

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

DeWAYNE SUTTON,	:	
	:	
Plaintiff/Appellee,	:	Case No. 2010-0670
	:	
v.	:	
	:	
TOMCO MACHINING, INC.,	:	On Appeal from the
	:	Montgomery County Court of Appeals
Defendant/Appellant.	:	Second Appellate District

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**REPLY BRIEF OF APPELLANT TOMCO MACHINING, INC.**

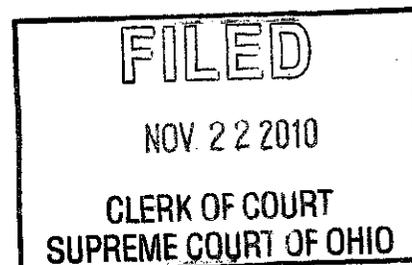
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## REPLY

### **The workers' compensation system.**

The purpose of the workers' compensation system is "to compensate employees for the disability incurred by workplace injury." *State ex rel. Schack v. Industrial Comm'n of Ohio* (2001), 93 Ohio St. 3d 247, 248. The workers' compensation system achieves that purpose through an administrative process that permits and encourages employees injured at work to file claims and provides prompt and adequate compensation for their injuries. The workers' compensation system ensures that employees are aware of the existence of the system and their employers' participation therein by requiring employers to post conspicuously certain notices. R.C. 4123.83.

In the present case, the system worked exactly as it was supposed to work. According to the complaint, as prepared and filed by plaintiff/appellee DeWayne Sutton ("Sutton"), he was injured at work, filed a claim, and received monetary benefits. Complaint, ¶3, 8, Sutton's Appx. 2, 3.

Of course, in the employment at will context and under circumstances other than those which give rise to a claim of intentional tort, permitting employers to terminate the employment of employees injured at work solely because such employees filed claims or otherwise pursued workers' compensation benefits could discourage injured employees from seeking the benefits to which they may be entitled. Therefore, such discharges are properly prohibited in light of the purpose of the workers' compensation system. R.C. 4123.90.

On the other hand, in the employment at will context and under circumstances other than those which give rise to a claim of intentional tort, permitting employers to terminate the employment of employees injured at work who have *not* filed claims or otherwise pursued

workers' compensation benefits *in no way* discourages injured employees from seeking the benefits to which they may be entitled. Therefore, prohibiting such discharges is *not* necessary to fulfill the purpose of the workers' compensation system, and they are *not* prohibited.<sup>1</sup>

The purpose of the workers' compensation system is not, and never has been, to guarantee continued employment to employees injured at work, and yet that could be the practical result if this Court follows the path set forth by the Ohio Association for Justice ("OAJ"), the Ohio Employment Lawyers Association ("OELA") (collectively, the "*amici curiae*"), and Sutton.

Tomco submits that the Eighth Appellate District correctly summarized the law of Ohio when it stated that R.C. 4123.90 "does not vest in the employee an absolute guarantee of continued employment simply because an injury was sustained in the course of employment." *Vince v. Parma Community General Hospital* (Jan. 21, 1988), Cuyahoga App. No. 53180, 1988 Ohio App. LEXIS 114, \*10. Any other conclusion would be contrary to the express terms of the constitutional provision that permitted the establishment of a workers' compensation system "[f]or 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". Section 35, Article II, Ohio Constitution (emphasis added). Providing continued *employment* is, of course, fundamentally distinct from providing *compensation* and this Court has explicitly recognized that the purpose of the workers' compensation system is to provide *compensation*. *Shack, supra*.

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<sup>1</sup> This principle assumes no violation of established law, consistent with the employment at will concept.

**Only the legislature may make public policy choices, including the choice Sutton asks this Court to make.**

The workers' compensation system is the result of a "unique mutual compromise" in which both employers and employees gave up common-law rights in return for the advantages afforded to both groups by the system. *Stetter v. R.J. Corman Derailment Services*, 125 Ohio St. 3d 280, 2010-Ohio-1029, ¶54. By asking this Court to create a new common-law "retaliation" remedy for employees who have suffered work-related injuries but are not entitled to the statutory retaliation remedy, Sutton and the *amici curiae* ask this Court to undo the unique mutual compromise and upset the delicate balance inherent in the workers' compensation system.

This Court has acknowledged that policy issues arise in the workers' compensation arena, and has explicitly recognized that the policy choices that must be made in addressing such policy issues *must* be made by the General Assembly, and *may not* be made by this Court:

The *policy choice* between permitting and prohibiting the discharge from employment of an employee who has been injured at work is a difficult one, as it inevitably creates a burden of some degree upon either the employer or the employee.

\* \* \* \*

In addressing this difficult policy issue, which lacks wholly satisfactory solutions, *the General Assembly chose to proscribe retaliatory discharges only*. Employers may not retaliate against employees for pursuing a workers' compensation claim. R.C. 4123.90. *It is within the prerogative and authority of the General Assembly to make this choice* when determining policy in the workers' compensation arena and in balancing, in that forum, employers' and employees' competing interests. *We may not override this choice and superimpose a common-law, public-policy tort remedy on this wholly statutory system.*

*Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St. 3d 351, 2007-Ohio-6751, ¶¶20-23

(citations omitted and emphasis added).

Sutton and the *amici curiae* correctly point out that there are factual differences between Sutton's case and the *Bickers* case. However, this Court granted jurisdiction in *Bickers* and in the present case not because of the particular facts of each case, but because they were "cases of public or great general interest". Section 2(B)(2)(e), Article IV, Ohio Constitution. Indeed, it is well known that this Court's role "as a court of last resort is not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in courts of appeals that are matters of public or great general interest." *State v. Bartrum*, 121 Ohio St. 3d 148, 2009-Ohio-355, ¶31 (O'Donnell, J., dissenting). If the issues in *Bickers* were fact specific, then this Court would have either declined jurisdiction, or dismissed the case *sua sponte*. *Williamson v. Rubich* (1960), 171 Ohio St. 253; S.Ct. Prac. R. 12.1. It did not do so and, therefore, it must be presumed that the issues in *Bickers*, and this Court's decision in that case, are of public or great general interest.

The marginalization of *Bickers* proposed by Sutton and the *amici curiae* is also inappropriate in light of this Court's statements in *Bickers* and subsequent cases. In *Bickers*, this Court could easily have stated its conclusion in a way that limited the rule set forth therein to the particular facts of that case. It did not. Both in the syllabus and in the opinion itself, this Court explicitly stated that there was no common law cause of action for Ms. Bickers because R.C. 4123.90 "provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act." *Bickers*, at syllabus and ¶26. This Court did not express any intention to limit the application of the rule set forth therein to the particular factual situation in *Bickers*.

Indeed, earlier this year, this Court reaffirmed its position regarding the prerogative and authority of the Ohio General Assembly. This Court acknowledged the limits of its role and unequivocally stated that *all* policy choices in the entire workers' compensation *arena*, and not

just the particular policy choice relating to the workers' compensation statute that was relevant to the particular factual situation in *Bickers*, can *only* be made by the General Assembly:

It is within the prerogative and authority of the General Assembly to make [choices] when determining policy in the workers' compensation arena and in balancing, in that forum, employers' and employees' competing interests.

*Kaminski v. Metal & Wire Products Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, ¶74 (quoting *Bickers*; alteration in *Kaminski*). The policy choices that are within the prerogative and authority of the General Assembly include the policy choice that Sutton and the *amici curiae* are now asking this Court to make.

The fact that *Kaminski* concerned the statutory provision regarding employer intentional torts rather than wrongful discharge reinforces the universal applicability of the principles set forth therein – it is for the legislature, and not the courts, to make public policy choices in the workers' compensation arena.

Therefore, Sutton and the *amici curiae* should make their arguments for the recognition of an entirely new policy in the workers' compensation arena, and an equally new cause of action, to the legislature.

**This is a case about whether an employee at will who is injured at work and is then discharged may, on that sole basis, assert a common law claim for wrongful discharge in violation of the public policy underlying R.C. 4123.90.**

While Sutton alleges in his complaint that Tomco terminated his employment *after* he reported that he was injured, he does *not* allege in his complaint that Tomco terminated his employment *because* he reported that he was injured. Complaint, ¶4-5, Sutton's Appx. 2. Moreover, no such allegation may be inferred since it would be contrary to the specific allegations in Sutton's complaint that Tomco terminated his employment *because he was injured*. Complaint, ¶12, 14, Sutton's Appx. 3. Sutton also alleges in his complaint that the

applicable public policy “prohibits employers from discharging employees *because they were injured* on the job.” Complaint, ¶10, Sutton’s Appx. 3 (emphasis added). This Court should not be distracted by the assertions in the opposing briefs that are based on allegations not set forth in the complaint. Giving a fair reading to Sutton’s own complaint, this is a case about whether an employee at will who is *injured* at work and is then discharged may assert a common law claim for wrongful discharge in violation of the public policy underlying R.C. 4123.90. Complaint, Sutton’s Appx. 1-4. This is *not* a case about whether an employer may retaliate against an employee for *reporting* an injury.

Similarly, this is *not* a case about whether an employer may prevent an employee from filing a claim. Tomco could not, and did not, prevent Sutton from filing his claim. Complaint, ¶8, Sutton’s Appx. 3. Moreover, terminating an employee who is injured at work is not likely to prevent or even discourage the employee from seeking workers’ compensation benefits. Quite the opposite result is surely more likely. Terminating an employee who is injured at work and depriving that employee of the income associated with that employment would surely *encourage* the employee to replace the lost income by seeking both workers’ compensation and unemployment benefits. The employer would not benefit from such terminations. Similarly, and for the same reason, terminating an employee who is injured at work is hardly likely to prevent or discourage *another* employee subsequently injured at work from seeking workers’ compensation benefits.

Public policy decisions arising out of this case should be driven by the factual realities of the workplace, not scare tactics conjured up in the minds of those who have an agenda that does not benefit the people of Ohio and the public at large.

**This Court has already decided that there is no common law claim for wrongful discharge in violation of the public policy underlying R.C. 4123.90.**

There should be no further expansion of any public policy exception to the employment at will doctrine. In 2007, this Court decided that R.C. 4123.90 “provides the *exclusive remedy* for employees claiming termination in violation of rights conferred by the Workers’ Compensation Act.” *Bickers*, at syllabus and ¶26 (emphasis added). In the present case, Sutton claims that the public policy that is relevant to his claim is “the public policy underlying Ohio’s workers’ compensation system, including R.C. § 4123.90,” Sutton’s Merit Brief, p. 13. There is no distinction between the public policy that Sutton claims is the basis of his wrongful discharge claim and the public policy that this Court has already rejected as the basis of a wrongful discharge claim.

**The legislature and the courts have already addressed the rights of employees who have not filed workers’ compensation claims.**

In its brief, the OAJ asks this Court to review this case on the basis that the issue of the termination of employees who have been injured at work but who have not filed claims for workers’ compensation benefits (pre-claim retaliation) is somehow novel. It is not.

The legislature chose to prohibit retaliation in the following terms:

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers’ compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer

R.C. 4123.90. Clearly, the legislature chose to afford protection not only to an employee who has “filed a claim”, but also to an employee who has “instituted, pursued or testified in any proceedings under the workers’ compensation act”. *Id.* In other words, the legislature chose to

afford protection to employees who have filed claims, and to certain employees who have not filed claims.

In light of that provision, this Court and several appellate courts have noted that an employee injured at work who did not file a claim *prior* to the employer's discharge could nevertheless be entitled to the protections of R.C. 4123.90. Indeed, almost thirty years ago, this Court set forth the rule:

We conclude \* \* \* that [R.C. 4123.90] applies only if the employee had been discharged after taking *some action which would constitute the actual pursuit of his claim*, not just an expression of his intent to do so.

*Bryant v. Dayton Casket Co.* (1982), 69 Ohio St. 2d 367, 371 (emphasis added). While the employee in *Bryant* had only expressed his intent to pursue a claim and, therefore, was not entitled to the protections of R.C. 4123.90, this Court clearly understood that some employees injured at work who had not filed claims would be entitled to the protections of R.C. 4123.90, i.e., pre-claim protection.

Two years later, this Court emphasized that certain employees injured at work who had not filed a claim were entitled to the protections of R.C. 4123.90:

*[W]e did not hold in Bryant that the protection of R.C. 4123.90 is triggered only upon the actual filing of a written claim.* Justice William B. Brown wrote in his *Bryant* concurring opinion at page 372:

“Indeed, a requirement that an actual filing of a claim is the only means by which a proceeding can be instituted or pursued would frustrate the legislative intent as evinced in R.C. 4123.90.”

We agree with the foregoing reasoning, and therefore find that *the court of appeals misinterpreted Bryant in holding that an actual claim must be filed before the employee is protected.*

*Roseborough v. N.L. Industries* (1984), 10 Ohio St. 3d 142, 143 (emphasis added). Although *Roseborough* involved a self-insured employer, this Court's comments regarding such situations are also instructive:

We therefore hold that a workers' compensation claim or proceeding for medical expense benefits has been "instituted" or "pursued" against a self-insured employer for purposes of R.C. 4123.90 if: (1) a formal written claim is filed by the employee with the employer, the Bureau of Workers' Compensation, or the Industrial Commission of Ohio, or (2) the employer agrees to pay or has paid for medical care provided to an injured employee, or (3) the employer receives written notice from an independent health care provider in the form of a bill for medical services rendered to an injured employee on account of his employment-related injury, or (4) the employer becomes similarly involved with the compensation process.

*Roseborough*, at 145.

In *Bryant* and *Roseborough*, this Court provided specific guidance regarding when an employee injured at work has acted in a manner that would entitle that employee to the pre-claim protections of R.C. 4123.90. Several appellate courts have followed this Court's lead and have similarly concluded that an employee injured at work who has not filed a claim might, depending on the specific facts of the case, be entitled to the protections of R.C. 4123.90. For example:

[T]he Ohio Supreme Court has held that *the physical filing of a written claim is not necessary to trigger the statute's protections*. To determine whether an *employee* of a state fund insured employer "*instituted*" or "*pursued*" a claim prior to their discharge, *this Court looks to the record*. We consider all of the evidence, such as whether the employee: (1) told his employer that he was injured on the job; (2) notified his employer of his intention to file a claim as to a particular injury; and (3) requested any paperwork so as to file his claim. Of course, if the employee actually filed a workers' compensation claim prior to his discharge, then we need not review the record for further evidence of "actual pursuit."

*Pinkerton v. Thompson*, 174 Ohio App. 3d 229, 2007-Ohio-6546, ¶36 (citations and footnote omitted) (emphasis added).

Thus, *[the employer's] contention that [the employee] was required to file a claim, before the date of his discharge (April 6, 1989), in order to recover pursuant to R.C. 4123.90, is not well-taken.* Moreover, a review of the record demonstrates that *[the employee] did initiate or pursue his claim before the date of discharge.*

\* \* \* \* \*

Again, as previously noted, *[the employee] was not required to file his claim prior to the date of discharge. He was merely required to initiate, pursue, or file his claim prior to the date of discharge.* Moreover, the record reflects that *[the employee] did pursue or initiate his claim prior to the date of discharge.*

*Enyart v. Columbus Metro. Area Community Action Org.* (1996), 115 Ohio App. 3d 118, 124-125 (citations omitted) (emphasis added).

*Actual filing of a workers' compensation claim is not a precondition to recovery by an employee under R.C. 4123.90 for a "retaliatory discharge" by an employer where the employee has been informed by the employer's agent that she will complete the employer's information section of the claim form and cause the claim to be filed with the Bureau of Workers' Compensation and the claim is not so filed prior to discharge of the employee.*

*Thompson v. Kinro, Inc.* (1987), 37 Ohio App. 3d 175, paragraph 1 of the syllabus (emphasis added). See also, *Mortensen v. Intercont'l Chem. Corp.*, 178 Ohio App. 3d 393, 2008-Ohio-4723, ¶28 ("While an employee need not actually file a claim, he must initiate or pursue proceedings for workers' compensation benefits before being discharged").

The workers compensation statute and the foregoing cases all demonstrate a clear recognition of the rights of employees injured at work who are subjected to pre-claim retaliatory discharge. Moreover, they also demonstrate that it is appropriate and necessary to require from the employee some overt act as a condition precedent to invoking the workers' compensation

system. Such a requirement helps to maintain the balance inherent in the workers' compensation system and one of the principal benefits of the system, i.e., the elimination of litigation between employees and their employers.

OAJ wants to expand the current pre-claim retaliatory discharge protection so that it begins at the moment of injury at work. Any such expansion is unnecessary and its implementation would give rise to significant practical problems that cannot be ignored. For instance, if a pre-claim retaliatory discharge cause of action is established at the moment of injury at work, some notice to the employer would surely be required before the employer would be at risk for being sued in the event of termination of the employee injured at work. But what notice would be required? Would notice that the employee merely claims to be injured be sufficient, or would notice that the employee claims that the injury is work-related also be required? If the employer is anything other than a very small business, would notice to the employee's co-workers or immediate supervisor be sufficient, as such individuals could conceivably be considered the employer's agents, or would notice to some specified or more senior individual be required?

The problems associated with the proposed expansion of existing statutory and common law rights in the name of public policy will be implicated *every* time an employer becomes aware that an employee has been injured at work, or might have been injured at work, and the issues that arise will not be easily resolved. After all, whenever affirmative rights are given (or taken away) based upon a "reasonable opportunity" standard, the resulting investigation is so fact-specific that litigation is inevitable. The Ohio courts, including this Court, have already rejected this type of expansive reasoning by holding that simply reporting an injury is not the same as pursuing a claim.

In fact, identifying discharges from the moment an employee suffers a work-related injury as “retaliatory” and “wrongful” in violation of Ohio’s public policy would create significant negative practical consequences for employers. Any employer who at any time and in any way became aware that an unsatisfactory employee had been injured at work, or might claim to have been injured at work, would immediately be placed in an impossible situation with respect to that employee. If the employer chose to terminate that employee, any such employee would then be in the position to bring a common law cause of action as advocated by Sutton and the *amici curiae*, alleging a violation of the public policy. Certainly, the employer might eventually demonstrate that there were legitimate business reasons for the termination, but by that time those legitimate business reasons, specifically any economic benefit derived from the employment decision, might well have been negated by the cost of litigation. Creating a new tort cause of action would significantly disturb the balance that the legislature carefully established as part of the unique mutual compromise inherent in the workers’ compensation system.

**This is not a case of an employer intentional tort.**

This Court held almost thirty years ago that intentional tort actions by employees against their employers are not precluded by the workers’ compensation system, because injuries suffered by an employee as a consequence of an employer’s intentional tortious conduct are always outside the scope of employment relationship:

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 v. Cincinnati Milacron Chems.* (1982), 69 Ohio St. 2d 608, 613. Such tort actions in Ohio are now governed by statute. R.C. 2745.01. See, also, *Kaminski*, at ¶103.

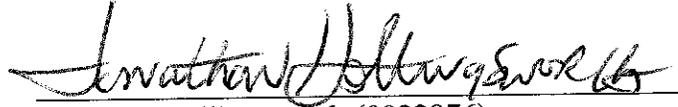
Sutton's contention that his claim against Tomco should be permitted because it is an employer intentional tort claim clearly misses the mark. This is a public policy wrongful discharge action; it is not an intentional tort action. Certainly, the termination of Sutton's employment was intentional – like every termination of every employee – but it indisputably arose out of the employment relationship between Tomco and Sutton. There is no suggestion that in terminating Sutton's employment (or indeed in any other way), Tomco intended to cause physical or psychic injury to Sutton or acted with deliberate intent to cause Sutton to suffer an injury, a disease, a condition, or death. *Cf.* R.C. 2745.01(D) (expressly stating that that 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”). If there was, Sutton would surely have included an employer intentional tort claim in his complaint.

### **CONCLUSION**

As part of a unique mutual compromise between employers and employees, the legislature made certain policy choices regarding the rights and remedies to be afforded to employees who are injured at work. It is the prerogative of the legislature to make such policy choices. This Court should not override these policy choices and make a common law wrongful discharge claim available to employees simply because they have been injured at work. In the workers' compensation arena, R.C. 4123.90 provides the exclusive remedy for employees claiming retaliatory or wrongful termination, whether or not they have filed claims.

Sutton received workers' compensation benefits as a consequence of the injury that he allegedly suffered during the course of his employment with Tomco. Sutton is *not* entitled to anything as a consequence of the termination of his employment.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served upon:

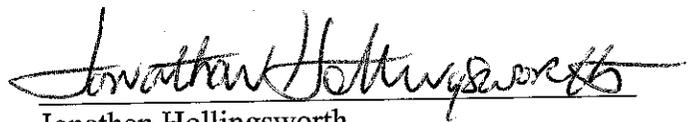
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## ARTICLE IV: JUDICIAL

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### ARTICLE IV: JUDICIAL

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#### *JUDICIAL POWER VESTED IN COURT.*

§1 The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.

(1851, am. 1883, 1912, 1968, 1973)

#### *ORGANIZATION AND JURISDICTION OF SUPREME COURT.*

§2 (A) The Supreme Court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the Supreme Court in the place and stead of the absent judge. A majority of the Supreme Court shall be necessary to constitute a quorum or to render a judgment.

(B)(1) The Supreme Court shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;
- (f) In any cause on review as may be necessary to its complete determination;
- (g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The Supreme Court shall have appellate jurisdiction as follows:

- (a) In appeals from the courts of appeals as a matter of right in the following:
  - (i) Cases originating in the courts of appeals;
  - (ii) Cases in which the death penalty has been affirmed;
  - (iii) Cases involving questions arising under the constitution of the United States or of this state.
- (b) In appeals from the courts of appeals in cases of

felony on leave first obtained.

- (c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed.
- (d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;
- (e) In cases of public or great general interest, the Supreme Court may direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify, or reverse the judgment of the court of appeals;
- (f) The Supreme Court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court.

(C) The decisions in all cases in the Supreme Court shall be reported together with the reasons therefor.

(1851, am. 1883, 1912, 1944, 1968, 1994)

#### *ORGANIZATION AND JURISDICTION OF COURT OF APPEALS.*

§3 (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo
- (f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify,

## **2745.01 Liability of employer for intentional tort - intent to injure required - exceptions.**

(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.

Effective Date: 04-07-2005

## **4123.83 Posting of notice by employer.**

Each employer paying premiums into the state insurance fund or electing directly to pay compensation to the employer's injured employees or the dependents of the employer's killed employees as provided in section 4123.35 of the Revised Code, shall post conspicuously in the employer's place or places of employment notices, which shall be furnished in adequate number by the bureau of workers' compensation at the time of the payment of the premium, stating the fact that the employer has made the payment, the date thereof, and period for which the payment is made, or that the employer has complied with section 4123.35 of the Revised Code, and has been authorized by the administrator of workers' compensation directly to compensate employees or dependents, and the date of the authorization. The notice, when posted, constitutes sufficient notice to the employer's employees of the fact that the employer has made payment or that the employer has complied with the elective provisions of section 4123.35 of the Revised Code.

Effective Date: 08-06-1999