IN THE SUPREME COURT OF OHIO

JOSE GALBAN CAMARA,
Appellant,

vs.

GILL DAIRY, LLC,
Appellee.

Case Nos. 2023-1599 & 2024-0064

On Appeal from the
Madison County Court of Appeals
Twelfth Appellate District

Court of Appeals
Case No. CA 2022-10-023

BRIEF OF AMICI CURIAE, OHIO CHAMBER OF COMMERCE AND OHIO ALLIANCE FOR CIVIL JUSTICE IN SUPPORT OF APPELLEE, GILL DAIRY, LLC

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STATEMENT OF INTEREST

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. It works to promote and protect the interests of its nearly 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. A more favorable business climate in Ohio promotes Ohio's economy and benefits all Ohioans. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

The Ohio Alliance for Civil Justice ("OACJ") is a group of small and large businesses, trade and professional associations, professionals, non-profit organizations, and local government associations. OACJ members support a balanced civil justice system that will not only award fair compensation to injured persons, but will also impose sufficient safeguards to ensure that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. The OACJ also supports stability and predictability in the civil justice system in order for Ohio's businesses and others to know what risks they assume as they carry on commerce in this state.

STATEMENT OF THE FACTS AND CASE

Amici adopt the Statement of Facts and Case as set forth in the Memorandum Opposing Jurisdiction filed by Appellee Gill Dairy, LLC.

ARGUMENT

Appellant advocates for an application of law that is in direct contravention of the Ohio Constitution, the will of the citizens of Ohio, and the will of the General Assembly. This application undermines Ohio's workers' compensation system in a way that will have a significant negative impact on Ohio's businesses. It is for this reason and those set forth below that Amici urge this Court to reject Appellant's propositions of law; overturn the unconstitutional decision in *Blankenship v. Cincinnati Milacron Chemicals*; and uphold the Ohio Constitution by finding employers are immune from liability for common law causes of action by virtue of the Workers' Compensation Act.

Amici's Proposition of Law No. 1: The Ohio Constitution Article II, Section 35 Precludes an Employee from Pursuing Common Law Remedies for Workplace Injuries Against an Employer for Any Cause of Action Including Intentional Tort.

Article II, Section 35 of the Ohio Constitution provides quite clearly that:

> For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation *shall be in lieu of all other rights to compensation, or damages,* for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, *shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease*.

(Emphasis added.) Ohio Const., art. II, §35. However, this Court's decision in *Blankenship v. Cincinnati Milacron Chemicals* runs counter to the clear text of Ohio's Constitution by introducing liability for employers for intentional torts. 69 Ohio St.2d 608 (1982).

A. Article II, Section 35 and its Supporting Statutes Necessitate Precluding Employees from Pursuing Common Law Remedies for Workplace Injuries.

For much of the history of Ohio's Workers' Compensation system, employees were precluded from pursuing common law remedies. This preclusion was purposefully added by the

legislature and the citizens of Ohio in the years that followed the adoption of workers' compensation protections.

In *State ex rel Engle v. Industrial Commission*, this Court noted that prior to 1924, Section 35 of Article II contained the following language:

> but no right of action shall be taken away from an employee when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees.

142 Ohio St. 3d 425, 429 (1944).

However, in 1923 the General Assembly, by joint resolution, submitted to the electors, a proposed amendment of Article II, Section 35 which deleted the words quoted above. 110 Ohio Laws, 631. The proposed amendment was adopted by the people in November 1923 and became effective January 1, 1924. *Engle* at 430. Since that change, Article II, Section 35 has not been amended.

The amendment purposefully removed the provision allowing employees to pursue alternative actions against employers and provided:

> Such compensation shall be in *lieu of all other rights to compensation, or damages,* for such death, injuries, or occupational disease, and any employer who pays the premium of compensation provided by law, passed in accordance herewith, *shall not be liable to respond in damages at common law or by statute* for such death, injuries, or occupational disease.

(Emphasis added.) *Bevis v. Armco Steel Corp.*, 156 Ohio St. 295, 300 (1951); Ohio Const., art. II, §35.

This Court in *Bevis* further deemed it significant that in 1931 the General Assembly repealed G.C. 1465-76 which had provided:

> Where a personal injury is suffered by an employee…while in the employ of an employer in the course of employment … and in case such injury has arisen from the willful act of such employer … nothing in this act contained shall affect the civil liability of such employer.

Bevis at 300. The *Bevis* Court also noted that effective May 26, 1939, G.C. 1465-70[1] was amended to provide that employers who comply with the provisions of the workers' compensation act shall not be liable to respond in damages at common law or by statute, for any injury, whether such injury is compensable under the act or not. *Id.* at 302-03.

After reviewing the foregoing constitutional and statutory history, this Court held:

> These changes in the constitutional and statutory provisions relating to workmen's compensation make it apparent that, insofar as provisions relating to workmen's compensation bar suits against an employer, the fact, that an action is based upon the 'defendant's intentional, wrongful and malicious act,' does not result in a plaintiff having any greater rights to recovery than if such action had been based merely upon negligence of the defendant.

Id. at 301. Accordingly, it was well settled that an employer who complied with the workers' compensation act was immune from tort liability, even if the tort could be characterized as intentional. *See Greenwalt v. Goodyear Tire & Rubber Co.*, 164 Ohio St. 1 (1955); *Roof v. Velsical Chemical Corp.*, 380 F.Supp. 1373 (N.D. Ohio 1974). That is until the Court in *Blankenship* swept away existing law and found that employers could be sued for intentional tort despite the clear language of Article II, Section 35.

The Court in *Blankenship* was far from unanimous in its decision. In his Dissenting Opinion, Justice Locher noted the majority's decision ran contrary to the plain text of the Ohio Constitution and Revised Code, writing:

> In my opinion, the Ohio Constitution and the Revised Code mean precisely what they say: workers' "compensation shall be in lieu of all other rights to compensation, or damages, for … injuries, or occupational disease, and any employer who pays

[1] G.C. 1465-70 survives today as R.C. 4123.74 which currently provides:

> Employers who comply with Section 4123.35 of the Revised Code *shall not be liable to respond in damages at common law or by statute* for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or not such injury, occupational disease, bodily condition, or death is compensable under this chapter.

(Emphasis added.) R.C. 4123.74.

> the premium … shall not be liable to respond in damages at common law or by statute for such … injuries or occupational disease." Appellants have convinced the majority that "all" does not mean "all," but instead means … "all, except for rights to compensation for intentional torts."

(Citation omitted.) *Blankenship* at 622 (Locher, J., dissenting). Considering the intent of the General Assembly, Justice Locher argued that the intent of R.C. 4123.35 was to eliminate all damage suits outside of the Act, including those based on intentional tort. *Id.* at 623. He noted that had the General Assembly wished to exclude intentional misconduct it could and would have done so just as it carved out recovery for employees' injuries which were purposefully self-inflected in R.C. 4123.54. *Id.*

Justice Locher lamented the holding of the majority "[t]he majority's myopic approach disrupts the delicate balance struck by the Act between the interests of labor, management and the public and signals the erosion of a valuable system which has served its purpose of providing a common fund for the benefit of all workers." *Id.* at 624.

B. *Blankenship* Creates Legal Fiction Without Logic or Support.

Blankenship created the legal fiction that an intentional tort is not an "injury" arising out of the course of employment. *Blankenship* at 613. Rather, "intentional tortious conduct will always take place outside [the employment] relationship." *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624, 634 (1991).

In the years that followed the *Blankenship* decision, Professor Larson wrote: "'The Ohio Supreme Court [in *Blankenship*] adopts the *distinctly out-of-line view* that employees and their spouses can sue their employer in tort.'" (Emphasis sic.) *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90, 105, (1984) (Holmes, J., dissenting), quoting 2A Larson, *Law of Workmen's Compensation* (1983) 13-8 to 13-9, Section 68.13, fn. 10.1. More recently Professor Larson described the rationale behind Ohio's intentional tort jurisprudence to be less than satisfactory by writing, "the most

fictitious theory of all is that the assault does not arise out of the employment; for if it is a work-connected assault, it is no less so because the assailant happens to be the employer." 9 Larson, *Larson's Workers' Compensation Law* § 103.01 (2024).

Regardless of how the rationale is described it lacks a logical appeal. In analyzing the facts of *Blankenship* Justice Locher noted:

> These appellants, and other employees of Milacron, were employed to engage in the manufacturing process, using the necessary ingredients or products reasonably determined by the management of the employer. Injuries, occupational disease, or bodily condition received or contracted by any employee in the course of or arising out of his employment and use of the materials of manufacture must, insofar as bringing an action against an employer, be considered a hazard of employment which may be compensable under R.C. 4123.01 to 4123.94, but not actionable in a civil suit against the employer.

Blankenship, 69 Ohio St.2d at 622 (Locher, J., dissenting). In fact, reviewing most of the injuries which have been given consideration under *Blankenship* it is clear the injuries were received in the course of, and arose out of, the employee's employment. All elements of the employment relationship were present. That a workplace injury might have been caused by some fault of the employer, intentional or otherwise, does not alter the fact that the injury arose out of the employment.

Take the case at hand, Appellant was performing his work duties operating a tractor and spreader when his clothing became caught in the machinery causing his injuries. The Appellant was performing his work duties, at his scheduled time of employment, at his place of employment, at the direction of his employer, and for the benefits of the employer. All of the elements of an employment relationship are clearly met and there is no disputing the fact that the Appellant was in the course and scope of his employment.

The fiction advanced by *Blankenship* is predicated on the idea that when an employee is subject to an intentional tort, the injury somehow did not arise out of the employment. *Blankenship,*

69 Ohio St.2d at 613. It would seem that an employee either can file a suit in tort under *Blankenship*, or file for workers' compensation benefits since it is impossible for an injury to occur both within and outside of the employment. However, in *Jones v. VIP Development Company,* this Court held that "the receipt of workers' compensation benefits does not preclude an employee or his representative from pursuing a common-law action for damages against his employer for an intentional tort." 15 Ohio St.3d 90, 100 (1984).

Blankenship and *Jones* create an illogical conflict in Ohio's laws where an injury could be sustained both within the employment relationship making the employee eligible for workers' compensation and outside that relationship with the ability to pursue any common law remedy against their employer. To the contrary, the correct conclusion is contained in the text of Ohio's Constitution. When an injury occurs in the course of and arises out of the employee's employment, the injury is covered under Article II, Section 35, and the workers' compensation system is the exclusive remedy.

Not only is Ohio's idea of intentional tort in conflict with its Constitution, it is also inconsistent with other jurisdictions. Just two years after the decision in *Blankenship* Justice Holmes noted that virtually every jurisdiction had "scorned the premise of *Blankenship*." *Jones,* 15 Ohio St.3d at 106 (Holmes, J., dissenting). Further, the view of *Blankenship* has not changed in recent years. Professor Larson's review of states allowing damage actions for intentional injuries shows Ohio to be the only state which advances this fiction that intentional torts are somehow outside of the employment relationship. 9 Larson, *Larson's Workers' Compensation Law*, § 103.01 (2024).

C. The Stated Purpose of *Blankenship* Was Already Fulfilled Prior to the Decision.

In *Blankenship v. Cincinnati Milicron Chemicals, Inc.* the Court raised concern that the purpose of the Workers' Compensation Act was to promote a safe and injury free workplace and

affording employers with immunity for intentional behavior would not support that environment. *Blankenship,* 69 Ohio St.2d at 615. However, what the *Blankenship* Court failed to recognize is that Ohio law already provided and still provides a remedy for employees injured due to unsafe work environments.

In 1924, Section 35 of Article II was amended by the electorate to empower the Industrial Commission to issue additional awards to employees for injuries, diseases, or deaths caused by an employer's failure to comply with any specific requirement enacted by the legislature or adopted by the Commission for the protection of employees' life, health, or safety. Ohio Const., art. II, §35; 1 Fulton, *Ohio Workers' Compensation Law* § 13.1 (2023).

The General Assembly created the Division of Safety and Hygiene to investigate allegations of unsafe working environment and provide grants and other resources to employers to ensure a safe workplace. R.C. 4121.37. The General Assembly also adopted R.C. 4121.13 giving the Bureau of Workers' Compensation the authority to prescribe the method of protection to render employees safe. In addition to paying premiums to the BWC the employer may be liable for a violation of a specific safety requirement ("VSSR") claim. As described by Mr. Fulton "a VSSR award is 'a new, separate, and distinct award' that may be awarded in addition to standard workers' compensation benefits and is not covered by an employer's workers' compensation premium." 1 Fulton, *Ohio Workers' Compensation Law* § 13.3 (2023). These awards serve as both a benefit given to the injured worker for an employer's violation of a safety requirement but also as a penalty to the employer for purposefully engaging in unsafe behavior. *Id.*

Subsequent to *Blankenship* the General Assembly enacted R.C. 4121.47. This statute codifies the Industrial Commission's authority to address additional awards for VSSR claims. R.C. 4121.47. The Industrial Commission was also given the authority to access an additional civil

penalty up to $50,000 for each violation if the employer violated more than one requirement in a 24-month period. *Id.* Further the Industrial Commission Staff Hearing Officer shall issue an order to correct the violation under the statute. *Id.*

As a result of *Blankenship* and its progeny, an employer, may be liable for increased premiums to the BWC, an additional penalty for a VSSR, and an intentional tort for a workplace injury.

Amicus Ohio Association for Justice discusses the improbable, and hopefully impossible, scenario of an employer intentionally harming an employee while describing a business resolution which reads:

> We the undersigned comprise a majority of directors of this corporation and do hereby consent to the adoption of the following as if it was adopted at a regular called meeting of the board of directors. Now, therefore, it is resolved that the corporation shall authorize John Doe to push Jane Smith into the wall causing her injury.

Merit Br. Of Amicus Curiae, Ohio Association for Justice 4. This type of resolution is wholly unthinkable, and not the type of conduct this court reviewed in *Blankenship*. The issue in *Blankenship* was whether Cincinnati Milacron knowingly exposed the employees to hazardous chemicals without the proper safety precautions and without informing the employees of the dangers. *Blankenship*, 69 Ohio St.2d 608 at 609. If in fact Cincinnati Milacron had failed to follow the necessary and required safety precautions, the injured workers could have availed themselves to an adequate remedy under Article II Section 35 of the Ohio Constitution.

The citizens of Ohio and the General Assembly clearly provided that workplace injuries, and their causes, are to be handled exclusively by the workers' compensation system. The Ohio Constitution is equally clear. Ohio employers cannot be sued for workplace injuries regardless of their cause. This case presents the opportunity for this Court to overturn *Blankenship* and its progeny and bring Ohio back in line with American Jurisprudence.

***Amici's* Proposition of Law No. 2: This Court Should Overturn *Blankenship* Because It Was Wrongly Decided at the Time, Is Impractical, and No Undue Hardship Exists.**

In *Westfield Ins. Co. v. Galatis,* this Court found "in Ohio, a prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." 2003-Ohio-5849, ¶ 48. In this instance, *Blankenship* meets all three requirements of the *Galatis* test, and this Court should overturn it.

A. *Blankenship* was wrongly decided at the time in direct conflict with Ohio's Constitution.

Blankenship was wrongly decided at the time. When construing constitutional text to ascertain its meaning, "[t]he court generally applies the same rules when construing the Constitution as it does when it construes a statutory provision, beginning with the plain language of the text, and considering how the words and phrases would be understood by the voters in their normal and ordinary usage." (Citation omitted.) *City of Centerville v. Knab*, 2020-Ohio-5219, ¶ 22.

The *Blankenship* Court diverges from the plain language of Article II, Section 35 by reading into the provision an intentional tort exemption that does not exist. Instead, a plain reading of the Constitutional provision dictates that Ohio's workers' compensation system is the exclusive remedy for workplace injuries since Article II, Section 35 provides "[s]uch compensation shall be in lieu of all other rights to compensation or damages." Ohio Const., art. II, §35. The use of the words in this provision do not suggest that damages outsides the workers' compensation are available in any circumstance, but rather affirm civil damages – even for intentional torts – are unavailable.

Further, an interpretation finding workers' compensation payments are the exclusive remedy for workplace injuries aligns with how voters would understand Article II, Section 35. The Section specifically declares workers' compensation shall replace "all other rights to compensation or damages" and tells employers they are "not liable to respond in damages at common law or by statute" for workplace injuries or occupational disease. *Id.* By its terms, a voter would not understand Article II, Section 35 as creating any exceptions, much less a singular exception for intentional torts.

Consequently, this Court should hold the first requirement of *Galatis* is met because the *Blankenship* Court's interruption of Article II, Section 35 is not in accord with its plain meaning as voters would understand it and thus wrongly decided at the time.

B. *Blankenship* and its progeny defy practical workability by drawing unclear and confusing lines between claims.

The interpretation of Article II, Section 35 under the *Blankenship* decision is not practical. As previously discussed, *Blankenship* advances a legal fiction that attempts to draw a line between which on the job injuries are only eligible for payment through Ohio workers' compensation system, and which may seek additional civil damages. Deciding where to draw that line is difficult for lower courts and has resulted in the types of conflicts that are before the Court today. The *Blankenship* decision also led the legislature to enact R.C. 2745.01 to provide a level of certainty as to the type of intentional actions that lead to civil liability, but that effort even resulted in this Court rejecting prior iterations of the statute. *See Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 306 (1999).

The lower court conflicts and the inability to clearly distinguish between what work-related injuries are eligible for civil damages makes workers' compensation litigation less predictable and creates confusion for employers and Ohioans alike. These are among the same

considerations this Court used in *Galatis* when it overturned *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*[2] since that decision resulted in "numerous conflicts emanating from the lower courts indicat[ing] that the decision muddied the waters of insurance coverage litigation, converted simple liability suits into complex multiparty litigation, and created massive and widespread confusion—the antithesis of what a decision of this court should do." *Galatis*, 2003-Ohio-5849, at ¶ 50.

A decision to overturn *Blankenship* will ameliorate each of these issues because the state's workers' compensation system will be the exclusive remedy for occupational injuries, which will reduce conflicts of law between the lower courts and create greater predictability for injured workers and employers. Accordingly, this Court should find *Blankenship* is not practical and meets the second element of the *Galatis* test since the decision has resulted in conflicts between lower courts that has caused confusion and muddied the waters of workers' compensation litigation.

C. No Undue Hardships will be Presented by Overturning *Blankenship* and its Progeny

Overturning *Blankenship* will not result in chaos or undue hardships for those who have previously relied upon it. Importantly, as in *Galatis*, there is no reliance interest in *Blankenship* because Article II, Section 35 also provides for additional awards up to fifty percent of the original award when an injury is the result of "the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the General Assembly." Ohio Const., art. II, §35. Overturning *Blankenship* will do nothing to diminish this Constitutional right.

[2] 85 Ohio St.3d 660 (1999).

Even if this Court does find a reliance interest, *Blankenship* is not a decision that "has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Galatis*, 2003-Ohio-5849, at ¶ 58 citing *Robinson v. Detroit*, 462 Mich. 439, 466, (2000). Absent *Blankenship,* employees are still eligible for additional awards *within the workers' compensation system* under Ohio's Constitution and the Revised Code.

As stated above, Article II, Section 35, prescribes that additional awards are payable to claimants when employers fail to comply with a specific safety requirement that protects the safety of employees. Moreover, R.C. 4121.47(A) codifies this Constitutional right by prohibiting employers from "violat[ing] a specific safety rule adopted by the administrator of workers' compensation pursuant to section 4121.13 of the Revised Code or an act of the general assembly to protect the lives, health, and safety of employees pursuant to Section 35 of Article II, Ohio Constitution."

The additional awards for violating specific safety rules as allowable by Ohio's Constitution and R.C. 4121.47 prevent claimants from suffering any undue hardship in the absence of *Blankenship* and would avoid a decision after the overturning of *Blankenship* from resulting in anything more than re-adjustments to compensation, which satisfies the third requirement of *Galatis.*

After evaluating the *Galatis* factors, this Court should overturn *Blankenship.* It was wrongly decided at the time since the prior court failed to adopt its plain meaning, it has impractical results due to its attempt to differentiate between which workplace injuries are eligible for civil damages, and there is no undue hardship or reliance interest that requires this Court to adhere to its misplaced precedent.

Therefore, Amici ask this Court to reverse the legal fiction created by *Blankenship v. Cincinnati Milicron*, and its progeny, and find that under the Constitution, employers are immune from civil liability and that the no-fault workers' compensation system, is the exclusive remedy available to employees for workplace injuries.

***Amici's* Proposition of Law No. 3: Under 2745.01(C) an Employee Must Prove the Employer Deliberately Removed an Equipment Safety Guard.**

While the Ohio Constitution precludes liability for employers under any circumstances, for the instant matter the Twelfth District, finding a conflict between Ohio's courts of appeals, certified the question:

> Must an employee prove, in addition to the employer having mere knowledge of a missing safety guard, that the employer, besides doing nothing, made a deliberate decision not to replace the guard in order to establish a deliberate removal under R.C. 2745.01(C)?

03/13/2024 Case Announcements, 2024-Ohio-880. Amici contends the text of R.C. 2745.01(C) is clear, an employer can only be liable for "deliberate removal" of a safety guard. The knowledge of the missing guard and the intent to replace it is irrelevant to the application of the statute.

A. "Deliberate Removal" is the Only Grounds for Liability Under R.C. 2745.01(C).

In response to this Court's erroneous decision in *Blankenship* and its progeny, the General Assembly adopted R.C. 2745.01 to limit the situations where employers may be held liable for intentional torts. Under the statute an employer can only be liable if "the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur." R.C. 2745.01(A). The statute does provide however that:

> Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

R.C. 2745.01(C). In essence this provision breaks down into two parts: (1) did the employer deliberately remove an equipment safety guard; and (2) did the injury occur as a direct result of that removal.

While the statute does not provide a definition for "deliberate removal," this Court has held, "that the 'deliberate removal' of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine." *Hewitt v. L.E. Myers Co.*, 2012-Ohio-5317, ¶ 30. In *Hewitt,* this Court found that an employer's failure to require employees to wear protective clothing did not amount to the removal of a safety guard. *Id.*

The most accurate response to the question posed by the Twelfth District is that an employee must prove that the "employer ma[de] a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine," and that the injury was a direct result of that removal. *Hewitt* at ¶ 30; R.C. 2745.01(C).

B. Any Application of R.C. 2745.01(C) Except in Cases of Deliberate Removal are Similarly Erroneous.

In certifying a conflict between the courts, the Twelfth District correctly identified that other courts, in addition to itself, have misapplied R.C. 2745.01(C). As discussed above, the plain language of the statute and this Court's holding in *Hewitt* make it clear – employers can only be liable for deliberate removal of an equipment safety guard.

The Twelfth District discusses the Third District's application of R.C. 2745.01(C) in *Thompson v. Oberlanders Tree & Landscape, LTD*. 2016-Ohio-1147 (3rd Dist.). In that case, the Third District found "that an employer deliberately removes an equipment safety guard when it makes a deliberate decision not to either repair or replace an equipment safety guard that is

provided by the manufacturer and/or required by law or regulation to be on the equipment." *Id.* at ¶34.

The Third District's decision was based in part on the similarly erroneous decision of the Seventh District in *Wineberry v. North Star Painting Co.* where the court found "[d]eliberate removal, as contemplated by R.C. 2745.01(C), not only encompasses the act of removing a safety device, but also the act of failing to install a safety device that is required by the manufacturer." 2012-Ohio-4212, ¶ 3 (7th Dist.).

Both of these applications mistakenly confer liability for instances when the employer fails to act, rather than as the statute provides, when the employer takes a deliberate action. The essential element of any cause of action under R.C. 2745 is a deliberate act by the employer. Under R.C. 2745.01(A) that deliberate act takes the form of a tortious act with the intent to injure, and under R.C. 2745.01(C) the deliberate act is the removal of a safety guard. The text is clear, an employer is only liable for deliberately removing a safety guard. No other action, or inaction on the part of the employer can lead to liability under R.C. 2745.01(C).

CONCLUSION

For the forgoing reasons, Amici urge the Court to overturn the unconstitutional decision of *Blankenship v. Cincinnati Milacron Chemicals* and its progeny and find in favor of the Appellee that "any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease." Ohio Const., art. II, §35.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing, was served upon the following via certified mail, fax, email and/or electronic service via the Clerk of Courts, this 6th day of August, 2024:

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