ORIGINAL

# IN THE SUPREME COURT OF OHIO

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| AMERICAN MUNICIPAL POWER, INC., | ) | Certified Question of State Law |
| | ) | |
| Petitioner, | ) | |
| v. | ) | |
| | ) | |
| BECHTEL POWER CORPORATION, | ) | Case No. 2014-1847 |
| | ) | |
| Respondent. | ) | |

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## MERITS BRIEF OF RESPONDENT BECHTEL POWER CORPORATION

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## I. INTRODUCTION

Petitioner American Municipal Power, Inc. ("AMP") obtained certification of the following question of state law pursuant to Ohio S.Ct.Prac. Rule 9.01:

> Does reckless conduct by the breaching party, as defined in *Anderson v. Massilon*, 134 Ohio St.3d 380 (2012), render a contractual limitation of liability clause unenforceable?

The answer to the certified question should be "No."

**AMP seeks a significant change in the law.** AMP seeks a change to well-settled Ohio law to expand a contracting party's liability beyond that accepted by agreement. In this case, AMP asked a federal court to set aside a contractual limitation of liability clause to which AMP agreed, and that respondent Bechtel Power Corporation ("Bechtel") bargained for, so that AMP could claim damages far greater than that agreed limit. After discovery, Judge Michael H. Watson of the Southern District of Ohio ruled that the limitation of liability should be enforced under Ohio law as applied to the undisputed facts of the case. AMP now asks this Court to change Ohio law to lower the standard a contracting party must meet to set aside a limitation of liability -- not only for this case, but for all contracts in Ohio. The new legal principle proposed by AMP would not advance any public policy of this State. On the contrary, it would undermine the freedom that contracting parties in Ohio enjoy to allocate their contractual risks by agreement in reliance upon well-settled precedent of this Court.

**Ohio Law is settled.** For more than a century, this Court has recognized the rights of contracting parties to limit their liability in the event of a breach. And the legal standard for enforcing such a contractual limitation of liability clause is settled. A clause that limits the amount of damages recoverable is valid and enforceable unless the breaching party's conduct was willful or wanton, *i.e.,* the party exercised no care

whatsoever. *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St. 2d 147, 158 (1978). Recently, this Court in *Anderson* considered whether a showing of reckless conduct meets the willful or wanton misconduct standard, and found that "wanton misconduct" is the "failure to exercise any care" and that "reckless conduct" (a lower standard that is legally distinct from willful or wanton misconduct) would not suffice. Thus, with respect to limitations of liability, the holding in *Anderson* reinforces the "willful and wanton" standard contracting parties in Ohio have long relied on under *Berjian* to evaluate their risks and to price their contracts accordingly.

**A contractual liability limit should only be set aside on a showing of a "willful or wanton" breach.** Freedom of contract is a strongly held tenet of Ohio law. Parties should be permitted to allocate contractual risk and liability as they see fit. Tort law concepts should not be imported into contract law to water down Ohio parties' freedom of contract. Instead, the Court should continue to allow contracting parties to evaluate their own risks and bargain for contractual performance accordingly. And absent a showing of willful or wanton misconduct, *i.e.,* no care whatsoever, a bargained-for contractual limitation of liability should be enforced.

**No public policy supports lowering the standard.** AMP's primary argument is that public policy, expressed by the legislature, compels this Court to lower the *Berjian* standard and expand liability under Ohio contracts. AMP claims that the General Assembly "consistent[ly] adopt[ed] . . . a reckless standard" and "expressed the public policy . . . that reckless conduct is sufficient to lose limitations of liability that would otherwise apply." AMP Brief at 9. To the contrary, the General Assembly has not consistently chosen the reckless standard over the wanton standard. Indeed, the Ohio

Revised Code contains **at least fifty-eight** instances where the legislature required willful or wanton conduct to abrogate statutory immunity. Moreover, there is no general or specific legislative enactment directly or even indirectly relating to the standard for enforcement of contractual limitation of liability provisions as the narrow and exacting "public policy" test requires. AMP's convoluted public policy argument is unsupportable.

***Stare decisis* requires adherence to the well-settled *Berjian* standard.** *Berjian* was correctly decided and remains consistent with Ohio jurisprudence today. It has proved successful and workable for nearly four decades, and does not appear to have been criticized by anyone until AMP sought to escape the limitation of liability clause that it agreed to in its contract with Bechtel. Changing the *Berjian* standard would cause unwarranted hardship for contracting parties who have relied upon it to allocate their risks and costs. There is no reason to abandon the clear and practical standard that has been the law of Ohio for more than forty years.

In sum, as explained below, *Berjian* was correctly decided and there is no reason to overrule it. Accordingly, the answer to the certified question should be "No."

## II. PROCEDURAL POSTURE AND RELEVANT FACTS

The certified question arose from a breach of contract case currently pending in the Southern District of Ohio. As a procedural matter, the District Court has ruled on Bechtel's motion for summary judgment, applying the "willful and wanton" standard to AMP's claim to set aside the contractual limitation of liability and finding, based on the undisputed facts, that the limitation is enforceable. Bechtel strongly disputes breach, damages, and causation; no trial has yet been conducted on these issues.

To address the certified question, this Court need only take notice of limited facts from the underlying case.[1]

### A. AMP Expressly And Unambiguously Agreed To Limit Bechtel's Liability.

AMP, a sophisticated generator and wholesaler of electricity, hired Bechtel to engineer and build a coal-fired power generating plant in Meigs County, Ohio. (A-2) The contract is detailed and over one thousand pages long. (A-28) Article 16.1 of the contract expressly (and in contrasting typeface) limits Bechtel's liability for damages. It provides that Bechtel's liability is limited to any earned fee paid by AMP[2] with an agreed minimum of $500,000 (A-23):

> [BECHTEL'S] CUMULATIVE MONETARY LIABILITY TO [AMP] ARISING UNDER OR IN RELATION TO [THE CONTRACT] WILL IN NO EVENT EXCEED . . . AN AMOUNT EQUAL TO THE EARNED FEE COMPONENT PAID TO [BECHTEL] BUT IN NO EVENT LESS THAN FIVE HUNDRED THOUSAND US DOLLARS ($500,000). . . .

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[1] AMP's Brief recites at length "findings" made by the District Court, but they are largely recitals of the allegations of AMP's Complaint. The fact statement in the Summary Judgment Order follows this caveat: "AMP alleges the following in its Complaint." (A-18) Bechtel denied and vigorously disputes many of AMP's allegations. And the District Court, for the purposes of its legal analysis of the limitation of liability in the context of a summary judgment motion, only assumed a breach of contract. (A-43 n. 15). The issue of breach remains to be tried in the District Court.

[2] The limitation of liability was effectively tied to the progress of the project. As the work progressed and Bechtel achieved project milestones, AMP would pay Bechtel a certain "earned fee," which would eventually have raised the limitation of liability up to $52 million. Because AMP cancelled relatively early in the project and before Bechtel earned any fee, the minimum limitation of $500,000 applies. (A-23)

### B. AMP Cancelled The Project And Decided To Pursue Natural-Gas Power Generation Instead Of Coal.

The contract was tailored to AMP's plan for developing the project. The contract contemplated that, during a ten-month preliminary development phase, Bechtel would advance the design of the coal-fired power generating plant and prepare a price estimate. (A-19) AMP then had the option to proceed with the project or to cancel it without incurring liability to Bechtel.

The contract became effective in January 2009. Bechtel proceeded with engineering and procurement activities and developed information for the estimate, which was to be completed in November 2009. In October 2009, Bechtel advised AMP that construction costs would be substantially higher than originally anticipated. (A-20, A-21) On November 24, 2009, AMP elected to cancel the contract and to pursue natural-gas-fired power generation instead. AMP contends that the sole reason for its cancellation of the project was the increase in estimated construction costs for the coal plant. Bechtel contends that AMP cancelled the project because external reasons made it economically infeasible.

Indeed, at the time of AMP's cancellation, there had been significant developments in national power markets and the economy that made construction of a large coal-fired generating station less attractive. Most obviously, the continued recession in 2009 reduced consumer demand for energy. Additionally, the discovery of enormous gas reserves in Ohio and other states that became accessible through new drilling techniques, such as fracking, increased the available supply and lowered the price of natural gas. This combination of falling demand and rising energy supply led to drastic price reductions for electricity and advantages for gas-fired power, which

severely worsened the economics of AMP's project and all other coal-fired power plants. Compounding matters, AMP faced an increasingly hostile environmental regulatory scheme for coal plants. (A-54, A-55)

### C. The District Court Found That Bechtel Exercised Sufficient Care In Its Contractual Performance And That The Limitation Of Liability Clause Was Therefore Enforceable.

AMP filed the underlying suit against Bechtel in 2011, asserting both contract and tort claims. The District Court dismissed AMP's tort claims at the outset of the case. Following discovery, Bechtel moved for partial summary judgment to enforce the contractual limitation of liability clause. The District Court granted Bechtel's motion on the enforceability of the limitation of liability clause, and held that at trial, subject to the disputed issues of breach, causation and damages, Bechtel's liability to AMP would be limited to $500,000. In so holding, the District Court relied on *Richard A. Berjian, D.O., Inc. v. Ohio Bell Telephone Co.*, 54 Ohio St. 2d 147 (1978), which held that a limitation of liability clause is enforceable in Ohio absent a showing that the breaching party's conduct was willful or wanton, *i.e.,* the party exercised no care whatsoever.

Applying the *Berjian* standard, the District Court found, after a review of the undisputed facts, that Bechtel exercised sufficient care in its contractual performance to enforce the limitation of liability clause.[3] The District Court also

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[3] AMP's central contention was that Bechtel exercised no care whatsoever in its obligation to conduct a "trend program." (A-2) Judge Watson found that Bechtel in fact did exercise care in performing its trend obligations (A-43), as Bechtel circulated a trend list in March 2009; Bechtel gave AMP progress reports in August, September and October informing AMP of price increases; the project manager for the Owner's Engineer was informed by early summer/fall of 2009 of $350 million in price increases; Bechtel and the Owner's Engineer met in May 2009 to discuss the development of costs; Bechtel identified schedule impacts in its February, March and May monthly

(continued...)

expressly rejected AMP's arguments that a different (and lower) "recklessness" standard, not found in *Berjian*, should be applied.

Although the District Court twice decided, at both the motion to dismiss and summary judgment stages, that "reckless conduct" was inadequate to meet the standard in Ohio to set aside a contract limitation of liability (A-24-27), at AMP's request it sought review of the certified question before conducting a trial.

## III. ARGUMENT

This Court agreed to answer the following certified question:

> Does reckless conduct by the breaching party, as defined in *Anderson v. Massillon*, 134 Ohio St. 3d 380 (2012), render a contractual limitation of liability clause unenforceable?

The answer to this question is "No."

### A. Ohio Law Requires A Showing Of "Willful Or Wanton Misconduct" By A Breaching Party To Abrogate A Limitation Of Liability Clause. "Reckless Conduct" Does Not Meet That Standard.

In Ohio, a limitation of liability clause will be enforced absent a showing that the party seeking protection under the clause engaged in **willful or wanton misconduct** by failing to exercise any care whatsoever.

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(continued...)

reports; and Bechtel conducted a quantity turnover meeting with the Owner's Engineer in September 2009 reviewing areas of potential cost increase. (A-38, 39)

### 1. *Berjian* Held That A Limitation Of Liability Clause Should Be Enforced Unless The Breaching Party Fails To Exercise "Any Care Whatsoever."

This Court's holding in *Richard A. Berjian, D.O., Inc. v. Ohio Bell Telephone Co.*, 54 Ohio St. 2d 147 (1978), answers the certified question in the negative.

In *Berjian*, this Court held that a limitation of liability clause in an advertising contract for a listing in the Yellow Pages "was not void as against public policy," and that it was enforceable because "[t]here was no showing of willful or wanton misconduct on the part of any of the Ohio Bell employees, and **absent such showing, the limitation of liability clause is effective**." *Id.* at 156, 158 (emphasis added). The *Berjian* Court also defined exactly what conduct would abrogate such a clause: "a limitation of liability clause . . . is ineffective where the party to the contract seeking protection under the clause **has failed to exercise any care whatsoever** toward those to whom he owes a duty of care." *Id.* at 158 (emphasis added).

### 2. *Anderson* Distinguished Between Reckless And Wanton Conduct; Reckless Conduct Does Not Meet The *Berjian* "Willful Or Wanton" Standard.

*Berjian* held that a limit of liability will be enforced absent a showing of "willful or wanton misconduct." *Anderson v. City of Massillon*, 134 Ohio St. 3d 380 (2012), whose definition of "reckless conduct" is referenced in the certified question, established beyond any doubt that an allegation of reckless conduct does not meet the standard of willful or wanton misconduct, *i.e.* no care whatsoever. *Anderson* held that "wanton misconduct" is a different and higher standard than "reckless conduct."

*Anderson* was a wrongful death case arising out of a collision between a fire truck and a passenger vehicle. A statute limited the municipal defendant's tort

liability unless its conduct was "**willful or wanton**" (R.C. § 2744.02(B)(1)), while its employees had immunity from a tort claim unless they acted in a "**reckless or wanton**" manner (R.C. § 2744.03(A)(6)). *Id.* at 384-85 (emphasis added). The Court of Appeals held that the two standards were the same. However, this Court reversed.

This Court rejected the contention "that 'willfulness,' 'wantonness,' and 'recklessness' are equivalent standards," and held that because "a political subdivision has a full defense to liability [under the statute] when the conduct involved is not willful or wanton, . . . if the conduct is **only reckless** the political subdivision has a full defense to liability." *Id.* at 386, 388 (emphasis added). The Court refused to weaken the willful and wanton standard for holding a political subdivision liable even though its employee could be liable for reckless conduct under a different statute.

The *Anderson* Court also cleared up any confusion arising from a footnote in *Thompson v. McNeill*, 53 Ohio St. 3d 102, 103 n.1 (1990), which had suggested that "[t]he term 'reckless' is often used interchangeably with 'willful' and 'wanton.'" The *Anderson* Court specifically "disavow[ed] the dicta contained in *Thompson*" that willfulness, wantonness, and recklessness are "equivalent standards." *Id.* at 388.

The five federal district court opinions noted by the District Court (A-10) that include "recklessness" as part of the *Berjian* standard are examples of pre-*Anderson* confusion of "reckless" and "wanton", and carry no weight after *Anderson.* Like the Fifth District in *Anderson*, those courts wrote as if there were no difference between "reckless conduct" and "wanton misconduct". A simple mistake compounded this error: *Nahra v. Honeywell*, 892 F. Supp. 962, 970 (N.D. Ohio 1995) paraphrased *Berjian* but mistakenly substituted the word "reckless" for the word "wanton" in *Berjian's*

holding. After the *Nahra* court, in *dicta*, made this mistaken substitution, other federal courts began to cite to *Nahra's* mistake and to each other. Nonetheless, the District Court in this case analyzed these cases in detail in ruling on Bechtel's motions to dismiss and for summary judgment and properly applied the language and the willful or wanton standard – *i.e.,* no care whatsoever – that this Court set forth in *Berjian.*

### 3. The Reckless Standard Put Forward By AMP To Set Aside A Limitation Of Liability Is Not Consistent With *Berjian.*

AMP is wrong when it argues that "A Reckless Conduct Standard Is Consistent With This Court's Opinion In *Berjian.*" AMP Brief at 10-12. *Berjian* was explicit that absent a showing of "willful or wanton misconduct" --the failure to exercise any care whatsoever-- a limitation of liability is enforceable. A showing of conduct meeting only the lower "reckless" standard (which as *Anderson* held is different from "wanton misconduct") does not suffice and AMP's attempt to avoid *stare decisis* by an incorrect interpretation of *Berjian* is fruitless.

In a strained effort to connect *Berjian* with a "reckless" standard, AMP constructs a daisy-chain of legal citations and appeals that leads to an Alabama guest statute case, *Feore v. Trammel*, 102 So. 529 (Ala. 1924). *Feore* uses "reckless indifference" as part of the definition of "wantonness" under Alabama law. But *Berjian* did not cite *Feore*, which addresses neither Ohio law, contract law, nor limitations of liability. *Berjian* actually relied upon *Hawkins v. Ivy,* 50 Ohio St. 2d 114 (1977), which at the time was recognized as the latest pronouncement of the Ohio Supreme Court on the definition of the "wanton misconduct" standard. *See Berjian*, 54 Ohio St. 2d at 158. *Hawkins* provided that: "[w]here the driver of an automobile **fails to exercise any care whatsoever** toward those to whom he owes a duty of care, and his failure occurs under

circumstances in which there is great probability that harm will result, **such failure constitutes wanton misconduct**." 50 Ohio St. 2d at 117-18 (emphasis added).

AMP also argues that *Berjian* does not answer the certified question because it did not specifically mention recklessness. AMP argues as if the "reckless" standard was first considered after *Berjian* was decided. But the "reckless" standard was considered and used (where appropriate) long before *Berjian*. *See, e.g., Soles v. Ohio Edison Co.*, 144 Ohio St. 373, 380 (1945) ("We think that the occupier of the land . . . owes no duty to a trespasser or licensee except to refrain from wanton, willful or **reckless** misconduct which is likely to injure him.") (emphasis added).

In fact, contrary to AMP's argument, the absence of a "recklessness" discussion in *Berjian* does not mean that the *Berjian* Court ignored the "reckless" standard. Rather, the Court put forward a different and higher standard, defined the conduct that would meet that standard, and applied it accordingly. Because a showing of reckless conduct is short of the showing of wanton misconduct the *Berjian* Court required, there was no need to apply or rule out lesser legal standards by name. If negligence or reckless conduct were also sufficient to set aside a limitation of liability, the *Berjian* Court would have examined the defendant's conduct under those lower legal standards before it upheld the limitation of liability clause. It did not do so, instead upholding the clause after determining that the "willful or wanton" standard had not been met.

Because Ohio law is settled by *Berjian*, this Court need go no further to answer the certified question in the negative.

### B. "Willful Or Wanton Misconduct" Is The Appropriate Standard To Set Aside A Limitation Of Liability Under Ohio Law.

There is no reason for this Court to adopt a standard lower than and different from "willful or wanton misconduct." Ohio courts greatly respect freedom of contract, and protect the expectations of contracting parties. Contrary to AMP's arguments, the General Assembly has not "consistently adopted" a reckless standard as regards limitations of liability; in fact, if anything, the legislature uses the "willful and wanton" standard more often than "reckless". Nor has the General Assembly expressed any preference regarding the circumstances under which Ohio courts should set aside contractual limits of liability for damages. AMP's arguments should be rejected. This Court should not expand the circumstances where the Ohio judiciary would re-write contracts and reallocate risks beyond the parties' mutual agreement beyond that already established in *Berjian*.

#### 1. Adoption Of A Reckless Standard Would Be Contrary To The Strongly-Held Tenet That Ohio Law Favors Freedom Of Contract.

Freedom of contract is a strongly held tenet of Ohio law. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 218 (2003) ("The freedom to contract and the attendant benefits and responsibilities . . . are integral to the liberty of the citizenry") (*citing* U.S. Const., art. 1, §10); *Blount v. Smith*, 12 Ohio St. 2d 41, 47, 74 (1967) ("The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write or speak without restraint. . . . A court is required to approach [invalidating a contract provision] with no less restraint than in striking down a statute").

Because parties decide whether and at what price to enter into contracts in light of the risks involved, they should be permitted to agree, along with the contract price, on the magnitude of the risk of damages for breach. As the Court observed a hundred years ago in upholding a railroad's right to limit by contract its liability for damages when a valuable race horse was injured in transit:

> There is no violation of public policy. **On the contrary it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contract, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.**

*Baltimore & Ohio R.R. Co. v. Hubbard,* 72 Ohio St. 302, 319-20 (1905) (emphasis added). Lowering the *Berjian* standard would inappropriately erode freedom of contract and contracting parties' ability to rely on the benefits of their bargain in Ohio.

**2. No Public Policy Rationale Supports Adopting The "Reckless" Standard Proposed By AMP.**

AMP argues that the willful or wanton misconduct standard should be changed by this Court because public policy, expressed by the Ohio legislature, can limit freedom of contract. But AMP has not identified any act or pronouncement of the General Assembly sufficiently tied to a contractual limitation of liability that would justify changing the parties' contract or lowering the standard for enforcement of its agreed limitation of liability.

**a. The General Assembly Has Made No Public Policy Pronouncement Favoring A Standard Lower Than Willful Or Wanton Misconduct.**

The very premise of AMP's argument – that the General Assembly provides a "consistent adoption of a reckless standard" lower than the willful or wanton

limitation of liability standard this Court established in *Berjian* – is fatally flawed. Contrary to AMP's arguments, **at least fifty-eight** Ohio statutes explicitly provide protection for all but "willful or wanton" misconduct.[4] In other words, even if a persuasive "public policy" could be divined from a tally of unrelated statutes, which it cannot, the General Assembly has chosen a higher standard than "reckless conduct" more often than not in the varied areas where it has addressed statutory immunity or defenses, rendering AMP's argument meaningless.

As the Court made clear in *Anderson*, the "reckless" and "wanton" standards, as well as other standards, have different meanings and apply in different contexts. The General Assembly explicitly chooses the "willful or wanton misconduct" standard when it sees fit and explicitly uses the "reckless conduct" or other standards for other occasions.[5] The General Assembly has expressed no policy preference for a "reckless" standard.

**b. Public Policy Permits Courts To Set Aside Contract Provisions Only When Legislative Policy Is Directly Expressed.**

The cases that AMP relies on reveal how truly narrow the "public policy" exception is, and how a contract must run counter to a direct expression of public interest before Ohio courts will rewrite parties' contract provisions. AMP has not demonstrated that any public policy supports the invalidation of all contractual

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[4] *See, e.g.*, the Ohio statutes listed in the Appendix at the end of this Brief.

[5] AMP's citation to Amended Senate Bill 361 is puzzling. That legislation has no relationship to civil liability, but rather clarified that strict criminal liability applied only if explicitly stated, and if not, then recklessness was the required criminal intent to be proven. It also applies only prospectively. It has nothing to do with enforcing limitations of liability in contract actions.

limitations of liability in Ohio in cases where a plaintiff can show "reckless" conduct on the part of the breaching party.

At the outset, AMP cites *Cincinnati City School District Board of Education v. Conners*, 132 Ohio St. 3d 468 (2012), where this Court invalidated a deed restriction prohibiting former school property from being used for educational purposes. In *Conners*, the General Assembly had clearly expressed a public policy favoring the use of school property by charter schools -- it required school districts to offer a school building for sale to charter schools before the building could be sold to other parties. When the school district drafted a deed provision that would have prohibited former school property from being used for educational purposes, this Court reasoned that such a restriction, generally disfavored in any event, frustrated the State's intent to make classroom space available to charter schools. *Id.* at 474. The case is inapposite here, as AMP fails to cite any Ohio statute evidencing a legislative policy regarding contractual limits of liability.

In fact, the *Conners* decision reaffirmed freedom of contract and cautioned that any exceptions to that principle on public policy grounds must be narrow and rare: "**We emphasize that we continue to uphold the importance of freedom of contract and recognize the narrowness of the doctrine of public policy.**" *Id.* at 475 (emphasis added).

AMP also cites to the dissenting opinion in *J.F. v. D.B.*, 116 Ohio St. 3d 363 (2007), a case that involved a challenge to a gestational surrogacy contract. There the surrogate mother had signed a contract relinquishing parental rights, but sought to invalidate the contract on public policy grounds. The majority of the Court examined the

statutes and cases cited by the mother, found no "articulated public policy against gestational surrogacy contracts" and enforced the contract. *Id.* at 364. In *J.F.*, although many Ohio statutes addressed the rights of parents, because none of those statutes specifically involved the contractual rights of gestational surrogates, the Court refused to rely on the public policy argument. *Conners* and *J.F.* came to different results because in *Conners* there was a nexus between the specific legislative policy favoring use of former school district property for charter schools and the challenged contract provision, while in *J.F.* there was no specific legislative policy against gestational surrogacy.

The General Assembly has expressed no "public policy" that relates to contractual limitations of liability. AMP can show nothing like a direct legislative expression to meet the narrow public policy exception for setting aside freedom of contract.

**3. AMP Wrongly Cites Tort Law Principles In Support Of Its Arguments To Change The Standard.**

AMP cites tort law to this Court to argue for a change in Ohio contract law. But this Court has consistently recognized the fundamental distinction between tort law and contract law. In *Floor Craft Covering, Inc. v. Parma Community General Hospital Assoc.*, 54 Ohio St. 3d 1 (1990), the Court explained that:

> Tort law is not designed . . . to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts.

*Id.* at 7 (1990) (citations omitted). "[T]he one point on which the majority and dissenting opinions in *Floor Craft* agree is that the contractor should not be permitted to circumvent

its contract terms by virtue of labeling the action a tort." *Foster Wheeler Enviresponse, Inc. v. Franklin Cnty. Convention Facilities Auth.*, 78 Ohio St. 3d 353, 367 (1997). The standard this Court endorsed in *Berjian* for Ohio contracts should not be changed because of the tort law authority AMP invokes.

**a. The Restatement Sections Cited By AMP Only Address Tort Claims And Do Not Support The Change In Ohio Contract Law That AMP Seeks.**

AMP relies heavily on two sections of the American Law Institute's Restatements of the Law, but they relate only to tort claims, not the issues presented by the certified question. Restatement (Second) of Torts section 500 defines "reckless" conduct with respect to the risk of "physical harm":

> The actor's conduct is in reckless disregard of the **safety** of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk **of physical harm** to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500 (1965) (emphasis added). This section was cited in *Anderson* and *Thompson* because they were both **tort** cases in which plaintiffs sought compensation for **physical harm** and alleged that the tortfeasors disregarded their **safety**. This section is not relevant to a contract case seeking compensation for solely economic losses.

AMP also cites section 195(1) of the Restatement (Second) of Contracts, but that section provides: "A term **exempting** a party from **tort liability** for harm caused intentionally or recklessly is unenforceable on grounds of public policy." Restatement (Second) Contracts, § 195(1) (1981) (emphasis added). Section 195(1) is

inapposite to the certified question for two reasons: it addresses tort liability, not a breach of contract, and it relates to an exculpatory clause, not a clause limiting contractual damages.

A limitation of liability clause, as presented in the certified question, is different from an exculpatory clause. Unlike an exculpatory contract term that completely exempts a party from liability, a limitation of liability clause merely puts a limit on the amount of damages a plaintiff may recover. The criticisms outlined in the Restatement of a contract term that exempts a party from tort liability do not apply to clauses that, rather than excusing all liability, specify a maximum recovery available in the event of a contractual breach. Setting a maximum recovery for contractual liability does not "induce want of care" *see Hubbard*, 72 Ohio St. at 319-320, and a contract term regarding such a limit should therefore be enforced absent "willful or wanton" conduct.

Further, although certified question pertains to limitations of liability for breach of contract damages, and not exculpatory clauses for tort claims, it is notable that Ohio courts have not even used the standard discussed in Section 195(1) of the Restatement to invalidate exculpatory clauses in tort cases. *See Bowen v. Kil-Kare, Inc.*, 63 Ohio St. 3d 84, 90 (1992) ("It has generally been held that a participant in a stock-car race and the proprietor of such activity are free to contract in such a manner so as to relieve the proprietor of responsibility to the participant for the proprietor's negligence, but not for the proprietor's **willful or wanton misconduct.**") (emphasis added).

The certified question does not address exempting a party from tort claims, but rather limitations of liability for contractual damages. The Restatement section does not apply unless a party attempts to exculpate itself from tort claims. *See LDCircuit, LLC v. Sprint Commc'ns, Inc.*, 364 F. Supp. 2d 1246, 1258 (D. Kan. 2005) (section 195(1) applies only to terms exempting parties from tort liability, not to claims for breach of contract). Accordingly, it does not support AMP's contention that the standard in Ohio under which Courts may set aside limitations of liability should be lowered from "willful or wanton" to "reckless."

**b. AMP's Suggestion That Other States Apply Restatement (Second) Of Contracts § 195(1) To Limitations Of Liability For Contract Claims Is Wrong.**

Although section 195(1) is inapplicable to the certified question, AMP nevertheless argues that "[s]ection 195(1) refers to tort liability but, . . . highest courts of other states have applied it regularly to cases involving contractual limitations of liability clauses." AMP Brief at 12. AMP's statement cannot be reconciled with the cited authority. Each of the cases cited by AMP applies section 195(1) where exculpatory clauses, which exclude all liability, are applied to tort claims, rather than the scenario presented by the certified question—where a limitation of liability clause, which limits the amount of damages recoverable, is applied to a breach of contract claim. The reference to Prosser's treatise at the end of AMP's Brief arises out of the same inapposite situation.

AMP incorrectly asserts that New York law utilizes a "reckless" standard to determine the enforceability of a limitation of liability clause in a contract between two

sophisticated parties, *citing Sommer v. Fed. Signal Corp.*, 79 N.Y. 2d 540 (1992).[6] In fact, New York's highest court has explained that: "As we said in *Sommer. . .* the conduct necessary to pierce an agreed-upon limitation of liability in a commercial contract, **must 'smack[ ] of intentional wrongdoing.'"** *Metro. Life Ins. Co. v. Noble Lowndes Int'l*, 84 N.Y. 2d 430, 438-39 (1994) (quoting *Sommer*, 79 N.Y. 2d at 554) (emphasis added). Moreover, New York law holds that "an allegation that a breach of contract was willful rather than involuntary does not allow a court to disregard an unambiguous limitation of liability provision agreed to by parties of equal bargaining power." *Dynacorp v. GTE Corp.*, 215 F. Supp. 2d 308, 317-18 (S.D.N.Y. 2002) (citations omitted).

AMP also cites a Maryland case, *Wolf v. Ford*, 644 A.2d 522 (Md. 1994), as holding that "a party will not be permitted to excuse its liability for intentional harms or for more extreme forms of negligence." AMP Brief at 13-14. But the *Wolf* court addressed an exculpatory clause, not a limitation of liability, and the contract in *Wolf* expressly permitted the plaintiff to assert claims for "gross negligence." *Wolf,* 644 A.2d at 523-24. *Wolf* did recognize, however, that "the allocation of risk" is "part and parcel of the freedom to contract in private matters." *Id.* at 528. *Wolf* upheld the contract provision and provides no support for AMP's proposition.

*Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. Partnership*, 166 P.3d 961 (Haw. 2007), is even less relevant. AMP Brief at 13-14. This Hawaii decision also

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[6] In *Sommer*, the court concluded that the claims were not limited to breach of contract but may also sound in tort. *Sommer*, 79 N.Y. 2d at 552. Moreover, the clause in *Sommer* was acknowledged by the court to be tantamount to an exculpatory clause inasmuch as the limitation of liability was under a hundred dollars. *Id.* at 553.

addressed an exculpatory clause, rather than a limitation of liability clause, and involved tort claims against non-parties to the contract, rather than contract claims. *Laeroc Waikiki Parkside*, 166 P.3d at 981-84. Moreover, the court upheld the contract provision, examining the defendants' conduct under the "fraud or willful misconduct" standard because the text of the clause expressly stated that the parties did not agree to exclude liability for such behavior. *Id.* at 965. The court did not apply AMP's proposed "reckless" standard.

Finally, the cases that AMP string cites on page fourteen of its Brief also address the application of exculpatory clauses to tort claims -- not limitations of liability in breach of contract claims, and are likewise inapposite to the certified question. *See Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186 (Colo. App. 2008) (applying an exculpatory clause in favor of a non-contracting party to claims for civil theft and conversion); *Sharon v. City of Newton*, 769 N.E.2d 738 (Mass. 2002) (applying an exculpatory clause in a release of a personal injury claim); *Finch v. Southside Lincoln-Mercury, Inc.*, 685 N.W.2d 154, ¶ 23 (Wis. Ct. App. 2004) (finding that an exculpatory clause in favor of non-contracting parties did not apply to breach of fiduciary duty and fraudulent transfer claims but could be unenforceable against the intentional tort of interference with contract). In short, AMP has not cited a single case that applies Restatement section 195(1) beyond its terms to a contracting party asserting a limitation of liability clause in a breach of contract claim.

**4. The Duty Of Good Faith And Fair Dealing Supports The Willful or Wanton Misconduct Standard.**

AMP suggests that the duty of good faith and fair dealing supports its argument that the *Berjian* standard should be lowered to recklessness. The cases AMP

cites show that the duty of good faith and fair dealing lends no support to expanding the exception set forth in *Berjian.* Moreover, as this Court recognized in *Hubbard,* "the soundest principles of **fair dealing**" require a party to honor a limitation of liability after reaping the benefit of a lower contract price. *Hubbard,* 72 Ohio St. at 319-20 (emphasis added). Simply put, the duty of good faith and fair dealing supports enforcing limitations of liability parties agree to, not lowering the willful or wanton standard this Court set forth in *Berjian*.

The cases AMP cites involve a party either intentionally interfering with the other party's performance or intentionally failing to perform an act which prevented the other party's performance. In *PHH Mortg. Corp. v. Ramsey*, 2014-Ohio-3519 (10th Dist. 2014), a note holder was prohibited from foreclosing on a mortgage where although the promissory note required payment by mail, the debtor had tendered payments through an internet service that the note holder represented would suffice. Likewise, in *Littlejohn v. Parrish*, 163 Ohio App. 3d 456 (1st Dist. 2005), the mortgage holder refused to allow the debtor to pre-pay a mortgage without a reason, despite the instrument permitting prepayment. Furthermore, in *Kirkwood v. FSD Dev. Corp.*, 2011-Ohio-1098 (8th Dist. 2011), the defendant agreed to split a real estate parcel with plaintiff but then refused to prepare a plan that was necessary to permit the plaintiff to secure municipal approval of the division.[7]

It is clear from these cases that the covenant of good faith and fair dealing under Ohio law is grounded in intentional conduct and does not reach "reckless"

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[7] The final case cited by AMP is wholly irrelevant. *Bolling v. Clevepak Corp.*, 20 Ohio App.3d 113 (6th Dist. 1984) merely recites that the duty of good faith and fair dealing applies to employment contracts.

contract performance. This principle does not support AMP's contention that Ohio courts should apply a "reckless" standard in deciding whether to set aside contractually-agreed limitations of liability.

### 5. A Showing Of "Willful Or Wanton Misconduct," Not A Lower Standard, Should Be Required In Ohio To Avoid An Agreed Limitation Of Liability.

"Willful or wanton misconduct" is the correct standard for Ohio courts to apply in cases challenging contractual limits of liability. This standard is consistent with Ohio's respect for freedom of contract, carving out an appropriately limited sphere in which parties' contractual bargains may be set aside or modified by the courts. (*See supra* at 12).

It is also a standard that respects the fundamental distinction between tort law and contract law. In contract law, the parties' duties to each other are measured by their agreement, and each party is expected to know its own risks and bargain for contractual performance accordingly. It is fitting that performance that smacks of intentional wrongdoing, that is, an intentional breach or the exercise of no care whatsoever, would frustrate the contractual exchange and forfeit the protection of a limitation of liability.

Recklessness, in contrast with wantonness, is present when a party exercises some but not enough care, and differs from negligence only by degree. "Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson,* 134 Ohio St. 3d at 388. This concept was adopted by this Court in *Thompson v. McNeill,* 53 Ohio St. 3d at 103, for instance, when standards of care for tort liability among co-participants in

recreational activities were declared. It is appropriate for tort law, where societal norms applied to whatever circumstances are encountered must govern the actions a party must take and what level of care is appropriate. In contract law, by contrast, the touchstone for obligations is consent, and the parties' choices, negotiations and bargaining, applied to circumstances known through working together, govern the parties' obligations.

Further, the "reckless" standard may be unfair when applied in specific contract cases, such as, for example where sophisticated parties enter into contracts after negotiating in detail, learning each other's risks and interests intimately, and bargaining for specific counterparty obligations to address those risks. In this context, the adoption of a lower reckless standard would undermine the principle of Ohio law that sophisticated parties are more rigorously required to live with their contractual choices. *See Kennecorp Mortgage Brokers, Inc. v. Country Club Convalescent Hospital, Inc.*, 66 Ohio St. 3d 173, 174 (1993) (a forum selection clause in an arms-length commercial contract between sophisticated business entities is valid irrespective of contacts with the forum state).

Public policy understandably allows Ohio courts to set aside limitations of liability for intentional and wanton conduct, but enforces such limits, in those cases where this standard is not met. Parties can bargain for a different (and lower) standard but where, as here, they have not, reckless conduct should not be a sufficient basis for courts to intervene to change their agreement -- A showing of no care whatsoever, as *Berjian* required, must be made to abrogate a bargained-for limitation.

### C. The "Bedrock" Doctrine Of *Stare Decisis* Requires Adherence To The Well-Settled *Berjian* Standard; None of the Factors That Would Justify Overruling *Berjian* Are Met Here.

*Stare decisis* alone compels this Court to answer the certified question in the negative. It is well settled that contractual limitations on liability are enforceable in the absence of a showing of "willful or wanton misconduct." *Berjian*, 54 Ohio St. 2d at 154. *Stare decisis et non quieta movere* -- this Court should "stand by things decided, and not disturb what is settled." "Without question, 'stare decisis is the bedrock of the American judicial system.'" *State v. Kalish*, 120 Ohio St. 3d 23, 27 (2008), *quoting Galatis*, 100 Ohio St. 3d at 217 (internal modifications omitted). As Chief Justice O'Connor has explained:

> 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.

*Galatis*, 100 Ohio St. 3d at 217.

Accordingly, this Court will overrule prior precedent only in limited circumstances where all of the following three factors are met:

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

*Id.* at 228. None of these factors are satisfied in the present case.

#### 1. *Berjian* Was Correctly Decided And Nothing Has Changed That Would Warrant A Lower Standard.

*Berjian* was correctly decided and remains consistent with Ohio jurisprudence today. This Court relied on substantial authority to hold that limitations of

liability are enforceable absent willful or wanton misconduct. *See Berjian*, 54 Ohio St. 2d at 158. *Berjian* is not a "decision widely recognized as an error of law," as was the case in *Galatis*, 100 Ohio St. 3d at 231 (C.J. Moyer concurring). It was decided by this Court with no dissent and does not appear to have been criticized by anyone until AMP sought to escape the limitation of liability clause that it agreed to in its contract with Bechtel.

**2. *Berjian* Established A Successful And Workable Standard.**

*Berjian* has proved successful and workable for nearly four decades, and it should remain the law. The *Berjian* "willful and wanton" standard was endorsed by this Court because it provides a practical and easily applied limit on contractual clauses that allocate risks of loss -- no care whatsoever. *See Berjian*, 54 Ohio St. 2d at 157 (holding that without the ability to limit their contractual liability, businesses would be "[b]urdened with unpredictable and indeterminable future liabilities" and would be "disinclined to provide [a] convenient service at all, or would provide the service at a prohibitive cost"). Absent willful or wanton misconduct -- no care whatsoever -- *Berjian* allows parties the freedom to choose which risks they will assume, and at what price. Applying a less clear standard, such as "recklessness," in a commercial context, will be harder for parties to guard against and lower courts to apply, and will erode the favorable business climate in Ohio.

In short, there is no reason to abandon the clear and practical standard of *Berjian*, and there are many reasons not to. AMP's second thoughts about the contractual terms it agreed to accept in this case do not justify altering a legal precedent that does not need to be "fixed."

### 3. Abandoning *Berjian* Would Create Undue Hardship For Contracting Parties Who Have Relied On It.

A departure from *Berjian* would cause unwarranted hardship for contracting parties who have relied upon its holding to allocate contract risks and costs. This Court should not overrule a decision that has shaped "everyone's expectations" such that a change would produce "practical real-world dislocations." *Galatis*, 100 Ohio St. 3d at 230 (quoting *Robinson v. Detroit*, 613 N.W.2d 307, 321 (Mich. 2000)). *See In Re Estate of Holycross*, 112 Ohio St. 3d 203, 207-08 (2005) ("overturning *Schilling* would create an undue hardship for those who have relied on it for the past 13 years," where "at least four of Ohio's 12 appellate districts have applied *Schilling*").

Ohio appellate courts have applied *Berjian* since it was decided to hold that limitations of liability are enforceable absent willful or wanton misconduct. *See, e.g., Main St. Marathon, LLC v. Maximus Consulting, LLC*, 2014-Ohio-2034, ¶ 30 (Ct. App. 5th Dist. 2014); *Sanfillipo v. Rarden*, 24 Ohio App. 3d 164, 168 (1st Dist. 1985); *Royal Indemn. Co. v. Baker Protective Servs., Inc.*, 33 Ohio App. 3d 184, 186 (2d Dist. 1986); *Arales v. Furs by Weiss*, No. 74301, 1999 Ohio App. LEXIS 125, at *16 (8th Dist. Jan. 21, 1999). Federal courts likewise have relied on *Berjian* to enforce limitations of liability in the absence of willful or wanton misconduct. *See, e.g., Airlink Commc'ns, Inc. v. Owl Wireless, LLC*, No. 3:10-cv-2296, 2011 U.S. Dist. LEXIS 106673, at *10 (N.D. Ohio Sept. 20, 2011); *Gunderson Amazing Fireworks, LLC v. Merrick Bank*, No. 12-cv-3869, 2013 U.S. Dist. LEXIS 136807, at *11 (E.D.N.Y. Sept. 24, 2013).

As a result, parties have evaluated contract risks and set prices with the assurance that they could limit their liability for breach as long as they do not engage in willful or wanton misconduct. Expanding *Berjian* would retroactively force these parties

to assume contractual risks they did not intend to assume and thus expose them to increased liability that is disproportionate to the contract prices they agreed to accept in exchange for more limited liability.

In other words, lowering the *Berjian* standard to recklessness would unsettle an issue long assumed to be settled. Although Ohio's statute of limitations has been shortened since the *Scott-Pontzer* case that was overruled in *Galatis*, *supra*, many long-dormant contract claims may be resurrected if this Court allows recovery of damages beyond a contractual limit of liability for reckless conduct.

Adding risks to contracts that cannot be limited even by mutual assent of the parties could adversely impact the prices Ohioans pay for goods and services, and the added uncertainty would unnecessarily undermine the business climate in Ohio. In short, upsetting the balance struck under countless existing contracts and frustrating Ohioans' settled expectations constitutes undue hardship that counsels maintaining the *Berjian* standard.

## IV. CONCLUSION

For the reasons set forth herein, this Court should answer the certified question in the negative.

Respectfully submitted,

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Dated: March 4, 2015

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following, by regular U.S. mail, this 4th day of March, 2015:

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## APPENDIX—STATUTORY SUPPORT FOR FOOTNOTE 4

The following statutory enactments provide an immunity or defense so long as the pertinent actor does not engage in conduct that rises to the level of "wanton misconduct":

1. R.C. § 9.60 (providing a defense to liability for office of the fire marshal and providers of emergency medical services for injuries caused from auto collisions);
2. R.C. § 128.32 (immunizing the false or unlawful disclosure of information related to a 9-1-1 call);
3. R.C. § 340.03 (protecting board members of alcohol, drug addiction, and mental health services);
4. R.C. § 901.52 (protecting conduct related to picking agricultural produce);
5. R.C. § 1517.26 (providing immunity for certain landowners in the absent of negligent failure to warn permittees of danger);
6. R.C. § 1531.13 (protecting landowners for injuries to wildlife officers injured on their land);
7. R.C. § 1533.17 (providing immunity for landowners for injuries to illegal hunters);
8. R.C. § 1533.66 (protecting landowners for injuries to persons trespassing near waters with introduced fish);
9. R.C. § 1547.11 (immunizing medical professionals and medical facilities from civil liability related to drawing blood of a person suspected of operating a water craft while under the influence);
10. R.C. § 1547.59 (protecting the operator of a vessel from civil liability for assisting other vessels);
11. R.C. § 2151.56 (providing immunity for actions taken under the interstate compact for juveniles);
12. R.C. § 2305.23 (providing immunity for the acts of good Samaritans);
13. R.C. § 2305.35 (allowing for immunity in connection with gleaning);
14. R.C. § 2305.38 (providing immunity for uncompensated volunteers of nonprofit charitable organizations);
15. R.C. § 2305.231 (protecting providers of emergency medical services who render assistance outside of a place having proper medical equipment);

16. R.C. § 2305.234 (providing immunity for volunteer health care professionals);

17. R.C. § 2305.235 (immunizing the use of an automated external defibrillator by certain actors);

18. R.C. § 2305.321 (providing immunity for equine activity);

19. R.C. § 2744.02 (immunizing certain conduct of political subdivisions and its employees);

20. R.C. § 3301.60 (providing immunity for actors involved with the interstate compact on educational opportunity for military children);

21. R.C. § 3313.539 (protecting schools from liability in carrying out certain statutory duties);

22. R.C. § 3313.717 (immunizing certain schools actors for injury caused by use of defibrillator, even in the absence of training);

23. R.C. § 3313.7110 (immunizing public schools for injury or death associated with epinephrine autoinjector);

24. R.C. § 3313.7111 (immunizing nonpublic schools and employees for injury associated with the use of an epinephrine autoinjector );

25. R.C. § 3313.7112 (protecting schools from liability for carrying out statutory duties related to student with diabetes);

26. R.C. § 3314.16 (immunizing community schools and employees for the placement of automated external defibrillators);

27. R.C. § 3314.142 (protecting certain actions by community school employees);

28. R.C. § 3314.143 (immunizing community schools for injury or death associated with epinephrine autoinjector);

29. R.C. § 3323.051 (protecting a surrogate for a child with a disability);

30. R.C. § 3326.27 (protecting STEM schools for carrying out certain statutory duties);

31. R.C. § 3326.28 (protecting STEM schools and employees from liability);

32. R.C. § 3328.29 (immunizing college-preparatory boarding schools for injuries or deaths associated with epinephrine autoinjector, except for "willful or wanton misconduct");

33. R.C. § 3701.20 (protecting actors giving advice in a poison prevention and treatment center);

34. R.C. § 3701.048 (precluding liability for an individual dispensing drugs during a public health emergency);

35. R.C. § 3707.511 (precluding liability for youth sports injuries of program officials);

36. R.C. § 3712.062 (protecting a hospice care program from liability);

37. R.C. § 3715.872 (providing immunity for dispensers of drugs under the drug repository program);

38. R.C. § 3737.221 (immunizing the fire marshal for injury or death caused by the operation of a motor vehicle);

39. R.C. § 3746.24 (immunizing certain actors for the release of hazardous materials on a property subject to a voluntary action program);

40. R.C. § 3746.25 (protecting state actors from liability in connection with a voluntary action program);

41. R.C. § 3746.27 (protecting certain fiduciaries and trustees from civil liability for the release of hazardous chemicals on property under their control);

42. R.C. § 3753.10 (providing immunity for state officers tortious conduct);

43. R.C. § 3921.08 (protecting board members of fraternal benefit societies);

44. R.C. § 3915.16 (providing for qualified immunity and legal representation under the interstate insurance product regulation compact);

45. R.C. § 4511.19 (immunizing medical professionals from civil liability related to drawing blood of a person suspected of drunk driving);

46. R.C. § 4515.02 (protecting an owner or operator of a vehicle for injuries or death of a non-paying guest);

47. R.C. § 4561.151 (protecting an owner or operator of an aircraft for injuries or death of a non-paying guest);

48. R.C. § 4730.22 (providing protection for injury or death caused while following the orders of a physician assistant);

49. R.C. § 4765.06 (protecting persons performing risk adjustment functions from liability for betrayal of professional confidence);

50. R.C. § 4765.12 (foreclosing liability for betrayal of professional confidence related to peer review or quality assurance programs);

51. R.C. § 4765.49 (providing protection for first responders administering emergency medical services);

52. R.C. § 4931.06 (foreclosing liability for tortious conduct of a communications assistant);

53. R.C. § 5101.76 (providing protection for a county-run camp);

**54.** R.C. § 5103.20 (protecting against liability under the interstate compact for placement of children);

**55.** R.C. § 5122.341 (protecting facilities in which the board of mental health places a committed person and their employees);

**56.** R.C. § 5149.21 (providing immunity under the interstate compact for adult offender supervision);

**57.** R.C. § 5502.281 (providing immunity for volunteers responding to state-declared emergency);

**58.** R.C. § 5723.01 (providing protection for torts committed by public official while testing for hazardous materials on forfeited land).