

IN THE SUPREME COURT OF OHIO

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CASE NO. 2008-0857

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ROSE KAMINSKI  
Plaintiff-Appellee

-vs-

METAL & WIRE PRODUCTS COMPANY  
Defendant-Appellants

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

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BRIEF OF *AMICUS CURIAE*,  
OHIO ASSOCIATION OF JUSTICE  
IN SUPPORT OF PLAINTIFF-APPELLEE, ROSE KAMINSKI

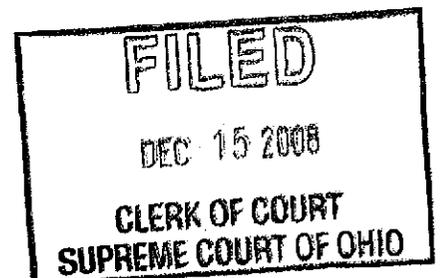
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## INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”), formally known as the Ohio Academy of Trial Lawyers. The OAJ is comprised of approximately two thousand (2,000) attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

Nothing less than the continued viability of the venerable doctrine of *stare decisis* is at stake in the collection of cases before this Court addressing the constitutionality of current R.C. §2745.01. That statute, just like its two predecessors, seeks to eradicate the “substantial certainty” workplace intentional tort theory which has long allowed injured workers, as well as the Ohio Bureau of Workers’ Compensation, to recover damages against employers which knowingly engage in unacceptably dangerous practices. On behalf of its constituents and the Ohio general public at large, the OAJ urges this Court to adhere to its established precedents and reaffirm that the workplace intentional tort theory of recovery may be eliminated or restricted only through a valid constitutional amendment.

## ARGUMENT

**PROPOSITION OF LAW NO 1: THE GALATIS STARE DECISIS TEST MUST BE APPLIED WITH FLEXIBILITY IN CONSTITUTIONAL ADJUDICATION. SINCE IT IS GENERALLY BEYOND THE POWER OF THE GENERAL ASSEMBLY TO CORRECT JUDICIAL INTERPRETATION OF THE CONSTITUTION, AN ERRONEOUS CONSTITUTIONAL DETERMINATION MAY BE REVISED WHERE IT IS DEMONSTRATIVELY WRONG. (*City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St.3d 1, followed.)**

This Court should take this opportunity to dispel the dangerous notion, which appears to be gaining in popularity, that *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, furnishes a roadmap for circumventing judicial precedents. That decision arose from unique circumstances created by the maddeningly ambiguous standard form commercial uninsured/underinsured motorists policies which had been in use in Ohio through the 1990s. A majority of this Court determined that a modification (not reversal) of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 1116, was warranted largely by the ruling's unanticipated impact upon the judicial system. The justifications which were identified in the opinion for departing from *stare decisis* were directly observable by the Court.<sup>1</sup> The *Galatis* decision certainly does not stand for the proposition that judicial precedents will be reconsidered anew with every enactment which is adopted by the legislature. *Stare decisis* should be set aside only in the rarest of instances when patent unworkability and seriously deleterious effects are not only identified, but conclusively verified from objective sources.

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<sup>1</sup> For example, a considerable portion of the opinion was focused upon the "chaos" which Ohio's courts had purportedly experienced in the wake of *Scott-Pontzer*. *Galatis*, 100 Ohio St.3d at 228-230 ¶ 50-57.

Lacking such proof, but armed with their result-driven interpretation of *Galatis*, Defendant-Appellant and its *amici* have waged a full-frontal assault upon *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, and *Johnson v. B.P. Chems., Inc.*, 85 Ohio St.3d 298, 1999-Ohio-267, 707 N.E.2d 1107. It should go without saying that the "orderly conduct of judicial affairs" requires appellate courts to abide by their own precedents. *State v. George* (10th Dist. 1975), 50 Ohio App.2d 297, 310, 362 N.E.2d 1223, 1231. A former member of this Court has wisely commented that:

I believe in the doctrine of stare decisis and I will continue to support this doctrine, regardless of my personal predilections as to public policy in some particular area of the law. Precision and consistency are values of the highest order in judicial decision-making. Populist jurisprudence only creates unpredictability in the law. While understanding that the common law is not immutable, we should strive to follow past experience and precedent.

*Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 263, 496 N.E.2d 699, 715-716 (Wright, J., concurring). In urging his fellow Justices to follow prior precedents, Justice Homes cautioned that:

To do otherwise again completely demolishes any remaining semblance of the doctrine of *stare decisis* in this state. The only change that has taken place which would conceivably alter our position as announced in those cases has been an intervening change of personnel on the court--precisely the type of changed circumstance that the doctrine of *stare decisis* has been relied upon to maintain the stability of the case law of this jurisdiction. What confidence may attorneys, judges and litigants have in the stability of the decisional law of this court? This query is self-answering.

*Wilfong v. Batdorf* (1983), 6 Ohio St.3d 100, 109, 451 N.E.2d 1185, 1193 (Holmes, J., dissenting), overrid. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489. More recently, Justice Cook has written for a majority of this Court that:

As the United States Supreme Court has noted, " 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.' " Like the United States Supreme Court, we recognize that "[o]ur precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established."

But "any departure from the doctrine of stare decisis demands special justification." [citations omitted]

*Wampler v. Higgins*, 93 Ohio St.3d 111, 120, 2001-Ohio-1293, 752 N.E.2d 962, 971-972.

No such "special justification" is present here. In stark contrast to the judicial "chaos" which lied at the heart of *Galatis*, 100 Ohio St.3d 216, Ohio's judicial system has been systematically adjudicating workplace intentional tort claims without any apparent difficulty over the last twenty-six (26) years. While some question may have existed over the specific standards which applied following the release of *Blankenship v. Cincinnati Milacron Chems., Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572, any uncertainty was remedied in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108. Not once has this Court been required since then to correct some sort of "ambiguity" or "unfairness" in the three-prong test which has been developed for distinguishing between conduct which is merely negligent, reckless, or wanton and that which is known to be substantially certain to cause harm.

Another important consideration in *Galatis*, 100 Ohio St. 3d at 221 ¶ 19, was that the *Stott-Pontzer* decision had been criticized by other courts shortly after the decision's release. In the case *sub judice*, Defendant-Appellant has failed to identify a single decision from anywhere in the United States which has found fault with analysis employed in *Brady* and *Johnson*, which is particularly significant given that *Brady* was published with much fanfare over seventeen years ago. The closest any court appears to have come to taking issue with this tribunal's approach appears to be the Supreme Court of North Dakota's decision to permit a separate recovery for workplace intentional torts but with the requirement of "certainty" instead of "substantial certainty". *Zimmerman v. Valdak Corp.*, 1997 N.D. 203, 570 N.W. 2d 204, 209 ("An employer is deemed to have intended to injure if the employer had knowledge an injury was certain to occur and willfully disregarded that knowledge."). An intermediate appellate

court had also criticized Ohio's system for supposedly allowing "an employee to seek both types of remedies and keep both the compensation and tort damages award" but had apparently overlooked that the subrogation rights afforded in R. C. § 4123.931 prevent any such double recoveries. *Calalpa v. Dae Ryung Co., Inc.* (2003), 357 N.J. Super. 220, 230, 814 A. 2d 1130, 1137-1138. *Brady* and *Johnson* otherwise appeared to have been well-received nationwide.

Defendant-Appellant has made no meaningful attempt to establish that a departure from *Brady* and *Johnson* is necessary because the law must be "modernized to conform with present day norms" *Gallimore v. Children's Hosp. Med. Ctr.*, 67 Ohio St.3d 244, 255, 1993-Ohio-205, 617 N.E.2d 1052, 1060 (overruling prior precedent to establish parental consortium claims). The "substantial certainty" exception to the workers compensation system has been in use for decades in other jurisdictions.<sup>2</sup> At least one other state goes farther than Ohio and permits a recovery against the employer upon a sufficient showing of gross negligence and similar misconduct.<sup>3</sup> There is thus no merit to the dire prognostications of Defendant-Appellant's *amici* to the effect that Ohio will suffer a competitive disadvantage and devolve into a jobless wasteland if the *Fyffe* test for liability remains in force.

The OAJ is mindful that the legislatures of a few other states have immunized employers from substantial certainty claims in the same manner as current R.C. §2745.01. Those jurisdictions do not appear to be governed, however, by constitutional restrictions analogous to Sections 34 & 35 of Article II, as construed by the Court. Varying approaches to compensating workplace injuries have been adopted in the fifty states and thus the proponents of H.B. 498 have

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<sup>2</sup> Examples of decisions recognizing the applicability of a "substantial certainty" exception include *Suarez v. Dickmont Plastics Corp.* (1994), 229 Conn. 99, 100-101 639 A.2d 507, 508; *Bakerman v. The Bombay Co.* (Fla. 2007), 961 So.2d 259, 262; *Parret v. UNICCO Serv. Co.* (2005), O.K. 54, 127 P. 3d 572, 578-579; *Woodson v. Rowland* (1991), 329 N.C. 330, 340-341, 407 S.E. 2d 222, 228; *Bazley v. Tortorich* (La. 1981), 397 So. 2d 475, 482; *Speck v. Union Elec. Co.* (Mo. App. 1987), 741 S.W. 2d 280, 282-283.

<sup>3</sup> See e.g., *Universal Servs. Co., Inc. v. Ung* (Tex. 1995), 904 S.W. 2d 638, 639-640.

been unable to justify a departure from *stare decisis* on the grounds that Ohio has become some sort of pariah standing alone in its recognition of substantial certainty intentional tort recoveries. The “special justifications” which are essential for setting aside *stare decisis* are lacking in this instance. *Wampler*, 93 Ohio St.3d at 120.

The specific citation to *City of Rocky River v. State Empl. Rel. Bd.* (1989), 43 Ohio St.3d 1, 539 N.E.2d 103, which appears in this Proposition of Law is puzzling. In that case this Court had reversed positions with respect to the constitutionality of a collective bargaining statute in the reconsideration phase of the appeal. The majority was careful to observe that *stare decisis* governed future cases and thus had no application. *Id.*, 43 Ohio St.3d at 6. That cannot be said here, as the *Brady* and *Johnson* proceedings were concluded years ago.

Defendant-Appellant’s real argument is merely that *Brady* and *Johnson* are “unworkable” for those employers which persist in maintaining alarmingly unsafe policies, violating safety regulations and standards, and taking unacceptable risks with their employees. No objective evidence whatsoever was offered in the proceedings below even remotely establishing that this Court’s recognition of the substantial certainty workplace intentional tort theory has inflicted actual harm upon the business community which outweighs the incalculable public benefits that are realized by compensating those who have been injured or killed by intentionally dangerous misconduct. Unlike prior “tort reform” measures, 2004 H.B. 498 contains no mention of any legislative findings to this effect. The Bill is noticeably bereft of any citations to impartial and verifiable studies, statistics, or data confirming that *Brady* and *Johnson* have truly proved to be “unworkable”.

2004 Am. Sub. S.B. 80, on the other hand, was replete with legislative “findings” and specific references to a variety of studies, polls of business officials, and the testimony of numerous witnesses who appeared before the General Assembly. *Id.*, Section 3(A). This Court

was specifically urged in the uncodified portion of the “tort reform” enactment to reconsider several decisions interpreting the Ohio Constitution. *Id.*, Section 3(E). In rendering the ensuing decision in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 ¶ 53-55, 68-69 & 100-101, a majority of this Court repeatedly emphasized that an evidentiary record had been developed by the legislature before caps were imposed upon noneconomic and punitive damages in tort actions. Indeed, Chief Justice Moyer’s opinion specifically observed that:

Unlike the record in *Morris* [*v. Savoy* (1991), 61 Ohio St.3d 684, 576 N.E.2d 765] and *Sorrell* [*v. Thevenir*, 69 Ohio St.3d 415, 1994-Ohio-38, 633 N.E.2d 504], which we criticized as lacking evidence demonstrating a rational connection between the tort reforms taken and the public good to be achieved, the record here draws a clear connection between limiting certain and potentially tainted noneconomic-damages awards and the economic problems demonstrated in the evidence. \*\*\*

*Id.*, 116 Ohio St.3d at 479-480 ¶ 56. Logically, the instant action is thus controlled by *Morris* and *Sorrell*, which have long stood for the proposition that the Supreme Court will not blindly accept unproven and unverifiable claims that “public policy” is being advanced.

There is a simple explanation for why no evidentiary record accompanies H.B. 498: there is no legitimate reason to believe that this Court’s interpretation of Article II, Sections 34 & 35 of the Ohio Constitution has proved to be “unworkable” or contrary to the public good. If one has faith in the jury system, then it must be acknowledged that liability is being imposed only against those employers which have purposefully engaged in policies and practices that were substantially certain to cause harm. Insurance coverage is available to provide indemnity and a defense against such lawsuits, except where the misconduct was truly “deliberate” (which remains a viable theory of recovery even under current R.C. §2745.01). See *e.g.*, *Presrite Corp. v. Commercial Union Ins. Co.* (8<sup>th</sup> Dist. 1996), 113 Ohio App.3d 38, 680 N.E.2d 216; *Baker v.*

*Aetna Cas. & Sur. Co.* (10<sup>th</sup> Dist. 1995), 107 Ohio App.3d 835, 669 N.E.2d 553. If allowed to stand, H.B. 498 will have the effect of rendering these “stop-gap” policies worthless despite the substantial premiums which have been collected by the carriers.

Employers who support H.B. 498 should be careful what they wish for. If R.C. §2745.01 is construed as simply recasting all workplace intentional tort claims into the “deliberate intent” variety, then they may find themselves routinely exposed to potentially ruinous liability. Neither indemnity nor a defense will be owed by their carriers due to the “deliberate” nature of the harm inflicted.

Defendant-Appellant and their *amici* seem to be under the impression that public policy will be best served if the Ohio Bureau of Workers’ Compensation is left to bear the costs of an employers’ intentionally dangerous practices. They have insinuated that the administrative system already offers sufficient relief to those who have been injured by deliberately dangerous employment practices. Such twisted logic ignores the fact that the Bureau possesses statutory subrogation rights and is thus entitled to reimbursement when a recovery is secured upon a workplace intentional tort theory. *R.C. §4123.931*. Ohio’s interests will hardly be advanced if the agency is precluded from recouping those considerable expenditures from employers which have been found – in a court of law – to have intentionally injured its workers through policies and practices which were substantially certain to cause harm. *Brady* and *Johnson* are not only “workable”, they offer the most fair and sensible approach to allocating the cost of workplace injuries and fatalities amongst the truly responsible parties.

**PROPOSITION OF LAW NO. 2: R.C. 2745.01 DOES NOT VIOLATE SECTION 34, ARTICLE II OF THE OHIO CONSTITUTION, OR SECTION 35, ARTICLE II OF THE OHIO CONSTITUTION, AND IS THEREFORE CONSTITUTIONAL ON ITS FACE.**

**I. LEGISLATIVE INTERFERENCE WITH WORKPLACE INTENTIONAL TORT CLAIMS.**

There is no truth to the assertion that 2004 H.B. 498 represents a bold new effort to “improve” upon the common law. Twice before the General Assembly has attempted to restrict workplace intentional tort claims. Initially, 1986 S.B. 307 had adopted R.C. §4121.80(G)(1) which endeavored to legislatively define the phrase “substantially certain” to mean only “that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.” The plain purpose of this enactment was to merge the less rigorous substantial certainty intentional torts into the realm of deliberate intents. Other portions of the Act sought to confer jurisdiction over such claims upon the Industrial Commission and set limits on the damages that could be recovered. *Am. Sub. S.B. No. 307, 141 Ohio Laws, Part I, 733-737.*

The validity of this legislation came before this Court in *Brady*, 61 Ohio St.3d 624. Writing for the majority, Justice Sweeney observed that legislative authority to regulate workplace injuries was governed by Section 35, Article II of the Ohio Constitution.<sup>4</sup> *Id.*, at 629.

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<sup>4</sup> Section 35 provides 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

By attempting to eliminate a remedy that had long been available to employees injured by deliberate misconduct that was substantially certain to result in injury, it was apparent that former R.C. §4121.80 did not further the “\*\*\* comfort, health, safety and general welfare of all employees” as authorized by Section 34 of Article II.<sup>5</sup> Likewise, the enactment defeated the purpose of Section 35, which is to make an administrative remedy available to those who have been injured in the course and scope of employment. *Brady*, 61 Ohio St.3d at 633-634. It was then reasoned that:

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such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

<sup>5</sup> Section 34 provides that:

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

Since we find that Section 35, Article II authorizes only enactment of laws encompassing death, injuries or occupational disease occasioned within the employment relationship, R.C. 4121.80 cannot logically withstand constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of its constitutional empowerment.

*Id.*, at 634. The syllabus of the majority opinion declared that:

1. A cause of action brought by an employee alleging intentional tort by the employer in the workplace is not preempted by Section 35, Article II of the Ohio Constitution, or by R.C. 4123.74 and 4123.741. While such cause of action contemplates redress of tortious conduct that occurs during the course of employment, an intentional tort alleged in this context necessarily occurs outside the employment relationship. (*Blankenship v. Cincinnati Milacron Chemicals, Inc.* [1982], 69 Ohio St.2d 608, 23 O.O.3d 504, 433 N.E.2d 572, approved and followed.)

2. R.C. 4121.80 exceeds and conflicts with the legislative authority granted to the General Assembly pursuant to Sections 34 and 35, Article II of the Ohio Constitution, and is unconstitutional *in toto*. [emphasis added]

The Cuyahoga County Court of Appeals interpreted this holding to establish that:

The area of intentional tort is not one in which the legislature has the authority to legislate an employee's recourse because it occurs outside of the employment relationship. *Brady v. Safety-Kleen Corp.* at 633. [emphasis added]

*Koziol v. Quality Stamping Prods.* (March 5, 1992), 8<sup>th</sup> Dist. No. 59941, 1992 W.L. 41849, p.

\*2. The General Assembly's attempt in S.B. 307 to define "substantially certain" in terms of a "deliberate intent" was unconstitutional and intentional tort claims were governed once again solely by common law principles.

Unfazed by the decision in *Brady*, the General Assembly adopted 1995 H.B. 103, which enacted the original version of R.C. §2745.01.<sup>6</sup> Subsection (D) purported to limit an

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<sup>6</sup> As set forth in Section 1 of Am. H.B. 103, 146 Ohio Laws, Part I, 756-757, the legislation provided: "That new sections 2305.112 and 2745.01 of the Revised Code be enacted to read as follows:

"Sec. 2305.112.(A) AN ACTION FOR AN EMPLOYMENT INTENTIONAL TORT UNDER SECTION 2745.01 OF THE REVISED CODE SHALL BE BROUGHT WITHIN ONE YEAR OF THE EMPLOYEE'S DEATH OR THE DATE ON WHICH THE EMPLOYEE KNEW OR THROUGH THE EXERCISE OF REASONABLE DILIGENCE SHOULD HAVE KNOWN OF THE INJURY, CONDITION, OR DISEASE.

"(B) AS USED IN THIS SECTION, 'EMPLOYEE' AND 'EMPLOYMENT INTENTIONAL TORT' HAVE THE SAME MEANINGS AS IN SECTION 2745.01 OF THE REVISED CODE.

"Sec. 2745.01. (A) EXCEPT AS PROVIDED IN THIS SECTION, AN EMPLOYER SHALL NOT BE LIABLE TO RESPOND IN DAMAGES AT COMMON LAW OR BY STATUTE FOR AN INTENTIONAL TORT THAT OCCURS DURING THE COURSE OF EMPLOYMENT. AN EMPLOYER ONLY SHALL BE SUBJECT TO LIABILITY TO AN EMPLOYEE OR THE DEPENDENT SURVIVORS OF A DECEASED EMPLOYEE IN A CIVIL ACTION FOR DAMAGES FOR AN EMPLOYMENT INTENTIONAL TORT.

"(B) AN EMPLOYER IS LIABLE UNDER THIS SECTION ONLY IF AN EMPLOYEE OR THE DEPENDENT SURVIVORS OF A DECEASED EMPLOYEE WHO BRING THE ACTION PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE EMPLOYER DELIBERATELY COMMITTED ALL OF THE ELEMENTS OF AN EMPLOYMENT INTENTIONAL TORT.

"(C) IN AN ACTION BROUGHT UNDER THIS SECTION, BOTH OF THE FOLLOWING APPLY:

"(1) IF THE DEFENDANT EMPLOYER MOVES FOR SUMMARY JUDGMENT, THE COURT SHALL ENTER JUDGMENT FOR THE DEFENDANT UNLESS THE PLAINTIFF EMPLOYEE OR DEPENDENT SURVIVORS SET FORTH SPECIFIC FACTS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE TO ESTABLISH THAT THE EMPLOYER COMMITTED AN EMPLOYMENT INTENTIONAL TORT AGAINST THE EMPLOYEE;

"(2) NOTWITHSTANDING ANY LAW OR RULE TO THE CONTRARY, EVERY PLEADING, MOTION, OR OTHER PAPER OF A PARTY REPRESENTED BY AN ATTORNEY SHALL BE SIGNED BY AT LEAST ONE ATTORNEY OF RECORD IN THE ATTORNEY'S INDIVIDUAL NAME AND IF THE PARTY IS NOT REPRESENTED BY AN ATTORNEY, THAT PARTY SHALL SIGN THE PLEADING, MOTION, OR PAPER. FOR THE PURPOSES OF THIS SECTION, THE SIGNING BY THE ATTORNEY OR PARTY CONSTITUTES A CERTIFICATION THAT THE SIGNER HAS READ THE PLEADING, MOTION, OR OTHER PAPER; THAT TO THE BEST OF THE SIGNER'S KNOWLEDGE, INFORMATION, AND BELIEF FORMED AFTER REASONABLE INQUIRY IT IS WELL GROUNDED IN FACT OR A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW; AND THAT IT IS NOT INTERPOSED FOR ANY IMPROPER PURPOSE, INCLUDING, BUT NOT LIMITED TO, HARASSING OR CAUSING UNNECESSARY DELAY

“employment intentional tort” claim to only those instances where the “employer deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee.” *Section 1, Am. H.B. No. 103, 146 Ohio Laws, Part I, 756-757.* The enactment thus denied any civil recovery to an injured worker unless the employer’s deliberate intent to cause the injury or death was established.

Once again, the Supreme Court confirmed, in no uncertain terms, that legislative interference with workplace intentional torts is flatly prohibited by Sections 34 & 35, Article II, of the Ohio Constitution. *Johnson*, 85 Ohio St.3d 298. The opinion reasoned that:

In *Brady*, the court invalidated former R.C. 4121.80 in its entirety, and, in doing so, we 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

OR NEEDLESS INCREASE IN THE COST OF THE ACTION.

"IF THE PLEADING, MOTION, OR OTHER PAPER IS NOT SIGNED AS REQUIRED IN DIVISION (C)(2) OF THIS SECTION, THE COURT SHALL STRIKE THE PLEADING, MOTION, OR OTHER PAPER UNLESS THE ATTORNEY OR PARTY PROMPTLY SIGNS IT AFTER THE OMISSION IS CALLED TO THE ATTORNEY'S OR PARTY'S ATTENTION. IF A PLEADING, MOTION, OR OTHER PAPER IS SIGNED IN VIOLATION OF DIVISION (C)(2) OF THIS SECTION, THE COURT, UPON MOTION OR UPON ITS OWN INITIATIVE, SHALL IMPOSE UPON THE PERSON WHO SIGNED IT, OR THE REPRESENTED PARTY, OR BOTH, AN APPROPRIATE SANCTION. THE SANCTION MAY INCLUDE, BUT IS NOT LIMITED TO, AN ORDER TO PAY TO THE OTHER PARTY THE AMOUNT OF THE REASONABLE EXPENSES INCURRED DUE TO THE FILING OF THE PLEADING, MOTION, OR OTHER PAPER, INCLUDING REASONABLE ATTORNEY'S FEES.

"(D) AS USED IN THIS SECTION:

"(1) '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.

"(2) 'EMPLOYER' MEANS ANY PERSON WHO EMPLOYS AN INDIVIDUAL.

"(3) 'EMPLOYEE' MEANS ANY INDIVIDUAL EMPLOYED BY AN EMPLOYER.

"(4) 'EMPLOY' MEANS TO PERMIT OR SUFFER TO WORK."

constitutional scrutiny. See, also, *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 230, 631 N.E.2d 582, 587. 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 again our holdings in *Brady* and hopefully put to rest any confusion that seems to exist with the General Assembly in this area. [emphasis added, footnote omitted]

*Johnson*, 85 Ohio St.3d at 304, 707 N.E.2d at 1111. Like former R.C. §4121.80, the original version of R.C. §2745.01 was then held to be unconstitutional in its entirety. *Id.*, 85 Ohio St.3d at 308, 707 N.E.2d at 1115. As a result of this decision, one appellate court was lead to observe that:

Once again, the court reiterated, as it had done in *Brady* nearly a decade earlier, that this area of the law is constitutionally protected and not subject to legislative regulation. It is that simple. [emphasis added]

*Solakakis v. National Machine Co.* (Aug. 6, 1999), 11th Dist. No. 98-T-0090, 1999 W.L. 652432.

## II. THE INVALIDITY OF H.B. 498.

As a result of the broad precedents issued by this Court in *Brady* and *Johnson* and, it is readily apparent that 2004 H.B. 498 is equally unenforceable. This Court has been urged to hold that the latest legislative foray is distinguishable due to several “worker friendly” provisions which have been engrafted therein. *Brief of Defendant-Appellant*, pp. 29-30. As of this writing, nine Ohio appellate judges have considered these same spurious arguments and forcefully rejected them without a single dissent. *Kaminski v. Metal & Wire Prods. Co.*, (7<sup>th</sup> Dist. 2008), 175 Ohio App. 3d 227, 2008-Ohio-1521, 886 N.E. 2d 262; *Fleming v. AAS Serv., Inc.* (11<sup>th</sup> Dist.

2008), 177 Ohio App. 3d 778, 2008-Ohio-3908, 896 N.E. 2d 175;<sup>7</sup> *Barry v. A.E. Steel Erec., Inc.*, 8<sup>th</sup> Dist. No. 90436, 2008-Ohio-3676, 2008 W.L. 2835245.

Just as in S.B. 307 and H.B. 103, the General Assembly has attempted to saddle victims of workplace accidents with the seemingly insurmountable “deliberate intent” standard. *R.C. §2745.01(B)*. While the phraseology utilized in the latest enactment may be slightly different than its predecessors, the impact is precisely the same. An effort is being made to “provide employers with immunity from liability for their intentional tortious conduct” which is constitutionally impermissible. *Johnson*, 85 Ohio St.3d at 304.

The OAJ appreciates that the General Assembly enjoys broad general authority under its police powers to change the common law by legislation. It is equally true, however, that such enactments must comply with other constitutional limitations. *Thompson v. Ford* (1955), 164 Ohio St. 74, 79, 128 N.E.2d 111. As was recognized in *Brady*, 61 Ohio St.3d at 631, one such restriction upon legislative authority is found in Sections 34 & 35, Article II of the Ohio Constitution. In *Johnson*, 85 Ohio St.3d at 303, this high court reasoned that:

We do not dispute the long-standing principle that the General Assembly has the authority, within constitutional limitations, to change the common law by legislation. \*\*\* We are also mindful of the fundamental precepts that all legislative enactments enjoy a strong presumption of constitutionality, \*\*\* and that the role of a court when considering the constitutionality of an Act is not to judge the wisdom of the legislation \*\*\*. However, these general principles are not absolute. \*\*\* [I]f the legislation at issue exceeds the limits of legislative power, we must protect the rights of the citizens effected by the law and, if appropriate, declare the legislation invalid. [citations omitted; emphasis added]

The wisdom of *Brady* and *Johnson* remains unerring today. The “great compromise” which lead to the passage of Sections 34 and 35 of Article II was premised upon the reality that

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<sup>7</sup> Judge Cannon dissented in *Fleming*, but only with respect to whether summary judgment had been properly granted upon the common law standard. *Id.*, ¶ 79-85.

inadvertent accidents are inevitable in the workplace and a limited administrative remedy which is promptly paid without regard to fault is preferable. *Blankenship*, 69 Ohio St.2d at 614; *Caygill v. Jablonski* (6th Dist. 1992), 78 Ohio App.3d 807, 814-815, 605 N.E.2d 1352, 1357. The notion that Ohio's workforce tacitly agreed in the process that they would also forego the full panoply of civil damages available for intentionally inflicted injuries and fatalities is absolutely preposterous. It is inconceivable that the promoters of these Constitutional guarantees could have intended that the immunity afforded by the workers' compensation system would be available to those employers which knowingly endanger the lives and safety of their employees. And any sensible person would have to be outraged upon learning that limited state funds are being utilized to remedy the damage caused by such disreputable practices while the offending party remains largely unscathed. As the Court sagely concluded in *Brady* and *Johnson*, laws like H.B. 498 which seek to limit workplace intentional tort victims to the administrative remedies offered by the Bureau are antithetical to the compromise embodied by Sections 34 and 35 of Article II.

For this reason, Defendant-Appellant's discussion of the supposedly more "worker friendly" aspects of H.B. 498 is seriously misplaced. All that matters in this action is that this latest enactment, just like 1986 S.B. 307 and 1995 H.B. 103, seeks to immunize employers from all forms of workplace intentional torts except where a "deliberate" intent to injure can be shown. In both *Brady* and *Johnson*, this insurmountable standard of proof was a focus of the court. *Brady*, 61 Ohio St.3d at 628 fn. 1; *Johnson*, 85 Ohio St.3d at 306.. The majority in the latter decision reasoned that:

By establishing the foregoing standards in R.C. 2745.01, the General Assembly has created a cause of action that is 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 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 civil liability under R.C. 2745.01(D)(1). \*\*\* Indeed, the requirements imposed by R.C. 2745.01 are so unreasonable and excessive that the chance of recovery of damages by employees for intentional torts committed by employers in the workplace is virtually zero.

*Johnson*, 85 Ohio St.3d at 307. In other words, redefining “substantial certainty” to mean only a “deliberate” intent does indeed “provide immunity for employers from civil liability for employee injuries, disease, or death caused by the intentional tortious conduct of employers in the workplace.” *Id.*, at 305 (emphasis added).

There certainly can be no merit to the suggestion that H.B. 498 simply remedies those aspects of the former statutes that this Court found to be unconstitutional in *Brady* and *Johnson*. In paragraph two of the syllabus of *Brady*, 61 Ohio St.3d 624, the Court majority declared that 1986 S.B. 307 was “unconstitutional *in toto*” [emphasis added]. Similarly, the high court found that former R.C. §2745.01, as adopted by 1995 H.B. 103, was “unconstitutional in its entirety” in *Johnson*, 85 Ohio St.3d at 308. Rather obviously, there was no suggestion in either opinion that only “aspects” of these enactments were invalid. Since both pieces of legislation attempted to restrict workplace intentional tort claims to only those caused by the employer’s “deliberate” intent to injure, just as current R.C. §2745.01 strives to accomplish, H.B. 498 must suffer the same fate as its predecessors.

The discourse offered by Defendant-Appellant’s and its *amici* upon the purported lowering of the “burden of proof” and creation of “rebuttable presumptions” is completely pointless. The underlying defense was plainly based upon, and this appeal concerns only, the insurmountable new requirement of “deliberate intent” that appears in revised R.C. §2745.01(A)

& (B). Given that this statutory requirement alone, in Defendant-Appellant's view, is sufficient to defeat Plaintiff-Appellee's claim for relief as a matter of law, it hardly matters that "worker-friendly" provisions may have been sprinkled elsewhere in the enactment. The emphatic dictates of *Brady* and *Johnson* can hardly be avoided simply by including provisions in the enactment that, by themselves, may be constitutionally valid. All this argumentation can accomplish is salvaging those supposedly "worker friendly" provisions that can be severed from the portions that unconstitutionally interfere with workplace intentional tort claims. See generally *State of Ohio v. Sterling*, 113 Ohio St.3d 255, 262, 2007-Ohio-1790, 864 N.E.2d 630, 636.

Nor is it true that 2004 H.B. 498 is really "worker friendly." Much ado has been made over the fact that the statute supposedly lowers plaintiff's burden of proof and shifts the burden to defendant in some cases involving missing safety guards. Actually, the present version of R.C. §2745.01(C) does nothing more than create a "rebuttable presumption" that the "[d]eliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance" is actionable. Such "deliberate" misconduct has, at least in theory, always been a basis of liability under the common law. *Fyffe*, 59 Ohio St.3d at 119-120.

A "rebuttable presumption" means little, moreover, since it disappears the moment that any evidence is presented to the contrary. *Horsley v. Essman* (4th Dist. 2001), 145 Ohio App.3d 438, 444, 2001-Ohio-2557, 763 N.E.2d 245, 249. All an employer has to do is deny acting "deliberately" to successfully defeat the new "worker friendly" presumption appearing in R.C. §2745.01(C). There is no escaping the fact that 2004 H.B. 498 is just as constitutionally offensive as its predecessors.

Other than avoiding costly judgments, no legitimate good can be derived from immunizing employers which knowingly endanger the lives of their employees from substantial

certainty intentional tort claims. By definition, these theories of recovery involve some of the most egregious and dangerous acts known to the civil law. As far as the OAJ attorneys are aware, there are no studies or data available even remotely suggesting that businesses in Ohio will face financial ruin if they remain accountable (as they have been for decades) for their knowingly dangerous acts and omissions. Except in the most extreme cases involving a direct intent to cause harm, insurance coverage can be secured as protection against intentional torts arising in the workplace. *Haraysn v. Normandy Metals, Inc.* (1990), 49 Ohio St.3d 173, 551 N.E.2d 962; *Presrite Corp.*, 113 Ohio App.3d 38. This Court should therefore re-affirm the validity of the doctrine of *stare decisis* and uphold *Brady* and *Johnson*.

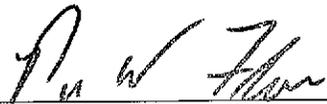
**PROPOSITION OF LAW NO. 3: AN INTERMEDIATE COURT OF APPEALS HAS NO AUTHORITY TO ISSUE DECISIONS RESOLVING ISSUES THAT ARE NOT PART OF ANY APPEALED ORDER, AND WHERE THE ISSUES RESOLVED WERE NOT RAISED IN ANY ASSIGNMENT OF ERROR ASSERTED BY THE APPELLANT OR SET FORTH IN ANY ARGUMENT IN THE PARTIES' BRIEFS.**

Defendant-Appellant's final Proposition of Law addresses a matter of procedure which appears to be unique to this lawsuit. On this point, the OAJ notes simply that upon review of a trial court decision "it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the [trial] judge." *Salve Regina College v. Russell* (1991), 499 U.S. 225, 232, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190. Likewise, an appellate court should not be artificially confined to the four corners of an "appealed order", particularly when vital public interests are at stake.

## CONCLUSION

For over a quarter-century, the Ohio judicial system has had no apparent difficulty awarding workplace intentional tort damages when they are deserved and denying them when they are not. Except for those employers who deliberately intend to maim and kill their workers, stop-gap insurance has long furnished both indemnity and a defense against such claims. When liability is imposed, the Ohio Bureau of Workers' Compensation is able to recover the benefits which have been advanced to the injured worker in accordance with the rights of subrogation afforded by R.C. §4123.931. No "double recovery" is produced. Because the precedents established in *Brady* and *Johnson* continue to preserve a fair and efficient system for justly allocating the costs of workplace injuries, the doctrine of *stare decisis* should be respected and the Seventh District affirmed in all respects.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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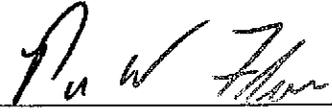
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