

ORIGINAL

IN THE SUPREME COURT OF OHIO

AMERICAN MUNICIPAL POWER, INC., : CASE No. 2014-1847  
:   
Petitioner, : On a Certified Question of State Law  
: from the U.S. District Court, Southern  
v. : District of Ohio, Eastern Division  
:   
BECHTEL POWER CORPORATION, : Case No. 2:11-cv-131  
:   
Respondent. :

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REPLY BRIEF OF PETITIONER  
AMERICAN MUNICIPAL POWER, INC.

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Stephen C. Fitch (0022322) (Counsel of Record)  
[sfitch@taftlaw.com](mailto:sfitch@taftlaw.com)  
David J. Butler (0068455)  
[dbutler@taftlaw.com](mailto:dbutler@taftlaw.com)  
Celia M. Kilgard (0085207)  
[ckilgard@taftlaw.com](mailto:ckilgard@taftlaw.com)  
Taft Stettinius & Hollister LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215  
Telephone: (614) 221-2838  
Facsimile: (614) 221-2007

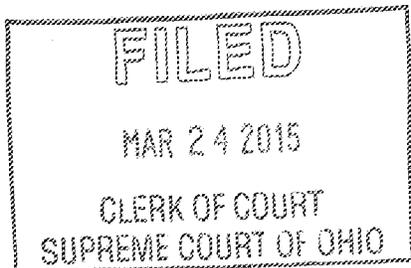
Judah Lifschitz (PHV - 5803-2015)  
[lifschitz@sllslaw.com](mailto:lifschitz@sllslaw.com)  
Shapiro, Lifschitz & Schram  
1742 N Street, N.W.  
Washington, DC 20036  
Telephone: (202) 689-1900  
Facsimile: (202) 689-1901

Attorneys for Petitioner  
American Municipal Power, Inc.

William G. Porter (0017296) (Counsel of Record)  
[wgporter@vorys.com](mailto:wgporter@vorys.com)  
Douglas R. Matthews (0039431)  
[drmatthews@vorys.com](mailto:drmatthews@vorys.com)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
Telephone: (614) 464-5448  
Facsimile: (614) 719-4911

Michael P. Subak (PHV - 5791-2014)  
[subakm@pepperlaw.com](mailto:subakm@pepperlaw.com)  
Richard W. Foltz, Jr. (PHV - 5792-2014)  
[foltzr@pepperlaw.com](mailto:foltzr@pepperlaw.com)  
Pepper Hamilton LLP  
3000 Two Logan Square  
Eighteenth and Arch Streets  
Philadelphia, PA 19103-2799  
Telephone: (215) 981-4000  
Facsimile: (215) 981-4750

Attorneys for Respondent  
Bechtel Power Corporation



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## INTRODUCTION

The arguments set forth in Bechtel Power Corporation's ("Bechtel") merit brief and the amicus curiae brief clearly fail to establish that under Ohio law a contracting party who materially breaches a contract while *consciously* disregarding a known or obvious risk of harm to the other contracting party, in a manner that is *unreasonable under the circumstances* and *substantially greater than negligent conduct*, should nonetheless be able to assert the shelter of the contract's limitation of liability clause. Accordingly, the certified question presented in this case should be answered in the affirmative.

This Court's opinion in *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St.2d 147, 375 N.E.2d 410 (1978) is not stare decisis in this matter nor is the law of Ohio settled with respect to whether reckless conduct by the breaching party, as defined in *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266 (2012), as well as willful or wanton conduct, renders a limitation of liability clause unenforceable. As the U.S. District Court said in its certification order to this Court:

In holding that willful or wanton conduct precludes enforcement of a limitation of liability clause, *Berjian* did not exclude recklessness as a standard that would bar enforcement of a limitation of liability clause. In fact, there is no indication that the court even considered the effect of recklessness at all.

Cert. Order at 9, Appx. at A-9. The argument by Bechtel and its amicus that AMP is seeking to overturn existing precedent and have this Court invalidate all limitation of liability clauses and re-write existing contracts is simply baseless.

Nor is reckless conduct merely a variation of negligent conduct. The argument by Bechtel and its amicus ignores the definition of reckless conduct adopted by this Court in *Anderson*. To establish reckless conduct, a party must prove a "conscious" disregard or indifference. The dictionary definition of "conscious" is "marked by thought, will, design, or

perception.” Merriam-Webster Dictionary, [www.merriam-webster.com/dictionary/conscious](http://www.merriam-webster.com/dictionary/conscious) (accessed March 23, 2015). Furthermore, *Anderson* itself says the conduct must be “*substantially greater than negligent conduct.*” *Anderson* at ¶ 34.

With respect to Bechtel’s argument that it relied on a willful or wanton standard in negotiating its contract with AMP, there is no record whatsoever supporting that contention and none could exist. In 2008, when the AMP-Bechtel contract was being negotiated, this Court had not addressed the reckless issue but multiple U.S. District Courts applying Ohio law had recognized reckless conduct as a bar to enforcement of a limitation of liability clause. In addition, Bechtel’s suggestion that the parties had a meeting of the minds on the standards governing enforcement of the limitation of liability clause is simply not true.

Finally, the argument by Bechtel and its amicus that Ohio’s economy and business climate will be fatally harmed if this Court answers the certified question in the affirmative is similarly meritless. Does it foster a positive business climate in Ohio for contracting parties to know that their counterpart can consciously disregard critical contractual obligations, as Bechtel did here, with knowledge of the risk of harm to the other party, and in a manner that a court or jury would find unreasonable, and yet still assert the protection of a limitation of liability clause in the contract? The answer is clearly no.

## **I. STATEMENT OF FACTS.**

This Court is not an “error” court and, particularly in a certified question proceeding, the underlying facts only provide context for the Court’s resolution of questions of law. Accordingly, AMP provides only a limited reply to Bechtel’s “statement of facts.”

While Bechtel correctly notes that the District Court references the allegations in AMP’s complaint in the opening paragraphs of the District Court’s summary judgment order, the order

was on a motion for summary judgment where the court is required to determine issues of material fact based upon the affidavits, depositions and other evidence submitted. The order is replete with citations to the same. More importantly, the significant points presented by AMP in its merit brief are not facts but rather findings of law by the District Court.

As the District Court noted in its order, “the interpretation of a contract is a question of law to be decided by the Court.” D.Ct. Opinion at 11; Appx. at A-27. As a matter of law, the court found:

1. *The trend provision in the EPC contract required Bechtel to trend cost and schedule impacts against the indicative target price. (Id. at 15; Appx. at A-31)*
2. *The trend provision in the EPC contract required Bechtel to trend similar project information that may introduce costs impacts to the project’s cost estimate. (Id. at 17; Appx. at A-33)*
3. *Bechtel does not dispute and thus no issue of fact exists as to whether Bechtel knew of the risks associated with failing to disclose potential cost impacts. (Id. at 20; Appx. at A-36)*
4. *Bechtel concedes that it did not trend similar project information. (Id. at 21; Appx. at A-37)*

Bechtel may “strongly dispute” that it breached its agreement with AMP but the District Court’s findings cited above are clear.

Nor did the District Court find that Bechtel exercised “sufficient care” in fulfilling its critical contractual trend obligations. Bechtel Br. at 6. The District Court applied an extremely broad interpretation of the wanton standard, including reliance on events that occurred **after** the alleged breach and after AMP had committed to hundreds of millions of dollars in boiler and turbine contracts in reliance upon Bechtel’s indicative price estimates. D.Ct. Opinion at 4, 5, 21, 22, 23; Appx. at A-20, A-21, A-37, A-38, A-39. Applying the court’s broad interpretation of the

wanton standard, the court found that “Bechtel exercised some care, thereby precluding a finding that it exercised no care whatsoever.” *Id.* at 26; Appx. at A-42.

Missing from Bechtel’s statement of facts, but fully supported by the District Court’s order, is the consequence of Bechtel’s failure to trend its similar project information. In reliance upon Bechtel’s May 2009 indicative estimate, AMP, on behalf of its member communities in Ohio and surrounding states, entered into hundreds of millions of dollars of contracts only to be presented months later for the very first time with a surprise billion dollar increase in Bechtel’s target price. D.Ct. Opinion at 4; Appx. at A-20. Also missing is any citation to any record evidence supporting Bechtel and its amicus’ claim that Bechtel negotiated a different, lower price in the contract in reliance upon a willful or wanton standard.

Finally, Bechtel’s assertion that AMP cancelled the project in order to pursue a natural gas power plant is not a “fact.” The District Court cites extensively in its order the deposition testimony of AMP’s vice-president and general counsel, John W. Bentine, as well as the deposition testimony of seven other AMP officials or experts, all in support of the fact that “*it was the unexpected cost increase that caused cancellation of the project.*” (emphasis added) D.Ct. Opinion at 39; Appx. at A-55.

## **II. ARGUMENT.**

### **A. *Berjian* Is Not *Stare Decisis*.**

In *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, 107 N.E.2d 206 (1952), paragraph 1 of the syllabus, this Court held:

A reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon or raised at the time of the adjudication.

In *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, this Court cited syllabus 1 in *Rhodes* in rejecting an argument that its prior decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, remanding a large number of cases for resentencing, was stare decisis on a waiver issue. In doing so, the Court noted that “(t)he remand orders were silent as to the issue currently confronting us,” “this court did not then definitively resolve the issue presented by this case; thus, it is appropriate to do so now,” and “we are not bound by any perceived implications that may be inferred from *Foster*.” *Id.* at ¶¶ 9, 10, 12.

Similarly, *Berjian* is not stare decisis for the certified question in this case nor is AMP seeking to reverse or overturn prior precedent of this Court. Bechtel fails to cite any case holding that *Berjian* implicitly or expressly rejected a reckless standard. In noting that there is no indication this Court “even considered the effect of recklessness at all” in *Berjian*, the District Court concluded in its certification order that “while *Berjian* constitutes controlling precedent as to whether willful or wanton conduct precludes enforcement of a limitation of liability clause, it is silent as to whether recklessness does so as well.” Cert. Order at 9-10; Appx. at A-25, A-26. “Additionally, the parties have not cited, and the Court has not found, an Ohio Supreme Court decision discussing recklessness as a bar to enforcing a limitation of liability clause \* \* \*.” *Id.*

The District Court’s conclusion on that point is correct. The syllabus in *Berjian* does not address reckless conduct nor does anything in the opinion suggest that the Court considered, and made a conscious decision (albeit unstated) that only willful or wanton conduct was sufficient to preclude enforcement of a limitation of liability clause. What Bechtel and its amicus characterize as stare decisis is but an erroneously perceived implication that is clearly not binding on this Court.

Bechtel argues that this Court's opinion in *Anderson* distinguished between reckless and wanton conduct, a proposition with which AMP has no disagreement. Bechtel Br. at 8-9. Bechtel then mischaracterizes the Court's decision in *Anderson* as reflecting a "refusal to weaken" the willful and wanton standard. *Id.* *Anderson* involved application of one immunity statute which excepted willful or wanton conduct while another excepted wanton or reckless conduct. Far from "refusing to weaken" one of the standards, the Court candidly acknowledged that "these degrees of care have been confused" and that the purpose and effect of *Anderson* was simply to "clarify their meaning." *Anderson*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266 at ¶ 3.

Bechtel also posits that "AMP argues as if the 'reckless' standard was first considered after *Berjian* was decided." Bechtel Br. at 11. There is no citation to where that appears in AMP's brief, because it doesn't. AMP's analysis of *Berjian* resulted in the same conclusion as the District Court in its certification order, i.e., that there is nothing in *Berjian* to indicate "that the court even considered the effect of recklessness at all." Cert. Order at 9; Appx. at A-9.

Finally, the argument by Bechtel and its amicus that the law has been settled on what standards of conduct render a limitation of liability clause unenforceable is groundless. The AMP-Bechtel contract was entered into as of January 1, 2009. D.Ct. Opinion at 3; Appx. at A-19. This voluminous contract was negotiated in 2008. *Anderson* was not decided until the end of 2012, meaning the lack of clarity caused by the Court's dicta in *Thompson v. McNeill*, 53 Ohio St.3d 102, 559 N.E.2d 705 (1990), fn. 1, was extant at the time the AMP-Bechtel contract was negotiated. Furthermore, as set forth in the District Court's certification order and AMP's merit brief, at the time the AMP-Bechtel contract was being negotiated, multiple U.S. District Courts applying Ohio law had recognized reckless conduct as precluding enforcement of a

limitation of liability clause. Cert. Order at 10; Appx. at A-10. Thus, even though this Court had not addressed the issue of whether reckless conduct precluded enforcement of a limitation of liability clause, the existence of other authority on that point makes clear that the law was anything but settled. The existence of this authority also demonstrates that AMP is not seeking to overturn existing law but rather to establish that a material contract breach occasioned by reckless conduct, as well as willful or wanton conduct, is so egregious as to warrant the court's refusal to enforce the contract's limitation of liability clause.

**B. Reckless Conduct Is “Substantially Greater Than Negligence.”**

Bechtel and its amicus argue that reckless conduct is essentially the equivalent of negligence and that a reckless conduct standard would be more difficult to apply than a willful/wanton standard. Acceptance of that argument would require the Court to completely disregard its syllabus definition of reckless conduct in *Anderson* and ignore the fact that courts regularly apply a reckless standard in many circumstances.

*Anderson* does not say that reckless conduct is characterized by a “*negligent disregard*” to a known or obvious risk. It requires a conscious disregard. “Conscious” is defined as “marked by thought, will, design, or perception.” Merriam-Webster Dictionary, [www.merriam-webster.com/dictionary/conscious](http://www.merriam-webster.com/dictionary/conscious) (accessed March 23, 2015). “Conscious” has also been defined by this Court as requiring that the party “possess knowledge of the harm that might be caused by his behavior.” *Preston v. Murty*, 32 Ohio St.3d 334, 335, 512 N.E.2d 1174 (1987).

The Restatement (Second) of Torts explains in its comments that for an act to be reckless, the act must be intended by the actor, even though the actor does not intend to cause harm. It is sufficient that the actor realize there is a strong probability that harm may result. (Restatement of the Law 2d, Torts, Section 500, Comment f (1965)).

Furthermore, *Anderson* flatly requires conduct that is “substantially greater than negligent conduct.” Bechtel’s argument that a reckless standard is effectively a negligence standard simply cannot be reconciled with *Anderson*. As noted in AMP’s merit brief, the Restatement of Torts explains the difference between negligence and reckless conduct as follows:

- For conduct to be reckless, “(i)t must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent.” Restatement of the Law 2d, Torts, Section 500, Comment a (1965).
- “The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.” *Id.* at Comment g.

A reckless conduct standard is a high standard that allows a party to bargain for a limitation of liability if it engages in negligent conduct but not if it engages in conduct “substantially greater than” negligence.

Nor is a reckless standard difficult to apply. The Court in *Anderson* has provided a workable definition that establishes in clear terms the elements that a non-breaching party will have to establish in order to preclude application of a limitation of liability clause. Why the Court’s definition of reckless would be any more problematic in application than the Court’s definition of wanton is a mystery Bechtel fails to resolve.

The fallacy in Bechtel’s argument is best illustrated by the discussion in section D below. Bechtel does not dispute that a multitude of Ohio statutes provide for immunity from liability unless the defendant engaged in wanton or reckless conduct. In cases involving those statutes, a court or a jury must apply the Court’s definition of those terms in *Anderson* to a discrete set of facts and reach a verdict. No difference exists between application of those standards in a statutory immunity case and application in a breach of contract case where enforcement of a limitation of liability clause is at issue.

**C. AMP's Analysis Of *Berjian* Precedent Is Accurate.**

Bechtel argues that this Court relied upon “substantial authority” in holding that limitations of liability clauses are enforceable absent willful or wanton conduct. Bechtel Br. at 25-26. AMP’s merit brief examines the authority cited by this Court in *Berjian* and demonstrates that adoption of a reckless standard is consistent with *Berjian*. Bechtel responds by characterizing AMP’s analysis as a “daisy-chain.”

In *Berjian*, the Court cited two authorities for the proposition that a limitation of liability clause was unenforceable where the breaching party failed to exercise any care whatsoever: *Thomas v. Atlantic Coast Line R. Co.*, 201 F.2d 167 (5th Cir. 1953) and Prosser, *Law of Torts*, Section 68, 444 (4th Ed. 1978). AMP’s brief correctly demonstrated that the *Thomas* case involved two separate appeals and that in the second appeal the court, citing Alabama law, defined wanton as conscious conduct with a reckless indifference to the consequences. AMP Merit Br. at 11. AMP also simply quoted the passage from Prosser cited by the Court in *Berjian* which says that limitations of liability agreements “are not construed to cover the more extreme forms of negligence which are described as wilful, wanton, reckless or gross.” Disparaging AMP’s analysis as a “daisy-chain” does not undermine the conclusion that adoption of a reckless standard by this Court is not inconsistent with *Berjian*.

Bechtel also argues that the Court in *Berjian* “actually relied upon *Hawkins v. Ivy*, 50 Ohio St.2d 114 (1977).” Bechtel Br. at 10. The court in *Berjian*, however, only cited *Hawkins* for the limited purpose of defining wanton: “for this court’s latest pronouncements on the definition of ‘wanton conduct,’ see *Hawkins v. Ivy*, 50 Ohio St.2d 114.” *Berjian*, 54 Ohio St.2d at 158, 375 N.E.2d 410. It is not cited anywhere else in the opinion and is not relevant to the issue presented by the certified question.

**D. Reckless Conduct Violates Public Policy.**

In its merit brief, AMP identified the numerous statutes where the legislature applied a wanton or reckless standard to deny otherwise available statutory immunity. Bechtel and its amicus invite the Court to do a numerical count of statutes which apply a willful or wanton but not a reckless standard.<sup>1</sup> Bechtel and its amicus miss the point.

As demonstrated in AMP's merit brief, the General Assembly has used a "reckless" or "wanton or reckless" standard throughout the Ohio Revised Code. The pervasive nature of the "wanton or reckless" standard by the legislature shows that, contrary to the argument of Bechtel and its amicus, that body places reckless conduct in the same genre as wanton conduct, conduct sufficiently egregious to deny persons engaging in such conduct a limit to their liability. The fact that the legislature chooses to use "wanton or willful" in some statutes and "wanton or reckless" in others does not refute but rather supports the conclusion that the public policy of Ohio, as expressed by the General Assembly, precludes enforcement of a limitation of liability by parties found to have engaged in reckless conduct.

**E. *Berjian* Involved An Exculpatory Clause And A Tort Action.**

Bechtel challenges AMP's citation to the Restatement of the Law 2d, Contracts, Section 195(1) (1981) on the basis that that section (1) only applies to tort claims, not contract claims, and (2) only applies to exculpatory clauses, not limitation of liability clauses. Bechtel Br. at 17-18. Section 195(1) provides that a term in a contract exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy. AMP

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<sup>1</sup> While AMP believes Bechtel's focus on numbers misses the point, to the extent it would assist the Court AMP has attached as an Appendix to this brief a listing of all statutes found by AMP which use the term wanton or reckless. AMP's survey indicates that 71 statutes use a combination of wanton and willful, but not reckless; 63 use reckless or a combination of willful and reckless, but not wanton; and 64 use a combination of wanton and reckless, or willful, wanton and reckless.

acknowledged the reference to tort liability in its merit brief but argued that other states have applied it to clauses similar to the one at issue here and that it should be adopted by this Court. AMP Merit Br. 12-15.

Bechtel's entire argument, indeed its primary defense throughout this case, has been premised on this Court's opinion in *Berjian*. This Court's syllabus in *Berjian* reads:

#### SYLLABUS

1. An *exculpatory clause* in a telephone company contract for advertising in the classified section of its directory, limiting the company's liability for a *negligent* failure to correctly display the advertising agreed upon, is not void as against policy. (emphasis added)

2. Absent any wilful or wanton misconduct, a telephone company may by contract limit its liability to the cost of the services provided where it *negligently* fails to place a customer's order for advertising in the classified section of its directory. (emphasis added)

*Berjian*, 54 Ohio St.2d at 147, 375 N.E.2d 410. The "exculpatory clause" referred to in syllabus 1 is the same clause referred to in syllabus 2. It limited the telephone company's liability in the same manner as the limitation of liability clause in the AMP-Bechtel contract. If Bechtel is correct that the test is whether the clause at issue is an exculpatory clause versus a limitation of liability clause, Bechtel's reliance on *Berjian* is clearly misplaced.

Similarly, Bechtel attempts to distinguish AMP's citation to New York law in *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 593 N.E.2d 1365 (1992) by arguing, inter alia, that "the clause in *Sommer* was acknowledged by the court to be tantamount to an exculpatory clause" because of the amount of the damage limit. Bechtel Br. at 20. In *Sommer*, the court said that New York public policy precluded a party from insulating itself from gross negligence (which the court defined as reckless indifference) whether the contract clause purported to exonerate a party from liability or a clause limiting damages to a nominal sum. *Id.* at 554. In *Berjian*, the telephone company's liability was limited to "an amount equal to the agreed price for said item

of advertising,” presumably a de minimus amount. *Berjian* at 148. Under Bechtel’s analysis, *Berjian* would involve an exculpatory clause even if the Court did not characterize it as such in its syllabus. Furthermore, AMP notes that the broad statement in Bechtel’s merit brief that the Restatement’s provisions apply only to exculpatory clauses, not limitation of liability clauses, is followed by no citation to any authority. Bechtel Br. at 18.

*Berjian* also involved a *tort* claim. The plaintiff alleged not only a breach of contract claim but also claims for gross or wanton negligence. *Id.* at 149. The Court in *Berjian* held that a telephone company may limit its liability for *negligent* failure to correctly display a yellow pages advertisement (syllabus 1) and that it may limit its liability where it *negligently* fails to place an advertising order (syllabus 2). Furthermore, *Berjian* cites only two authorities on the issue of enforcement of an exculpatory clause: *Thomas v. Atlantic Coast Line R. Co.*, 201 F.2d 167 (5th Cir. 1953) and Prosser, *Law of Torts*, Section 68, 444 (4th Ed. 1978). While repetitive, AMP again notes in reply to Bechtel’s argument that the principle stated in Restatement Section 195(1) only applies to tort claims that ***Berjian* cites Prosser on Torts**. Also, *Thomas* was a tort case involving a negligence claim against a railroad resulting from a fire. This Court in *Berjian* looked to tort law to identify the type of conduct by a breaching party that would justify refusing to enforce a contract limitation of liability clause for both tort and breach of contract claims.

Nor is Bechtel correct that an intentional or reckless conduct exception such as the one recognized in Restatement of the Law 2d, Contracts, Section 195(1) (1981) has only been applied in tort cases. In *Sommer*, the court initially provides an extensive discussion of whether the plaintiff could assert both breach of contract and tort claims. *Sommer*, 79 N.Y.2d at 550, 593 N.E.2d 1365. The court then said: “Having concluded the 810’s claims lie in tort as well as contract, we next consider the effect of the contractual clauses limiting Holmes’ liability to its

customer.” *Id.* at 553. The court, citing Restatement Section 195(1), found that the clause was ineffective against the plaintiff’s contract and tort claims if the defendant engaged in conduct “that evinces a reckless indifference to the rights of others.” *Id.* at 554.

In *Onconome, Inc. v. Univ. of Pittsburgh*, W.D. Pa. No. 09CV1195, 2010 U.S. Dist. LEXIS 27304 (March 23, 2010), the procedural posture was remarkably similar to this action. As did the District Court below, the court in *Onconome* had previously dismissed the plaintiff’s tort claims and was now faced with a motion to limit plaintiff’s contract damages pursuant to a contractual limitation of liability clause. *Id.* at \*2-3. In denying the motion, the U.S. District Court, applying Pennsylvania law, held:

Although limitation of damages clauses negotiated between parties at arms length are generally enforceable in Pennsylvania, such clauses are not enforceable to limit damages for *breaches of contract* that are intentional, willful, wanton, reckless or otherwise in bad faith. (emphasis added)

*Id.* at \*7. While not specifically referencing Section 195(1) of the Restatement, the court clearly applied the rule of law contained therein. *See also Campmor, Inc. v. Brulant, LLC*, D.N.J. No. 09-546 (WHW), 2011 U.S. Dist. LEXIS 74861, \*16-19 (July 12, 2011) (Applying Ohio law to breach of contract claim, limitation of liability clause upheld “so long as the party invoking the provision has not committed a wilful or reckless breach” citing *Nahra v. Honeywell Inc.*, 892 F. Supp. 962 (N.D. Ohio 1995) and *Berjian*); *Purizer Corp. v. Battelle Mem’l Inst.*, N.D. Ill. No. 01C6360, 2002 U.S. Dist. LEXIS 138 (Jan. 4, 2002) (applying willful or reckless standard to breach of contract claim citing *Berjian*); *Southworth & McGill, P.A. v. Southern Bell Tel. & Tel. Co.*, 580 So.2d 628, 633-34 (Fla. App. 1991) (exculpatory clause limiting liability for “errors and omissions” in directory advertising was unenforceable where complaint alleged breach of contract was willful, malicious or grossly negligent.)

**F. Other States Have Applied A Reckless Standard.**

Bechtel also argues that AMP has incorrectly characterized New York law as stated in *Sommer*. Bechtel Br. at 19-20. AMP invites the Court to review the passage at issue, including the sentence immediately following the phrase quoted in Bechtel's merit brief. The entire paragraph at issue reads as follows:

Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must "smack[] of intentional wrongdoing" (*Kalisch-Jarcho, Inc. v. City of New York*, 58 NY2d, at 385, *supra*). It is conduct that evinces a reckless indifference to the rights of others (*id.*; *see also*, Restatement [Second] of Contracts § 195 [1] [intentional or reckless conduct vitiates contractual term limiting liability]).

*Sommer*, 79 N.Y.2d at 554, 593 N.E.2d 1365. As noted in AMP's merit brief, the court then cites to a New York statute which adopted "a reckless indifference standard" and explains in a footnote that "public policy precludes enforcement of contract clauses exonerating a party from its reckless indifference to the rights of others, whether or not termed 'gross negligence.'" *Id.* at fn. 3; AMP Merit Br. at 13. The standard in New York is "reckless indifference" which parallels this Court's definition of reckless in *Anderson*.

Furthermore, the New York case cited by Bechtel, *Metropolitan Life Ins. Co. v. Noble Lowndes Intl.*, 84 N.Y.2d 430, 643 N.E.2d 504 (1994), involved a contract which specifically included the term "willful."

The issue here is not how we and other courts have construed "willful" in other contexts, such as in interpreting statutes using that term or in formulating or applying legal principles in tort or contract law. Rather, the issue is what the parties intended by "willful acts" as an exception to their contractual provision limiting defendant's liability for consequential damages arising from its "non-performance under this agreement".

*Id.* at 435. The limitation of liability clause in the AMP-Bechtel agreement did not include terms defining the types of conduct included. Rather, it left enforcement of the contract to the common law of Ohio.

**G. The Duty Of Good Faith Supports Adoption Of A Reckless Standard.**

Bechtel argues that the duty of good faith and fair dealing recognized in the Restatement of the Law 2d, Contracts, Section 205 (1981) supports its position and that AMP fails to exhibit good faith in the enforcement of the limitation of liability clause, a proposition with which AMP vehemently disagrees. Bechtel Br. at 21-23. As it relates to whether this Court should adopt a reckless conduct standard to render a limitation of liability clause unenforceable, however, the focus of a good faith analysis must be on the breaching party's performance under the contract.

In *Airfreight Express, Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 111, 158 P.3d 232 (2007) the court said, "As a matter of public policy, a party should not benefit from a bargain it performed in bad faith," citing Restatement of the Law 2d, Contracts, Section 205, Comment d (1981). The court further said that such a rule was consistent with § 195 of the Restatement (Second) of Contracts. *Id.*

Consciously disregarding a known or obvious risk of harm to the non-breaching party in a manner that is unreasonable and substantially greater than negligent conduct is the antithesis of good faith. If such conduct is countenanced, as Bechtel argues, the very basis of every contract--a commitment to perform in good faith--would be critically eroded.

Bechtel cites *Baltimore & O.R. Co. v. Hubbard*, 72 Ohio St. 302 (1905), for the proposition that good faith and fair dealing "require a party to honor a limitation of liability after reaping the benefit of a lower contract price." Bechtel Br. at 22. In *Hubbard*, the Court premised its holding as follows:

In this case, besides the bill of lading, the railroad company pleads and contends that, in consideration of a reduced freight rate for the transportation of the horses, their owner entered into a written special contract with the company, wherein a valuation for shipping purposes was agreed upon, beyond which the company would not be liable for loss or damage on account of negligence or any event.

*Id.* at 319. Bechtel never asserted in any pleading nor is there any record supporting the allegation that Bechtel gave AMP a *lower* price in consideration of the limitation of liability clause and, specifically, in consideration of a meeting of the minds that the clause would be enforceable even if Bechtel consciously disregarded a known or obvious risk of harm to AMP in an unreasonable manner, that was substantially greater than negligent conduct. Neither AMP, nor any Ohio business, would knowingly enter into such an agreement.

**H. A Reckless Standard Is Not Contrary To Freedom Of Contract.**

Bechtel and its amicus spend much time arguing that Ohio law strongly favors freedom of contract. AMP does not dispute that proposition. Bechtel and its amicus go on to argue, however, that adoption by this Court of a reckless standard with respect to enforcement of limitation of liability clauses will eviscerate freedom of contract, will harm Bechtel and others who allegedly relied upon a willful/wanton standard and will harm Ohio's economy. None of these arguments has merit.

Ohio law has consistently recognized that while parties are free to enter into contracts, the law will only enforce contract terms that are not contrary to public policy. *Cincinnati City School Dist. Bd. of Edn. v. Connors*, 132 Ohio St.3d 468, 2012-Ohio-2447, 974 N.E.2d 78, ¶ 17 (“contracts which bring about results which the law seeks to prevent are unenforceable as against public policy.”) *Berjian's* holding that willful or wanton conduct precludes enforcement of a limitation of liability clause is a perfect, but only one, example. In *Boone Coleman Constr., Inc. v. Village of Piketon*, 4th Dist. Pike No. 13CA836, 2014-Ohio-2377 (May 22, 2014), the court of appeals acknowledged that freedom of contract is a “deep-seated right” but said “(n)evertheless, penalty provisions in contracts are invalid on public policy grounds.” *Id.* at ¶¶ 34-36. Similarly, as a matter of public policy, a covenant not to compete will only be enforced “to the extent

necessary to protect an employer's legitimate interests." *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 25-26, 325 N.E.2d 544 (1975).

Bechtel cites *Blount v. Smith*, 12 Ohio St.2d 41, 47, 74 (1967) for the proposition that a court "is required to approach [invalidating a contract provision] with no less restraint than in striking down a statute." Bechtel Br. at 12. The actual language in *Blount* which Bechtel paraphrases in its parenthetical is "approve brushing aside of the explicit terms of a contract." *Blount* at 46-47. The difference is significant.

In *Blount*, a contract expressly required that a partner provide a six month notice of withdrawal from the partnership or face a forfeiture. *Id.* at 44. The explicit nature of the contract provision was central to the "restraint" language used by the Court. *Id.* at 46-47. The limitation of liability clause in this case does not express an explicit standard for enforcement. Nor does AMP seek to invalidate that clause or ask this Court to re-write its existing contract with Bechtel, just as this Court did not "re-write" existing contracts when it rendered its opinion in *Berjian*.

Bechtel also contends that adoption of a reckless standard "would undermine the principle of Ohio law that sophisticated parties are more rigorously required to live with their contractual choices," Bechtel Br. at 24, citing *Kennecorp Mortgage Brokers, Inc. v. Country Club Convalescent Hospital, Inc.*, 66 Ohio St.3d 173, 174 (1993). Nowhere in *Kennecorp* is such a principle of Ohio law to be found. In *Kennecorp*, the Court simply held that a forum selection clause negotiated between commercial parties should be enforced. *Id.* at syllabus. None of the gloss that Bechtel attempts to add to that opinion exists.

The issue presented by the certified question does not represent a frontal assault on traditional freedom of contract but rather asks this Court to declare that freedom of contract does

not include permitting a party to consciously disregard its contractual obligations with knowledge of the risk of harm to the other party and avoid liability.

It is also disingenuous for Bechtel and its amicus to argue that Bechtel relied upon a willful/wanton standard in negotiating its contract with AMP, and in particular the price of the contract. As demonstrated in part A above, not only is there no record supporting that argument but also the law regarding enforcement of limitation of liability clauses was, and remains, unsettled. Bechtel cites to no authority, in or out of Ohio, where a reckless standard was considered but rejected by a court. Bechtel employs sophisticated and experienced legal counsel. Even if Bechtel had considered the law of Ohio in negotiating the limitation of liability clause, for which there is no record and which AMP disputes, to suggest that Bechtel's counsel would not have recognized the unsettled state of Ohio law is simply not credible.

Bechtel also argues that contracting parties in general have relied upon *Berjian* for a willful or wanton standard and cites various state and federal opinions citing *Berjian*. In addition to the U.S. District Court cases collected at p. 10 of AMP's merit brief which recognize a reckless standard, other Ohio cases have not limited themselves to only a willful or wanton standard. *See Motorists Mut. Ins. Co. v. ADT Sec. System*, 2nd Dist. Montgomery Nos. 14799, 14803, 1995 WL 461316, \*4 (Aug. 4, 1995) (limitation of liability clause enforced unless breaching party was "grossly negligent" or contract unconscionable); *Ohio Cas. Ins. Co. v. D&J Distrib.*, 6th Dist. Lucas No. L-08-1104, 2009-Ohio-3806 (July 31, 2009) (clause ineffective where failure to exercise any care whatsoever, where willful or wanton misconduct, where clause is against public policy concerns, unconscionable, or vague and ambiguous).

Similarly, Bechtel and its amicus's argument that recognizing a reckless standard results in an unfairness to Bechtel is unfounded. Bechtel had the opportunity to move this Court to

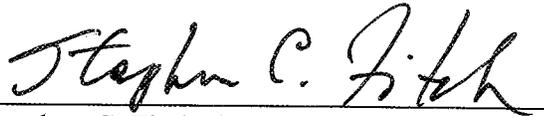
transmit all or any portion of the record below to this Court pursuant to S. Ct. Prac. R. 9.06. It did not and thus there is nothing to support the argument, or to even suggest, that the price negotiated by Bechtel was in any way a function of Bechtel's alleged understanding of Ohio law on limitations of liability, or that AMP "reaped the benefit of a lower contract price," or that Bechtel or other parties relied upon *Berjian* "to allocate contract risks and costs." Bechtel Br. at 22, 27. This Court never considered or passed upon the issue of reckless conduct in *Berjian*; answering the certified question in the affirmative will not reverse or overrule *Berjian*; and no party, certainly not a sophisticated party like Bechtel, can credibly claim that its contract price was driven by a skewed reading of *Berjian*.

Finally, Bechtel and its amicus argue that precluding enforcement of limitation of liability clauses when the breaching party consciously disregards its obligations, in an unreasonable manner, with knowledge of risk of harm to the other party, and in a manner substantially greater than negligence, will somehow harm Ohio's economy and drive businesses from Ohio. Leaving the lack of any evidentiary or legislative support for that argument aside, what is good for Ohio businesses, like AMP, is the knowledge that when they enter into a contract in good faith, the other party cannot consciously disregard its obligations with impunity.

### **III. CONCLUSION.**

As set forth in AMP's merit brief, Bechtel's reckless conduct has caused millions of dollars in damages to AMP's member municipalities in Ohio and surrounding states. By answering the certified question in the affirmative, this Court will make clear that parties engaging in such conduct may not, at the same time, benefit from the enforcement of a limitation of liability clause.

Respectfully submitted,



Stephen C. Fitch (0022322) (Counsel of Record)

[sfitch@taftlaw.com](mailto:sfitch@taftlaw.com)

David J. Butler (0068455)

[dbutler@taftlaw.com](mailto:dbutler@taftlaw.com)

Celia M. Kilgard (0085207)

[ckilgard@taftlaw.com](mailto:ckilgard@taftlaw.com)

Taft, Stettinius & Hollister LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215

Telephone: (614) 221-2838

Facsimile: (614) 221-2007

Judah Lifschitz (PHV - 5803-2015)

[lifschitz@srlslaw.com](mailto:lifschitz@srlslaw.com)

Shapiro, Lifschitz & Schram

1742 N Street, N.W.

Washington, DC 20036

Telephone: (202) 689-1900

Facsimile: (202) 689-1901

Counsel for Petitioner

American Municipal Power, Inc.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing *Reply Brief of Petitioner American Municipal Power, Inc.* was served via regular U.S. mail, postage prepaid, this 24th day of March, 2015 upon:

William G. Porter, Esq.  
Douglas R. Matthews, Esq.  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008

Michael P. Subak, Esq.  
Richard W. Foltz, Jr., Esq.  
Pepper Hamilton LLP  
3000 Two Logan Square  
Eighteenth and Arch Streets  
Philadelphia, PA 19103-2799

Counsel for Respondent



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Stephen C. Fitch

# APPENDIX

**APPENDIX**  
**Survey of Ohio Statutes Containing Willful, Wanton and/or Reckless**

| Section | Title                      | Chapter   | Wanton and Willful, But Not Reckless | Reckless, or Willful and Reckless, But Not Wanton | Wanton and Reckless; or Willful, Wanton and Reckless |
|---------|----------------------------|---|--------------------------------------|---|--|
| 9.07    | General Provisions         | Miscellaneous                                   |                                      |   | X  |
| 9.60    | General Provisions         | Miscellaneous                                   | X                                    |   |  |
| 9.86    | General Provisions         | Miscellaneous                                   |                                      |   | X  |
| 9.87    | General Provisions         | Miscellaneous                                   |                                      |   | X  |
| 109.362 | 1 - State Government       | Attorney General                                |                                      |   | X  |
| 120.06  | 1 - State Government       | Public Defenders                                |                                      |   | X  |
| 128.32  | 1 - State Government       | Emergency Telephone Number System               | X                                    |   |  |
| 145.054 | 1 - State Government       | Public Employees Retirement System              |                                      | X   |  |
| 149.45  | 1 - State Government       | Documents, Reports and Records                  |                                      |   | X  |
| *309.05 | 3 - Counties               | Prosecuting Attorney                            | X                                    |   |  |
| 311.05  | 3 - Counties               | Sheriff   |                                      | X   |  |
| 317.082 | 3 - Counties               | Recorder  |                                      |   | X  |
| 319.26  | 3 - Counties               | Auditor   |                                      | X   |  |
| 321.37  | 3 - Counties               | Treasurer                                       |                                      | X   |  |
| 340.03  | 3 - Counties               | Alcohol, Drug Addiction, & Mental Health Servs. | X                                    |   |  |
| 341.27  | 3 - Counties               | Jails   |                                      |   | X  |
| 351.05  | 3 - Counties               | Convention Facilities Authorities               |                                      |   | X  |
| 503.52  | 5 - Townships              | General Provisions                              |                                      |   | X  |
| 507.13  | 5 - Townships              | Clerk   |                                      | X   |  |
| 715.55  | 7 - Municipal Corporations | General Powers                                  |                                      |   | X  |
| 718.37  | 7 - Municipal Corporations | Municipal Income Taxes                          |                                      |   | X  |

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|----------|---|---|--------------------------------------|---|--|
| 733.78   | 7 - Municipal Corporations                                  | Officers  |                                      | X   |  |
| 742.043  | 7 - Municipal Corporations                                  | Police and Fire Pension Fund                          |                                      | X   |  |
| 753.06   | 7 - Municipal Corporations                                  | Reformatory Institutions                              |                                      |   | X  |
| 901.52   | 9 - Agriculture - Animals - Fences                          | Department of Agriculture                             | X                                    |   |  |
| 1121.32  | 11 - Financial Institutions                                 | Banks-Superintendent's Powers                         |                                      | X   |  |
| 1125.33  | 11 - Financial Institutions                                 | Banks - Liquidations & Conservatorships               |                                      | X   |  |
| 1157.33  | 11 - Financial Institutions                                 | Possession of Savings & Loan Assoc. by Superintendent |                                      | X   |  |
| 1165.33  | 11 - Financial Institutions                                 | Savings Banks - Possession by Superintendent          |                                      | X   |  |
| 1315.15  | 13 - Commercial Transactions - Ohio Uniform Commercial Code | Transmitters of Money; Check-Cashing Businesses       |                                      | X   |  |
| 1335.11  | 13 - Commercial Transactions - Ohio Uniform Commercial Code | Statute of Frauds                                     |                                      |   | X  |
| 1337.35  | 13 - Commercial Transactions - Ohio Uniform Commercial Code | Power of Attorney                                     |                                      | X   |  |
| 1513.372 | 15 - Conservation of Natural Resources                      | Coal Surface Mining                                   |                                      |   | X  |
| 1515.081 | 15 - Conservation of Natural Resources                      | Soil and Water Conservation Commission                |                                      |   | X  |
| 1517.26  | 15 - Conservation of Natural Resources                      | Division of Natural Areas and Preserves               | X                                    |   |  |
| 1531.13  | 15 - Conservation of Natural Resources                      | Division of Wildlife                                  | X                                    |   |  |

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|----------|--|---|--------------------------------------|---|--|
| 1533.17  | 15 – Conservation of Natural Resources | Hunting, Fishing  | X                                    |   |  |
| 1533.66  | 15 – Conservation of Natural Resources | Hunting, Fishing  | X                                    |   |  |
| *1533.85 | 15 – Conservation of Natural Resources | Hunting, Fishing  | X                                    |   |  |
| *1533.95 | 15 – Conservation of Natural Resources | Hunting, Fishing  | X                                    |   |  |
| 1533.171 | 15 – Conservation of Natural Resources | Hunting, Fishing  |                                      | X   |  |
| 1547.07  | 15 – Conservation of Natural Resources | Watercraft and Waterways                                    |                                      | X   |  |
| 1547.11  | 15 – Conservation of Natural Resources | Watercraft and Waterways                                    | X                                    |   |  |
| 1547.59  | 15 – Conservation of Natural Resources | Watercraft and Waterways                                    | X                                    |   |  |
| 1547.111 | 15 – Conservation of Natural Resources | Watercraft and Waterways                                    |                                      |   | X  |
| 1561.26  | 15 – Conservation of Natural Resources | Division of Mineral Resources Management – Mines & Quarries |                                      |   | X  |
| 1561.261 | 15 – Conservation of Natural Resources | Division of Mineral Resources Management – Mines & Quarries |                                      |   | X  |
| 1701.13  | 17 – Corporations – Partnerships       | General Corporation Law                                     |                                      | X   |  |
| 1701.59  | 17 – Corporations – Partnerships       | General Corporation Law                                     |                                      | X   |  |
| 1702.12  | 17 – Corporations – Partnerships       | Nonprofit Corporation Law                                   |                                      | X   |  |

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|----------|--|--|--------------------------------------|---|--|
| 1702.30  | 17 – Corporations - Partnerships           | Nonprofit Corporation Law                        |                                      | X   |  |
| 1705.281 | 17 – Corporations - Partnerships           | Limited Liability Companies                      |                                      | X   |  |
| 1705.29  | 17 – Corporations - Partnerships           | Limited Liability Companies                      |                                      | X   |  |
| 1729.23  | 17 – Corporations - Partnerships           | Ohio Cooperative Law                             |                                      | X   |  |
| 1745.33  | 17 – Corporations - Partnerships           | Uniform Unincorporated Nonprofit Association Act |                                      | X   |  |
| 1745.43  | 17 – Corporations - Partnerships           | Uniform Unincorporated Nonprofit Association Act |                                      | X   |  |
| 1776.44  | 17 – Corporations - Partnerships           | Ohio Uniform Partnership Act                     |                                      | X   |  |
| 1901.141 | 19 – Courts – Municipal – Mayor’s – County | Municipal Court                                  |                                      |   | X  |
| 1923.14  | 19 – Courts – Municipal – Mayor’s – County | Forcible Entry and Detainer                      |                                      |   | X  |
| 2108.33  | 21 – Courts – Probate – Juvenile           | Human Bodies or Parts Thereof                    |                                      |   | X  |
| 2151.56  | 21 – Courts – Probate – Juvenile           | Juvenile Court                                   | X                                    |   |  |
| 2305.23  | 23 – Courts – Common Pleas                 | Jurisdiction; Limitation of Actions              | X                                    |   |  |
| 2305.35  | 23 – Courts – Common Pleas                 | Jurisdiction; Limitation of Actions              | X                                    |   |  |
| *2305.37 | 23 – Courts – Common Pleas                 | Jurisdiction; Limitation of Actions              | X                                    |   |  |
| 2305.38  | 23 – Courts – Common Pleas                 | Jurisdiction; Limitation of Actions              | X                                    |   |  |
| 2305.39  | 23 – Courts – Common Pleas                 | Jurisdiction; Limitation of Actions              | X                                    |   |  |
| 2305.231 | 23 – Courts – Common Pleas                 | Jurisdiction; Limitation of Actions              | X                                    | X   |  |
| 2305.232 | 23 – Courts – Common Pleas                 | Jurisdiction; Limitation of Actions              | X                                    |   |  |
| 2305.234 | 23 – Courts – Common Pleas                 | Jurisdiction; Limitation of Actions              | X                                    |   | X  |
| 2305.235 | 23 – Courts – Common Pleas                 | Jurisdiction; Limitation of Actions              | X                                    |   |  |
| 2305.237 | 23 – Courts – Common Pleas                 | Jurisdiction; Limitation of Actions              | X                                    |   | X  |

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|-----------|---|--|--------------------------------------|---|--|
| 2305.238  | 23- Courts – Common Pleas                           | Jurisdiction; Limitation of Actions          |                                      |   | X  |
| 2305.321  | 23- Courts – Common Pleas                           | Jurisdiction; Limitation of Actions          | X                                    |   |  |
| *2305.401 | 23- Courts – Common Pleas                           | Jurisdiction; Limitation of Actions          | X                                    |   |  |
| 2305.402  | 23- Courts – Common Pleas                           | Jurisdiction; Limitation of Actions          |                                      |   | X  |
| 2743.02   | 27 – Courts – General Provisions – Special Remedies | Court of Claims                              |                                      |   | X  |
| 2744.02   | 27 – Courts – General Provisions – Special Remedies | Political Subdivision Tort Liability         | X                                    |   |  |
| 2744.03   | 27 – Courts – General Provisions – Special Remedies | Political Subdivision Tort Liability         |                                      |   | X  |
| 2901.22   | 29 – Crimes – Procedure                             | General Provisions                           |                                      | X   |  |
| 2903.041  | 29 – Crimes – Procedure                             | Homicide and Assault                         |                                      | X   |  |
| 2903.06   | 29 – Crimes – Procedure                             | Homicide and Assault                         |                                      | X   |  |
| 2903.08   | 29 – Crimes – Procedure                             | Homicide and Assault                         |                                      | X   |  |
| 2903.081  | 29 – Crimes – Procedure                             | Homicide and Assault                         |                                      | X   |  |
| 2907.04   | 29 – Crimes – Procedure                             | Sex Offenses                                 |                                      | X   |  |
| 2907.06   | 29 – Crimes – Procedure                             | Sex Offenses                                 |                                      | X   |  |
| 2907.07   | 29 – Crimes – Procedure                             | Sex Offenses                                 |                                      | X   |  |
| 2907.24   | 29 – Crimes – Procedure                             | Sex Offenses                                 |                                      | X   |  |
| 2907.27   | 29 – Crimes – Procedure                             | Sex Offenses                                 |                                      | X   | X  |
| 2907.32   | 29 – Crimes – Procedure                             | Sex Offenses                                 |                                      | X   |  |
| 2911.21   | 29 – Crimes – Procedure                             | Robbery, Burglary, Trespass and Safebreaking |                                      | X   |  |
| 2917.31   | 29 – Crimes – Procedure                             | Offenses Against the Public Peace            |                                      | X   |  |
| 2919.23   | 29 – Crimes – Procedure                             | Offenses Against the Family                  |                                      | X   |  |

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|-----------|------------------------------------|---|--------------------------------------|---|--|
| 2921.03   | 29 – Crimes - Procedure            | Offenses Against Justice and Public Administration                    |                                      |   | X  |
| 2921.34   | 29 – Crimes - Procedure            | Offenses Against Justice and Public Administration                    |                                      | X   |  |
| 2923.129  | 29 – Crimes - Procedure            | Conspiracy, Attempt & Complicity; Weapons Control; Corrupt Activity   |                                      |   | X  |
| 2925.02   | 29 – Crimes - Procedure            | Drug Offenses   |                                      | X   |  |
| 2950.12   | 29 – Crimes - Procedure            | Sexual Predators, Habitual Sex Offenders, Sexually Oriented Offenders |                                      |   | X  |
| 2953.35   | 29 – Crimes - Procedure            | Appeals; Other Postconviction Remedies                                |                                      |   | X  |
| 3107.10   | 31 – Domestic Relations - Children | Adoption  |                                      |   | X  |
| 3109.61   | 31 – Domestic Relations - Children | Children  |                                      |   | X  |
| 3109.73   | 31 – Domestic Relations - Children | Children  |                                      |   | X  |
| 3301.60   | 33 – Education - Libraries         | Department of Education   | X                                    |   |  |
| 3307.073  | 33 – Education - Libraries         | State Teachers Retirement System                                      |                                      | X   |  |
| 3309.073  | 33 – Education - Libraries         | Public School Employees Retirement System                             |                                      | X   |  |
| 3313.539  | 33 – Education - Libraries         | Boards of Education   | X                                    |   |  |
| 3313.713  | 33 – Education - Libraries         | Boards of Education   |                                      |   | X  |
| 3313.717  | 33 – Education - Libraries         | Boards of Education   | X                                    |   |  |
| *3313.791 | 33 – Education - Libraries         | Boards of Education   | X                                    |   |  |

**APPENDIX**  
**Survey of Ohio Statutes Containing Willful, Wanton and/or Reckless**

| Section   | Title                      | Chapter   | Wanton and Willful, But Not Reckless | Reckless, or Willful and Reckless, But Not Wanton | Wanton and Reckless; or Willful, Wanton and Reckless |
|-----------|----------------------------|---|--------------------------------------|---|--|
| 3313.815  | 33 – Education - Libraries | Boards of Education                                       |                                      |   | X  |
| 3313.7110 | 33 – Education - Libraries | Boards of Education                                       | X                                    |   |  |
| 3313.7111 | 33 – Education - Libraries | Boards of Education                                       | X                                    |   |  |
| 3313.7112 | 33 – Education - Libraries | Boards of Education                                       | X                                    |   |  |
| 3314.16   | 33 – Education - Libraries | Community Schools   | X                                    |   |  |
| 3314.142  | 33 – Education - Libraries | Community Schools   | X                                    |   |  |
| 3314.143  | 33 – Education - Libraries | Community Schools   | X                                    |   |  |
| 3319.25   | 33 – Education - Libraries | Schools – Superintendent; Teachers, Employees             |                                      |   | X  |
| 3323.051  | 33 – Education - Libraries | Education of Children with Disabilities                   | X                                    |   |  |
| 3326.27   | 33 – Education - Libraries | Science, Technology, Engineering, and Mathematics Schools | X                                    |   |  |
| 3326.28   | 33 – Education - Libraries | Science, Technology, Engineering, and Mathematics Schools | X                                    |   |  |
| 3328.29   | 33 – Education - Libraries | College-Preparatory Boarding Schools                      | X                                    |   |  |
| 3334.08   | 33 – Education - Libraries | College Savings Program; Variable College Savings Program |                                      |   | X  |
| 3345.122  | 33 – Education - Libraries | State Universities – General Powers                       |                                      |   | X  |
| 3345.20   | 33 – Education - Libraries | State Universities – General Powers                       |                                      |   | X  |

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|----------|-------------------------------|---|--------------------------------------|---|--|
| 3345.30  | 33 – Education – Libraries    | State Universities – General Powers                         |                                      |   | X  |
| 3354.09  | 33 – Education – Libraries    | Community Colleges  |                                      |   | X  |
| 3357.09  | 33 – Education – Libraries    | Technical Colleges  |                                      |   | X  |
| 3358.08  | 33 – Education – Libraries    | State Community Colleges                                    |                                      |   | X  |
| 3501.90  | 35 – Elections                | Election Procedure; Election Officials                      |                                      | X   |  |
| 3517.21  | 35 – Elections                | Political Parties   |                                      | X   |  |
| 3517.22  | 35 – Elections                | Campaigns, Political Parties                                |                                      | X   |  |
| 3701.20  | 37 – Health – Safety – Morals | Department of Health  | X                                    |   |  |
| 3701.048 | 37 – Health – Safety – Morals | Department of Health  | X                                    |   |  |
| 3701.249 | 37 – Health – Safety – Morals | Department of Health  |                                      | X   |  |
| 3707.511 | 37 – Health – Safety – Morals | Board of Health   | X                                    |   |  |
| 3713.063 | 37 – Health – Safety – Morals | Hospice Care  | X                                    |   |  |
| 3715.054 | 37 – Health – Safety – Morals | Pure Food and Drug Law                                      | X                                    |   | X  |
| 3715.871 | 37 – Health – Safety – Morals | Pure Food and Drug Law                                      | X                                    |   |  |
| 3727.17  | 37 – Health – Safety – Morals | Hospitals   |                                      |   | X  |
| 3737.231 | 37 – Health – Safety – Morals | Fire Marshal; Fire Safety                                   | X                                    |   |  |
| 3746.11  | 37 – Health – Safety – Morals | Voluntary Action Program                                    | X                                    |   |  |
| 3746.23  | 37 – Health – Safety – Morals | Voluntary Action Program                                    | X                                    |   |  |
| 3746.27  | 37 – Health – Safety – Morals | Voluntary Action Program                                    | X                                    |   |  |
| 3747.01  | 37 – Health – Safety – Morals | Low-Level Radioactive Waste Act                             | X                                    |   |  |
| 3753.10  | 37 – Health – Safety – Morals | Risk Management Program                                     | X                                    |   |  |
| 3797.12  | 37 – Health – Safety – Morals | Childhood Sexual Abuse Penalties and Community Notification | X                                    |   | X  |

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|-----------|--|---|--------------------------------------|---|--|
| 3915.16   | 39 - Insurance                                 | Life Insurance Policy Provisions                      | X                                    |   |  |
| 3921.08   | 39 - Insurance                                 | Fraternal Benefits Societies                          | X                                    |   |  |
| 3937.25   | 39 - Insurance                                 | Casualty Insurance; Motor Vehicle Insurance           |                                      | X   |  |
| 3937.28   | 39 - Insurance                                 | Casualty Insurance; Motor Vehicle Insurance           |                                      | X   |  |
| 3964.177  | 39 - Insurance                                 | Captive Insurance Companies                           |                                      | X   |  |
| 4109.99   | 41 - Labor and Industry                        | Employment of Minors                                  |                                      | X   |  |
| 4141.48   | 41 - Labor and Industry                        | Unemployment Compensation                             |                                      | X   |  |
| 4506.17   | 45 - Motor Vehicles - Aeronautics - Watercraft | Commercial Driver's License                           |                                      |   | X  |
| *4507.07  | 45 - Motor Vehicles - Aeronautics - Watercraft | Driver's License Law                                  | X                                    |   |  |
| *4510.036 | 45 - Motor Vehicles - Aeronautics - Watercraft | Driver's License Suspension, Cancellation, Revocation | X                                    |   |  |
| 4510.15   | 45 - Motor Vehicles - Aeronautics - Watercraft | Driver's License Suspension, Cancellation, Revocation |                                      | X   |  |
| 4511.19   | 45 - Motor Vehicles - Aeronautics - Watercraft | Traffic Laws - Operation of Motor Vehicles            | X                                    |   |  |
| *4511.20  | 45 - Motor Vehicles - Aeronautics - Watercraft | Traffic Laws - Operation of Motor Vehicles            | X                                    |   |  |
| 4511.191  | 45 - Motor Vehicles - Aeronautics - Watercraft | Traffic Laws - Operation of Motor Vehicles            |                                      |   | X  |
| *4511.201 | 45 - Motor Vehicles - Aeronautics - Watercraft | Traffic Laws - Operation of Motor Vehicles            | X                                    |   |  |

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|----------|--|--|--------------------------------------|---|--|
| 4511.453 | 45 – Motor Vehicles – Aeronautics - Watercraft | Traffic Laws – Operation of Motor Vehicles |                                      | X   |  |
| 4513.40  | 45 – Motor Vehicles – Aeronautics - Watercraft | Traffic Laws – Equipment; Loads            |                                      | X   |  |
| 4513.66  | 45 – Motor Vehicles – Aeronautics - Watercraft | Traffic Laws – Equipment; Loads            |                                      | X   |  |
| 4515.02  | 45 – Motor Vehicles – Aeronautics - Watercraft | Venue; Guest Statute                       | X                                    |   |  |
| 4561.15  | 45 – Motor Vehicles – Aeronautics - Watercraft | Aeronautics                                |                                      |   | X  |
| 4561.151 | 45 – Motor Vehicles – Aeronautics – Watercraft | Aeronautics                                | X                                    |   |  |
| 4582.03  | 45 – Motor Vehicles – Aeronautics – Watercraft | Port Authorities                           |                                      |   | X  |
| 4717.30  | 47 – Occupations – Professions                 | Embalmers, Funeral Directors, Eternities   |                                      |   | X  |
| 4730.22  | 47 – Occupations – Professions                 | Physician Assistants                       | X                                    |   |  |
| 4735.67  | 47 – Occupations – Professions                 | Real Estate Brokers                        |                                      | X   |  |
| 4735.68  | 47 – Occupations – Professions                 | Real Estate Broker                         |                                      | X   |  |
| 4737.04  | 47 – Occupations – Professions                 | Secondhand Dealers; Junk Yards             |                                      |   | X  |
| 4765.06  | 47 – Occupations – Professions                 | Division of Emergency Medical Services     | X                                    |   |  |
| 4765.12  | 47 – Occupations – Professions                 | Division of Emergency Medical Services     | X                                    |   |  |
| 4765.49  | 47 – Occupations – Professions                 | Division of Emergency Medical Services     | X                                    |   |  |

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|----------|---------------------------------|--|--------------------------------------|---|--|
| 4771.17  | 47 - Occupations - Professions  | Serv<br>Article Agarb                                |                                      |   |  |
| 4905.94  | 49 - Public Utilities           | Public Utilities Commission -<br>General Powers      |                                      |   | X  |
| 4931.06  | 49 - Public Utilities           | Companies - Telegraph;<br>Telephone                  | X                                    |   |  |
| 4981.033 | 49 - Public Utilities           | Rail Development Commission                          |                                      |   | X  |
| 5101.76  | 51 - Public Welfare             | Dept. of Job & Family Servs. -<br>General Provisions | X                                    |   |  |
| 5103.20  | 51 - Public Welfare             | Placement of Children                                | X                                    |   |  |
| 5103.162 | 51 - Public Welfare             | Placement of Children                                | X                                    |   | X  |
| 5109.20  | 51 - Public Welfare             | Blind-Made Products                                  | X                                    |   |  |
| 5122.341 | 51 - Public Welfare             | Hospitalization of Mentally Ill                      | X                                    |   |  |
| 5123.422 | 51 - Public Welfare             | Dept. of Developmental<br>Disabilities               |                                      |   | X  |
| 5123.47  | 51 - Public Welfare             | Dept. of Developmental<br>Disabilities               |                                      |   | X  |
| 5149.21  | 51 - Public Welfare             | Adult Parole Authority                               | X                                    |   |  |
| 5164.35  | 51 - Public Welfare             | Adult Parole Authority                               |                                      |   | X  |
| 5501.27  | 55 - Roads - Highways - Bridges | Dept. of Transportation                              |                                      | X   |  |
| 5502.281 | 55 - Roads - Highways - Bridges | Dept. of Public Safety                               | X                                    |   |  |
| 5505.045 | 55 - Roads - Highways - Bridges | Highway Patrol Retirement<br>System                  |                                      | X   |  |
| 5703.54  | 57 - Taxation                   | Dept. of Taxation                                    |                                      |   | X  |
| 5723.01  | 57 - Taxation                   | Forfeited Lands                                      | X                                    |   |  |

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|----------|----------------------------------|--------------------------|--------------------------------------|---|--|
| 5810.02  | 58 – Trusts                      | Breach of Trust          |                                      | X   |  |
| 5810.08  | 58 – Trusts                      | Breach of Trust          |                                      | X   |  |
| *5923.36 | 59 – Veterans – Military Affairs | Organized Militia        | X                                    |   |  |
| 5923.37  | 59 – Veterans – Military Affairs | Organized Militia        |                                      |   | X  |
| 5924.111 | 59 – Veterans – Military Affairs | Code of Military Justice |                                      |   | X  |

**TOTALS:**

71                      63                      64

\*Denotes a statute that was excluded from Respondent Bechtel's Appendix A-1 list of statutory enactments providing an immunity or defense so long as the actor does not engage in "wanton" conduct, but that does use the word "wanton" in its language.