

No. 2008-0857

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**In The Supreme Court of Ohio**

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**APPEAL FROM THE COURT OF APPEALS  
SEVENTH APPELLATE DISTRICT  
COLUMBIANA COUNTY, OHIO  
CASE NO. 07-CO-15**

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ROSE KAMINSKI,  
*Plaintiff-Appellee,*

v.

METAL & WIRE PRODUCTS COMPANY,  
*Defendant-Appellant.*

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**MERIT BRIEF OF APPELLEE ROSE KAMINSKI**

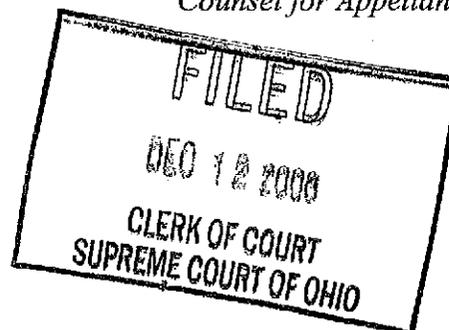
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## I. INTRODUCTION

The citizens of Ohio have two recognized constitutional rights at issue in this appeal: (1) the right to seek a civil remedy for injury caused by the intentional tort of an employer; and (2) the right to live pursuant to laws which comport with Due Process under Section 16, Article I of our Ohio Constitution. As to (1), see *Blankenship v. Cincinnati Milacron Chem. 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; *Fyffe v. Jenos, Inc.* (1991) 59 Ohio St.3d 115, 570 N.E.2d 1108; *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 634, 576 N.E.2d 722; *Johnson v. B.P. Chemicals, Inc.* (1999) 85 Ohio St. 3d: 298, 305, 707 N.E.2d 1107. As to (2) see *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 688-689, 576 N.E.2d 765; *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 423, 633 N.E.2d 504.

Plaintiff-Appellee Rose Kaminski is an Ohio citizen residing in Columbiana County. Her foot was crushed while working as a press operator for Defendant-Appellant Metal & Wire Product Co. Reasonable minds can conclude, based upon the evidence in the record, that Defendant-Appellant committed an intentional tort against Ms. Kaminski as measured by the stringent criteria set forth by this Court in 1988: "in order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: 1. knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; 2. knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition then harm to the employee will be a substantial certainty; and 3. that the employer under such circumstances and with such knowledge did act to require the employee to continue to perform the dangerous task." *Fyffe v. Jenos, Inc.* (1991) 59 Ohio St.3d 115, 570 N.E.2d 1108, explaining and modifying *Van Fossen v. Babcock & Wilcox* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, syllabus at

5, citing Section 8(A) of Restatement of Law 2<sup>nd</sup> Torts and Section 8 of Prosser & Keaston on Torts (5<sup>th</sup> Ed. 1984).

Ms. Kaminski's intentional tort action against Defendant-Appellant is one of the first cases subject to R.C. 2745.01, effective April 7, 2005. R.C. 2745.01 is the General Assembly's latest attempt to codify and effectively extinguish a well-established exception to the exclusivity of the worker's compensation system: intentional torts. On repeated occasions, this Court has held that legislative enactments promulgated to provide immunity for employers from civil liability for employee injuries, disease, or death caused by the intentionally tortious conduct of employers exceeds the limits of legislative power under the Ohio Constitution. See *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 633, 576 N.E.2d 722; *Johnson v. B.P. Chemicals, Inc.* (1999) 85 Ohio St.3d. 298, 305, 707 N.E.2d 1107.

R.C. 2745.01 utilizes an unreasonable, illogical and unnecessary definition of the words "substantial certainty" to provide employers with immunity from suit for otherwise intentionally tortious conduct. The purported legal remedy for persons subject to the statute's definition language is simply illusory. The effective immunity from suit provided by the statute is evidenced by the initial proceedings before the trial court in this matter. Like its similarly worded and purposed statutory predecessors, the statute at bar offends our Ohio Constitution for the same constitutional reasons set forth in *Brady* and *Johnson*. The Seventh District Court of Appeals decision reaching this conclusion is well-reasoned, based upon the substantial and similar precedent of this Court and should be affirmed accordingly.

Appellant urges this Court to set aside its past decisions and utilize the General Assembly's police power as a valid basis for the enactment of R.C. 2745.01. The General Assembly's police power is not absolute. It is checked by the very Constitution which gives rise to the power.

R.C. 2745.01(B)'s definition of "substantial certainty" impermissibly restricts a fundamental right to remedy, bears no relation to the public health, safety, morals or general welfare of the public and is both unreasonable and arbitrary in effect. The statute violates Ohio citizens' right to due process under Article I, Section 16 of our Ohio Constitution. R.C. 2745.01 can not be held to be a constitutionally valid exercise of the General Assembly's police power should this Court accept Defendant-Appellant's invitation to overrule and abandon substantially similar past precedent.

## **II. STATEMENT OF THE CASE AND FACTS**

### **A. Defendant-Appellant's Intentional Tort**

In June of 2005, Plaintiff Rose Kaminski was working third-shift at Defendant-Appellant's Salem manufacturing facility. (Kaminski Dep. at 20-22.) Ms. Kaminski had been working as a press operator at Defendant-Appellant Metal & Wire Products Company for a little over one year before she was injured. (Id. at 16 lns. 21-24, 17 lns. 1-2.) Ms. Kaminski had approximately five years of press-operating experience prior to working for Defendant-Appellant Metal & Wire Products Company. (Id. at 19-20.) Defendant-Appellant's supervisors considered her a skilled, safe and cautious worker. (Frederick Dep. at 21 lns. 4-5; Hardy Dep. at 14 lns. 6-9.)

The presses used by Defendant-Appellant's employees were fed by spools of metal coil which had to be replaced from time to time. (Bellinger Dep. at 23; Hardy Dep. at 15-17.) The spools of coils were fed into the press' "cradle" and ranged in size from 800 lbs. to 6,000 lbs. (Bellinger Dep. at 24 lns. 9-24, 37.) The width of the spools of coil varied according to the their respective weights, i.e. the lightest spools of coil were approximately one-half to one and one-half inches wide at the base and the heaviest spools of coil could be up to sixteen inches wide. (Bellinger Dep. at 40-41; Frederick Dep. at 21 lns. 16-24.)

A forklift was used to retrieve the replacement spool of coil from the production floor and

place it into the press' cradle. (Hardy Dep. at 18 lns. 13-21; Frederick Dep. at 24 lns. 22-24, 25 lns. 1-2.) Any employee who had passed a written forklift operator examination could operate the forklift for the purposes of changing a coil. (Bellinger Dep. at 23 lns. 16-18, 28 lns. 5-8; Hardy Dep. at 17 lns. 3-18, Stivers Dep. at 32-34.) It was well known to Defendant-Appellant that the lighter spools of coil were prone to tipping due to their narrow width. (Bellinger Dep. at 40-41; Hardy Dep. at 26 lns. 11-26; Frederick Dep. at 22-24, 28 lns. 10-20.)

Contrary to 29 CFR 1910.178(o)(1), the federal regulation requiring that industrial materials being loaded or unloaded be properly secured, one or more of the Defendant-Appellant's press operators were required to physically steady the narrow coils when the forklift operator had to set the coil down during the loading process. ("U.S. Dept. of Labor 10/06/2005 Citation and Notification of Penalty", attached to Pl. Resp. to Def.'s Mot. Summ. J. as Ex. E; Hardy Dep. at 37 lns. 23-24, 38 lns. 1-10, 39; Bellinger Dep. at 42-43, 59-60; Frederick Dep. at 25 lns. 16-23.)

The danger involved in this method of employee-balancing of narrow, exceedingly heavy metal coils being maneuvered by a forklift driver was obvious. (Bellinger Dep. at 25 ln.24, 26, lns. 1-8, 43-44; Frederick Dep. at 31-33; Hardy Dep. at 27-28; Girardi Dep. at 24-27; Kaminski Dep. at 43-44.)

On several occasions, Defendant-Appellant's third-shift supervisor, Mr. David Bellinger, had seen the coils fall over before and during the employee-balanced coil loading process. (Bellinger Dep. at 41-42, 67-68.) Despite Defendant-Appellant's knowledge of danger to employees, neither Mrs. Kaminski nor any of Defendant-Appellant's foremen, supervisors, forklift operators, or other employees ever received any formal training or instructions from Defendant-Appellant regarding the proper loading of coils. (Bellinger Dep. at 36, lns. 11-22, 52, 59 lns. 2-6, 70 lns. 8-12; Stivers Dep. at 30 lns. 15-23, 31 lns. 17-21.)

Assistant Foreman Frederick knew from prior experience that there were safer methods of transferring the coils to the presses. (Frederick Dep. at 29-31.) He had complained of the danger to Defendant-Appellant's managers and supervisors without result. (Frederick Dep. at 31-37.) He went so far as to show his superiors the safer alternatives available to them in the industrial supplier catalogs. (Frederick Dep. at 37-39.) Salem Plant Manager Kevin Ehrenberg told Mr. Fredericks that Defendant-Appellant would not pay for the expense of purchasing the safer alternatives. (Frederick Dep. at 38-39.)

On June 30, 2005, the certainty of injury was realized. Towards the end of her shift, Ms. Kaminski's press ran out of metal coil. (Kaminski Dep. at 34 lns. 19-24.) Following unofficial protocol, Ms. Kaminski spent ten minutes searching for her shift's supervisor, David Bellinger, for assistance. (Kaminski Dep. at 35-37.) Unable to locate her supervisor, who was suspected of drinking on the job, Ms. Kaminski asked her forklift-licensed co-worker, Toby Stivers, to load the coil for her. (Kaminski Dep. at 25-26, 35-37; Stivers Dep. at 23 lns. 3-10, 25.) Mr. Stivers was authorized to load the coil and had done this for Mrs. Kaminski several times before. (Stivers Dep. at 25 lns. 10-19; Bellinger Dep. at 23 lns. 16-18, 28 lns. 5-8; Hardy Dep. at 17 lns. 3-18.)

Using the forklift, Mr. Stivers retrieved the necessary 800 lb. narrow width, four to five foot tall spool of metal coil and brought it to the area where Rose was working. (Stivers Dep. at 27-30.) Her work area was crowded with coils and machinery that had been transferred to the Salem plant from the Defendant-Appellant's closed Columbiana facility. (Bellinger Dep. at 16 lns. 11-24, 50 lns. 11-22; Kaminski Dep. at 68 lns. 14-24; Stivers Dep. at 26 lns. 15-17.)

In order to load the coil into the automatic feeder, Mr. Stivers had to switch the coil from the right fork of the forklift to the left fork. (Stivers Dep. at 27-30.) Using the forklift, he set the coil upright on the floor in order to facilitate the transfer. (Id.) Knowing that the coil would have to be

balanced while he made the shift from fork to fork, Mr. Stivers looked to see if the supervisor Bellinger had re-appeared. (Stivers Dep. at 32-34.) Concerned that Mr. Bellinger was intoxicated, Mr. Stivers proceeded to place the coil on the left fork while Ms. Kaminski steadied the coil. (Id.) Neither Mr. Stivers' nor Ms. Kaminski's actions violated any company policy or rule. (Id.) Ms. Kaminski had uneventfully steadied narrow spools of coil a couple of times before this incident, and she was the only employee available to steady the coil at the time of the loading. (Kaminski Dep. at 41-44, 60 lns 22-44, 61 lns. 1-3.)

Mr. Stivers attempted to thread the left fork through the hole, a procedure that was made difficult by the obstructed view of the operator. (Stivers Dep. at 36 lns. 21-24, 37-39; Bellinger Dep. at 49 lns. 19-24, 50 lns. 1-10.) The fork bumped the coil held by Ms. Kaminski. (Kaminski Dep. at 64 lns. 8-14, 66 lns. 6-10; Stiver Dep. at 38-39.) Ms. Kaminski, her back against a non-operative press, wobbled with the coil before it fell onto her legs and feet, causing serious injury. (Kaminski Dep. at 68, lns. 4-24; Stivers Dep. at 39.) Supervisor Bellinger was discharged from Defendant-Appellant's employ approximately one month after the incident, allegedly for drinking on the job. (Bellinger Dep. at 63-64.)

**B. The Trial Court Proceedings**

Ms. Kaminski asserted both a common law intentional tort claim as well as a statutory intentional tort claim under R.C. 2745.01. She specifically alleged that R.C. 2745.01 was both unconstitutional and contrary to established Ohio Supreme Court precedent. (Pl. Compl. at ¶ 13.)

Defendant-Appellant answered and counter-claimed for a declaratory judgment that R.C. 2745.01 is constitutional. Pursuant to R.C. 2721.12, Defendant-Appellant notified the Ohio Attorney General's office of the pending declaratory judgment action and the Attorney General filed a reservation of rights and appearance in connection with the constitutional issue to be decided.

After discovery was completed, Defendant-Appellant moved for Summary Judgment on the counterclaim. Defendant-Appellant's Motion for Summary Judgment was served upon the Ohio Attorney General's office. Ms. Kaminski timely opposed Defendant's Motion for Summary Judgment and cross-moved for summary judgment declaring R.C. 2745.01 to be unconstitutional. On 12/21/06, the trial court granted Defendant-Appellant's Motion for Summary Judgment on the counter-claim and the suit proceeded under R.C. 2745.01, which states as follows:

2745.01. Employer's liability for intentional tort

(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.

(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.

(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.

(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.

Defendant-Appellant filed a Motion for Summary Judgment under R.C. 2745.01, utilizing the circuitous and illogical definition of "substantial certainty" set forth in R.C. 2745.01(B). Plaintiff timely responded by providing the trial court with evidence of Defendant-Appellant's knowledge of the dangerous process, Defendant-Appellant's knowledge that injury to an employee was substantial certainty to result if the process was continued, and Defendant-Appellant's deliberate decision to forego the purchase of remedial equipment or the institution of proper procedures. By Judgment

Entry filed on April 20, 2007, the trial court granted summary judgment in favor of Defendant-Appellant.

The trial court relied upon the R.C. 2745.01 (B) definition of “substantial certainty” and focused upon the Plaintiff-Appellee’s alleged voluntary assumption of the task of loading the press’ coil in contravention of an alleged and factually unsubstantiated company policy. Plaintiff-Appellee timely appealed the trial court’s decision to the Seventh District Court of Appeals.

**C. The Appeal in the Seventh District**

The Seventh District Court of Appeals heard oral arguments on January 30, 2008. Per the Assignments of Error and the parties’ respective Briefs, the issues before the Seventh District Court of Appeals were: (1) whether R.C. 2745.01 exceeds and conflicts with the legislative authority granted to the General Assembly pursuant to Sections 34 and 35, Article II of the Ohio Constitution; (2) whether R.C. 2745.01 comports with the requirements of Section 16, Article I of the Ohio Constitution; and (3) whether issues of fact remained to be litigated under R.C. 2745.01 or the common law standard for intentional torts set forth in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108.

The Seventh District issued its Opinion in Case No. 07-CO-15 on March 18, 2008. The Court (1) presumed the statute to be constitutional; (2) closely examined the effect of defining “substantially certain” as the “deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death” in light of this Court’s decisions in *Brady, Jones and Johnson*, supra; and (3) determined that the cause of action purportedly granted by the statute was illusory and thus unconstitutional: “[w]hen we consider the definition of “substantial certainty,” it becomes apparent that an employee does not have two ways to prove an intentional tort claim as R.C. 2745.01(A) suggests. The employee’s two options of proof become: (1) the employer acted with intent to injure

or (2) the employer acted with deliberate intent to injure. Thus, under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury. The *Johnson* court held that this type of action was simply illusory: “Under the definitional requirements contained in the statute, an employer’s conduct, in order to create civil liability, must be both *deliberate* and *intentional*. Therefore, in order to prove an intentional tort \* \* \* the employee, or his or her survivors, must prove, at a minimum, that the actions of the employer amount to criminal assault. In fact, given the elements imposed by the statute, it is even conceivable that an employer might actually be guilty of a criminal assault but exempt from civil liability under [former] R.C. 2745.01(D)(1). *Johnson*, 85 Ohio St.3d at 306-307, 707 N.E.2d 1107. Furthermore, the Ohio Supreme Court has explicitly held that a specific intent to injure is *not* necessary to a finding of intentional misconduct. *Jones*, 15 Ohio St.3d at 95, 472 N.E.2d 1046. Pursuant to the Ohio Supreme Court’s holdings in *Brady*, *supra*, and *Johnson*, *supra*, and consistent with Sections 34 and 35, Article II of the Ohio Constitution, we must conclude that R.C. 2745.01 is unconstitutional. Because of its excessive standard of requiring proof that the employer intended to cause injury, ‘it is clearly not ‘a law that furthers the “\* \* \* comfort, health, safety and general welfare of all employees.’ *Johnson*, 85 Ohio St.3d at 308, 707 N.E.2d 1107, quoting *Brady*, 61 Ohio St.3d at 633, 576 N.E.2d 722, quoting Section 34, Article II of the Ohio Constitution. Additionally, ‘because R.C. 2745.01 is an attempt by the General Assembly to govern intentional torts that occur within the employment relationship’, R.C. 2745.01 ‘cannot logically withstand constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of constitutional empowerment.’ [*Johnson*], quoting *Brady*, 61 Ohio St.3d at 634, 576 N.E.2d 722.” See 7<sup>th</sup> Dist. Opinion, Case No. 07-CO-15, at ¶ 31-34.

The Seventh District found R.C. 2745.01 unconstitutional without reaching Plaintiff-Appellant's Section 16, Article I argument. Per Defendant-Appellant's specific request, the Court then examined the factual record to determine whether issues of fact remained to be determined under the common law. After lengthy review, the Seventh District concluded that reasonable minds could conclude that Defendant-Appellant committed a common law intentional tort against Ms. Kaminski and remanded accordingly.

All other Ohio Courts of Appeals which have rendered opinions on the constitutionality of R.C. 2745.01 have explicitly followed the Seventh District's well-reasoned decision. See *Barry v. A.E. Steel Erectors, Inc.*, 8<sup>th</sup> Dist. No. 90436, 2008-Ohio-3676, at ¶ 21 (discretionary appeal filed 09/17/08, Case No. 2008-1840); *Flemming v. AAS Serv., Inc.*, 11<sup>th</sup> Dist. No.2007-P-0071, 2008-Ohio-3908 at ¶ 48 (discretionary appeal, claimed appeal of right filed 09/18/08, Case No. 2008-1852); see also *Bostwick v. NVR, Inc.* (S.D. Ohio, Western Div., June 19, 2008), Case No. 1:08-cv-076, 2008 U.S. Dist. LEXIS 73949 (recognizing unconstitutionality of R.C. § 2745.01 per *Kaminski* in Order denying Motion to Dismiss)

### III. ARGUMENT

#### Response to Proposition of Law No. 1

**The *Galatis* stare decisis test is a “well-structured method of ensuring a disciplined approach to deciding whether to abandon a precedent.” (*Westfield Ins. Co. v. Galatis*, 10 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 47 and *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546 at ¶ 135, approved and followed.)**

Defendant-Appellant urges this Court to insert “flexibility” into the stare decisis test set forth by this Court five years ago in the syllabus of *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849, syllabus at ¶ 1. *Galatis* established a three pronged test: “[a] prior decision of

the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” Id.

Defendant-Appellant requests that the dicta of a pre-*Galatis* case, *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, be incorporated into the second and third prongs of the *Galatis* test. Such an approach will implicitly eviscerate the test’s stability and predictability when applied in the context of constitutional interpretation.

**A. Recent Precedent Demonstrates that the *Galatis* Stare Decisis Test is an Effective Tool in Achieving Consistent Constitutional Jurisprudence**

Ohio’s constitutional jurisprudence will not be well-served by the evisceration of *Galatis* in order to reach Defendant-Appellant’s desired constitutional result. The *Galatis* test has proven itself reasonable and consistent in its constitutional application. Indeed, this Court has used the *Galatis* test to review prior constitutional decisions on numerous occasions without the need to insert additional “flexibility” into the analysis. See, e.g. *State ex. rel. Int’l Paper v. Trucinski*, 106 Ohio St.3d 203, 2005-Ohio-4557, 833 N.E.2d 728 at ¶ 5-14; *Cleveland Bar Ass’n v. Compmanagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, 857 N.E.2d 95 at ¶ 16-21; *In Re Estate of Holycross*, 112 Ohio St.3d 203, 2007-Ohio-1, 858 N.E.2d 805 at ¶ 21-29; *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 337 at ¶ 130-147.

The “flexibility” sought by Defendant-Appellant would result in an ever-shifting approach to using, ignoring or modifying stare decisis whenever necessary to reach a desired constitutional result. This Court has examined the results of a “flexible” approach to constitutional stare decisis in *Groch*, supra. *Groch* examined, in part, the propriety of the Ohio Supreme Court’s decision in *Brenneman v.*

*R.M.I. Co.* (1994), 70 Ohio St.3d 460, 639 N.E.2d 425. *Groch* at ¶ 130-147. *Brennaman*, decided prior to *Galatis*, overruled past constitutional precedent regarding statutes of repose seemingly at whim. *Groch* at ¶ 137.

This Court's opinion in *Groch* makes it clear that the "flexibility" sought by Defendant-Appellee in its Proposition of Law Number One does not comport with sound judicial principle: "*Brennaman* illustrates why it is imperative that the *Galatis* factors be applied. Otherwise, the principles of predictability and stability are sacrificed for the sake of judicial whims." *Groch* at ¶ 137. While the *Groch* opinion found it possible to limit *Brennaman* to its facts rather than overrule the precedent, *Groch* made it clear that the reasonable and precise approach to stare decisis set forth in *Galatis* should apply with equal force to judicial decisions involving constitutional interpretation.

Even jurists who do not believe in "rigid" adherence to stare decisis in constitutional cases seek reliability in the constitutional application of the doctrine. Justice Scalia's dissent in *Lawrence v. Texas* (2003), 539 U.S. 558, 123 S. Ct. 2472, is particularly poignant. Justice Scalia found himself on the minority side of what he observed to be an ever-shifting stare decisis doctrine: "I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick*. I do not myself believe in rigid adherence to stare decisis in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. \*\*\* To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of stare decisis set forth in *Casey*. It has thereby exposed *Casey's* extraordinary deference to precedent for the result-oriented expedient that it is." *Lawrence* at 2488-92 (Scalia, dissenting).

In the case at bar, Defendant-Appellant seeks a result-oriented revision to the standards of stare decisis set forth by this Court a mere 5 years ago. This revision is sought in order to justify,

explicitly or implicitly, the overruling of multiple prior constitutional decisions protecting Ohio citizens' right to remedy intentional torts committed against them. This Court should decline the invitation to venture into the slippery slope of unchecked constitutional subjectivity.

The separate concurrence of Justices Moyer and Stratton in *Galatis* ably explain why clear standards should apply to the doctrine of stare decisis: “[t]he majority opinion \*\*\* sets forth a tripartite standard that honors stare decisis by preventing arbitrary and discriminatory enforcement of the law while relieving courts of the obligation to apply stare decisis with ‘petrifying rigidity.’ *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 438, 1994 Ohio 519, 628 N.E.2d 46. We serve the bench and the bar by adopting a cogent, clear standard by which to test claims that our precedents should not be followed. \*\*\* . Our decision today does not mark a change in my belief in the importance of the predictability and consistency produced by stare decisis. No one should assume that our decision heralds a new era in which prior cases of this court will be routinely or arbitrarily overruled.” (Emphasis added.) *Galatis* at ¶ 66-67.

Defendant-Appellant makes much ado about the General Assembly’s purported “inability” to “correct” this Court’s interpretations of our Ohio Constitution as justification for a more “flexible” stare decisis test for overruling constitutional precedent. See Defendant-Appellant’s Merit Brief at 12. This Court is charged with the task of interpreting our Constitution. See Section 2 (B)(2)(a)(iii), Article IV, Ohio Constitution. It is well within the power of the General Assembly, should it disagree with this Court’s interpretation(s) of our state Constitution, to place a proposed constitutional amendment before the electorate by a simple three-fifths majority vote of the Assembly. See Section 1, Article XVI, Ohio Constitution.

The relative ease of amending our state Constitution is readily distinguishable from the inherently difficult proposition of amending the United States’ Constitution. Defendant-Appellant’s

reliance on U.S. Supreme Court cases in support of its “flexible” approach to constitutional stare decisis is thus misguided in light of Section 1, Article XVI of our Ohio Constitution. If this Court was wrong in deciding *Blankenship*, *Jones*, *Van Fossen*, *Fyffe*, *Brady*, and *Johnson*, supra, the constitutional will of Ohio’s citizens can be readily ascertained.

In short, the *Galatis* stare decisis test remains a “well-structured method of ensuring a disciplined approach to deciding whether to abandon a precedent” and should be applied “as-is” to Defendant-Appellant’s challenge of substantial and similar constitutional precedent. *Groch* at ¶ 135.

### **Response to Proposition of Law No. 2**

**R.C. 2745.01 is not authorized by Section 35, Article II of the Ohio Constitution, violates Section 34, Article II of the Ohio Constitution, is not a valid exercise of the General Assembly’s Police Power under Section 1, Article II of the Ohio Constitution and violates Ohio citizens’ right to due process under Section 16, Article I of the Ohio Constitution.**

Defendant-Appellant seeks to limit the analysis in this case to the propriety of this Court’s decision in *Johnson v. B.P. Chemicals, Inc.* (1999) 85 Ohio St.3d. 298, 707 N.E.2d 1107 while implicitly attacking all of this Court’s decisions from *Blankenship* to *Johnson*. The constitutional issues at the bar preclude such a narrow examination of precedent.

#### **A. This Court Has Already Considered The History of Sections 34, 35, Article II**

Defendant-Appellant asserts that this Court “did not analyze the purpose or history of the 1923 amendment to Section 35, Article II” in *Blankenship*, *Jones*, *Van Fossen*, or *Fyffe*. (Emphasis added.) See Defendant-Appellant’s Merit Brief at 22-23. This assertion is not an accurate depiction of the reasoning of this Court over the course of two and one half decades of jurisprudence.

The majority opinion of *Blankenship* is rife with historical examination of the purpose of Section 35, Article II. *Blankenship* was considered settled law for the purposes of *Jones*’ examination

of the definition of “intent.” *Jones* at 94. *Van Fossen’s* opinion, at section III, “addressed the prior holdings of this court in *Blankenship* and *Jones* and their progeny” with a detailed historical analysis which included the purpose and history of Section 35, Article II. *Van Fossen* at 109-118. Section 35 was not an issue at bar in *Fyffe*.

The majority opinion of *Brady v. Safety-Kleen Corp.* (1991) 61 Ohio St.3d 624, 576 N.E.2d 722 also went to great lengths to closely examine the history and purpose behind the Ohio workers’ compensation system and Section 35, Article II. *Brady* at 627-631. Five of the seven Justices deciding *Brady* agreed with the ultimate result of *Blankenship*, including dissenting Justice Wright. *Brady* at 658 (Wright, dissenting).

*Johnson* did not arise from the judicial ether based upon some unfounded premise. The assertion that the *Johnson* decision is based upon jurisprudence which did not examine the history and purpose of the applicable law is simply not supported by reviewing this Court’s relevant pre-*Johnson* opinions.

**B. Intentionally Tortious Conduct Always Takes Place Outside of the Employee-Employer Relationship**

Section 35, Article II of the Ohio Constitution provides the General Assembly with the power to pass laws establishing a State fund and administrating board “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 \*\*\* .” (Emphasis added.)

The General Assembly does not have the power under Section 35, Article II of the Ohio Constitution to codify an employer’s common law intentional tort as the tort necessarily occurs, outside of the employment relationship. See *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 634; *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 305, 1999-Ohio-267, at ¶ 11-12. The

rationale for this aspect of the holdings in *Brady* and *Johnson* flows from this Court's decision in *Blankenship v. Cincinnati Milacron Chem. Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572.

In *Blankenship*, this Court recognized that an intentional tort can be committed by an employer vis-à-vis an employee and is not a natural risk of the employee's employment: "where an employee asserts in his complaint a claim for damages based on an intentional tort, \* \* \* the substance of the claim is not an injury \* \* \* received or contracted by an employee in the course of or arising out of his employment' within the meaning of R.C. 4123.74 \* \* \*. No reasonable individual would equate intentional and unintentional conduct in terms of the degree of risk which faces an employee nor would such individual contemplate the risk of an intentional tort as a natural risk of employment. Since an employer's intentional conduct does not arise out of employment, R.C. 4123.74 does not bestow upon employers immunity from civil liability for their intentional torts and an employee may resort to a civil suit for damages." *Blankenship* at 612-14, accord. *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 634; *Johnson v. BP Chemicals, Inc.* 85 Ohio St.3d 298, 305, 1999-Ohio-267 ¶ 11-12.

The Opinion of the Seventh District Court of Appeals is fully in line with this accepted tenet of constitutional law. Section 35, Article II does not provide constitutional authority for the enactment of R.C. 2745.01.

C. **R.C. 2745.01, Due To Its Excessive Standard of Requiring Proof That An Employer Deliberately Intended To Cause Injury, Is Not a Law That Furthers the Comfort, Health, Safety and General Welfare of All Employees**

In 1912, during a period of sweeping enlargement and enforcement of the people's powers in their government, Ohio's citizens cemented socially beneficial labor laws into our state Constitution by amendment of Section 34, Article II. See *Patten v. The Aluminum Castings Co.* (1921), 105 Ohio

St. 1, 67-82, 136 N.E. 426 (Wanamaker, J., dissenting). Upon its amendment to our state Constitution, Section 34, Article II read: "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.* (Emphasis added.) The language of Section 34, Article II remains unchanged to this day.

Thus the legislative power under Section 34, Article II is constrained by the interests of the health, safety and general welfare of all employees. All past attempts by the General Assembly to statutorily exclude or redefine into non-existence the term "substantial certainty" as it pertains to the intentional employment tort have been held to be "totally repugnant" to Section 34, Article II of the Ohio Constitution: "[a] legislative enactment that attempts to remove a right to a remedy under 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 \*\*\*." *Brady* at 633; cited with approval by *Johnson* at 308.

In *Brady*, this Court considered the constitutionality of a statute which attempted to codify, by utilizing the authority of the State Worker's Compensation Board, the common law intentional employment tort. See former R.C. 4121.80. R.C. 4121.80(G)(1) attempted to define the term "substantial certainty" as follows: "substantial certainty means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death." The statute at bar contains the same definitional language as the statute reviewed by the *Brady* Court and found to conflict with the legislative authority granted to the General Assembly pursuant to Section 34, Article II of the Ohio Constitution. *Id.* at 635. The primary import of the *Brady* decision can not be explained away by reference to the act's other unconstitutionally suspect provisions.

In *Johnson*, the Ohio Supreme Court reviewed yet another statute which attempted to codify

and extinguish the intentional employment tort. Former R.C. 2745.01(D)(1) defined an “intentional employment tort” as: “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.”

The *Johnson* court expressed its frustration at the General Assembly’s continued attempts to codify the common-law employment intentional tort: “[w]e thought that we had made it abundantly clear that any statute created to provide employers with immunity from liability for their intentional tortious conduct cannot withstand constitutional scrutiny. Notwithstanding, the General Assembly has enacted R.C. 2745.01 and again seeks to cloak employers with immunity. In this regard, we can only assume that the General Assembly has either failed to grasp the import of our holdings in *Brady* or that the General Assembly has simply elected to willfully disregard that decision. In any event, we will state our holding in *Brady* and hopefully put to rest any confusion that seems to exist with the General Assembly in this area.” *Johnson* at 304, citing *State ex. rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St. 3d 225, 230 fn. 5, 631 N.E. 2d 582, 587.

The Ohio Supreme Court has repeatedly considered the Section 34, Article II constitutionality of statutes such as R.C. 2745.01. Yet again, the latest statute provides an illusory remedy in an effort to grant immunity to employers for intentional torts. The Seventh District Court of Appeals’ determination of the Section 34, Article II constitutional issue is supported by substantial constitutional precedent and in accordance with this Court’s instructions for reviewing acts of the General Assembly for constitutionality. “Any enactment that eliminates an individual’s right to a judgment or to a verdict properly rendered in a suit will \*\*\* be unconstitutional.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468; 2007-Ohio-6948 at ¶ 45, citing *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 426, 633 N.E.2d 504.

**D. R.C. 2745.01 Is Not a Valid Exercise of the General Assembly's Police Power**

Defendant-Appellant promotes the police power as the constitutional authority underlying the General Assembly's enactment of R.C. 2745.01. As R.C. 2745.01 clearly violates two other provision of our state Constitution, it is not a valid exercise of the General Assembly's police power.

**1. The police power of the General Assembly is constrained by constitutional limitations**

Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. *Lawton v. Steele* (1894), 152 U.S. 133, 137. It is well-settled law that the police power of the General Assembly can not be utilized to circumvent rights clearly granted in any other provision of our state Constitution. See *State ex. rel. Yaple v. Creamer* (1912), 85 Ohio St. 349, 391-92, 97 N.E. 602; *Thompson v. Ford* (1955), 164 Ohio St. 74, 79; *Brady*, supra, at 639-641 (Brown, J., concurring).

**2. Section 34, Article II is both a broad grant of authority and a limitation upon the General Assembly's police power**

Defendant Appellant casts Section 34, Article II as merely a "broad grant of authority" while conceding that Section 34, Article II can render R.C. 2745.01 unconstitutional if Section 34 places "specific and clear" limitations on the General Assembly's authority. Defendant-Appellant's Merit Brief at 28 ¶ 1, 30 ¶ 1.

This Court has held that Section 34, Article II "contains clear, certain and unambiguous language" providing that "no other provision of the Constitution may impair the intent, purpose and provisions" of Section 34. See *Rocky River v. State Employment Relations Board* (1989), 43 Ohio St.3d 1, 16, 539 N.E.2d 103, citing *State ex rel. Bd. of Trustees of Pension Fund v. Bd. of Trustees of Relief Fund* (1967), 12 Ohio St.2d 105, 107, 233 N.E.2d 135. In *Rocky River*, Section 34, Article II

was found to limit laws passed pursuant to Section 3, Article XVIII, the home rule provision, when such laws conflicted with the intent, purpose and provisions of Section 34, Article II. *Id.*, syllabus at ¶ 2.

Taken together, the prior decisions of this Court in *Brady* and *Johnson* held that the General Assembly was constrained by the intent, purposes and provisions of Section 34, Article II no matter what section of the Revised Code was used to frame the legislation. See, e.g., *Johnson* at 305, fn. 9 (“Although [former] R.C. 2745.01 was not made part of the Workers’ Compensation Act, it is abundantly clear, \*\*\*, that the overriding purpose of the statute is to shield employers from civil liability for employee injuries caused by the intentionally tortious conduct of the employer.”).

The police power of the General Assembly can not be utilized as a constitutional bypass of the intent, purpose and provisions of Section 34, Article II.

3. **Strict Scrutiny: R.C. 2745.01 (B) is not necessary to promote a compelling government interest and violates the fundamental constitutional right to due process**

Section 16, Article I of the Ohio Constitution sets forth the due process rights of Ohio citizens: “[a]ll 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. \*\*\*.”

In addition to the constitutional right to seek remedy for intentional torts enumerated and repeatedly affirmed in *Blankenship*, *Jones*, *Van Fossen*, *Fyffe*, *Brady* and *Johnson*, supra, this Court has recently reaffirmed Ohio citizens’ constitutional right to legal redress for intentional torts committed against them, as the constitutional right existed prior to the enactment of Section 5, Article I of the Ohio Constitution. See *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468; 2007 Ohio 6948 at ¶ 32, citing *Belding v. State ex. Rel. Heifner* (1929), 121 Ohio St. 393, 169 N.E. 301, syllabus, and

*Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio 3257 at ¶ 21. The right to seek a civil remedy for injury caused by an intentional tort is a fundamental constitutional right.

According to the principles of due process, governmental action which limits the exercise of fundamental constitutional rights is subject to the highest level of judicial scrutiny. *Sorrell v. Thevinir* (1994), 69 Ohio St.3d 415, 423, 633 N.E.2d 504, citing *Natl. Assn. for Advancement of Colored People v. Alabama ex rel. Patterson* (1958), 357 U.S. 449, 78 S.Ct. 1163. Under the strict scrutiny standard for reviewing legislation which restricts the exercise of fundamental rights, a statute will be considered unconstitutional unless it is shown to be necessary to promote a compelling government interest. *Id.*

By its illogical and unnecessary definition of the term “substantial certainty”, R.C. 2745.01(B) removes the right of injured employees to seek redress for the intentional torts of their employers by providing an illusory remedy. The meaning and elements of “substantial certainty” in the context of an intentional tort committed by an employer have been fleshed out in great detail. See generally *Van Fossen, Fyffe*, *supra*.

No compelling government interest has been set forth by the General Assembly to justify the restriction of Ohio citizens’ fundamental right to seek redress for the intentional torts of their employers. 2003 H.B. 498 contains no mention of any legislative findings to this effect. The Bill is noticeably bereft of any citations to objective and verifiable studies, statistics, or data demonstrating a compelling government interest. The Detailed Fiscal Analysis prepared for the General Assembly in connection with the Bill’s Fiscal Note & Local Impact Statement does not examine the effect of the definition of “substantially certain” in R.C. 2745.01(B), and states: “Since the bill in effect codifies the standard of proof accepted by Ohio’s courts following the 1999 ruling [in *Johnson*], if enacted it appears unlikely to have any noticeable effect on the number of employment intentional tort actions

filed annually. Assuming that were true then the bill should have no effect on the revenues and expenditures of the state or its political subdivisions.” See Fiscal Note & Local Impact Statement, 125<sup>th</sup> General Assembly of Ohio, H.B. 498, available at <http://www.lbo.state.oh.us/fiscalnotes/125ga/HB0498HR.HTM>.

No compelling government interest has been demonstrated by the General Assembly which would make it necessary to extinguish Ohio citizens’ fundamental right to seek a civil remedy for an intentional tort committed against them by an employer. R.C. 2745.01(B) unconstitutionally restricts a fundamental right to remedy under Section 16, Article I of the Ohio Constitution. The police power is not a constitutionally viable legislative vehicle to drive a fundamental constitutional right into extinction.

4. **Rational Basis: R.C. 2745.01 (B) bears no relation to the public health, safety, morals or general welfare of the public and violates Ohio citizens’ constitutional right to due process**

Even if this Court does not consider the right to seek redress for an intentional tort a fundamental right subject to strict judicial scrutiny, R.C. 2745.01 violates Section 16, Article I of our Constitution under the rational basis test set forth by this Court in *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 688-689, 576 N.E.2d 765, citing *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 503 N.E.2d 717 and *Schwan v. Riverside Memorial Hosp.* (1983), 6 Ohio St.3d 300, 452 N.E.2d 1337, see also *Sorrell v. Thevinir* (1994), 69 Ohio St.3d 415, 423-24, 633 N.E.2d 504. A two part test is applied to legislative enactments which do not infringe upon a fundamental right and whose validity is challenged on due process grounds: “a legislative enactment will be deemed valid on due process grounds if [1] 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.” *Id.*

R.C. 2745.01(B) does not satisfy the first prong of the due process rational basis test. By its

illogical and unnecessary definition of the term “substantial certainty”, R.C. 2745.01(B) effectively removes the right of injured employees to seek redress for the intentional torts of their employers. As such, it is not a statutory provision which bears a real and substantial relation to the public health, safety, morals or general welfare of the public.

The public health is not substantially furthered by the statute’s definition, it is jeopardized by the immunity afforded employers for their intentionally tortious conduct. No rational person can argue that defining “substantially certain” as “the deliberate intent to injure” promotes the safety of employees. The moral imperative of Section 34, Article II to enact laws which protect workers is ignored. The general welfare of the public is jeopardized, not furthered, by the legislation. R.C. 2745.01 (B) does not bear a real and substantial relation to the public health, safety, morals or general welfare of the public the and thus violates Section 16, Article I of the Ohio Constitution.

5. **R.C. 2745.01 (B) is illogical, unreasonable and arbitrary and violates Ohio citizens’ right to due process**

R.C. § 2745.01(B) also fails when tested for reasonableness or arbitrariness. Reason is based upon the basic tenets of logic and there is no logical reason which supports the statute’s definition of “substantial certainty”. R.C. 2745.01(A) allows for suit against an employer if the employer committed the tortious act: (1) with the intent to injure or (2) with the belief that injury was substantially certain to occur. For the purposes of logical inquiry, X signifies (1), Y signifies (2) and S signifies “cause of action for intentional employment tort”. R.C. 2745.01(A) is logically sound: if X or Y, then S.

Y is then statutorily defined in a manner which makes  $Y = X$  (“as used in this section, substantially certain means that an employer acts with deliberate intent to cause an employee to suffer an injury, disease, a condition, or death”).

The effect of the definition is to eliminate a cause of action which the statute purports to offer. Now the logical equation would be understood as: if X or X, then S. Poof! Out goes the mischievous Y. There is no logic or reason behind this result, except to intentionally deny an employee a cause of action purported to be granted by the statute itself. This is a clear violation of the employee's due process rights under the Ohio Constitution. Either there is a Y in the original equation or there is not. The definition is unsupportable by reason and must be construed as arbitrary in nature.

The meaning of "substantial certainty" has been fleshed out in great detail. See generally *Van Fossen, Fyffe*, supra. Never has it been equated with "the deliberate intent to injure". The statutory definition defies reasonableness, logic, prior interpretation and the common understanding of the words themselves. Accordingly, R.C. 2745.01(B) violates Article I, Section 16 of the Ohio Constitution.

### **Response to Proposition of Law No. 3**

**Per the language of App. R. 12(A)(1)(b), an intermediate Court of Appeals has authority to decide issues which were clearly argued as an "Issue Presented For Review" in response to an Assignment of Error on appeal.**

Defendant-Appellant's Answer Brief in the Seventh District Court of Appeals explicitly invited the Court to review the factual record in this case pursuant to the common law standard of *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108. See Seventh Dist. Answer Brief of Appellee Metal & Wire Products Co. at 14-17. The Defendant-Appellant set forth its common law argument as an "Issue Presented for Review" and the main basis of its response to Ms. Kaminski's Second Assignment of Error. *Id.* The Defendant-Appellant went into great detail, both legally and factually, in support of its contention. *Id.*

The Seventh District's Opinion cited Defendant-Appellant's common-law argument as the

basis for the court's common-law analysis of the record. See Case. No 07-CO-15, Opinion at ¶ 45. Now, having received an adverse decision upon its invitation, it claims the Court of Appeals was without authority to decide an issue it requested to be reviewed.

Defendant-Appellant has come to the tardy realization that its detailed argument in the Court of Appeals is irreconcilable with its proffered Proposition of Law No. 3. Proposition of Law No. 3, as accepted by this Court for review, concedes intermediate court authority to decide issues "set forth in the parties' briefs." See Defendant-Appellant's Merit Brief at 31. As a result of this realization, Defendant-Appellant seeks to modify Proposition of Law No. 3 with a more "concise iteration" of its original statement: "[a]n intermediate court of appeals has no authority to resolve issues not yet decided by the trial court." *Id.*

App. R. 12(A)(1)(b) does not impose such a sweeping restriction upon intermediate courts if a party to an appeal: (1) sets forth a legal argument in response to an Assignment of Error as an "Issue Presented for Review"; and (2) requests that the intermediate Court review the record in light of its argument:

#### RULE 12. Determination and Judgment on Appeal

##### (A) Determination.

(1) On an undismissed appeal from a trial court, a court of appeals shall do all of the following:

(a) Review and affirm, modify, or reverse the judgment or final order appealed;

(b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App. R. 16, the record on appeal under App. R. 9, and, unless waived, the oral argument under App. R. 21;

The equities and the clear language of App. R. 12(A)(1)(b) weigh heavily against the Defendant-Appellant on either its original Proposition of Law No. 3 or its latest iteration thereof. Defendant-

Appellant did not have to argue the common-law standard before the Seventh District. It chose to make the issue an integral part of its Brief on Appeal, specifically as an “Issue Presented for Review” in response to Ms. Kaminski’s Second Assignment of Error. See Seventh Dist. Answer Brief of Appellee Metal & Wire Products Co. at 14-17.

The factual record before the Seventh District Court of Appeals was extensive. The panel’s review was limited to the facts before the trial court upon Defendant-Appellant’s own request for review of the common-law issue. See Case. No 07-CO-15, Opinion at ¶¶ 45-78. An intermediate court reviewing the record before the trial court in response to an Assignment of Error and the Briefs and arguments of the parties is well within its authority to render a decision on the issue. See, e.g. *Hungler v. City of Cincinnati* (1986), 25 Ohio St.3d 338, 342, 496 N.E.2d 912.

Defendant-Appellant urges this Court to allow intermediate courts to consider alternative legal theories set forth in a party’s Brief on Appeal only if the result of such consideration is favorable to the proponent of the alternative theory. See Defendant-Appellant’s Merit Brief at 35. A party who raises a legal issue on appeal as an “Issue Presented for Review” in response to an Assignment of Error and who seeks appellate review of the factual record before the trial court in light of its argument provides an intermediate court with the authority to decide the issue under App. R. 12(A)(1)(b).

Accordingly, Defendant-Appellant’s argument under to Proposition of Law No. 3 lacks merit and should be decided in Ms. Kaminski’s favor.

### III. CONCLUSION

The passage of time has proven *Blankenship, Jones, Van Fossen, Fyffe, Brady and Johnson* to be rightly decided and practically workable. The State of Ohio has a valid statutory right of subrogation to any proceeds recovered by an intentionally injured employee per R.C. § 4123.931. The tort has been deemed insurable per *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St.3d 173, 176. Ohio citizens' fundamental right to remedy an intentional tort has been preserved.

Adopting Defendant-Appellant's Propositions of Law in this appeal would unnecessarily: (1) eviscerate a "well-structured method of ensuring a disciplined approach to deciding whether to abandon a precedent"; (2) grant the legislature unchecked constitutional authority to strip Ohio's citizens and workers of their constitutional right to a civil remedy for an intentional tort committed against them; and (3) insert an inequitable limitation into Appellate Rule 12(A)(1)(b) which does not exist in the plain language of the Rule itself.

For the reasons set forth herein, Plaintiff-Appellee Rose Kaminski respectfully requests that this honorable Court Affirm the sound decision of the Seventh District Court of Appeals.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

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