

IN THE SUPREME COURT OF OHIO

ROSE KAMINSKI
Appellee,

v.
WIRE & METAL PRODUCTS
COMPANY,
Appellant.

* Case No. 2008-0857
* On Appeal from the Columbiana
County Court of Appeals, Seventh
* Appellate District
* Court of Appeals Case No. 07-CO-15
*

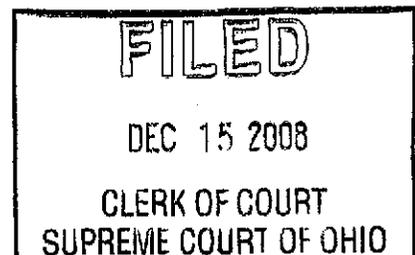
**MERIT BRIEF OF AMICI CURIAE
UFCW LOCAL 911 and AFSCME LOCAL 2415**

David A. Forrest (#0006673)
Counsel of Record
Jarrett J. Northrup (#0080697)
JEFFRIES, KUBE, FORREST & MONTELEONE
Co. LPA
1650 Midland Bldg.
101 Prospect Avenue, West
Cleveland, OH 44115
Phone: (216) 771-4050
Fax: (216) 771-0732
email: dforrest@jkfmlaw.com
jnorthrup@jkfmlaw.com
Counsel for Appellee Rose Kaminski

Dennis A. DiMartino (#0039270)
6004 Market Street
Boardman, OH 44512
Phone: (330) 758-7313
Fax: (330) 758-4938
email: Dimartino@zoominternet.net
Counsel for Appellee Rose Kaminski

* Irene C. Keyes-Walker (#0013143)
Counsel of Record
* Benjamin C. Sassé (#0072856)
TUCKER, ELLIS & WEST LLP
* 1150 Huntington Building
925 Euclid Avenue
* Cleveland, OH 44115
Phone: (216) 592-5000
* Fax: (216) 592-5009
email: ikeyse-walker@tuckerellis.com
* basse@tuckerellis.com
Counsel for Appellant
* *Wire & Metal Products Company*

*
*
*
*
*
*
*
*
*



Theodore A. Bowman (#0009159)
Russell Gerney (#0080186)
GALLON, TAKACS, BOISSONEAULT
& SCHAFFER CO. L.P.A.
3516 Granite Circle
Toledo, OH 43617-1172
Phone: (419) 843-2001
FAX: (419) 843-6665
email: tbowman@gallonlaw.com
rgerney@gallonlaw.com
Counsel for Amici Curiae
UFCW Local 911 and
AFSCME Local 2515

David P. Kamp (#0020665)
Carl J. Stich, Jr. (#0072856)
WHITE, GETGEY & MEYER CO., LPA
1700 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
Phone: (513) 241-3685
Fax: (513) 241-2399
email: cstich@wgmlpa.com
Counsel for Amicus Curiae
Amantea Nonwovens, LLC

- * Nancy H. Rogers (#0002375)
Attorney General of Ohio
- * Benjamin C. Mizer (#0083089)
Solicitor General
- * *Counsel of Record*
Elisabeth A. Long (*pro hac vice* pending)
- * Deputy Solicitor
Todd A. Nist (#0079436)
- * Assistant Solicitor
30 East Broad Street, 17th Floor
- * Columbus OH 43215
Phone: (614) 466-8980
- * Fax: (614) 466-5087
email: bmizer@ag.state.oh.us
- * *Counsel for Amicus Curiae*
Ohio Attorney General Nancy H. Rogers
- *
- Carolyn A. Taggart (#00227107)
- * PORTER WRIGHT MORRIS & ARTHUR, LLP
250 East Fifth Street Suite 2200
- * Cincinnati, OH 43202
Phone: (513) 369-4231
- * Fax: (513) 421-0991
email: ctaggart@porterwright.com
- * *Counsel for Amicus Curiae*
Ohio Association of Civil Trial Attorneys
- *
- J.H. Huebert (#0078562)
- * PORTER WRIGHT MORRIS & ARTHUR, LLP
41 South High Street
- * Columbus OH 43215
Phone: (614) 227-2114
- * Fax: (614) 227-2100
email: jhuebert@porterwright.com
- * *Counsel for Amicus Curiae*
Ohio Association of Civil Trial Attorneys
- *
- Robert A. Minor (#0018371)
- * VORYS, SATER, SEYMOUR & PEASE, LLP
52 East Gay Street, P.O. Box 1008
- * Columbus, OH 43216-1008
Phone: (614) 464-6410
- * Fax: (614) 719-4874
email: raminor@vssp.com
- * *Counsel for Amicus Curiae*
Ohio Self-Insurers' Association

- * Preston J. Garvin # 0018641
Michael J. Hickey # 0021410
- * GARVIN & HICKEY, LLC
236 East Town Street, Suite 112
- * Columbus, OH 43215
Phone: (614) 225-9000
- * Fax: (614) 225-9080
email: wclaw@garvin-hickey.com
- * *Counsel for Amicus Curiae
Ohio Chamber of Commerce*
- *
- Anne Marie Sferra (#0030855)
- * Thomas R. Sant (#0023057)
BRICKER & ECKLER, LLP
- * 100 South Third Street
Columbus, OH 43215
- * Phone: (614) 227-2300
Fax: (614) 227-2790
- * email: tsant@bricker.com
*Counsel for Amici Curiae
Ohio Chapter of the National Federation of
Independent Business
and Ohio Manufacturers Association*
- *
- *



TABLE OF CONTENTS

TABLE OF CONTENTS.....	p. iv.
TABLE OF AUTHORITIES.....	p. v.
STATEMENT OF INTEREST.....	p. 1.
STATEMENT OF THE CASE.....	p. 1.
STATEMENT OF FACTS.....	p. 1.
ARGUMENT.....	p. 1.
Proposition of Law No. 1	
Pursuant to this Court’s holding in <i>Westfield v. Galatis</i>, a party seeking to have a previous decision of the Ohio Supreme Court which interprets the Ohio Constitution overturned bears the burden of demonstrating that that previous decision was decided wrongly.....	p. 1.
CONCLUSION.....	p. 12.
CERTIFICATE OF SERVICE.....	p. 13.

TABLE OF AUTHORITIES

CASES

<u>Baehr v. Lewin</u> , (1993) 74 Haw 530; 852 P.2d 44.....	pp. 4-5.
<u>Brady v. Safety-Kleen Corporation</u> , 61 Ohio St. 3d 624.....	p. 8, 11.
<u>Blankenship v. CRT Tree</u> , (8 th App. Dist.) 2002 Ohio 5354.....	p. 9.
<u>City of Rocky River v. State Employment Relations Board</u> , (1989) 43 Ohio St. 3d 1.....	p. 2.
<u>Houston v. Liberty Mutual Fire Insurance Co.</u> , (6 th App. Dist) 2005 Ohio 4177.....	p. 9.
<u>Johnson v. BP Chemicals, Inc.</u> , (1999) 85 Ohio St. 3d 298.....	p. 7.
<u>Milberger v. KBHL, LLC</u> , (Dist. Haw. 2007) 486 F. Supp. 2d 1156.....	p. 5.
<u>Skapura v. Cleveland Electric Illuminating Co.</u> , (8 th App. Dist.) 89 Ohio App. 403.....	p. 9.
<u>Westfield Insurance Co. v. Galatis</u> , (2003) 100 Ohio St. 3d 216.....	p. 1, 3.
<u>White Oak Coal Co. v. Rivoux</u> , (1913) 88 Ohio St. 18.....	p. 9.

STATUTES

R.C. 2745.01.....	p. 6, 11.
R.C. 2745.01 (1996).....	p. 6.
R.C. 4121.80 (1988).....	p. 6, 11.

OHIO CONSTITUTION

OH CONST. Section 34, Article II	p. 10.
OH CONST. Section 35, Article II.....	p. 9-10.

STATEMENT OF INTEREST

The United Food and Commercial Workers (UFCW) Local 911 is comprised of over 8000 working men and women in the state of Ohio. Both UFCW Local 911 as an entity and the individual members have a vital interest in seeing that the rights of injured Ohio workers are protected.

The American Federation of State, County and Municipal Employees (AFSCME) Local 2415 is comprised of over 1900 working men and women in the state of Ohio. Both AFSCME Local 2415 as an entity and the individual members have a vital interest in seeing that the rights of injured Ohio workers are protected.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici Curiae UFCW Local 911 and AFSCME Local 2415 concur in the recitation of the case and recitation of the facts as set forth in the Brief of Appellee, Rose Kaminski.

ARGUMENT

Proposition of Law # 1

Pursuant to this Court's holding in *Westfield v. Galatis*, a party seeking to overturn a decision of the Ohio Supreme Court which interprets the Ohio Constitution bears the burden of demonstrating that that precedential decision was decided wrongly.

"Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system. It is only with great solemnity and with the assurance that the newly chosen course for the law is a significant improvement over the current course that we should depart from precedent." Westfield Insurance Co. v. Galatis, (2003) 100 Ohio St. 3d 216, 217; 2003 Ohio 5849, ¶ 1. Moreover,

"Stare decisis" is, of course, shorthand for *stare decisis et non quieta movere*--"stand by the past decisions and do not disturb settled things." ...

The heritage of the law is built like a wall--brick by brick. The spirit of the Anglo-Saxon law is, in part, the impact of the cases as they come down through the years. Each case as it is decided supplies another brick for the wall and gives us the taught tradition of the law. This tends to provide the stability necessary for an organized society to deal with its every day affairs.

Uniformity and continuity in law are necessary for us to deal with our daily pursuits. We need to preserve the integrity of contractual agreements, wills, conveyances of property and our dealings in the commercial market-place. The application of the principles of tort cannot be an ever-changing concept. What is negligence in the morning must also be negligence in the afternoon. To permit such standards to be in a continual state of flux would invite havoc.

City of Rocky River v. State Employment Relations Board, (1989) 43 Ohio St. 3d 1, 4-5.

Contrary to Appellant's assertion, *Rocky River* does not teach that in matters of constitutional law, the Court should eschew precedent and reinterpret the Ohio Constitution *de novo* each time the legislature re-passes a statute previously found to be unconstitutional. Rather, *Rocky River* teaches that when considering constitutional questions it is improper for the Court to "live with such hidebound, slavish adherence to the past," so as to avoid correcting a past mistake. *Rocky River*, 43 Ohio St. 3d at 7.

To illustrate the point, the *Rocky River* Court discusses the infamous decision of the United States Supreme Court in *Plessy v. Ferguson* and notes how the incorrect doctrine of "separate but equal" was abandoned in *Brown v. Board of Education*. *Id.* at 7-8. The use of these two cases illustrates the situation in which *stare decisis* must be abandoned and a new rule must be articulated. The appellants in *Brown* argued against precedent and in order to prevail needed to show the Court that *Plessy* had been decided incorrectly and that the doctrine of "separate but equal" was wrong. The import of this example used by the *Rocky River* Court is to show that in order for constitutional authority to be overturned, it is the burden of the party seeking to have the precedent overturned to show that the precedential

decision is wrong. Simply disagreeing with the previous decision is not enough--the burden must be on the party seeking to have the decision overturned to demonstrate that the precedential decision was decided incorrectly.

Building on the logic of *Rocky River*, the *Galatis* Court held, “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.” *Galatis*, 100 Ohio St. 3d at SYLLABUS, ¶ 1. Looking closely at the first element in *Galatis*, it is clear that in order for a previous decision of this Court to be overturned the party seeking to have the previous decision overturned must show that said previous decision was decided wrongly or that it is now incorrect.

The first element provides “the [previous] decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the [previous] decision.” The first clause of the first element (the [previous] decision was wrongly decided at that time) clearly provides that where a previous decision was decidedly incorrectly *at that time* it may be overturned. This is a clear standard and should continue to be used for interpreting the Ohio Constitution. Under that standard the burden continues fall on the party challenging the precedential decision to prove that the precedential decision was decided incorrectly. This is a fair and reasonable standard which gives proper deference to *stare decisis* but which still allows the Court the proper flexibility to overrule an incorrect decision. The decision of the United States Supreme Court in *Brown v. Board*

of *Education* to overrule *Plessy v. Ferguson*, which is discussed above, is a clear example of how the first clause of the *Galatis* test is properly applied in a Constitutional setting.

The second clause (changes in circumstances no longer justify continued adherence to the [previous] decision), however, seems a bit more nebulous. The Appellants would have this Court read the second clause as allowing for a previous decision to be overturned based upon nothing more than Appellant's assertion that it should be overturned. However, if the doctrine of *stare decisis* and *Galatis* are to have any meaning in Ohio Constitutional law, then the second clause must have some more significant meaning.

In order to avoid the trap of having the second clause in the first element of *Galatis* serve as a license for unrestrained judicial activism, that clause must have a meaning sufficiently similar to the first clause so as to prevent the sound precedents of this Court and previous courts from being overturned on a whim by future courts. Thus, for purposes of interpreting the Ohio Constitution, the phrase "change in circumstances" can only mean a change to the Ohio Constitution itself. This is the only logical interpretation of that phrase for Constitutional interpretation purposes. If the relevant provision was interpreted correctly in the precedential decision, then the only logical and valid reason to overturn or otherwise cease relying upon the precedential decision is due to a change in the Constitution itself.

An example of how that interpretation works is Baehr v. Lewin, (1993) 74 Haw 530; 852 P.2d 44 and the subsequent changes to the Constitution of Hawaii. In *Baehr*, the Hawaiian Supreme Court found that a law which prohibited same-sex couples from marrying was in violation of the Constitution of Hawaii. Hawaii responded by amending

its Constitution such that pursuant to the amendment, the legislature could limit marriage to only opposite sex couples.

Clearly it would be absurd for the Supreme Court of Hawaii to continue to rely upon the decision in *Baehr* in light of the change in the Hawaiian Constitution, and in fact, the Supreme Court of Hawaii dismissed a pending case based upon that change in the Constitution of Hawaii. Milberger v. KBHL, LLC, (Dist. Haw. 2007) 486 F. Supp. 2d 1156, 1164 n9. As such, this represents a clear example of the type of changed circumstances that would warrant overturning or ceasing to rely upon a precedential Constitutional decision.

A. Appellants have failed to demonstrate that *Johnson v. BP Chemicals* was decided incorrectly

Appellant has failed to present cogent arguments that *Johnson v. BP Chemicals* was decided incorrectly. Appellant offers some broad condemnation of the *Johnson* Court's ruling, but never makes any attempt to analyze either the text of the Ohio Constitution or the actual language of the case. Rather, Appellant offers essentially an *ipse dixit* argument that the decision of the Ohio Supreme Court was wrong, rather than engage in genuine legal analysis. However, when a proper legal analysis is performed, it becomes clear that *Johnson* (as well as *Brady v. Safety-Kleen*) should not be overruled but should instead continue as precedent.

B. Because this version of R.C. 2745.01 suffers from the same constitutional infirmities from which the prior statutes suffered, in order to find the current version of R.C. 2745.01 constitutional, *Johnson* and *Brady* must be overruled.

There are three statutes which are relevant to this discussion. The first is R.C. 4121.80 (effective date 8-22-1986--hereinafter "R.C. 4121.80 (1988).") The second is R.C.

2745.01 (effective date 11-1-1995--hereinafter “R.C. 2745.01 (1996).”) The third is the current employer intentional tort statute, R.C. 2745.01.

R.C. 4121.80 (1988) provides, in pertinent part:

“Intentional tort” is an act committed with intent to injure another or committed with the belief that the injury is substantially certain to occur.

Deliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance is evidence, the presumption of which may be rebutted of an act committed with the intent to injure another if injury or an occupational disease or condition occurs as a direct result.

“Substantially certain” means that an employer acts with *deliberate intent* to cause an employee to suffer injury, disease, condition or death.

R.C. 4121.80 (1988) (G)(1) (emphasis added).

R.C. 2745.01 (1996) provides, in pertinent part:

“Employment intentional tort” means an act committed by an employer in which the employer *deliberately and intentionally* injures, causes an occupational disease of, or causes the death of an employee.

R.C. 2745.01 (1996) (D)(1) (emphasis added).

Finally, R.C. 2745.01, the current statute, provides, in pertinent part:

(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.

R.C. 2745.01 (A)(B) (emphasis added).

The key language on all three statutes is “deliberate intent.” All three statutes provide that an injured worker must be able to show that the employer deliberately and intentionally or with deliberate intent (these two phrases are clearly synonymous) caused

the injury to the worker. There are superficial differences among the three, but the key concept is “deliberate intent.”

This concept was carefully analyzed by the Johnson Court. In Johnson the Court found:

the General Assembly has created a cause of action that is simply illusory. Under the definitional requirements contained within 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 in accordance with R.C. 2745.01(D)(1), 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 liability under R.C. 2745.01(D)(1).

Johnson v. BP Chemicals, Inc., (1999) 85 Ohio St. 3d 298, 306-307 (emphasis in original).

“Under this definition [former R.C. 4121.80(G)(1)], an employer, in order to be held civilly liable, must have proceeded *deliberately* to cause death or injury to an employee. The implications of this standard are astounding. Legally speaking, an employer is now subject to civil liability *only if his actions amount to criminal assault or murder.*”

Johnson, 85 Ohio St. 3d at 307, n13 (emphasis in original, citations omitted).

The Johnson Court examined both of the two former statutes and found that the concept of “deliberate intent” and “deliberate and intentional” were essentially the same. The current statute uses the exact same “deliberate intent” language found in R.C. 4121.80 (1988)--the exact same language that the Ohio Supreme Court has found to be unconstitutional once before. The current statute is not a new statute passed in an attempt to create a constitutionally sound law pursuant to the Ohio Supreme Court’s previous decisions. Rather, the current statute is simply an attempt to pass a statute which contains an unconstitutional concept *in spite of* what this Court has previously held. In other words, the General Assembly has simply decided to put fresh lipstick on the same old tired unconstitutional pig.

The decisions of this Court in *Brady* and *Johnson* were sound well-reasoned correct decisions. The General Assembly has no authority to pass the employer intentional tort law pursuant to either Section 35 or Section 34 of Article II of the Ohio Constitution.

C. Because employer intentional torts occur outside the employment relationship, the General Assembly has no power to regulate employer intentional torts pursuant to Section 35, Article II of the Ohio Constitution

The first attempt by the Ohio General Assembly to limit the employer's liability for employer intentional torts was found to be unconstitutional pursuant to Section 34, Article II and Section 35, Article II of the Ohio Constitution in *Brady v. Safety-Kleen Corporation*, 61 Ohio St. 3d 624, SYLLABUS ¶ 2. The *Brady* Court explained its holding by noting that:

[the statute] does not further the purposes of Section 35, Article II, but instead attempts to circumvent them completely. As cogently reasoned by one distinguished member of this court:

'When an employer intentionally harms his employee, that act effects a complete breach of the employment relationship, and for purposes of the legal remedy for such an injury, the two parties are not employer and employee, but intentional tortfeasor and victim. If the victim brings an intentional tort suit against the tortfeasor, it is a tort action like any other. The employer has forfeited his status as such and all attendant protections fall away.'

Brady, 61 Ohio St. 3d at 634.

The *Brady* Court clearly understood that there is no inherent difference between a supervisor or manager committing a battery in the classic sense (i.e. simply striking the employee with his fist) versus committing a battery by sending an employee into a situation where injury was substantially certain to occur. Neither action furthers the employers business and thus is occurring outside the employment relationship. This basic concept is well-understood within Ohio law.

As a general rule, an employee who is on a “frolic” is barred from receiving workers compensation benefits. (*see e.g. Blankenship v. CRT Tree*, (8th App. Dist.) 2002 Ohio 5354). Additionally, it has long been understood that where an employee injures a third party while on a frolic, no vicarious liability will attach to the employer. (*see e.g. White Oak Coal Co. v. Rivoux*, (1913) 88 Ohio St. 18; *Skapura v. Cleveland Electric Illuminating Co.*, (8th App. Dist.) 89 Ohio App. 403).

Whether an employee is “on the clock” at the time of the injury is not dispositive as to whether or not the injury (whether to the worker or to a third party) occurs within the course of and arises out of the employment. *Houston v. Liberty Mutual Fire Insurance Co.*, (6th App. Dist) 2005 Ohio 4177, ¶¶ 41, 46 *Blankenship v. CRT*, 2002 Ohio 5354 at ¶ 77.

Thus, it is clear that Ohio law has long understood that incidents occur while an employee is “on the clock” without necessarily occurring in the course of and arising out of the employment. Clearly an employee may, by engaging in activities outside the scope of his employment, deviate from the performance of his duties and thereby lose certain legal protections which would normally apply as a consequence of the employment relationship. This Court, in *Brady*, did nothing more or less than recognize that an employer may also act in a fashion so inconsistent with its rights and duties as such that its actions can be said to occur outside the scope of the employment relationship. When this occurs, the employer, no less than the employee, may lose legal benefits which would otherwise have applied.¹

Section 35, Article II, by its own language, was passed “[f]or the purpose of providing compensation to workmen and their dependents, for death, injuries or

¹ Interestingly enough, a ruling by this Court that employer intentional torts occur within the context of the employment relationship could have a profound effect on both workers compensation law and employer vicarious liability.

occupational disease, occasioned in the course of such workmen's employment..." i.e. for providing benefits to workers injured during the employment relationship. As seen above, the law has long understood that an employee may technically be "on the clock" but engaged in behavior that is far from furthering the employer's business. The *Brady* Court clearly understood this concept and applied to intentional acts by the employer which result in injury to the employee. Because intentionally injuring an employee cannot further an employer's business, such incidents must, by their very nature occur outside the employer/employee relationship.

Section 35, Article II grants the General Assembly broad powers to create, mandate and fund a workers compensation system. But, Section 35, Article II does not allow the General Assembly to legislate outside that area. As such, the General Assembly has no authority, pursuant to Section 35, Article II to create an employer intentional tort statute. That basic concept was true pursuant to both R.C. 4121.80 (1988) and R.C. 2745.01 (1996) and it remains true pursuant to the statute currently under review.

D. R.C. 2745.01 does not provide for the comfort, health, safety and general welfare of Ohio employees and is therefore unconstitutional pursuant to Section 34, Article II of the Ohio Constitution.

Section 34, Article II of the Ohio Constitution provides, *in toto*, "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 employes; [sic] and no other provision of the constitution shall impair or limit this power." The relevant clause, for this discussion, is "providing for the comfort, health, safety and general welfare of all employes [sic]." As the Appellant and several of its amici have correctly noted, Section 34, Article II gives the General Assembly a broad grant of authority. However, inherent in

that broad grant is the understanding that the laws must provide for the comfort, health, safety and general welfare of all employees. Laws which take away from an employee's comfort, health, safety and general welfare are *not* authorized pursuant to Section 34, Article II.

The *Brady* Court held

After careful consideration, we find that R.C. 412.80 is totally repugnant to Section 34, Article II. Petitioners and their supporting *amici* set forth the persuasive argument that the statute in issue is not a law that furthers the “* * * comfort, health, safety and general welfare of all employees, * * *” and we conclude that this argument is well taken. 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.

The *Brady* Court's decision is especially important because R.C. 4121.80 (1988) and the current statute are almost identical, as seen below; to wit:

“Substantially certain” means that an employer acts with *deliberate intent* to cause an employee to suffer injury, disease, condition or death.
R.C. 4121.80 (1988) (G)(1) (emphasis added).

“substantially certain” means that an employer acts with *deliberate intent* to cause an employee to suffer an injury, a disease, a condition, or death.
R.C. 2745.01 (B) (emphasis added).

Here the General Assembly has not passed a new statute which attempts to correct the constitutional defects of the prior statute--instead the General Assembly has passed a second statute which incorporates the *exact language previously found to be unconstitutional by this Court*.

Thus, the current statute is *not* a new statute. It is nothing more than R.C. 4121.80 (1988). That statute was unconstitutional. If *stare decisis* and the decisions of this Court are to have any meaning, then R.C. 2745.01 must be found to be unconstitutional as well.

CONCLUSION

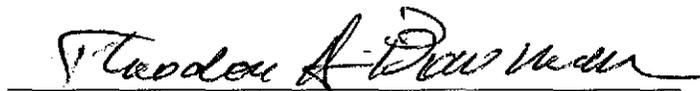
It has long been understood that the laws passed by the General Assembly enjoy a presumption of constitutionality. However, where this Court has ruled on the constitutionality of a particular statute, the same presumption should not apply. In the instant matter R.C. 2745.01 is nothing more than R.C. 4121.80--a statute that was found to be unconstitutional by this Court twenty years ago. The two statutes are almost indistinguishable in pertinent part. Thus, because this Court is seeing the same statute which was found to be unconstitutional before, the presumption that the General Assembly normally enjoys simply cannot apply.

Moreover, this Court should assert its authority regarding interpretation of the Ohio Constitution. If the laws passed by the General Assembly enjoy a presumption of constitutionality, then surely the same should apply to decisions of this Court--otherwise the judiciary is regulated from co-equal partner to junior associate in the State of Ohio. That is not a proper role for this Honorable Court.

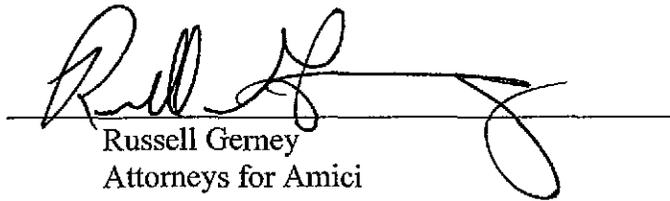
The *Brady* Court has already ruled on the statute currently under review. Let that decision stand.

Respectfully submitted

GALLON, TAKACS, BOISSONEAULT
& SCHAFFER CO. L.P.A.



Theodore A. Bowman
Attorneys for Amici


Russell Gerney
Attorneys for Amici

CERTIFICATION

This is to certify that a copy of the foregoing **Merit Brief of Amici UFCW Local 911 and AFSCME Local 2415** was sent this 12th day of December, 2008, via ordinary U.S. mail, postage pre-paid, to:

David A. Forrest (#0006673)
Counsel of Record
Jarrett J. Northrup (#0080697)
JEFFRIES, KUBE, FORREST &
MONTELEONE CO. LPA
1650 Midland Bldg.
101 Prospect Avenue, West
Cleveland, OH 44115
Counsel for Appellee Rose Kaminski

Dennis A. DiMartino (#0039270)
6004 Market Street
Boardman, OH 44512
Counsel for Appellee Rose Kaminski

David P. Kamp (#0020665)
Carl J. Stich, Jr. (#0072856)
WHITE, GETGEY & MEYER CO., LPA
1700 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
*Counsel for Amicus Curiae
Amantea Nonwovens, LLC*

Robert A. Minor (#0018371)
VORYS, SATER, SEYMOUR & PEASE, LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
*Counsel for Amicus Curiae
Ohio Self-Insurers' Association*

Irene C. Keyes-Walker (#0013143)
Counsel of Record
Benjamin C. Sassé (#0072856)
TUCKER, ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115
*Counsel for Appellant
Wire & Metal Products Company*

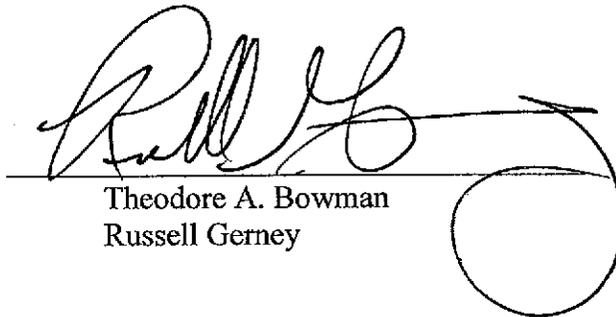
Nancy H. Rogers (#0002375)
Attorney General of Ohio
Benjamin C. Mizer (#0083089)
Solicitor General
Counsel of Record
Elisabeth A. Long (*pro hac vice* pending)
Deputy Solicitor
Todd A. Nist (#0079436)
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus OH 43215
*Counsel for Amicus Curiae
Ohio Attorney General Nancy H. Rogers*

Carolyn A. Taggart (#00227107)
PORTER WRIGHT MORRIS & ARTHUR, LLP
250 East Fifth Street Suite 2200
Cincinnati, OH 43202
*Counsel for Amicus Curiae
Ohio Association of Civil Trial Attorneys*

Anne Marie Sferra (#0030855)
Thomas R. Sant (#0023057)
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215
Counsel for Amici Curiae
Ohio Chapter of the National Federation
of Independent Business
and Ohio Manufacturers Association

J.H. Huebert (#0078562)
PORTER WRIGHT MORRIS & ARTHUR, LLP
41 South High Street
Columbus OH 43215
Counsel for Amicus Curiae
Ohio Association of Civil Trial Attorneys

Preston J. Garvin # 0018641
Michael J. Hickey # 0021410
GARVIN & HICKEY, LLC
236 East Town Street, Suite 112
Columbus, OH 43215
Counsel for Amicus Curiae
Ohio Chamber of Commerce



Theodore A. Bowman
Russell Gerney