' compensation and employer liability. There are over one thousand self-insured employers in the State of Ohio. Ohio's self-insured employers represent a significant part of the Ohio work force and its payroll. OSIA routinely files amicus briefs to assist its members in presenting arguments to the Ohio Supreme Court as well as other courts throughout the state.

The Ohio Chapter of the National Federation of Independent Business (NFIB) is an association with more than 25,000 governing members, making it the state's largest association dedicated exclusively to the interests of small and independent business owners. NFIB's members typically employ fewer than ten (10) people and record annual gross sales of less than \$450,000. NFIB's members are almost exclusively state fund employers.

All of these organizations and their members are vitally concerned about the issues presented in this case.

STATEMENT OF THE CASE

Amici curiae concur in the recitation of the Statement of the Case as set forth in the Brief of Respondents.

ARGUMENT

Petitioners posit in their merit brief that R.C. 2745.01 represents the legislature's waiving "a white, though tattered, flag to this Court's now-settled precedent" and its extending an "olive branch, albeit a contorted one, to the state judiciary." That is, Petitioners assert that the General Assembly did not attempt to govern or regulate common law employment intentional torts in R.C. 2745.01 but, rather, intended to create a new and additional cause of action. Amici curiae suggest that "contorted" is a modifier that would be better applied to the argument of Petitioners and that it is impossible to fairly review the legislative and judicial history of employment intentional tort in Ohio and reach the conclusion that Petitioners reach. Amici curiae find equally unfounded the other propositions of law of Petitioners and concur in the brief of Respondents. Amici curiae would offer the following, as set forth in their brief filed in Kaminski v. Wire & Metal Products Co., Case No. 08-0857, pending before this Court.

PROPOSITION OF LAW NO. 1

SECTION 35, ARTICLE II OF THE OHIO CONSTITUTION PRECLUDES AN EMPLOYEE FROM PURSUING COMMON LAW REMEDIES FOR WORKPLACE INJURIES AGAINST AN EMPLOYER FOR ANY CAUSE OF ACTION INCLUDING INTENTIONAL TORT.

Section 35, Article II of the Ohio Constitution provides in pertinent part that:

"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, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be

made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.” Effective January 1, 1924. (Emphasis added.)

In *State ex rel. Engle v. Indus. Comm.*, (1944), 142 Ohio St. 425, this Court noted that prior to 1924, Section 35 of Article II contained the following language:

“... but no right of action shall be taken away from an employee when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees.”
Engle at p. 429.

However, in 1923 the General Assembly by joint resolution (110 Ohio Laws 631) ordered, and submitted to the electors, a proposed amendment of Section 35, Article II which deleted the words quoted above. The proposed amendment was submitted to and adopted by the people in November, 1923, and became effective January 1, 1924. (*Engle* at p. 430).

As further noted by this Court in *Bevis v. Armco Steel Corp.* (1951), 156 Ohio St. 295 at 300, the 1924 amendment to Section 35, Article II replaced the deleted words with the provision that “Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries, or occupational disease.” Section 35, Article II has not been amended by the electorate since 1924.

The Court in *Bevis* further deemed it significant that in 1931 the General Assembly repealed G.C. 1465-76 which had provided that, where a personal injury was sustained by an employee while in the employ of an employer in the course of employment and where such

injury had arisen from the willful act of the employer, then in such event nothing in the workers' compensation act would affect the civil liability of such employer and the employee could, at his/her option, either claim workers' compensation benefits or institute a court proceeding for damages. *Bevis* at 300.

The *Bevis* Court also noted that effective May 26, 1939, G.C. 1465-70 was amended to provide that employers who comply with the provisions of the workers' compensation act shall not be liable to respond in damages at common law or by statute, for any injury, whether such injury is compensable under the act or not. *Bevis* at 302-303. G.C. 1465-70 survives today as R.C. 4123.74, which provides:

“Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or not such injury, occupational disease, bodily condition, or death is compensable under this chapter. (Emphasis added).

After reviewing the foregoing constitutional and statutory history, the *Bevis* Court held at page 301:

“These changes in the constitutional and statutory provisions relating to workmen's compensation make it apparent that, insofar as provisions relating to workmen's compensation bar suits against an employer, the fact that an action is based upon the 'defendant's intentional, wrongful and malicious act,' does not result in a plaintiff having any greater rights to recovery than if such action had been based merely upon negligence of the defendant.”

Accordingly, it was well-settled that an employer who complied with the workers' compensation act was immune from that liability, even if the tort could be characterized as intentional. See, *Greenwalt v. Goodyear Tire & Rubber Co.* (1955), 164 Ohio St. 1; *Roof v.*

Velsical Chemical Corp., (1974), 380 F. Supp. 1373 (N.D. Ohio). That is until the Court in *Blankenship v. Cincinnati Milicron Chemicals, Inc.* (1982), 69 Ohio St. 2d 608, swept away existing law and found that employers could be sued for intentional tort. In *Blankenship*, the legal fiction was created that an intentional tort is not an “injury” arising out of the course of employment. An examination of the facts of *Blankenship* and its progeny reveal that all of the involved injuries were received in the course of, and arose out of, the employees’ employment. All elements of the employment relationship were present. That a workplace injury might have been caused by some fault of the employer, intentional or otherwise, does not alter the fact that the injury arose out of the employment.

Recently, this Court addressed the issue of “fault” in the workers’ compensation system. This issue arose in *State ex rel. Gross v. Indus. Comm.* (2006), 112 Ohio St. 3d 65 (*Gross I*). This case involved the issue of whether a claimant is entitled to temporary total disability compensation when he was fired because of his repeated violation of company safety rules. In *Gross I*, this Court found that the claimant’s repeated willful violation leading to his termination barred him from receiving temporary total disability compensation. When this case was decided, a great deal of concern was expressed that the Court had interjected fault into the workers’ compensation system. In a Memorandum in Support of Reconsideration filed by the Ohio Academy of Trial Lawyers, joined by the Fraternal Order of Police of Ohio, this Court was asked to reconsider its decision for fear that fault might become a part of the workers’ compensation system. The Ohio Academy and the FOP put forth a proposition of law that all injuries except those purposely self-inflicted are fully compensated independent of the question of negligence, fault, or assumption of the risk. In support of this proposition, they argued that any fault would

destroy the “carefully crafted balance between employers and employees stabilizing the workers’ compensation system”

Likewise, in its Memorandum in Support of Reconsideration of the *Gross* decision, the Ohio United Auto Workers argued that workers’ compensation should be the exclusive remedy for injuries. They further noted that the rights and duties created by the Constitution were purely statutory and “did not rest upon any common law principals but exclusively on the grant of legislative authority”

After hearing from the Ohio Academy of Trial Lawyers and United Auto Workers that fault should not be interjected into the carefully balanced workers’ compensation system, the Court reconsidered *Gross I* and decided *Gross II*. In doing so, the Court stated that to the extent that the previous opinion in *Gross I* had been interpreted as injecting fault into the system, that interpretation should be rejected. *State ex rel. Gross v. Indus. Comm.* (2007), 115 Ohio St. 3d 249.

Amici curiae agree that fault should not be a part of the workers’ compensation system. Nevertheless, in *Blankenship* and its progeny, the Court has injected fault into the system, thus destroying the balance between employers and employees. Amici urge this Court to again find that fault should not be a part of the system and restore the balance between employers and employees.

The Ohio constitutional proscription is clear: Ohio employers may not be sued for work related injuries. Amici ask this Court to reverse *Blankenship v. Cincinnati Milicron, supra*, and its progeny, and find that under the Constitution, employers are immune from suit and that the

no-fault workers' compensation system is the exclusive remedy available to employees for workplace injuries.

PROPOSITION OF LAW NO. 2

IF OHIO EMPLOYERS MAY BE SUED FOR "EMPLOYMENT INTENTIONAL TORTS" IN SPITE OF THE CONSTITUTIONAL PROHIBITION, THEN OHIO REVISED CODE SECTION 2745.01, THE GENERAL ASSEMBLY'S INTENTIONAL TORT REFORM STATUTE IS CONSTITUTIONAL AND SHOULD BE GIVEN FULL AND COMPLETE EFFECT BY THE COURTS.

By introducing fault into the no-fault workers' compensation system, the Court has created uncertainty as to when an employer could be sued and the extent of damages. The workers' compensation system was designed to eliminate fault and establish fixed and certain compensation for employees who sustained work related injuries.

This Court has acknowledged on a number of occasions that there are inherent dangers in the workplace. This is especially true in manufacturing, a type of work performed by many more Ohioans at the time *Blankenship* was decided than today.

Reacting to *Blankenship*, the General Assembly has, on four separate occasions, passed legislation to re-establish certainty. In 1986 a bipartisan General Assembly passed intentional tort legislation as part of the workers' compensation system and provided fixed damages to be determined by the Industrial Commission. The 1986 negotiated legislation also included increases in benefits to employees and increased penalties to employers. This legislation was designed to restore balance to the system.

However, the 1986 legislation was struck down by this Court in *Brady v. Safety Kleen* (1991), 61 Ohio St. 3d 624. In doing so, the *Brady* Court maintained the fiction that intentional tort conduct takes place outside the employment relationship and, therefore, the workers'

compensation system could not be used to solve the problem. Once again, the balance in the system was upset.

The General Assembly's second attempt to re-establish certainty was rejected by this Court in *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St. 3d 225. This attempt was rejected on the basis of the one subject rule.

The General Assembly's third attempt to restore balance and define an employment intentional tort was struck down by this Court in *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St. 3d 298. The Court found that the General Assembly did not have authority to limit employers' liability for such employment intentional torts. Amici curiae strongly disagree. The General Assembly does have that authority and amici we would urge this Court to so find and reverse *Johnson* if necessary.

The General Assembly has for the fourth time passed legislation to provide more certainty to employers conducting business in this state by enacting R.C. 2745.01 which defines an employment intentional tort. The statute starts with the definition given by this Court in *Jones v. VIP Development Co.*, (1984), 15 Ohio St. 3d 90: namely, an act committed with the belief that injury is "substantially certain to occur". Amici submit that, if this Court finds that an employer can be sued for a workplace injury, then it is within the purview of the General Assembly to determine when and under what circumstances those suits can be filed and recovery may be made.

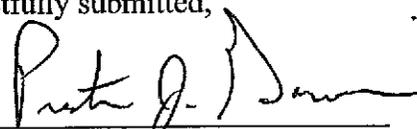
The General Assembly has now acted four times to re-establish the will of the people first expressed in 1924 with the amendment of Section 35, Article II. Amici curiae urge this Court to

accept the will of the people and the legislative role of the General Assembly to place limits on employment intentional lawsuits. R.C. 2745.01 should be held to be constitutional.

CONCLUSION

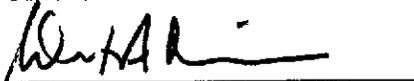
Amici curiae urge this Court to find that Section 35, Article II precludes all employee suits against employers for work related injuries. However, if this Court finds that the Constitution permits suits for work related injuries, then amici curiae urge this Court to find R.C. 2745.01 constitutional.

Respectfully submitted,

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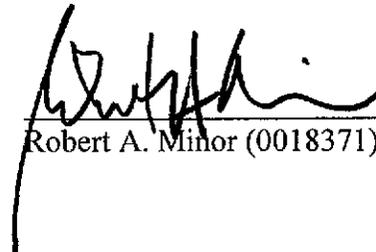
CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing has been served upon the following:

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