Ohio's Employment Intentional Tort: A Workers' Compensation Exception, or the Creation of an Entirely New Cause of Action

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OHIO'S "EMPLOYMENT INTENTIONAL TORT": A WORKERS' COMPENSATION EXCEPTION, OR THE CREATION OF AN ENTIRELY NEW CAUSE OF ACTION?

I. INTRODUCTION .................................... 381
II. DEVELOPMENT OF WORKERS' COMPENSATION .............. 384
III. WORKERS' COMPENSATION IN OHIO ...................... 386
IV. COMPENSABLE INJURIES UNDER OHIO WORKERS' COMPENSATION ................................... 389
V. EMERGENCE OF THE COMMON LAW INTENTIONAL TORT EXCEPTION ................................. 391
   A. Blankenship, Jones, and Revised Code § 4121.80 ................................. 391
   B. Van Fossen, Pariseau, and Fyffe ........................................ 396
VI. LEGISLATURE'S NEW RESPONSE - OHIO REVISED CODE
   § 2745.01 .................................... 399
   A. Enactment of Ohio Revised Code § 2745.01 ................................ 399
   B. Responding Exclusively to a Workers' Compensation Problem .............. 400
   C. Overreaching of Section 2745.01 - Sections (B) and (C) ..................... 405
   D. Creation of an Entirely New Cause of Action in Ohio ......................... 406
VII. CONCLUSION ..................................... 413

I. INTRODUCTION

On November 1, 1995, the Ohio 121st General Assembly in House Bill 1031 enacted section 2745.01 of the Ohio Revised Code. This legislation created an

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2Ohio Rev. Code Ann. § 2745.01 (Anderson 1995) reads as follows:
   (A) Except as provided in this section, an employer shall not be liable to respond in damages at common law or by statute for an intentional tort that occurs during the course of employment. An employer only shall be subject to liability to an employee or the dependent survivors of a deceased employee in a civil action for damages for an employment intentional tort.
   (B) An employer is liable under this section only if an employee or the dependent survivors of a deceased employee who bring the action prove by clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort.
"employment intentional tort," and attempts to address the long-standing conflict between the exclusive remedy provision of the Ohio workers' compensation system, and intentional torts that occur in the course of

(C) In an action brought under this section, both the following apply:

(1) If the defendant employer moves for summary judgment, the court shall enter judgment for the defendant unless the plaintiff employee or dependent survivors set forth specific facts supported by clear and convincing evidence to establish that the employer committed an employment intentional tort against the employee;

(2) Notwithstanding any law or rule to the contrary, every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name and if the party is not represented by an attorney, that party shall sign the pleading, motion, or paper. For the purposes of this section, the signing by the attorney or party constitutes a certification that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact or a good faith argument for the extension, modification, or reversal or existing law; and that it is not interposed for any improper purpose, including, but not limited to, harassing or causing unnecessary delay or needless increase in the cost of the action.

If the pleading, motion, or other paper is not signed as required in division (C)(2) of this section, the court shall strike the pleading, motion, or other paper unless the attorney or party promptly signs it after the omission is called to the attorney's or party's attention. If a pleading, motion, or other paper is signed in violation of division (C)(2) of this section, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, or the represented party, or both, an appropriate sanction. The sanction may include, but is not limited to, an order to pay to the other party the amount of the reasonable expenses incurred due to the filing of the pleading, motion, or other paper, including reasonable attorney's fees.

(D) As used in this section:

(1) "Employment intentional tort" means an act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee.

(2) "Employer" means any person who employs an individual.

(3) "Employee" means any individual employed by an employer.

(4) "Employ" means to permit or suffer to work.

Ohio Const. art. II, § 35 (West 1995).

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.
employment. Though this legislation was needed, the statute, as written, contains overly broad definitions, an ambiguous scope, and controversial provisions.

The Ohio General Assembly declared its intent to supersede the effects of several recent Ohio Supreme Court decisions\(^4\) and to establish a statutory definition, different from common law, of an intentional tort in the workplace. To understand the legislature's actions, it is imperative to trace the development and the policies behind the Ohio's workers' compensation system, and to realize the impact those Ohio Supreme Court's decisions had on both employers and employees in the State of Ohio. Only when these factors are considered, the basis for understanding the legislation can occur.

This note will begin with a review of the history of workers' compensation in Ohio, including the development of the exclusive remedy provision.\(^5\) Next, this note will discuss the types of injuries normally compensated by the Ohio Workers' Compensation Act [hereinafter OWCA or Act], followed by an analysis of the Ohio Supreme Court cases and legislation creating an intentional tort exception in Ohio.\(^6\) Finally, this note will critique newly enacted Revised Code section 2745.01, discuss the severe problems associated with an expansive interpretation of the statute, and suggest that continuing legislative reform is needed in this area of law.\(^7\)

\(^{1}\)Id.

Further, this note will use the term workers' compensation rather than the original phraseology of workmen's compensation. The Ohio General Assembly effectuated a change to the former language with S. 545, 11th Gen. Assembly, 2d Sess. (1976).

\(^{4}\)1995 Ohio Laws 43 (H.B. 103) § 3, eff. 11-1-95 reads:
The General Assembly hereby declares its intent in enacting sections 2305.112 and 2745.01 of the Revised Code to supersede the effect of the Ohio Supreme Court decisions in Blankenship v. Cincinnati Milacron Chemicals, Inc. (1982), 69 Ohio St. 2d 608 (decided March 3, 1982); Jones v. VIP Development Co. (1982), 15 Ohio St. 3d 90 (decided December 31, 1982); Van Fossen v. Babcock & Wilcox (1988), 36 Ohio St. 3d 100 (decided April 14, 1988); Pariseau v. Wedge Products, Inc. (1988), 36 Ohio St. 3d 124 (decided April 13, 1988); Hunter v. Shenago Furnace Co. (1988), 38 Ohio St. 3d 235 (decided August 24, 1988); and Fyffe v. Jeno's, Inc. (1991), 59 Ohio St. 3d 115 (decided May 1, 1991), to the extent that the provisions of sections 2305.112 and 2745.01 of the Revised Code are to completely and solely control all causes of actions not governed by Section 35 of Article II, Ohio Constitution, for physical or psychological conditions, or death, brought by employees or the survivors of deceased employees against employers.

\(^{5}\)See supra notes 29-51 and accompanying text.

\(^{6}\)See supra notes 52-137 and accompanying text.

\(^{7}\)See supra notes 138-217 and accompanying text.
II. Development of Workers' Compensation

Prior to the enactment of workers' compensation statutes, an employee attempting to recover damages against an employer for work-related injuries had to bring a common law cause of action. Courts were generally unsympathetic to those employees because the tort actions inhibited the development of the industrialized society. To recover at common law, employees not only had to prove that the employer assumed a duty of care towards them, but also had to prove the employer was negligent. Furthermore, employers were permitted to raise three statutory defenses: (1) contributory negligence; (2) assumption of the risk; and (3) the fellow servant rule. These defenses, labeled the "unholy trinity," almost always insulated an employer from liability, even if the employer in its duty failed to protect his servants. As a result, employees were only recovering damages in approximately twenty percent of the cases, and were generally left without a means of compensation and future earning capacity. The uncompensated, injured employees and their dependents, were then forced to rely on government aid for sustenance. It was this situation that initiated the creation

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9 See W. PAGE KEETON et al., PROSSER AND KEETON ON THE LAW OF TORTS § 80, 569 (5th ed. 1984). An employer's obligations were limited to specific common law duties for the protection of his servants which were:

(1) the duty to provide a safe place to work; (2) the duty to provide safe appliances, tools, and equipment for the work; (3) the duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance; (4) the duty to provide a sufficient number of suitable fellow servants; (5) the duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

Id.


11 See generally Dodd, supra note 10, at 4-11; Keeton et al., supra note 9, § 80, 568-72.

12 See Keeton et al., supra note 9, at 859.


15 Id.
of an insurance type system between employers and employees to provide compensation for the injured employees.\textsuperscript{16}

Several policies were uniformly cited as bearing on the creation and design of these insurance systems. First, the injured worker should not be the person to bear the burden of contending with the injuries of industry, and the costs of those industrial injuries should be allocated to those receiving the benefits of industry.\textsuperscript{17} Second, the expenses of employee injuries should be treated as a cost of doing business to be passed on to the customer.\textsuperscript{18} Third, the employer needs to provide an injured worker with a safe working environment\textsuperscript{19} and provide compensation to the employee for medical and financial benefits in a dignified fashion.\textsuperscript{20} Finally, a major purpose of worker's compensation statutes was to compensate an employee for the economic loss that resulted whenever an employee was injured or if he was killed.\textsuperscript{21}

The hallmark of workers' compensation laws in effectuating those policies was a system incorporating a \textit{quid pro quo}. In a typical workers' compensation act, the employer provides the employee with a guaranteed and speedy remedy, regardless of fault or nature of the injury,\textsuperscript{22} and agrees to surrender his common law " unholy trinity" of defenses.\textsuperscript{23} In exchange, the employee agrees

\begin{flushright}
\textsuperscript{16} F. Lang, \textit{Workmen's Compensation Insurance} 6-9 (1947). Though a new concept in the United States, many industrialized societies around the world had provided compensation to injured employees. The first workers' compensation system was enacted in Germany in 1883, soon followed by Austria, Norway, Finland, and England. As of 1910, almost all European countries had some form of workers' compensation, and the United States was the only industrialized society without a workers compensation system.

\textsuperscript{17} See W. Prosser, \textit{Handbook on the Law of Torts} § 80 (4th ed. 1971) [hereinafter Prosser 4th]("the cost of the product should bear the blood of the workman.' The human accident losses of modern industry are to be treated as a cost of production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the customer."). \textit{Id.} at 530.

\textsuperscript{18} See Miller, \textit{supra} note 14, at 289.

\textsuperscript{19} See Dodd, \textit{supra} note 10.

\textsuperscript{20} See 1A. Larson, \textit{Workmen's Compensation Law} § 2 (1982) [hereinafter Larson 1A].

\textsuperscript{21} See Harold F. Adams, \textit{The Workmen's Compensation Law of Ohio} 1-3 (1930)("The theory upon which [Ohio's] Act is based is that each time an employee is killed or injured, there is an economic loss which must be made up in some way; that most of the accidents are attributable to the inherent risk of employment; that accidents in industry under modern conditions are inevitable, that the burden of this loss should be borne by the industry.").

\textsuperscript{22} See Larson 1A, \textit{supra} note 20, at § 1.10.

\textsuperscript{23} \textit{Id.}; see also Donald P. Wiley, Comment, \textit{The New Workers' Compensation Law in Ohio: Senate Bill 307 was No Accident}, 3 AKRON L. REV. 491, 495-96 (Winter 1987); see also Keeton et al., \textit{supra} note 9, at § 80.
\end{flushright}
to surrender his common law causes of action against the employer—his
right to recover pain and suffering, loss of consortium, punitive damages,
and also agrees that workers' compensation would be his exclusive remedy.

In a system of workers' compensation, both the employer and the employee
make the above sacrifices to gain certain advantages. An employee no longer
has to pursue common law remedies in a system traditionally unfavorable to
him; an employer no longer has to subject himself to unpredictable tort
damages; both parties receive the benefits from a uniform system of
compensation outside the realm of tort law; and avoid the heavy costs of
litigation.

III. WORKERS' COMPENSATION IN OHIO

The Ohio Workers' Compensation Act was first enacted in 1911 "to create a
state insurance fund for the benefit of injured, and the dependents of killed
employees [sic], and to provide administration of such fund by a state liability
board of awards." In its enactment, the Ohio Supreme Court and legislature
furthered the same policies and rationale that were used in other states
throughout the country.

However, Ohio's original enactment was not an entire solution. Although its
provisions were based on a system of quid pro quo and provided for guaranteed
recovery and limited employer liability, the Act did not provide for compulsory
employer participation. In 1912, Article II, section 35, of the Ohio Constitution
was adopted and gave the Ohio General Assembly the power to establish and
regulate a compulsory workers' compensation fund. Article II, section 35
became the foundation for the workers' compensation system in Ohio, was
plenary in nature, and would serve as the basis of power for legislative
enactments. For example, the Ohio legislature defined the types of injuries


25 See Fesmier, supra note 24, at 407.

26 See Exceptions, supra note 10, at 1642.

27 See Fesmier, supra note 24, at 407.


29 1911 Ohio Laws 524.

30 See supra notes 17-21 and accompanying text; see also State ex rel. Munding v. Industrial Comm'n, 111 N.E. 299 (Ohio 1915)(expressing the theory upon which the Ohio workers' compensation law is based).

31 J. YOUNG, WORKERS' COMPENSATION LAW OF OHIO, § 1.4 at 8 (2d ed. 1971).

32 OHIO CONST. art. II, § 35.
covered,33 eliminated the common law defenses for non-complying employers,34 and stated that the provisions of the Act shall be liberally construed in favor of employees and their dependents.35

Only two instances existed when an employee could bring a common law cause of action against an employer outside the confines of the Ohio workers’ compensation system. First, in situations where an employee’s injury was the result of a "willful act" of the employer or his agent, Section 1465-76 of the Ohio General Code provided an employee the option to pursue either a common law remedy or workers' compensation.36 Second, an employee’s right to pursue a common law action also remained when the employer violated a safety statute.37 In all other cases, workers’ compensation was to provide the exclusive remedy for an employee suffering from a workplace injury.38

One of these exceptions, the "willful act" exception, caused much confusion among the courts. This confusion was the result of the failure of the legislature to include the definition of "willful act" in the original Section 1465-76.39 Thus, in 1914, section 1465-76 was amended to include the definition of "willful act" as an act done "knowingly and purposefully with the direct object of injuring another."40 In 1924, however, the Ohio legislature eliminated the "willful act" exception,41 and in 1931, it was replaced by section 4123.74 of the Ohio Revised Code.42

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33 OHIO REV. CODE ANN. § 4123.01(C)(Anderson 1995).
34 OHIO REV. CODE ANN. § 4123.85.
35 OHIO REV. CODE ANN. § 4123.95.
36 1913 Ohio Laws 72, 84-85; OHIO GEN. CODE ANN. § 1465-76 (Page 1916) (Under the original statute, an employee had to make an election of remedies that was mutually exclusive. If the employee lost in court, he was barred from seeking workers’ compensation).
37 OHIO CONST. art II, § 35 (In its original form, § 35 provided: "No right of action shall be taken away from an employee when the injury, disease, or death arises from the failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of the employees.").
38 OHIO GEN. CODE ANN. § 1465-76 (Page 1916).
40 1914 Ohio Laws 193, 194.
41 See Mobley & Carew Co. v. Lee, 193 N.E. 745 (Ohio 1934)(judiciary stating the wording of the amendment suggested that General Code § 1465-76 was implicitly repealed by the 1924 Amendment).
42 OHIO REV. CODE ANN. § 4123.74 (Anderson 1995)("Employers ... shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition . . . ").
In essence, the Ohio General Assembly had exercised its power under Article II, section 35, of the Ohio Constitution and enacted a provision stating that an employee's only remedy for a workplace injury was through workers' compensation. And though this provision sometimes produced harsh results for employees, section 4123.74 was strictly upheld by the courts for several years. Courts were denying employee recovery at common law in all instances whether or not the injury was even compensable under workers' compensation law.

In 1939, the Ohio Supreme Court once again had the opportunity to interpret the exclusivity provision of Article II, section 35 in Triff v. National Bronze & Aluminum Foundry Co. The result was an entirely different interpretation than in previous years. The Court held that the legislative intent behind the workers' compensation scheme was to grant common law immunity to employers for injuries compensable under the workers' compensation system only, and that common law remedies were not eliminated for non-compensable injuries. Thus, the Court created an exception to section 4123.74's exclusive remedy provision in situations where the employee's injury was outside the scope of the compensatory scheme of workers' compensation.

Forseeably, this caused extreme reactions among labor organizations and employers. The Ohio legislative quid pro quo originally established and bargained for at the foundation of workers' compensation was being curtailed. The judiciary had given employees a bypass to pursue common law remedies in situations previously limited to the domain of workers' compensation. Contrary to the original quid pro quo, employers would now have to respond in damages at common law.

In 1939, as a response to these extreme reactions, the legislature added "occupational diseases" as compensable injuries under the Ohio workers' compensation system, in exchange for the upholding of the exclusive remedy provision. For nearly twenty years following, the legislature adopted no further legislation, and contrary to the Ohio Supreme Court's decision in Triff, the exclusivity of remedies under the workers' compensation system remained intact.

In 1959, the legislature amended section 4123.74 and stated that employers are immune from liability for all injuries "received or contracted by an

43 See supra note 32 and accompanying text.
45 See Miller, supra note 14, at 290.
47 Id. at 237.
48 118 Ohio Laws 422 (1939); see also Felson, supra note 39, at 551; see also Miller, supra note 14, at 290-291.
employee in the course of or arising out of his employment . . . "49 In essence, this legislative amendment re-affirmed that the only remedy for an employee injured "in the course of or arising out of his employment" was workers' compensation benefits, and that an injured employee was "barred from suing at common law . . . even if an employer's intentional act caused the employee's injury."50

Though the exclusive remedy provision of workers' compensation law may seem extreme and may produce unfavorable results for employees,51 there is little doubt that the Ohio legislature has established a pattern of control over the laws in this arena, and does not allow exceptions to the exclusivity rule. For every Ohio Supreme Court decision that has tried to expand the remedies available to employees, the legislature has quickly responded by re-defining the Workers' Compensation Act to balance the competing parties' interests.

IV. COMPENSABLE INJURIES UNDER OHIO WORKERS' COMPENSATION

Workers' compensation is a type of insurance to cover injuries that occur in the course of or arising out of employment situations. All states have established their own definition as to what types of injuries are compensable in light of their own workers' compensation statutes. Some states have stated that workers' compensation is the exclusive remedy for employees for all types of injuries whether they are caused by physical or emotional means.52 Other

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50 See Felson, supra note 39, at 552.
51 See, e.g., Bevis v. Armco Steel Corp., 102 N.E.2d 444 (Ohio 1955). In Bevis, a common law remedy outside of workers' compensation was denied to an employee who suffered from silicosis as a result of his employer concealing information about his employee's occupational disease. The employer did not inform his employee that chest x-rays and medical examinations revealed the employee had contracted the disease in the course of his employment. The court upheld the exclusivity of workers' compensation, even though the employer used deceit and misrepresentation. See e.g., Greenwalt v. Goodyear Tire & Rubber Co., 128 N.E.2d 116 (Ohio 1955) overruled in part by Vandemark v. Southland, 525 N.E.2d 1374 (Ohio 1988). In Greenwalt, the court denied a common law remedy for an employee who relied upon his employer's offer to file workers' compensation benefits for him. Id. The employer intentionally did not file the claim, but paid benefits for two years directly to the employee. After two years, the employer refused to make anymore payments. Since the statute of limitations had run, the employee was left with no means of additional compensation. The court held that the sole remedy was workers' compensation and the employee was responsible for seeing that his claim was filed properly. See also Miller, supra note 14, at 291.
52 In Wisconsin, workers' compensation is the exclusive remedy where the employee sustains an injury. Wis. Stat. Ann. § 102.03 (West 1985) and at the time of the injury, both the employer and employee are subject to the provisions of the statute—the employee is performing service growing out of and incidental to his or her employment and the injury is not self-inflicted. Wis. Stat. Ann. § 102.03(1). In Hawaii, compensable injuries are those personal injuries "either by accident or arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment." Haw. Rev. Stat. § 386-3 (1991).
states have stated that workers’ compensation is the exclusive remedy only for injuries that occur in the course of employment and caused by physical means.\textsuperscript{53} In the latter states, an employee still has common law remedies outside workers’ compensation. By enacting either a limiting or an expansive definition of injury, the state legislatures can determine the extent of their own exclusivity provisions.

The Ohio legislature has provided an expansive definition of injury under OWCA, and has stated that workers’ compensation is the exclusive remedy for an industrial injury, disease or bodily condition.\textsuperscript{54} The burden of proving that injury is upon the worker and the OWCA expressly states that the terms of the Act are to be construed in favor of workers and dependents of deceased workers.\textsuperscript{55} The current Act allows compensation for workers in cases of injury, occupational disease, or death, provided the same were not: (1) purposely self-inflicted or (2) caused by intoxication or the influence of a controlled substance not prescribed by a physician.\textsuperscript{56}

In essence, Ohio law states that workers’ compensation is the exclusive remedy for an employee suffering from a workplace injury, and encompasses three types of injuries in the workplace "whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee’s employment."\textsuperscript{57} Courts have applied the exclusive remedy provision: (1) when employees suffer from physical injury caused by physical stimuli;\textsuperscript{58} (2) when employees suffer mental injury caused by physical stimuli;\textsuperscript{59} and (3) when employees suffer physical injury caused by mental stimuli.\textsuperscript{60} In fact, the only type of injury not recognized in Ohio and governed by the exclusive remedy provision is for employees who suffer

\textsuperscript{53}In Florida, the workers’ compensation statute prohibits a compensation award for "a mental or nervous injury due to fright or excitement only." FLA. STAT. ANN. § 440.02(1)(West 1987).

\textsuperscript{54}OHIO REV. CODE ANN. § 4123.74 (Anderson 1995).

\textsuperscript{55}OHIO REV. CODE ANN. § 4123.95 (Anderson 1995).

\textsuperscript{56}OHIO REV. CODE ANN. § 4123.54 (Anderson 1995).

\textsuperscript{57}OHIO REV. CODE ANN. § 4123.01(C) (Anderson 1995).

\textsuperscript{58}This is a typical workers’ compensation injury in which an employee, for example, suffers a physical injury such as a broken bone after something falls on him at work.

\textsuperscript{59}This type of claim usually originates where an employee suffers a physical injury to a specific part of the body, caused by a physical stimulus such as a falling object. After the claim for physical injury is allowed, the employee then develops a mental condition, such as a neurosis, which was proximately caused by the physical injury, and seeks additional allowance.

\textsuperscript{60}Ryan v. Conner, 503 N.E.2d 1379 (Ohio 1986)(recognizing Ohio was the only remaining state to not include this type of injury as compensable under workers’ compensation).
mental injuries caused by mental stimuli. Other than that limited scenario, workers' compensation was to be the exclusive remedy for all workplace injuries, and thus, bar all common law remedies.

V. EMERGENCE OF THE COMMON LAW INTENTIONAL TORT EXCEPTION

Over time, the Ohio Supreme Court began to bypass the exclusive remedy provision in situations when an employee was injured as a result of an intentional tort committed by the employer. The Court accomplished this bypass in two stages. First, the Court stated that only injuries compensable under the Act were governed by the exclusive remedy provisions. Second, the Court reasoned that intentional torts were not "accidental" in nature, and thus not compensable or governed by the exclusive remedy provision as defined by the Act. In a sense, the Ohio Supreme Court furthered its own definition of which injuries were and were not compensable under the workers' compensation provisions, and essentially, contrived a common law exception for intentional torts.

A. Blankenship, Jones, and Revised Code § 4121.80

The first of several cases recognizing an intentional tort exception to the exclusivity of workers' compensation was the 1982 Ohio Supreme Court decision of Blankenship v. Cincinnati Milacron Chemicals, Inc. The Court held that Article II, section 35 of the Ohio Constitution and sections 4123.74 and


63 See supra text accompanying notes 54-61.

64 See MILLER, supra note 14, at 294-95.

65 See FESMIER, supra note 24, at 418-21 (complete discussion of treatment of accidental injuries under workers' compensation law in Ohio).

66 See FESMIER, supra note 24, at 419-20 (and cases cited therein)(compensable injuries must be an "actual, measurable, physical or traumatic damage that occurred at a definite, particular time and place, unexpectedly, and in the usual course of events."). Id. at 419-20.

4123.741 did not preclude an employee who was injured by an employer's intentional tort from pursuing a common law action.\textsuperscript{68}

In \textit{Blankenship}, eight plaintiffs alleged that they were injured by exposure to certain noxious chemicals within the scope of their employment. They stated that Cincinnati Milacron Chemicals (Milacron) knew of the dangers posed by the chemicals, knew that certain occupational diseases were being contracted, and failed to inform the employees.\textsuperscript{69} The plaintiffs claimed that the failure was "intentional, malicious and in willful and wanton disregard of their health."\textsuperscript{70} Milacron argued that Article II, section 35, of the Ohio Constitution, and O.R.C. 4123.74 precluded the employee's common law cause of action.\textsuperscript{71}

In holding for the plaintiffs, the Court, citing \textit{Delamotte v. Midland Ross},\textsuperscript{72} reasoned that an injury caused by an employer's intentional tort is not an injury arising out of or in the course of employment, and that no employee would contemplate the risk of an intentional tort.\textsuperscript{73} Thus, workers' compensation laws do not give an employer tort immunity for the intentional acts.\textsuperscript{74} The Court further reasoned that granting immunity to employers for intentional tortious conduct would encourage such intentional conduct by those employers,\textsuperscript{75} and the workers' compensation system should not insure employers for intentional conduct for public policy reasons.\textsuperscript{76} Based on these findings, the court remanded the case to the trial court to determine, as a factual issue, whether the employer's conduct constituted an intentional tort.\textsuperscript{77} Unfortunately, the case was settled before the courts decided what actually constituted an intentional tort.

Although some other states have supported the position that intentional torts are not barred by workers' compensation statutes,\textsuperscript{78} in contrast the \textit{Blankenship} decision gave rise to several problems. First, the Court never

\textsuperscript{68}Id. at 572-73.

\textsuperscript{69}Id. at 572; For a good explanation of the Blankenship decision, see also Mark Steven Kanter, Comment, 51 U. CIN. L. REV. 682, 682-83 (1982).

\textsuperscript{70}Blankenship, 433 N.E.2d at 574; see also Felson, supra note 39, at 553.

\textsuperscript{71}Blankenship, 433 N.E.2d at 575-76.

\textsuperscript{72}Delamotte v. Midland Ross, 411 N.E.2d 814 (Ohio Ct. App. 1978).

\textsuperscript{73}Blankenship, 433 N.E.2d at 576.

\textsuperscript{74}Id. at 577.

\textsuperscript{75}Id. at 577.

\textsuperscript{76}Id.

\textsuperscript{77}Id. at 578.

defined what constituted an intentional tort, and merely stated that "it is for the trier of fact to initially determine whether the alleged conduct constitutes an intentional injury." The Court also did not decide whether an employee had to elect whether to pursue either workers' compensation benefits or a common law remedy.

Two years later, the Ohio Supreme Court addressed these particular issues in Jones v. VIP Development, Co. In Jones, a city employee who worked in a city light plant died of severe injuries which he sustained in an accident while becoming trapped in a coal conveyor system. Even though Jones had applied for, and received workers' compensation benefits, the executrix of his estate brought action against the city alleging that the city knew or should have known of dangerous conditions which should have been made safe and, accordingly, the employer should have warned the employee.

The Court stated three holdings. First, in determining a standard for an intentional tort, the Court stated that an intentional tort is "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur." Second, the 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. Finally, the Court held that an employer found liable for an intentional tort, is not entitled to a setoff of the award in the amount of the workers' compensation benefits received by the employee or his representative. Thus, the Ohio Supreme Court flatly rejected three contentions: (1) that a specific intent to injure is necessary for a finding of intentional misconduct; (2) that an employee has to elect to pursue either

79 Blankenship, 433 N.E.2d at 578; see also Hertlein, supra note 62, at 250-51.
80 See HERTLEIN, supra note 62, at 251.
82 Jones, 472 N.E.2d 1046.
83 Id. at 1048-53; In Gains, a coal chute operator was fatally injured reaching into a coal chute, of which the employer had previously removed the safety guard. 466 N.E.2d at 572. The complaint alleged the employer's actions were intentional, malicious, willful and wanton. In Hamlin, the employees alleged they received physical injury while exposed to toxic chemicals at work, although the company knew of the hazardous workplace and misrepresented the safety to the employees. The court characterized the employer's actions as malicious, willful and reckless.
84 Id. at 1047 (relying on 1 RESTATEMENT OF THE LAW 2D, TORTS (1965) 15, Section 8A.).
85 Id. at 1047-48.
86 Jones, 472 N.E.2d at 1048.
87 Id. at 1051.
workers' compensation or a common law remedy; and (3) that the employer may not setoff any workers' compensation awards against a common law finding of liability. 88

With the decision in Jones, the Ohio Supreme Court upset the balance and equilibrium initially established by the workers' compensation system in favor of Ohio employees. Similar to the decision in Triff v. National Bronze, 89 employers and labor organizations quickly responded by creating a perception that a "workers' compensation crisis" existed in the State of Ohio and that Ohio would not be able to attract new business or expand or maintain those businesses already in the state.90 In response, the Ohio legislature enacted Ohio Revised Code section 4121.80 in Amended Substitute Senate Bill 307.91

Section 4121.80 was ultimately a legislative statement that the new liberal approach established by the judiciary in regard to workers' compensation provisions was not appropriate. The House and Labor Committee in the introductory paragraph of its report on House Bill 307 stated:

[e]xisting law confers upon employers who comply with the Workers' Compensation law immunity from civil suit by employees who sustain injury or occupational disease 'in the course of or arising out of employment.' Until recently, this provision was thought to bar virtually any type of civil damages suit by an employee against an employer.92

The legislature apparently believed that workers' compensation should be an exclusive remedy for employees and that the court in Blankenship, and later in Jones, had misinterpreted its intent.93 The primary purpose of workers' compensation was not to protect and compensate the worker by "improv[ing] the plight of the injured worker,"94 but the purpose was to effectuate a balance between the workers' and employers' interests.95 The legislature declared that:

[the] enactment of Chapter 4123. of the Revised Code and the establishment of the workers' compensation system is intended to remove from the common law tort system all disputes between or

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88 Id. at 1047-48 (syllabus).
89 See supra notes 46-47 and accompanying text.
90 Jerald D. Harris, Ohio Workers' Compensation Act 31, at 3 (1986)(quoting Senator Finan who stated that his main goal in initiating legislation was "the reversal of the Blankenship problem. . . ."); see also Felson, supra note 39, at 554-55.
91 1986 Ohio Laws 718; For an in-depth discussion of Section 4121.80, see also Hertlein, supra note 62.
93 See Hertlein, supra note 62, at 252.
94 Blankenship, 433 N.E.2d at 577.
95 See supra notes 22-28 and accompanying text.
among employers and employees regarding the compensation to be received for injury or death to an employee [and] . . . that the immunity . . . is an essential aspect of Ohio's workers' compensation system. . . .

Therefore, to keep the balance of interests between employers and employees in intentional tort situations where the Ohio Supreme Court was ruling that an employee had a common law cause of action, section 4121.80 specifically: (1) made all defenses available to the employer including contributory negligence, assumption of the risk, and the fellow servant rule;97 (2) eliminated a trial by jury for the employee by stating that the court will make the determination of the issue of liability of the intentional tort;98 (3) established an intentional tort fund to pay for legal fees and damages;99 (4) stated that the recoverable damages are only those in excess of workers' compensation benefits;100 (5) set limitations on the amount of recovery an employee could receive;101 and (6) stated that these provisions applied to all claims pending.102

Most importantly, though, the legislature in section 4121.80(G) defined an intentional tort as "an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur."103 While this wording is similar to Jones' language, the legislature further defined "substantially certain," to mean that "an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death."104 This limited definition of "substantial certainty" indicated a legislative intent to disregard the expansive interpretation of intentional tort as found in Jones, and attempted to bring Ohio in line with most other jurisdictions.105

96 OHIO REV. CODE ANN. § 4121.80(B)(Page 1986)(emphasis added); see also Hertlein, supra note 62, at 252.

97 OHIO REV. CODE ANN. § 4121.80(A).

98 Id. § 4121.80(D)(arguing the words "court" and "judicial" as phrased by the legislature indicate that a trial by jury was eliminated); see also Wiley, supra note 23, at 512-14.

99 OHIO REV. CODE ANN. § 4121.80(E).

100 § 4121.80(A)(allowing for employer "set-off" of awards).

101 Id. § 4121.80(D)(providing Industrial Commission would determine damages, not a jury).

102 Id. § 4121.80(H)(legislature intent to retroactively apply this statute to all pending claims).

103 OHIO REV. CODE ANN. § 4121.80(G).

104 § 4121.80(G)(1). Two specific scenarios creating a rebuttable presumption that an employer acted with the intent to injure another were stated specifically: (1) deliberate removal by the employer of an equipment safety guard and (2) deliberate misrepresentation of a toxic or hazardous substance.

105 See Hertlein, supra note 62, at 257-58; See also 2A LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.13 n.10.1 (1983) [hereinafter LARSON 2A]; (For an in-depth analysis of the history of intentional torts) Blankenship through Fyffe, see also Lisa A. Rutenschroer, Note, The Ohio "Standard" for Workplace Intentional Torts: Fyffe v. Jeno's Inc., 570 N.E.2d

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This legislation, however, met severe constitutional scrutiny in *Brady v. Safety-Kleen.* In *Brady*, the Ohio Supreme Court held that section 4121.80 was unconstitutional *in toto.* The Court held that section 4121.80 exceeded the legislative authority granted to the General Assembly under both sections 34 and 35 of Article II, of the Ohio Constitution. The legislature had violated Article II, section 34 by eliminating the right to an intentional tort common law cause of action that would otherwise benefit the employee and, therefore, such a law did not further the comfort, health, or general welfare of employees within the meaning of that section. Further, the Court held that Article II, section 35 did not apply because employer intentional torts were outside the scope of and unrelated to employment.

As a result of the Ohio Supreme Court’s ruling in *Brady*, the intentional tort exception to the exclusive remedy provision of Ohio’s workers’ compensation scheme existed under the common law standards as set forth in *Blankenship* and *Jones.* However, there was still much confusion among the courts. This confusion was especially true in cases where there was no showing of specific intent to injure, but there was a showing of more than mere negligence. *Van Fossen, Pariseau,* and *Fyffe* were all attempts by the judiciary to clarify the intentional tort standard.

### B. Van Fossen, Pariseau, and Fyffe

In *Van Fossen v. Babcock & Wilcox Co.*, an employee was injured when he slipped and fell backing down a stairway which another employee had earlier welded together. The injured employee claimed that the employer knew the steps were installed dangerously due to previous accidents, yet failed to take corrective measures and continued to allow the employees to use the unsafe

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107 For a complete discussion of § 4121.80 prior to *Brady v. Safety Kleen*, see Hertlein, *supra* note 62.
108 OHIO CONST. art. II, §§ 34, 35 (West 1995)("Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.") *Id.* at § 34.
109 OHIO CONST. art. II, § 35.
110 Brady, 576 N.E.2d at 728.
111 *Id.* at 729 (quoting Taylor v. Academy Iron & Metal Co., 522 N.E.2d 464, 476 (Douglas, J., dissenting)).
113 See Rutenschroer, *supra* note 105, at 347 (and notes cited therein).
steps.\textsuperscript{115} The employee also alleged that the employer's disregard of the dangerous steps with the knowledge that accidents were substantially certain to occur constituted an intentional tort as defined by the Blankenship and Jones standards.\textsuperscript{116} The Ohio Supreme Court, however, rejected the employee's claim, stating that a typical personal injury "slip and fall" case, without any evidence of an employer's wrongdoing, would not support an intentional tort finding.\textsuperscript{117}

To establish an intentional tort by an employer, proof beyond that required to prove negligence or recklessness must be established.\textsuperscript{118} Specific intent is not needed, only a "virtual certainty" that the accident would occur.\textsuperscript{119} The Van Fossen court then established its own three-prong test based upon the Restatement of Torts and Prosser and Keeton, but in addition to the Restatement position, also required that the employer have knowledge of the danger as a prerequisite.\textsuperscript{120} In essence, the Van Fossen court adopted a variation of the Restatement of Torts 2d as referenced in Jones.

In a decision published the same day as Van Fossen, the Ohio Supreme Court in Pariseau v. Wedge Products \textsuperscript{121} further tried to refine its definition of what constituted a common law intentional tort in the workplace. In Pariseau, an employee was injured when a punch press he was operating malfunctioned and the pullback restraint guards, designed to pull the operator's hands away from the press, failed.\textsuperscript{122} The employee alleged intentional tortious conduct, stating that the company's foreman instructed the employee to operate the press despite knowledge of the press's previous failure, and that the foreman had improperly adjusted the pullback restraints.\textsuperscript{123} However, the Court held in favor of the employer stating that without a showing that the employer knew of the harm, the employer's actions were not the result of intentional conduct, but of mere negligence.\textsuperscript{124}

\textsuperscript{115}Id.
\textsuperscript{116}Id.
\textsuperscript{117}Id. at 505.
\textsuperscript{118}Van Fossen, 522 N.E.2d at 491.
\textsuperscript{119}See Rutenschroer, supra note 105, at 348.
\textsuperscript{120}Van Fossen, 522 N.E.2d at 504. Under the Van Fossen test, an injured employee must prove: (1) knowledge by the employer of a dangerous condition or process within his business operation; (2) knowledge by the employer that if the employee were subjected to such dangers, harm to the employee would be a "substantial certainty" and not merely a "high risk;" and (3) despite this knowledge, the employer required the employee to continue performing the dangerous task.
\textsuperscript{121}Pariseau v. Wedge Products, 522 N.E.2d 511 (Ohio 1988).
\textsuperscript{122}Id. at 512.
\textsuperscript{123}Id. at 514.
\textsuperscript{124}Id. at 514-15.
Pursuant to *Pariseau*, to establish an intentional tort, an employee must show that the employer manifested an intent to injure the employee, and that the intent included the knowledge and expectation that such injury was substantially certain to occur.\(^{125}\) The court stated that under the substantial certainty test, the issue was whether reliable, probative evidence was available to show that the employer intentionally acted in this manner despite a "known threat of harm" to the employee.\(^{126}\) The *Pariseau* Court stated that a crucial element of substantial certainty is that the possibility of harm that may come to the employee if subjected to the dangerous condition or process, must amount to more than a high risk.\(^{127}\) As set forth, the standard was more restrictive than the *Restatement*’s substantial certainty test, but required much less than specific intent.

Three years later, however, the Ohio Supreme Court decided another standard for workplace intentional torts in *Fyffe v. Jeno’s Inc.*\(^{128}\) In *Fyffe*, an employee brought a cause of action against his employer for allegedly removing a safety guard from a conveyor belt, and directing the employee to clean the machine while it was running.\(^{129}\) He alleged that those acts constituted an intentional tort by his employer because the acts were substantially certain to result in harm.\(^{130}\) The majority began by addressing the various differences between *Blankenship, Jones, Van Fossen, Pariseau*, and the *Restatement*, and admitted there was confusion among the courts.\(^{131}\)

Overall, the majority in *Fyffe* stated that the common law standard for establishing an intentional tort was premised upon the law of section 8(A) of the *Restatement* and section 8 of *Prosser and Keeton*, and that the same standards had remained from *Jones* through the *Van Fossen* trilogy.\(^{132}\) The Court amended the *Van Fossen* three-prong test\(^{133}\) and stated that in some situations, acts creating a "high risk" of harm could rise to the level of substantial certainty and reasonably raise an issue of whether or not the employer committed an intentional tort.\(^{134}\) Even though the Court expressed its desire to not materially

\(^{125}\) *Pariseau*, 522 N.E.2d at 516.

\(^{126}\) *Id.*

\(^{127}\) *Id.* at 516-519 (Holmes, J., concurring).


\(^{129}\) *Id.* at 1110.

\(^{130}\) *Id.*

\(^{131}\) *Id.* at 1111.

\(^{132}\) *Id.* at 1112.

\(^{133}\) *Fyffe*, 570 N.E.2d at 1111-12.

\(^{134}\) *Id.*
change the law, this statement was in direct contrast to the Van Fossen court which stated that a high risk of harm is merely recklessness, and does not rise to the level of an intentional tort.

In sum, the Court in Fyffe deleted the Van Fossen and Pariseau language that distinguished activities with a high risk of harm to employees from those involving a substantial certainty of harm, and decided that recklessness may be equated with an intentional tort. The effect of these changes resulted in a decision, though meant to clarify past ambiguities, that changed the law of intentional tort liability. Fyffe therefore liberalized the substantial certainty test and developed a more lenient and expansive standard for an intentional tort than even previously set forth in Jones, Van Fossen and Pariseau.

VI. LEGISLATURE'S NEW RESPONSE—OHIO REVISED CODE § 2745.01

A. Enactment of Ohio Revised Code § 2745.01

As it stood after Fyffe, the status of the common law exception to workers' compensation for intentional torts in the workplace was still unsettled. The judiciary had created a common law exception for intentional torts, and the long established employer-employee equal compromise which had served as the foundation of the Ohio Workers' Compensation Act, was replaced with a system favoring the employee. No longer would an employer have common law immunity from workplace injuries as stated in the Ohio Constitution and prior case law. Now, an employer not only had to compulsorily pay into the workers' compensation system, but also had to defend common law tort actions in many cases where an employee merely alleged an intentional tort though the evidence could support no more than mere negligence.

135 Id. at 1112.
136 Id. As modified, the Fyffe court's new three-prong test states in its syllabus:
To establish an intentional tort of an employee, proof beyond that required to prove negligence and beyond that required to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent.

Id.

137 See Rutenschroer, supra note 105, at 356 (citing to Justice Douglas's concurring opinion).
138 OHIO CONST. art. II, § 35.
139 See Rutenschroer, supra note 105, at 359.
On November 1, 1995, as a reaction to *Fyffe, et al.*, Ohio Governor George Voinovich signed Ohio House Bill 103, later codified in Ohio Revised Code section 2745.01 creating an "Employment Intentional Tort." This legislation overruled several Ohio Supreme Court decisions and established the Ohio standard for workplace intentional torts. Newly enacted section 2745.01 states that an employer is not subject to damages at common law for an intentional tort that occurs during the course of employment; an employer is only subject to liability for an "employment intentional tort." As used in this section, an "employment intentional tort" means, "an act committed by an employer in which the employee deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee."

**B. Responding Exclusively to a Workers' Compensation Problem**

As a reaction to an exclusively workers' compensation problem, section 2745.01 is clearly far less extensive than its predecessor, which was held unconstitutional in *Brady v. Safety-Kleen Corp.* Section 2745.01 does not include provisions requiring: (1) an intentional tort fund to be established; (2) the elimination of a jury trial for the employee; (3) limitations on the amount of employee recovery; (4) that the statute should be applied retroactively; and (5) that an employer may set-off of damages from an intentional tort action and a workers' compensation claim.

The significance of section 2745.01 is that this statute represents a major attempt by the legislature to isolate the specific issue of intentional torts in the workplace sufficient to pass constitutional scrutiny. In its efforts, the Ohio legislature defines intentional tort, and gives a workable standard for the Ohio courts to apply. Though the section 2745.01 standard is more stringent than the Ohio Supreme Court's or the *Restatement of Torts* position, it is a standard that should be followed.

Specifically, the Ohio legislature overruled *Blankenship, Jones, Van Fossen, Pariseau, and Fyffe*. By doing so, the legislature has eliminated several of the

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140 *See supra* note 2.

141 *See supra* note 4. Specifically, the cases overruled are as follows: *Blankenship, Jones, Van Fossen, Pariseau, Hunter, and Fyffe.*


143 *Ohio Rev. Code Ann.* § 2745.01(A), (B), and (D); *see also* note 2 and accompanying text.


145 The Ohio Legislature has also overruled *Hunter v. Shenago Furnace Co.*, 38 Ohio St. 3d 124 (1988). In that case, the Ohio Supreme Court held: "unless the circumstances of an action clearly indicate a battery or any other enumerated intentional tort in the Revised Code, a cause of action alleging bodily injury as a result of an intentional tort by an employer arising prior to the effective date of R.C. 4121.80 will be governed by the two-year statute of limitations established in R.C. 2305.10."

*Id.*
problems and confusion associated with intentional torts in the workplace. The legislature has abandoned the "substantially certain to occur" language created by the Ohio courts, and inserted a provision requiring an employee attempting to prove an intentional tort in the workplace to show that the employer "deliberately and intentionally injures."\(^\text{146}\)

Although former section 4121.80 also contained "deliberate intent" as part of its definition of "substantially certain" language, section 4121.80 implied that the legislature's test for an intentional tort was that the tort was "committed with the intent to injure or with the deliberate intent to injure."\(^\text{147}\) And unless those two phrases in section 4121.80 were read as a redundancy as having the same meanings, the former phrase must have been some standard less than deliberate intent (i.e. willful, wanton, or reckless).\(^\text{148}\) On the other hand, section 2745.01 provides that an employee must prove deliberate and intentional conduct by the employer. Thus, the legislature has in essence, declared the Jones, Fyffe, Van Fossen, and Pariseau tests insufficient and not intended, and that an employee will not be able to state a claim for an intentional tort simply alleging recklessness or a "virtual certainty" of danger.\(^\text{149}\)

All of these consequences, though seemingly unfair to employees, are a logical solution to the imbalance created by the judiciary. In the scheme of workers' compensation, the argument against judicial activism is strong. Unlike other areas of tort law which were developed by the courts,\(^\text{150}\) workers' compensation has always been a "child of the legislature."\(^\text{151}\) The legislature has weighed through painstaking and thoughtful processes the various interests between employers and employees.\(^\text{152}\) Arguably, the judiciary tipped the scale in favor of employees without regard to the system of competing interests. The Ohio Supreme Court has made a sweeping change in the law without justifying its role in the change, looking at prior precedent,\(^\text{153}\) or

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The court stated that if the legislature wants to provide a specific statute of limitations for a specific tort, it must do so legislatively. Interestingly, when George Voinovich signed House Bill 107, Ohio Revised Code § 2305.112 was also enacted addressing this point. Under 2305.112, the statute of limitations for an "employment intentional tort" is one year.


\(^\text{147}\)See\textit{ Hertlein, supra} note 62, at 257.

\(^\text{148}\)\textit{Id.}

\(^\text{149}\)All of these provisions were holdings, at least in part, of the overruled cases.

\(^\text{150}\)Examples include the public policy exception to at-will employment and wrongful discharge in violation of public policy.

\(^\text{151}\)See Patricia C. Cecil, Comment, \textit{The Role of the Supreme Court in Opening the Courtroom Doors to Tort Victims}, 55 U. Cin. L. Rev. 477, 494 (1986)[hereinafter cited as \textit{Role}].

\(^\text{152}\)\textit{Id.} at 494-95.

\(^\text{153}\)\textit{Id.} at 494.
deferring to the legislative power granted in the Ohio Constitution under Article II, section 35.

By creating this new standard of "deliberate and intentional acts," the legislature is effectively re-balancing the interests involved and eliminating the judicially created unfairness and inconsistencies. For example, the Court in Jones classified intentional torts as outside the scheme of worker's compensation and not covered by the statute; then stated that an intentional tort award is a "supplement" to workers' compensation allowing an employee to recover under workers' compensation and common law, while denying employers the ability to set-off the civil judgment. This effectively gave employees double recovery. Not only did an employer have to pay under both systems, but now the employer had to incur significant litigation expenses in the process.

The judiciary also treated an act as negligent and compensable under workers' compensation, and at the same time, intentional and compensable under common law. Employees were not only alleging alternative theories of liability, but also recovering under both theories. The courts ignored the fact that intentional and negligent actions are mutually exclusive, a concept recognized in many other jurisdictions. By overruling Jones and its progeny in section 2745.01, the legislature is merely reconciling these inconsistencies.

Further, Ohio's judicially created standard for workplace intentional torts requiring proof less than specific intent was contrary to other states and the only state in the country with such a liberal application. The Ohio courts, nevertheless, did not try to justify the exclusion of intentional torts from the immunity of workers' compensation system, or justify such an expansive definition of intent. The Ohio Supreme Court in Blankenship and Jones merely stressed the "plight of the innocent victim," and stated that "the protection

154 *Jones*, 472 N.E.2d at 1055.

155 *Id.*

156 The court in *Jones* disagrees with a notion of double recovery because the "common-law award represents a supplemental remedy for pain and suffering, and spousal loss of services. It also provides an avenue for the imposition of punitive sanctions on employers who engage in intentional wrongdoing. None of these types of relief is available under the [Workers' Compensation] Act."

157 Varnes v. Willis Day Moving and Storage Co., No. CI 82-1949 (Lucas Cty. (April 1, 1983)), unreported; *see also*, John C. West, *Comments: In the Wake of Blankenship: Following Footprints Into the Mire of Intentional Torts in the Workplace in Ohio*, 12 N. Ky. L. Rev. 267, 270-280 (1985)(explaining election of remedies, set-off, and various arguments for and against whether these actions are mutually exclusive).


159 *See* Larson 2A, *supra* note 105, at § 68.

160 *See* Role, *supra* note 151, at 495 and cases cited therein.

161 Blankenship, 433 N.E.2d at 577.
afforded by the Act has been for negligent acts and not for intentional tortious conduct." In support of its original position in *Blankenship*, the Ohio Supreme Court placed significant reliance on West Virginia’s Supreme Court case of *Mandolidis v. Elkins Industries, Inc.*

In 1913, West Virginia created a statutory exception to its workers’ compensation laws for intentional torts by enacting section 23-4-2 of the West Virginia Code. The West Virginia Supreme Court interpreted the definition of intentional tort created by the legislature by stating in *Mandolidis* that a civil cause of action could be maintained when an employer’s conduct was willful, wanton, or reckless. In 1984, however, the West Virginia legislature amended section 23-4-2 to define "deliberate intention" more specifically, and required that an employee prove his employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee." A showing of willful, wanton, or reckless misconduct was deemed inadequate. Therefore, the precedent relied upon by the Ohio Supreme Court’s decision in *Blankenship* has since been overruled by the West Virginia legislature.

As one commentator stated:

> [s]ince the legal justification for the common-law action is the non-accidental character of the injury from the defendant employer’s standpoint, the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute or other misconduct of the employer short of genuine intentional injury.

In support of his "almost unanimous rule," the commentator notes cases from thirty-one states that require specific intent, while only two cases are noted which allowed actions for less than that standard: West Virginia’s

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162 *Id.; but see* Greenwalt v. Goodyear Tire & Rubber Co., 128 N.E.2d 116 (Ohio 1955)(holding workers’ compensation is the exclusive remedy and that an employee may not bring an action for fraud or deceit); *but see* Zajachuck v. Willard Storage Battery Co., 140 N.E. 405 (Ohio 1922)(holding no common law remedy available even if the injury was not compensable under the Ohio Workers’ Compensation Act).


164 W. VA. CODE § 23-4-2 (1985)(allowing common law recovery for an intentional tort against an employer outside of workers’ compensation’s exclusivity provision).


166 W. VA. CODE § 23-4-2(c)(2)(i)(similar to a broad range substantial certainty test).

167 § 23-4-2(c)(2)(i)(C).


169 *See* LARSON 2A, *supra* note 105, § 68.13 n.11 at 13-9 to 13-21 (citing other states requiring specific intent).
Mandolidis, subsequently curtailed to require deliberate intent, and Ohio's Blankenship, affirmed by Jones through Fyffe.

It is not a coincidence that other states have retreated from a "substantially certain to occur" definition of an intentional tort allowing a common law cause of action for willful or high risk activities by the employer. As the West Virginia legislature even noted when it legislatively overruled the Mandolidis decision, a showing of less than deliberate intent will result in a number of very large jury verdicts for the plaintiffs. In one case, the jury verdict was for $4,000,000, reportedly three times the value of the company's total assets.

Further, a recent survey found that "nearly forty percent of companies consider the costs of a state workers' compensation system before deciding where to locate operations. In manufacturing, fifty-six percent [of companies] considered the cost as a location factor." By allowing a common law intentional tort action based upon a "substantial certainty" standard that includes recklessness, it will not be long before Ohio runs the risk of encouraging companies to locate elsewhere and deprive the state of needed revenues.

This is not to say that Ohio should entirely abandon an intentional tort exception to the exclusivity of workers' compensation. The justifications for allowance of a common law action are strong. However, the Ohio judiciary should merely let the Ohio legislature determine the appropriate standard to apply as granted to them in the powers of article II, section 35 of the Ohio Constitution. The Ohio judiciary should not rule on its own concept of justice, and should stop upsetting the legislatively created balance of competing interests between employers and employees that have stood the test of time and which continues to have modern day applicability.

In enacting section 2745.01, the Ohio General Assembly has defined the standard of an intentional tort in the workplace as a standard requiring specific intent and deliberateness on the part of the employer. This was a proper step in the direction of workers' compensation reform. In overruling the supreme court decisions in the Blankenship line of cases, the Ohio legislature is only doing what a majority (almost every other state except Ohio) has done legislatively.

170Mandolidis, 246 S.E.2d at 907 (1978).
173Workers' Compensation Costs Found Soaring, 135 LAB. REL. REP. (BNA) 535 (Dec. 12, 1990)(the study was conducted by Tillinghast, a risk management consulting company).
174See Miller, supra note 14, at 293-95 (justifying tort actions on grounds that intentional torts are outside the realm of workers' compensation).
175See Role, supra note 151, at 500.
176OHIO REV. CODE ANN. § 2745.01(D)(Anderson 1995).
Section 2745.01 creates a common law exception to the exclusive remedy provision of workers' compensation where an employee must prove specific intent to injure on the part of the employer. It does not eliminate the intentional tort exception and retreat to the status of Pre-Blankenship law; section 2745.01 merely defines when that limited exception should be applied.

C. Overreaching of Section 2745.01—Sections (B) and (C).

In creating the parameters for the intentional tort exception, however, the Ohio legislature has interjected problems of statutory wording and excessiveness. Section 2745.01(B) states that an employee or the dependent survivors of a deceased alleging an "employment intentional tort" must prove by "clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort." In section 2745.01(C), the Ohio General Assembly has expressed that this heightened "clear and convincing" standard should be applied to an employee responding to an employer's motion for summary judgment and quotes a section similar to Federal Rule 11 requiring every pleading, motion, or other paper be signed by at least one party of record in the individual's name, and that if this section is ignored, the court shall impose appropriate sanctions. The rationale is supposedly to create a high burden of proof making it more difficult for employees to file suit against employers, and to address employer's concerns of frivolous lawsuits and the legal costs associated with defending common law suits.

While these may be concerns, the inclusion of these provisions in the statute is extreme. To impose a clear and convincing standard of proof, in addition to requiring specific intent, distorts the very balance the legislature was trying to achieve. Forseeably, it will be extremely difficult for an employee to prove a case of intentional tort in anything short of a flagrant battery. With the threat of sanctions it is also foreseeable that an employees attorney will not want to file employee cases, otherwise risk being punished for what the court feels was

177 Id. § 2745.01(B).

178 FED R. CIV. P. 11 (requiring pleadings, motions, and other papers submitted to the court to either be signed in good faith, or subject to sanctions).

179 OHIO REV. CODE ANN. § 2745.01(C)(stating that appropriate sanctions may include, but are not limited to, reasonable expenses incurred due to the filing of the paper and attorney's fees).

180 See Erika L. Haupt, Comment, Brady v. Safety-Kleen Corp.: Tipping Ohio's Workers' Compensation Scale in Favor of the Employee, 54 OHIO ST. L.J. 837, 856 (1993)(stating rationale for Amended Substitute House Bill 107 which has similar wording as section 2745.01).

181 One of the concerns employers had as a result of the expansive definition of intentional tort was that every plaintiff would file both workers' compensation and intentional tort in every case whether they had a case or not.
not a "good faith" argument, or for "causing unnecessary delay or needless increase in the cost of the action." 182

A second criticism of the "clear and convincing" standard is that it may raise constitutional issues. The Ohio Supreme Court has already suggested that applying a different standard to actions between employers and employees, different from other tort actions between non-employers and non-employees, may create an equal protection issue. 183 Further, this statute also suggests that this heightened standard of proof only applies to intentional tort actions by employees versus employers, not vice-versa. These implications, in light of the Ohio Supreme Court’s quick response to legislation in this area of law, seem like an invitation for judicial scrutiny.

Sections 2745.01(B) and (C) were not needed to address the employer’s concerns. Merely by changing the standard from "substantial certainty" to "deliberate and intentional" in Section (A), the legislature had already addressed the issue of frivolous lawsuits, widespread litigation problems, and had already balanced the competing interests between employers and employees of which the judiciary had tipped in favor of the employees. However, by extending the requisite degree of proof to a "clear and convincing" standard, the Ohio General Assembly has jeopardized the foundation of the reform it was trying to make. As the Ohio Supreme Court ruled in Brady declaring section 4121.80 unconstitutional in toto, it will only be a matter of time that the same determination of section 2745.01 will have to be made. Unless the severability clause in House Bill 103 184 is heeded, the entire statute seems doomed.

D. Creation of an Entirely New Cause of Action in Ohio

The discussion, thus far, was limited to a strictly workers’ compensation problem and the injuries associated therein. The wording of section 2745.01, however, may have much greater implications, and even suggests that this statute was not enacted to address a purely workers’ compensation problem. The broad language of the statute may also suggest the creation of an entirely

182 OHIO REV. CODE ANN. § 2745.01(C)(2).

183 In Brady v. Safety-Kleen, 576 N.E.2d 722, 730 (Ohio 1991), Justice Douglas in his concurring opinion stressed that he could not see a legitimate state interest in creating a special intentional tort victim category within the class of all victims of intentional torts. Although he was referring to the constitutionality of section 4121.80(D), his argument may equally apply to newly enacted section 2745.01 of the Ohio Revised Code 12.9(b).

184 1995 Ohio Laws 43 (H.B. 103). Section 4 states "[i]f any provision of a section of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable."
new cause of action for employees seeking common law remedies against employers.185

Taken literally, section (A) states that an employer shall not be liable at common law or by statute for an intentional tort that occurs during the course of employment.186 Only if the employee can prove by "clear and convincing evidence" that an "employment intentional tort" was committed, will an employee have a common law cause of action.187 As stated, an "employment intentional tort" means an "act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee."188

The key problem with the statutory wording of section 2745.01 is that the language appears to apply to both physical and non-physical injuries, whether caused by physical or non-physical stimuli, even though the latter has never been covered by the Ohio workers' compensation system.189 For example, suppose a female employee is allegedly sexually harassed by her manager and brings a state common law action against her employer stating that she suffered psychological injury as a result of a manager attempting to touch her breasts, and the manager exposing himself to her.190 The employer then moves for summary judgment alleging that the employee failed to state a cause of action, relying on the Ohio workers' compensation exclusive remedy provisions.

In that particular situation, the Ohio Supreme Court has held that the term "injury" when applied to the Ohio Workers' Compensation Act does not include a non-physical injury with purely psychological consequences.191 Therefore, the woman employee would have a common law cause of action under Ohio law, irrespective of an intentional tort exception. The sexual harassment allegedly inflicted amounts to emotional stress, and because the plaintiff claimed psychological harm from it, her injuries did not fall within the types of injuries contemplated by the workers' compensation statute.192 Under

185OHIO REV. CODE ANN. § 2745.01(A)(Anderson 1995)("Except as provided in this section, an employer shall not be liable to respond in damages at common law or by statute for an intentional tort that occurs during the course of employment. An employer only shall be subject to liability to an employee or the dependent survivors of a deceased employee in a civil action for damages for an employment intentional tort.").

186Id.

187OHIO REV. CODE ANN. § 2745.01(B).

188OHIO REV. CODE ANN. § 2745.01(D).

189See supra text accompanying notes 57-61.

190See e.g., Kerans v. Porter Paints, 575 N.E.2d 428 (Ohio 1991).

191Id. at 431. ("We are not prepared to assume that psychological disturbances arising solely from emotional stress in the workplace fit within the definition of "injury" in R.C. 4123.01."). Id. at 430-31.

192For a complete discussion of Kerans v. Porter Paint Co. and the types of injuries associated with workers' compensation in Ohio, see Deborah S. Brenneman, Note, Sexual Harassment and Ohio's Workers' Compensation Statute: Kerans v. Porter Paint Co., 575
the law prior to section 2745.01, the exclusive remedy provision of workers’ compensation would not apply, and based upon the particular facts of the case, summary judgment on behalf of the employer would be denied.193

On the other hand, if those same facts were applied to section 2745.01, which does not state whether the injuries normally excluded from the workers’ compensation scheme are covered, the case may have a different result. To survive the employer’s motion for summary judgment, the plaintiff employee would have to prove by clear and convincing evidence that her employer “deliberately and intentionally” sexually harassed her.194 The plaintiff’s attorney could also be subject to sanctions by “the court, upon motion or upon its own initiative” if the court determines the attorney did not make a good faith claim.195 Clearly, if the courts apply these facts in this manner to section 2745.01, the results may be extreme.

Another situation in which it would be easy to see the extreme implications of this statutory interpretation is when section 2745.01 is applied to a wrongful discharge action. For example, in Collins v. Rizkana,196 an employee brought a wrongful discharge action based upon alleged sexual harassment. The employee was allegedly constructively discharged for refusing to write a statement that the defendant, her employer, had never touched her sexually, although it allegedly happened on numerous occasions.197 The Ohio Supreme Court reversed the trial court’s granting of summary judgment in favor of the employer and held that a cause of action may be brought for wrongful discharge in violation of public policy against an employer based upon sexual harassment.198

Again, a much different result may occur if newly enacted section 2745.01 were applied to the facts in Collins. A wrongful discharge situation usually occurs in the "course of employment" and is intentional in nature. An employer usually fires an employee, rightfully or wrongfully, for reasons or situations related to the workplace. Therefore, "an employer shall not be liable to respond in damages at common law or by statute for an intentional tort."199 Under section 2745.01, Collins only has a common law cause of action if she can establish an "employment intentional tort" and the parties involved fit within the definitions in the statute.


193 Kerans, 575 N.E.2d at 428.
195 Ohio Rev. Code Ann. § 2745.01(C)(2).
197 Id. at 655-656.
198 Id. at 654-655, syllabus.
199 Ohio Rev. Code Ann. § 2745.01(A).
As defined by statute, Collins was an employee (an individual employed by an employer), Rizkana was an employer (any person who employs an individual), and Collins was employed (permitted or suffered to work) by Rizkana.\(^{200}\) Thus, section 2745.01 is to "completely and solely control all causes of action,"\(^{201}\) and Collins must prove by clear and convincing evidence that she was deliberately and intentionally injured (discharged in violation of public policy based upon sexual harassment) because of her employer's act.\(^{202}\) Collins must adhere to the stringent pleading requirements requiring her or her attorney to state that "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact or a good faith argument for the extension, modification, or reversal of existing law . . . ."\(^{203}\) Finally, Collins or her attorney must subject themselves to possible sanctions including reasonable expenses and attorney's fees.\(^{204}\) Hypothetically, a much different result may occur than in the original holding.

While this expansive interpretation of section 2745.01 covering injuries not normally associated with Ohio workers' compensation law may seem farfetched, there is some support from the legislature that indicates this is the proper application. First, this new definition and creation of an "employment intentional tort" was not enacted as a section of Revised Code Chapter 41 on Workers' Compensation. Instead, it is found under Title XXVII Courts—General Provisions—Special Remedies. If the legislature had been addressing the exclusive remedy provision of workers' compensation and the injuries associated therein, why didn't the legislature put this in Chapter 41?\(^{205}\) Second, new definitions of employer, employee, and employ were created.\(^{206}\) These terms are defined much more broadly than in the workers' compensation arena, and apply to all employers and employees whether or not

\(^{200}\)Ohio Rev. Code Ann. § 2745.01(D)(2)-(4).

\(^{201}\)This phraseology refers to the legislative intent statement in 1995 Ohio Laws 43 (H.B. 103 section 3).

\(^{202}\)Ohio Rev. Code Ann. § 2745.01(B).

\(^{203}\)Ohio Rev. Code Ann. § 2745.01(C)(2).

\(^{204}\)Id.

\(^{205}\)One reason the legislature may not have included this section in Revised Code Chapter 41, is that 1993 Ohio House Bill 107 contained an "employment intentional tort" provision similar to that of 1995 Ohio House Bill 103, and was held unconstitutional for violating the "one subject rule" contained in Ohio Const. art. II, § 15(D). However, this reason is not supported since the Ohio Supreme Court only addressed the violation of the "one subject rule," and not the substantive standard created for an "employment intentional tort" in holding the provisions unconstitutional. Further, in House Bill 103, the legislature remedied the "one subject rule" problems that the Court had stated in House Bill 107. See State ex rel. Ohio AFL-CIO et al., v. Voinovich, Governor, et al., 631 N.E.2d 582 (Ohio 1994).

the employer must comply with workers' compensation laws.207 For example, there is no requirement that the employer must have a certain number of employees and compulsorily pay into the compensation system for the employer to be covered by the exclusive remedy provision. Again, if the legislation was strictly a reaction to a workers' compensation problem, and only applied to those types of injuries normally covered, why would the legislature re-define the parties involved and not keep old definitions?

Third, and most significant, was the statement of legislative intent. The intent of section 2745.01 was to overrule all the Ohio Supreme Court decisions supporting the judicially created substantial certainty test for workplace intentional torts, and to establish a specific intent requirement that applies to all intentional injuries that occur in the workplace which are not compensable under the workers' compensation system.208 As worded, all types of tort actions not normally covered by the workers' compensation system between an employer and employee might now be subject to a clear and convincing standard, Rule 11-type sanctions, and the heightened evidence requirements for a plaintiff responding to a motion for summary judgment or in other pleadings.209

A crucial factor that is relevant, but not mentioned in section 2745.01, is that section 2745.01 contains no indication as to what types of injuries resulting from workplace torts are covered. Section 2745.01 contains no distinction, as is made in the realm of workers' compensation excluding mental injuries caused by mental stimuli from the exclusive remedy provisions.210 The only requirements in 2745.01 are that there must be (1) an intentional act; (2) an employee; (3) an employer; and (4) the employee must be employed.211

When these minimal requirements are read in conjunction with the legislative intent requiring section 2745.01 to completely and solely control all causes of action not governed by workers' compensation between employers and employees, every injured employee will have extreme difficulty bringing a common law cause of action against the employer. The requirements

207 OHIo REV. CODE ANN. § 4123.01(A), (B), and (G) (Anderson 1996).

208 See supra note 4; 1995 H.B. 103 §3, eff. 11-1-95, reads:
   The General Assembly hereby declares its intent in enacting . . .
   2745.01 of the Revised Code to supersede the effect of the Ohio Supreme Court decisions in Blankenship . . . Jones . . . Van Fossen . . . Pariseau . . . and Fyffe . . . to the extent that the provisions of . . . 2745.01 of the Revised Code are to completely and solely control all causes of actions not governed by Section 35 of Article II, Ohio Constitution, for physical or psychological conditions, or death, brought by employees or the survivors of deceased employees against employers. (emphasis added)(citations omitted).

Id.

209§ 2745.01(B)-(C).

210 See supra notes 57-61 and accompanying text.

211§ 2745.01(A)-(D).
subjecting employees to a "clear and convincing" and deliberate intent standard in all intentional tort actions will always apply.

Furthermore, the distinction the Ohio Supreme Court used in Blankenship stating that intentional torts are outside the course of employment, and thus not covered by the exclusive remedy provision of workers' compensation, becomes irrelevant. The entire nature of this expansive interpretation is that by overruling Blankenship and its successors, section 2745.01 becomes a compliment, not a provision of, the worker's compensation scheme. The Ohio workers' compensation system will compensate employees for all injuries that are normally covered by the system, and Section 2745.01 will apply to all other situations.

An employee's only possible bypass of this statute will be to argue that the act did not occur in the course of employment. However, even this argument is flawed. This is because both the reasoning in Blankenship was overruled, and the definition of "employment intentional tort" does not specifically state that the employer's intentional act even needs to be in the course of employment. Section (A) states that an employer is not liable to respond in damages or at common law for an intentional tort that occurs during the course of employment; however, the next sentence states that the employer is only subject to liability for an employment intentional tort.212 The definition of an employment intentional tort does not mention that the act must occur in the course of employment. This is a problem of statutory ambiguity that needs to be resolved by the legislature. In the meantime, the consequences as a result of section 2745.01 will be extreme.

Query? Does section 2745.01 apply to a situation where an employee brings a defamation action against an employer? Normally in a defamation action, a plaintiff has the burden of proving by clear and convincing evidence that the defendant made a false defamatory statement of fact regarding the plaintiff, and that the defendant was "at least" negligent in publishing it.213 Under section 2745.01, does a plaintiff employee now have to prove by clear and convincing evidence that the defendant employer intentionally and deliberately published the statement, and was not just "at least" negligent? If this expansive interpretation of section 2745.01 is applied, the answer suggests "yes."

Taking another situation, does an employee now have to prove by clear and convincing evidence that an employer deliberately and intentionally injured him in a negligent infliction of emotional distress claim? Or what about a situation in which an employee alleges an invasion of the right of privacy and

212 § 2745.01(A).

213 Lansdowne v. Beacon Journal Publishing Co., 512 N.E.2d 979, 982-84 (Ohio 1987). The United States Supreme Court has held that in some circumstances, the First Amendment requires the plaintiff to show the defamatory statement was made with actual malice; see, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, (1964).

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the employer moves for summary judgment quoting section 2745.01? 214 Under an expansive interpretation of section 2745.01, as long as the employer committed the "act" during the course of employment, and the employee cannot prove by a clear and convincing standard that the employer deliberately and intentionally committed the act, the employee will not be able to recover common law damages. In fact, if section 2745.01 is applied expansively, all types of mental injuries caused by mental stimuli that occur in the course of employment, between an employer and employee, which are not normally covered by the Ohio's workers' compensation system, may be classified as an intentional tort, and thus, subject an employee to this new standard. In all cases, an employee would have to meet the heightened proof requirements and show deliberate intent to have a common law cause of action.

This expansive application of section 2745.01 must be avoided. The purpose of Article II, section 35 of the Ohio Constitution was to grant the Ohio General Assembly the power to enact laws to create a balance between employers and employees in the State of Ohio in regard to a system of insurance for employees and work-related accidental injuries. 215 The creation of an intentional tort system solely for employers and employees interpreted outside the injuries normally covered by workers' compensation, at this stage, 216 exceeds those granted powers. Article II, section 35 did not give the legislature the power to create a sub-class of people and create standards and laws for those particular people in situations outside the scheme of workers' compensation and the injuries associated therein.

There are no legitimate reasons why the legislature would want to impose different standards upon employees receiving mental-type injuries from those applied to a person walking down the street just because of the employer/employee relationship. An employee who is defamed by an employer, has as much a right to a common law cause of action, as an actor who is defamed by the National Enquirer. The employee should not be penalized just because the act was committed during his employment and have to meet a clear and convincing standard in all situations.

\[\text{Vol. 44:381}\]

214 See, e.g., Housh v. Peth, 133 N.E.2d 340, syllabus (Ohio 1956)("An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to person of ordinary sensibilities."). Id. at 341.

215 See supra notes 22-28 and accompanying text.

216 If the Ohio Legislature re-defines the term "injury" and includes mental injuries caused by mental stimuli as compensable injuries, it may find constitutional support under OHIO CONST. art. II, § 35 for including these injuries in an intentional tort exception. Kerans, 575 N.E.2d at 430-31 (denying that exclusivity provision of Ohio Workers' Compensation Act encompasses sexual harassment)("[w]e are not prepared to assume that psychological disturbances arising solely from emotional stress in the workplace fit within the definition of "injury" in R.C. 4123.01."). 575 N.E.2d at 430-31.
It is also difficult to recognize any legitimate reasons why the legislature would impose restrictions on employee attorney's in regard to heightened pleading standards and possible sanctions, and not the same standard for all attorneys and all causes of actions. The requirements in section 2745.01 interfere with an employee's ability to obtain fair representation. Forseeably, not only will employee attorneys deny to take cases unless there are flagrant deliberate and intentional employer actions, but also employer attorneys will always claim lack of good faith, and move for summary judgment requiring the clear and convincing standard to be applied. In a sense, there is a built in deterrence for employees to not file cases, and an incentive for employers to commit undesirable actions without being subject to recourse.

VII. CONCLUSION

The proper interpretation of Ohio's Revised Code section 2745.01 should be limited to the types of injuries normally associated with the Ohio workers' compensation statute and only limited to that particular context. In the workers' compensation context, section 2745.01 is a proper application of Ohio legislative power. While the Ohio Supreme Court in Blankenship rightfully established an exception to Ohio's exclusive remedy provision in workers' compensation for cases involving intentional torts in the workplace, the standard to be applied should not be the overly broad substantial certainty test which includes recklessness; the proper standard should be the one determined by the legislature in section 2745.01. That standard requires an employee to prove deliberate and intentional conduct by the employer to proceed with a common law intentional tort cause of action as an exception to Ohio workers' compensation law.

However, further legislative reform is needed. The imposition of both the clear and convincing standard and the heightened pleading hurdles upon employees and their attorneys is extreme. The legislature had already accomplished its goal of balancing the interests between employers and employees without adding those provisions. These sections should be deleted, and the intentional tort exception should be moved to Ohio Revised Code, Chapter 41—Workers' Compensation.

Any expansive interpretation of section 2745.01 covering the types of injuries, not traditionally associated with Ohio workers' compensation law and that the legislature has either expressly or implicitly stated, is an abuse of power that is not granted in Article II, section 35 of the Ohio Constitution. To create a different standard for employees suffering from mental-type injuries caused by non-physical stimuli, different than standards required of other people, does not make sense and should not survive constitutional scrutiny. Ohio Revised Code section 2745.01 should not be interpreted to shield employers from liability in all cases when an employee cannot meet the heightened proof standards. If this happens, it will only be a matter of time before all employers will deny liability for conduct which they previously would have been held.
accountable, and will rely on section 2745.01 to force employees in all instances to prove by "clear and convincing" evidence that they were "deliberately and intentionally" injured.

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