[Cite as *Wheeler Consulting v. Lavalley*, 2016-Ohio-1309.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

WHEELER CONSULTING, INC., f.k.a. WHEELER LANDSCAPING, INC., et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2015-P-0046**
- vs -	:	
DEVIN G. LAVALLEY, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2013 CV 00848.

Judgment: Affirmed.

Joan E. Pettinelli and *William T. Wuliger,* The Brownell Building, 1340 Sumner Court, Cleveland, OH 44115 (For Plaintiffs-Appellants).

M. Charles Collins, Eastman & Smith Ltd., One Seagate, 24th Floor, P.O. Box 10032, Toledo, OH 43699-0032. (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Wheeler Consulting, Inc. and John D. Wheeler, appeal the summary judgment of the Portage County Court of Common Pleas against them and in favor of appellee, Devin G. LaValley, and appellees, Werner Enterprises, Inc. and its subsidiary, Drivers Management, LLC ("hereafter collectively referred to as "Werner"), on appellants' claim for economic damages. This case arose from a motor vehicle

accident involving appellants' employee and Werner's employee, in which appellants' employee sustained personal injuries. At issue is whether appellants are entitled to recover economic losses they sustained resulting from the personal injuries sustained by their employee. For the reasons that follow, we affirm.

{¶2} On September 1, 2011, LaValley, who was driving a tractor-trailer for Werner, rear-ended appellants' pick-up truck, which was being driven by appellants' employee, Brenda Giebel, damaging the truck and causing serious injury to Ms. Giebel.

{¶3} Appellant, John D. Wheeler, testified that Ms. Giebel's injuries affected her ability to perform her job duties. Her inability to work at her pre-collision level caused appellants to lose about 20 per cent of their revenue. Sometime after the accident, appellants sold the business and, subsequently, the new owner terminated several employees of the business, including Ms. Giebel.

{¶4} LaValley has had Attention Deficit Hyperactivity Disorder, and has been treated for this condition, since childhood. Although, at the time of the accident, he was covered by an unexpired, unqualified medical certificate, which is required of truck drivers by the United States Department of Transportation, at that time, he was not taking his medication. Following the accident, LaValley was terminated.

{¶5} This collision resulted in three separate litigations against appellees. In May 2012, Ms. Giebel filed an action in the United States District Court for the Northern District of Ohio. She alleged she was injured by LaValley while he was driving a tractor-trailer owned by Werner. She alleged that LaValley was negligent in operating the tractor-trailer and that Werner was negligent in hiring and supervising him.

{¶6} While the federal litigation was pending, on August 28, 2013, Ms. Giebel's husband filed a loss-of-consortium claim in the trial court. That case was removed to the District Court and, subsequently, both cases were settled and dismissed.

{¶7} Also on August 28, 2013, appellants filed the instant action. Ms. Giebel and her husband were never parties in this matter. In appellants' amended complaint, they alleged that as a result of Ms. Giebel's injuries, appellants sustained property damage to their pick-up truck and financial losses because, following the accident, Ms. Giebel was unable to fully perform her job duties. In Count One, appellants alleged that LaValley negligently or intentionally operated Werner's tractor-trailer, causing damage to their property and injury to Ms. Giebel, as a result of which appellants sustained damages. In Count Two, appellants alleged that LaValley intentionally exposed the motoring public to a risk of harm by driving a truck while he had an untreated disability. In Count Three, appellants alleged that Werner negligently or intentionally hired and supervised LaValley. In Count Four, appellants alleged that Werner intentionally exposed the motoring public to harm by failing to establish a system to monitor its drivers, which allowed LaValley to drive its tractor-trailer under a disability. In Count Five, appellants alleged that Werner committed spoliation of evidence in that Werner allegedly destroyed evidence in order to disrupt appellants' case.

{¶8} On June 11, 2014, appellees filed a motion for summary judgment. The parties engaged in extensive discovery in the federal case. The depositions taken in that matter were filed in this case. Although appellants complain in their brief that the trial court granted appellees' motion to stay discovery pending the court's ruling on

summary judgment, precluding them from obtaining additional discovery, appellants do not assign error to this ruling and it is therefore not before us.

{¶9} On March 19, 2015, the trial court granted summary judgment in appellees' favor on appellants' claims for economic damages and for spoliation, but denied summary judgment on appellants' claim for damage caused to their pick-up truck. With respect to appellants' claims for economic damages as a result of Ms. Giebel's injuries, the trial court concluded that such claims could not be maintained as there is no Ohio case law or statute supporting those claims.

{¶10} Thereafter, appellees filed a supplemental motion for summary judgment on appellants' property-damage claim (involving their pick-up truck) based on evidence that said claim was fully paid. That summary-judgment motion was granted and appellants' property-damage claim was dismissed.

{¶11} Appellants' appeal is limited to the trial court's initial summary judgment denying their claims for economic damages. Appellants do not appeal the trial court's dismissal of their property-damage and spoliation-of-evidence claims. Appellants assert three assignments of error. For their first, they allege:

{¶12} "The trial court reversibly erred in granting defendants-appellees' motion for summary judgment based on its conclusion that an employer may not recover economic damages for injury to its employee because the common law right is no longer a viable cause of action."

{¶13} Summary judgment is a procedural device intended to terminate litigation and to avoid trial when there is nothing to try. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358 (1992). Summary judgment is proper when: (1) there is no genuine issue of

material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party, that party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Leibreich v. A.J. Refrigeration, Inc*., 67 Ohio St.3d 266, 268 (1993).

{¶14} The party seeking summary judgment on the ground that the nonmoving party cannot prove his case bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996).

{¶15} If this initial burden is not met, the motion for summary judgment must be denied. *Id.* However, if the moving party has satisfied his initial burden, the nonmoving party then has a reciprocal burden, as outlined in Civ.R. 56(E), to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against him. *Id.*

{¶16} Since a trial court's decision whether or not to grant summary judgment involves only questions of law, we conduct a de novo review of the trial court's judgment. *DiSanto v. Safeco Ins. of Am*., 168 Ohio App.3d 649, 2006-Ohio-4940, ¶41 (11th Dist.).

{¶17} In order to establish an actionable claim for negligence, the plaintiff must establish: (1) the defendant owed a duty to him; (2) the defendant breached that duty; (3) the defendant's breach of duty proximately caused his injury; and (4) he suffered damages. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998); *Bond v.*

Mathias, 11th Dist. Trumbull No. 94-T-5081, 1995 Ohio App. LEXIS 979, *6 (Mar. 17, 1995).

{¶18} First, appellants argue the trial court erred in dismissing their claim for economic damages based on appellees' alleged negligence. However, in *Pickett v. Consignment Enterprise Co*., 1st Dist. Hamilton No. C-77372, 1978 Ohio App. LEXIS 8217 (Aug. 9, 1978), the First District stated:

> **{¶19}** If * * * we suppose that an employee was negligently injured to the loss of the employer, we find the courts have consistently ruled that there is no cause of action. In *Snow v. West*, 250 Or. 114, 440 P. 2d 864 (1968), and in *Preiser Scientific, Inc. of Ohio v. Piedmont Aviation, Inc*., 432 F. 2d 1002 (4th Cir.1970), *cert. den*., 401 U.S. 1009, both courts held that the employer has no cause of action for loss of services of its employees caused by the negligence of a third party. *Picket, supra,* at *4.

{¶20} Subsequently, the Supreme Court of Ohio also rejected the right of an employer to assert such a claim in *Cincinnati Bell Tel. Co. v. Straley*, 40 Ohio St.3d 372 (1988). In *Straley*, the Court ruled on five cases that were certified for its review. In one of those cases, Case No. 88-114, the facts were strikingly similar to those presented here. In that case, a truck driver was injured in an accident with another truck driver. The injured driver's employer sued the other truck driver and his employer to recover the amounts it paid for its employee's medical bills and workers' compensation benefits. The court of appeals ruled against the employer of the injured driver, holding that a self-insured employer cannot recover from a negligent third party the monies paid to its employee as allowed by the Ohio Bureau of Workers' Compensation. The Supreme Court affirmed, holding:

> **{¶21}** We do not find that a duty to an injured employee's employer exists by virtue of the pronouncements of common law, by legislative enactment, or by operation of law. It would appear that such a duty

> could only exist based on contract or warranty. * * * [Specifically, as to Case No. 88-114,] [n]othing in the record reveals a breach of duty owed to the employer based on contract or warranty.
>
> **{¶22}** * * *
>
> **{¶23}** Therefore, we hold that a self-insured employer which has paid medical expenses and other related workers' compensation benefits, or a state fund employer which has incurred increased workers' compensation premiums due to an injury suffered by an employee, may *not* recover damages against the third party who negligently caused the injury to the employee *in the absence of any legal relationship based upon contract or warranty between the employer and the third party*. (Emphasis added.) *Id*. at 380.

{¶24} In their briefing, appellants barely mention the majority opinion in *Straley*, but, instead, take four pages to discuss the alleged merits of the dissent. However, *Straley* has been the law for 30 years. It has often been followed and cited with approval and has never been reversed, modified, or criticized in any reported opinions.

{¶25} Appellants concede that "*this Court does not have the authority to overrule* [*Straley*]." (Emphasis added.) Rather, appellants argue *Straley* "should be revisited and overruled by the Ohio Supreme Court." However, the only way that could happen is if this court affirms the trial court's summary judgment.

{¶26} Appellants acknowledge that the Supreme Court's holding in *Straley* is not limited to the employer's payment of workers compensation benefits, but, rather, applies to any economic losses allegedly sustained by the employer as a result of personal injuries sustained by its employee. Appellants thus concede that *Straley* stands for the general proposition that "an employer may not recover damages against a third party who negligently caused injury to the employee in the absence of any legal relationship based upon contract or warranty between the employer and the third party."

{¶27} In fact, the Eighth District in *Minneapolis Flour Co. v. Cleveland*, 188 Ohio App.3d 146, 2010-Ohio-2607 (8th Dist.), stated:

> **{¶28}** Although the causes of action in [*Straley*] all concerned employers' efforts to recover workers' compensation payments, the more general principle to be gleaned from that case [is] that any damages suffered by an employer as a result of a tort committed upon its employee are too remote to allow recovery [because they] are such remote consequences of the city's alleged negligence that they are not recoverable. *Minneapolis, supra,* at ¶10.

{¶29} Thus, pursuant to *Straley,* a tortfeasor who injures an employer's employee owes no duty to the employer, and such employer cannot sue the tortfeasor (or his employer) for economic losses sustained as a result of injuries negligently inflicted on the employee in the absence of a legal relationship based on a contract or warranty between the employer and the third-party tortfeasor. *Id*. at 380.

{¶30} Here, the trial court in its summary judgment entry quoted the following analysis by the Fourth Illinois Appellate District in *Castle v. Williams*, 338 Ill. App.3d 708, 788 N.E.2d 421 (2003), in support of its decision:

> **{¶31}** The common-law right of a master to recover for loss of services due to a servant's injury by a negligent third party is rooted in feudalism, where the servant was considered a member of the master's household. * * * Such a relationship no longer exists. Today, the relationship between an employer and his employee is contractually based. * * * After analyzing the duty element in light of the modern employer-employee relationship, we find the common-law right is no longer a viable cause of action in Illinois.
>
> **{¶32}** First, the employer's injury is not reasonably foreseeable because it is too remote and indirect from the negligent act. A natural connection between the wrongdoing and the injury does not exist. To find such a duty would be to impose liability on a tortfeasor for interfering with a contract not known to him.
>
> **{¶33}** Second, holding the third-party tortfeasor liable for an employer's loss of an employee's service would place an unreasonable burden on the tortfeasor, who has no knowledge of the contract and no

> control over the employer's business. The employers are in the better position to insure against such a loss through the purchase of "key man" insurance and business management.
>
> **{¶34}** Third, such a duty raises serious social policy concerns. With the majority of people employed, the allowance of employers to recover for loss of profits for negligent injury to their employees would result in a proliferation of claims. * * * Moreover, the nature of the damages is conducive to fraudulent claims. * * * Additionally, the economic consequences of any single accident are virtually limitless, and the allowance of an employer's recovery for loss of service would be a major step toward open-ended tort liability * * *.
>
> **{¶35}** The weight of authority reaches the same conclusion, denying the existence of such a cause of action. *See Champion Well Service, Inc. v. NL Industries*, 769 P.2d 382, 383 (Wyo. 1989). Additionally, a person who tortiously causes physical harm to an agent is not liable to the principal for the harm thereby caused to him. Restatement (Second) of Agency, Section 316(2), at 58 (1958). *Castle, supra,* at 711-712.

{¶36} The Restatement (Second) of Agency cites similar policy considerations in explaining why modern courts do not hold a tortfeasor liable for economic loss sustained by the injured employee's employer. The Restatement (Second) of Agency states, as follows:

> **{¶37}** [A]t the time of the early common law, the relation between master and servant was very close. Servants, frequently apprentices, were considered as part of the household of the master. Because of this, the master was given an action against anyone who tortiously harmed the master's servant.
>
> **{¶38}** * * *
>
> **{¶39}** It is quite clear today that the relation of master and servant no longer represents the close bond which it once did. It is equally clear that a servant no longer regards himself as his master's man, but as an independent person who can bargain effectively. There is no longer anything which even remotely resembles what was formerly thought of as the status of a servant. * * * Bearing in mind, therefore, the great difference between the modern industrial servant and the servant in early centuries of the English common law, the question arises whether the liability placed upon a person

> who negligently harms a servant should continue in view of the change in the relation.
>
> **{¶40}** * * *
>
> **{¶41}** With most of the work of the world today performed by servants, some of whom are of great value to their employers, it is a matter of great significance that, in the last 150 years, in only a few cases has action been brought for the loss of services. It would appear that American lawyers have not believed in the existence of such a cause of action. It would appear, therefore, that this action is obsolescent and that there is no valid reason for reviving it. Restatement (Second) of Agency, Section 316(2), Comments and Reporter's Notes.

{¶42} In an effort to fall within the exception to the rule of non-liability set forth in *Straley, supra,* appellants argue the Federal Motor Carrier Safety Act and its regulations create a warranty by commercial carriers and their truck drivers, such as Werner and LaValley, that they will comply with the statute and regulations. Appellants argue that the breach of such warranty gives rise to an action in favor of an employer for economic damages resulting from negligently inflicted injuries to its employees.

{¶43} The problem with this argument is that appellants do not cite any statutory or case law providing that the subject statute and regulations create a warranty. In any event, the type of warranty appellants argue exists is not the type of warranty that is required to satisfy the exception in *Straley.* Appellants argue that the federal statute and regulations operate as a "warranty to the general public." However, in *Straley,* the Ohio Supreme Court held that, in order to come within the exception, there must be a legal relationship based on a contract or warranty *between the tortfeasor and the employer.* The contract/warranty on the part of the tortfeasor (appellees) in favor of the employer (appellants) would be that the tortfeasor would not damage the employer's business. A warranty in favor of the general public does not suffice.

{¶44} Moreover, appellants' warranty argument ignores the Ohio Supreme Court's holding in *Straley* that no duty is owed by the tortfeasor to an injured employee's employer by the "common law, *by legislative enactment or by operation of law.* (Emphasis added.) *Id*. at 380. Thus, the subject statute and regulations did not create a duty on the part of appellees in favor of appellants.

{¶45} If we were to accept appellants' argument that the statute/regulations create a warranty between appellees and appellants, the breach of which results in a negligence action, this would effectively overrule *Straley* because it would do away with the requirement in that case that in order for the tortfeasor to be liable to the employer, there must be a contract or warranty specifically between them. According to appellants' argument, the mere status of the defendant as a truck driver creates a warranty and potential liability, regardless of the existence of an actual contract or warranty. Although *Straley* involved truck drivers, the Supreme Court in that case did *not* exclude truck drivers from its holding that a contract or warranty must exist between the tortfeasor and the employer in order to impose liability on the tortfeasor.

{¶46} We therefore hold the trial court did not err in entering summary judgment in favor of appellees on appellants' negligence claim for economic damages.

{¶47} For appellants' second assignment of error, they contend:

{¶48} "The trial court reversibly erred by implicitly determining that Plaintiff-Appellant cannot maintain an action for economic damages from arising from [sic] Defendant-Appellees' intentional misconduct in injuring Plaintiff-Appellant's employee."

{¶49} Appellants argue that even if their claims based on negligence fail under *Straley*, they can maintain claims based on Werner and LaValley's alleged intentional

conduct because, appellants argue, Ohio law recognizes their right to recover for economic losses resulting from intentional conduct. However, the cases cited by appellants that allowed recovery, *Eysoldt v. Imaging*, 194 Ohio App.3d 630, 2011-Ohio-2359 (1st Dist.), and *ODW Logistics, Inc. v. Karmaloop, Inc.*, 2014 U. S. Dist. LEXIS 9615 (S.D.Ohio 2014), involved intentional torts, i.e., conversion and invasion of privacy, that were committed by the tortfeasor *directly against the plaintiff*; they did not involve injury to an employee resulting in economic loss to an employer. These cases are inapposite and thus do not support appellants' argument. Further, contrary to appellants' suggestion, the Oregon Supreme Court in *Snow, supra,* did *not* hold that the tortfeasor was liable to the employer for its economic loss resulting from intentional conduct because the employee's injuries resulted only from the tortfeasor's negligence. *Id.* at 117-118.

{¶50} Significantly, appellants fail to cite any Ohio case law holding that an employer can recover economic losses resulting from personal injury intentionally inflicted on his employee. We note that the same section of the Restatement (Second) of Agency, which provides that a tortfeasor who *negligently* harms a principal's agent is not liable to the principal for its resulting economic harm, also addresses the issue of the tortfeasor's liability to the principal based on the tortfeasor's *intentional* conduct. The Restatement provides: "[The tortfeasor] is not liable for [economic] harm [caused to a principal] even if [the tortfeasor] intentionally injures the agent, *unless he does so in order to cause harm to the principal*." (Emphasis added.) Restatement (Second) of Agency, Section 316(2), Comments. Thus, according to the Restatement, an employer

can only recover its economic losses for the tortfeasor's intentional conduct where the tortfeasor injured the employee *in order to cause harm to the employer*.

{¶51} Here, there is no evidence that appellees were aware of appellants' existence prior to the accident or that appellees intentionally injured Ms. Giebel in order to harm appellants' business. In fact, LaValley testified that he never even heard of Ms. Giebel or appellants prior to this accident and that he never intended to cause appellants any harm.

{¶52} Apparently acknowledging they have no evidence that appellees intended to harm their business, appellants argue that intentional conduct includes results that are intended (specific intent) as well as results that the tortfeasor knows are substantially certain to follow from what the actor does (inferred intent). They argue that appellants' intent to injure appellants' business can be inferred. However, appellants fail to cite any case law holding that inferred intent applies in this context. As noted above, the Restatement limits recovery by an employer to its economic losses resulting from injury to its employees to situations in which the tortfeasor intentionally injured the employer's employee *in order to cause harm to the employer.* Consequently, the intentional form of this cause of action is a "specific intent" tort. *Mattingly v. Sheldon Jackson College*, 743 P.2d 356, 363 (Alaska Supreme Court 1987) ("an employer is required to allege some definite, specific, or knowing intent on the part of a third person to do harm to the employer's contractual relations with its employees or with its prospective economic advantage, in order to state a cause of action * * *.")

{¶53} In any event, even if evidence of inferred intent to harm appellants' business was sufficient to impose liability, appellants' argument would still lack merit.

Appellants argue in their brief that "inferred intent torts are those in which the actor believes his actions are substantially certain to cause a *particular result*, even if the actor does not desire to bring that result about." (Emphasis added.) Thus, if inferred intent was sufficient, even according to appellants, in order for them to prove inferred intent, they would have to prove that appellees knew with substantial certainty that their conduct would cause a particular result, which in this case would be damage to appellants' business. Appellants have not presented any such evidence.

{¶54} Instead, the evidence of inferred intent presented by appellants as to LaValley is that he had three prior accidents while on the job, although each appears to have been minor, resulting in no damage. Appellants also point to the fact that LaValley was not taking his medication at the time of the accident.

{¶55} With respect to Werner, appellants' inferred-intent evidence is that Werner did not have any policies beyond those required by the United States Department of Transportation aimed at determining whether its prospective employees (such as LaValley) withheld medical information from their medical examiners. Further, appellants argue that their expert, Jeffrey Liva, M.D., an occupational medicine specialist, testified that Werner's conduct in hiring and supervising LaValley involved breaches of certain federal safety regulations, resulting in a disregard for the safety of the general public. However, this same evidence was also presented in the District Court by the Giebels in opposition to appellees' motion for summary judgment filed in that case. We find the following comments of Judge Sara Lioi in the District Court's entry granting summary judgment to appellees regarding this evidence to be persuasive:

{¶56} Plaintiff * * * contends in her briefing that Werner has failed to "adopt any policy to ensure that its drivers are medically qualified to operate large commercial vehicles." But plaintiff readily cites to uncontroverted deposition testimony by [Werner's] corporate representative, Jaime Maus, discussing how Werner "ensures that drivers who are hired on with the company see a company-approved physician who conducts a DOT physical on that driver," and that "Werner's policy is the same as federal regulations, that that driver would complete and pass a DOT-approved physical." Plaintiff's real bone of contention appears to be that Werner does not have any additional policies * * * directed at revealing information that prospective applicants have withheld from the medical examiner. Again, however, plaintiff offers no evidence or argument to support the idea that such an additional policy is required by the federal regulations or some other source of law, much less to support the notion that failure to implement such an additional policy constitutes the conscious disregard for the rights and safety of others in a way that had a great probability of causing substantial harm * * *.

{¶57} Plaintiff also cites to testimony by Dr. Liva to attempt to establish that "motor carriers have a separate and ongoing duty to monitor the health of their drivers regardless of the existence of an unexpired medical certificate." This claim * * * is a legal conclusion unacceptable as evidence, as is Dr. Liva's extended discussion of how 49 C.F.R. Section 391.65(c) is analogous to Werner's situation in re-hiring LaValley and manifests a duty incumbent upon Werner to re-examine him upon re-hire.

{¶58} * * *

{¶59} The [medical certificate] clearly shows that * * * LaValley answered "No" to every question in the "Health History" section. The medical examiner also wrote "No meds," which the parties agree represents that LaValley did not disclose that he was taking any medications at the time. Undeterred, Dr. Liva testified that the medical examiner who examined LaValley incorrectly failed to discuss LaValley's "No" answers with him. The plain language of both forms is obvious: the medical examiner is only required to discuss "Yes" answers and document that discussion in the section in question. Regardless of Dr. Liva's testimony that "Yes" means "No," plaintiff has utterly failed to establish that [Werner's] use of this form constitutes "conscious disregard for the rights and safety of others."

{¶60} In summary, there is no evidence in the record that any of the appellees intentionally injured Ms. Giebel in order to cause harm to appellants' business. For this reason alone, appellants' intentional tort claims fail. Further, even under the substantial-certainty (inferred-intent) test, there is no evidence that appellees knew their actions were substantially certain to cause harm to appellants' business. We therefore hold the trial court did not err in entering summary judgment in favor of appellees on appellants' claim for economic damages based on appellees' alleged intentional conduct.

{¶61} For their third and final assignment of error, appellants allege:

{¶62} "The trial court reversibly erred in judicially abolishing the common law right of an employer to recover for economic losses resulting from injury to its employee in violation of Article II, Section I and Article I, Section 16 of the Ohio Constitution."

{¶63} Appellants argue that by granting summary judgment in favor of appellees on appellants' intentional tort claims, the trial court abolished such claim and violated their right to a remedy in Article 1, Section 16 of the Ohio Constitution. Section 16 provides, in pertinent part: "[E]very person, for an injury done to him in his land, goods, person, or reputation, shall have remedy in due course of law."

{¶64} Appellants misconstrue the right-to-a-remedy provision in Section 16. This provision is implicated when *the legislature* improperly abolishes a common law remedy. *See Strock v. Pressnell*, 38 Ohio St.3d 207, 214 (1988); *Stetter v. R.J. Corman Derailment Servs*., 125 Ohio St.3d 280, 2010-Ohio-1029, ¶36. Appellants do not argue that the legislature abolished their intentional tort claims. As a result, Section 16 is not implicated here. For this reason alone, this assigned error lacks merit.

{¶65} As an aside, we note that the trial court's right to recognize or abolish a common-law cause of action cannot be seriously questioned. *See Kulch v. Structural Fibers, Inc*., 78 Ohio St.3d 134, 161 (1997). "After all, who presides over the common law but the courts?" *Gallimore v. Children's Hosp. Med. Ctr*., 67 Ohio St.3d 244, 253 (1993). A cause of action may be judicially created and it may be judicially abolished. *Kulch, supra*. It is the responsibility of the Ohio judiciary to determine whether public policy reasons exist to recognize or abolish a cause of action. *Id*.

{¶66} For the reasons stated in this opinion, the assignments of error lack merit and are overruled. It is the order and judgment of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, J.,

COLLEEN MARY O'TOOLE, J.,

concur.