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OHIO TORT REFORM IN 1998: THE WAR CONTINUES

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The discussion that follows illustrates a sincere difference of opinion between the author and members of the Ohio Supreme Court in regard to recent decisions of the court. The author fully appreciates the integrity and intellect of the members of the court and, as reflected in other writings, often agrees with decisions of the court which have fostered the interests of persons deserving compensation for harm caused by defective products.

I. THE CULMINATING BATTLE - *STATE EX REL. OHIO ACADEMY OF TRIAL LAWYERS v. SHEWARD*

For more than a decade a war has been waged between forces seeking legislative reform of tort law, with emphasis on product liability, and the Ohio Supreme Court. The battleground has been the legislative enactments of the Ohio General Assembly. This legislation has faced consistent challenge before the court as a proper exercise of its power of judicial review. Time and time

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again the court's philosophical approach, predicated on a need to protect injured parties and guarantee compensation for harm, has led to determinations that given legislation fails constitutional scrutiny.[2]

In a real sense, the Court has become a super legislature comprised of a somewhat consistent four member majority.[3] *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,[4] foreshadows what may be the ultimate battle. The result of that battle could end the war. That end will be the unconditional surrender of tort reform advocates. Absent a significant change in the composition of the court, future efforts at tort reform which in any way impede the right of recovery will be preordained to an early demise.

In *Ohio Academy of Trial Lawyers* the court accepted original jurisdiction of a complaint seeking a writ of mandamus or prohibition in regard to Amended H.B. No. 350. H.B. 350 reflects a major effort to reform the law of product liability. This effort not only reiterated much existing statutory and decisional law, it also addressed significant areas of concern not previously addressed by the General Assembly. Several of these efforts are either untested in decisional law or inconsistent with the law prior to the enactment of the Bill.[5]

The dissenters argued that the court did not have the power to assume jurisdiction over the matter and that doing so was a misapplication of the mandamus power. Regardless of whether the majority abused judicial authority, the ultimate issue would eventually have reached the court.

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[2] *See generally*, Stephen J. Werber, *Ohio Tort Reform Versus The Ohio Constitution*, 69 TEMPLE L. REV. 1155 (1996).

[3] Each of the primary cases which are the focus of this article: Collins v. Sotka, 692 N.E.2d 581 (Ohio 1998); State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 689 N.E.2d 971 (Ohio 1998); and Carrel v. Allied Products Corp., 677 N.E.2d 795 (Ohio 1997); was decided by the same four members of the court: Justices Douglas, Resnick, Sweeney and Pfeifer. In *Carrel* these justices were joined by Justice Lundberg Stratton.

[4] 689 N.E.2d 971 (Ohio 1998).

[5] *See e.g.*, OHIO REV. CODE ANN. § 2307.75 (Anderson 1998) (abolishing the consumer expectancy test for design defect and mandating that a product is not defective in design or formulation if no practical and technically feasible alternative design or formulation was available at the time the product left the control of its manufacturer); *Cf.* Cremeans v. International Harvester Co., 452 N.E.2d 1281 (Ohio 1983); Knitz v. Minster Mach. Co., 432 N.E.2d 814 (Ohio 1982); Temple v. Wean United Inc., 364 N.E.2d 267 (Ohio 1977); *accord*, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b)(1997); OHIO REV. CODE ANN. § 2307.791 (1998) (precluding a product liability claim based on industrywide, enterprise, or alternative liability); *Cf.* Horton v. Harwick Chem. Corp., 653 N.E.2d 1196 (Ohio 1995); OHIO REV. CODE ANN. § 2307.80 (1998) (permitting evidence of failure to comply with a recall notice to support defenses of contributory negligence or assumption of the risk); OHIO REV. CODE ANN. § 2315.20 (1998) (applying principles of comparative negligence to product liability claims); *Cf.* Crislip v. Twentieth Century Heating & Ventilating Co., 556 N.E.2d 1177 (Ohio 1990); Bowling v. Heil Co., 511 N.E.2d 373 (Ohio 1987).

The complainant, the Ohio Academy of Trial Lawyers, played an instrumental role as *amicus* counsel in *Carrel v. Allied Products Corp.*[6] This complainant, a highly regarded professional organization, has unquestionably earned the respect of the court. Its position may well be given the benefit of any doubt. The Complaint, as described in the dissent, asserts that H.B. 350 is unconstitutional for any one of several reasons.[7] The only serious question is whether the court, when it reaches the merits, will void only selected sections of the new law or whether it will void the entire Act.[8] The court majority has made manifest its ability to negate reform efforts through constitutional analysis and through statutory interpretation.[9] One hopes that the court, in deciding the fate of H.B. 350, will act with restraint and give a reasonable measure of deference to the General Assembly. If that restraint is shown, the court could, and should, carefully scrutinize the constitutionality of some aspects of the Act, such as the omission of punitive damages from wrongful death action judgments.[10] On the other hand, the court should uphold many

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[6] "However, as *amicus curiae*, The Ohio Academy of Trial Lawyers, aptly points out, the phrase 'subject to' is not strong enough to completely eliminate unmentioned common-law theories." *Carrel*, 677 N.E.2d at 799.

[7] Relators claim that Am.Sub.H.B. No. 350 is unconstitutional because, among other things, it conflicts with rules promulgated by the court, and further violates the one-subject rule, right to a jury trial, prohibition on damage caps for wrongful death, right to a remedy, due process, equal protection, prohibition on special privileges, and prohibition against retroactive laws. 689 N.E.2d at 971 (Cook, J. dissenting).

[8] *See, e.g.*, State *ex rel.* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582 (Ohio 1994) (striking all provisions of Am.Sub.H.B. No. 107, as enacted in violation of the one subject rule, Ohio Constitution Section 15(D), Article II). Alternatively, the court could strike down a substantial number of specific sections, such as those cited *supra* note 5, and then rule that absent these provisions the entire Act fails as no longer meeting its legislative objective. That some of the individual sections can be successfully challenged is abundantly clear. *See* cases *infra* note 26.

[9] The court's approach to constitutional analysis will also be applied to a broad based constitutional attack focused on section 2745.01 of the Ohio Revised Code. *See id.* § 2745.01 (eff. Nov. 1, 1995) which redefines employment intentional tort to overrule Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572 (Ohio 1982), and its progeny. As many intentional tort actions arise from industrial machinery related injuries, the relationship to product liability is evident. The statute was improperly deemed in violation of the equal protection clause. Johnson v. BP Chems., Inc., No.1-97-32, 1997 WL 729098 (Ohio App., Nov. 18, 1997), *discretionary appeal allowed*, 691 N.E.2d 1061 (Ohio April 1, 1998). The court has also determined to address this issue in a certified question proceeding. Mullins v. Rio Algom, Inc., 689 N.E.2d 50 (1998). Of interest, and perhaps a portent of decision, Justices Douglas, Resnick and Sweeney dissented in *Johnson* whereas Chief Justice Moyer and Justices Resnick and Lundberg Stratton dissented in *Mullins*.

[10] *Cf.* OHIO REV. CODE ANN. § 2307.801 (Anderson 1998) allowing such damages in product liability actions while establishing well conceived procedural and evidentiary safeguards against excessive awards.

of the Act's most innovative provisions including those addressing claimant's own conduct.[11]

The two decisions discussed below illustrate the court's power to win its war with the General Assembly by the simple expedient of replacing legislative words and intent with judicial interpretations of those same words through innovation which defies logic and the rules of grammar. It has often be said that censorship is dangerous because there is no one to censor the censors. For advocates of tort reform, especially those who seek to recognize that injured parties can, and often do, contribute to their own harm by failing to comply with recall notifications or by engaging in conduct made dangerous by alcohol or drug abuse, or by simply failing to act in a reasonable manner, the question is: what can be done if the final arbiter of the law acts in an arbitrary manner.

II. THE ACTION FOR NEGLIGENT PRODUCT DESIGN - *CARREL v. ALLIED PRODUCTS CORPORATION*

A. Background

Despite its lack of logic, the Ohio Supreme Court's holding in *Carrel* should surprise no one. Determining that the Ohio Product Liability Act (hereinafter "Act")[12] does not bar a common law action for negligent design, the court held that summary judgment should have been denied because a fact issue existed as to whether an employee assumed the risk of harm while working on a large transfer press. Plaintiff-Appellant, Donald Carrel, an employee of Whirlpool Corporation, was injured while working on a press designed and manufactured by a corporate division of Defendant-Appellee, Allied Products Corporation.[13] Plaintiff filed suit alleging statutory causes of action under the Act together with a common law negligent design claim.[14] The appellate court ruled that the Act abrogated common law causes of action including the negligent design claim. The appellate court also granted Allied Products'

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[11] *E.g.*, OHIO REV. CODE ANN. § 2125.01 (B)(1) (Anderson 1998) (addressing the effect of release in regard to decedent's prior personal injury action and effectively overruling Thompson v. Wing, 637 N.E.2d 917 (Ohio 1994)); § 2307.80 (failure to heed a recall notice); §§ 2315.19 and 2315.20 (effect of contributory negligence); and § 2323.59 (effect of substance abuse as a contributing cause of injury in tort claims including product liability claims). That the substance abuse defense is contained in a "tort" section of the Revised Code rather than the "product liability" sections of the Revised Code may provide the court with an opportunity to improperly conclude that H.B. violates the one subject rule.

[12] OHIO REV. CODE ANN. §§ 2307.71-.80 (Anderson 1998)(effective January 5, 1988) (amended effective January 27, 1997). Although the wording of the relevant sections considered by the court remain unchanged, the scope of the Amended Act may have a significant effect on future constitutional analysis. *See* §§ 2307.71(M), 2307.72(A), 2307.73.

[13] *Carrel*, 677 N.E.2d at 797-98.

[14] *Id.*

motion for summary judgment, ruling that the plaintiff assumed the risk of harm as a matter of law.[15] Both rulings were reversed.

This outcome reflects the continuing battle between the objective of the General Assembly to impose limitations on the liability of tort defendants and the policy of the courts to compensate and protect injured parties whenever possible.[16] The first part of the appellate court's holding is predicated on a questionable rule of statutory construction, while the second applies prior law in an extraordinary manner. Both rulings serve the underlying judicial policy of encouraging compensation for harm and distort the law to gain an objective of minimal value or need.

Distortions aside, the lack of surprise at the court's major holding - the continued existence of a common law negligent design claim - is grounded in prior rulings which fall into two categories. The first category reflects the court's willingness to hold all, or parts of, tort reform legislation unconstitutional. The second category limits or expands prior decisional law to support both a cause of action and a likelihood of success for injured parties. While the General Assembly's tort reform efforts were excessive in some areas, the court fails to recognize that the overall legislative effort represents a rational and limited means to delineate a body of law which protects both alleged tortfeasors, particularly product liability defendants, and injured parties. A fair balance between the rights of manufacturers and injured consumers requires correlative rights and duties. This essential concept was not fully appreciated by either the General Assembly or the court.

In *Carrel*, the court apparently misconceives the concept that product related injuries arise from the confluence of three factors: the product, the environment in which that product is used, and the conduct of the party using the product. An injured party's liability may be greater than that of a manu-

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[15] *Id.* at 798. Further detail as to the facts surrounding the assumption of the risk ruling are set forth *infra*, at note 115.

[16] Although this article is critical of some decisions, the court generally has done a remarkable job in its effort to strike a proper balance between the needs of injured consumers and product manufacturers. *See, e.g.*, Horton v. Harwick Chem. Corp., 653 N.E.2d 1196 (Ohio 1995)(alternative liability and rejection of broad based industry wide liability); Calmes v. Goodyear Tire & Rubber Co., 575 N.E.2d 416 (Ohio 1991)(punitive damages); Freas v. Prater Constr. Co., 573 N.E.2d 27 (Ohio 1991)(adequacy of warning); R.H. Macy & Co. v. Otis Elevator Co., (intervening cause); Flaugher v. Cone Automatic Mach. Co., 507 N.E.2d 331 (Ohio 1987)(successor corporate liability); Anderson v. Ceccardi, 451 N.E.2d 780 (Ohio 1983)(merger of contributory negligence and assumption of the risk for purposes of comparative negligence); Wilfong v. Batdorf, 451 N.E.2d 1185 (Ohio 1983)(recognition of common law comparative negligence), *overruled in part* by Van Fossen v. Babcock & Wilcox Co., 522 N.E.2d 489 (1988); Knitz v. Minster Mach. Co., 432 N.E.2d 814 (Ohio 1982)(abandoning the "unreasonably dangerous" requirement of strict liability and adopting risk-benefit analysis); Leicthamer v. American Motors Corp., 424 N.E.2d 568 (Ohio 1981)(second collision liability theory); Temple v. Wean United Inc., 432 N.E.2d 814 (Ohio 1977)(adopting RESTATEMENT (SECOND) OF TORTS, § 402A (1965)).

facturer's as recognized in the law of comparative fault.[17] Assumption of the risk, a form of user conduct,[18] should always be an element in the liability calculus. Although *Carrel* theoretically allows for such conduct to be a factor, in reality the decision will negate the assumption of the risk defense in work-related cases.[19] The court has made it clear that employees need pay little attention to their own conduct as they will be faced with gossamer, if any, legal liability for their actions.

The court continues, perhaps inadvertently, to encourage the trend toward societal rather than individual responsibility. Many products, no matter how well-designed, carry an inherent danger. However, the user must bear responsibility for the ensuing harm when that user voluntarily encounters such a danger and fails to take available and known steps to minimize that danger. Both the General Assembly's effort to fully negate manufacturer liability where there has been an assumption of risk, and the court's effort to maximize liability in the same circumstance, miss the mark. An approach is needed which applies comparative fault principles to all product liability actions and their conduct based defenses.[20]

On the constitutional plane, a majority of the court has shown a willingness, if not an outright desire, to vitiate tort reform efforts through any possible methodology. In some instances this result has been proper; for example, the court found Ohio Revised Code section 4120.80 an invalid attempt to overturn the court's doctrine of intentional tort as an exception to workers' compensation immunity.[21] The legislation under consideration not only

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[17]Comparative fault is distinct from the narrower principle of comparative negligence set forth in section 2315.19 of the Ohio Revised Code.

[18]This was recognized by the court's merger of contributory negligence and assumption of the risk for purposes of comparative negligence. *See Anderson*, 451 N.E.2d at 780.

[19]The court's reversal of the grant of summary judgment was predicated, in part, on the determination that a genuine issue of material fact existed as to the presence of assumption of the risk. *See infra* Part II(E).

[20]This approach would foster one of the recognized policies which led to adoption of strict liability in tort: a manufacturer who profits from the sale of goods should bear the loss for harm caused by that product. Neither this, nor any other policy supporting strict liability, imposes insurer status upon product manufacturers. *See, e.g.*, Delk v. Holiday Inns, Inc., 545 F.Supp. 969, 972 (S.D. Ohio 1982) (relying on Strimbu v. American Chain & Cable Co., 516 F.2d 781 (6th Cir. 1975)). *See also* Menifee v. Ohio Welding Prods. Inc., 472 N.E.2d 707 (Ohio 1984)(manufacturer does not guarantee that its product is incapable of causing injury). Imposing liability upon a manufacturer for the degree of contribution to the harm caused by its defective product will reduce profits and force the manufacturer to bear an appropriate share of the cost of harm.

[21]Brady v. Safety-Kleen Corp., 576 N.E.2d 722 (Ohio 1991). The effect of *Brady* was to restore the full common law intentional tort doctrine with its substantial certainty test as enunciated in Jones v. VIP Dev. Corp., 472 N.E.2d 1046 (Ohio 1984), which expanded upon the seminal decision, of Blankenship v. Cincinnati Milacron Chem., Inc., 433 N.E.2d 572 (Ohio 1982).

redefined "intentional tort," it also removed key fact determinations from the jury and placed them in the hands of the trial court and the Industrial Commission. The General Assembly made it easy for the court to void the attempted reincarnation of its statutory changes (Amended House Bill No., 107, effective October 20, 1993) as that effort violated the one-subject rule of the Ohio Constitution.[22]

In other areas, the court's constitutional analysis was openly imaginative and a reflection of an outcome-determinative approach. Although the court's resolution in *Carrel* obviated the need to address constitutional issues raised by plaintiff,[23] these issues may be ripe for future consideration.[24]

The Act is one element in a series of tort reform enactments designed to either create uniformity and fairness in Ohio tort law (from the perspective of industry) or to impose draconian limitations on rightful recovery for personal injury claimants (from the perspective of the Ohio Academy of Trial Lawyers). Regardless of one's perception of the motivating factor, the Act represents one step in a long-term legislative effort to reform Ohio tort law. The court's constitutional treatment of past reform efforts has direct bearing on the likely outcome of the constitutional challenges posed, but not decided, in *Carrel*. Recent precedent suggests that, despite the strong presumption of legislative validity,[25] the court is quite willing to hold tort reform legislation violative of one or more provisions of the Ohio Constitution.[26]

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[22]*See* State *ex rel.* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582 (Ohio 1994). The General Assembly enacted yet another effort to overcome the intentional tort doctrine. *See* OHIO REV. CODE ANN. § 2745.01 (Anderson 1998) (effective November 1, 1995). This more limited effort, which redefines intentional tort as an act in which the employer "deliberately and intentionally" injures an employee, does not raise a legitimate constitutional issue. The decisions in *Johnson* and *Mullins*, may void this legislation and restore the ill-advised substantial certainty test. *See supra* note 9.

[23]Constitutional issues were addressed at the appellate level and in the briefs to the Supreme Court of Ohio. *See* Carrel v. Allied Products Corp., No. 9-94-24, 1995 Ohio App. LEXIS 3091 (Ohio App. July 11, 1995); Plaintiff-Appellant's Memorandum in Support of Jurisdiction at 7-10 (No. 95-1773); Brief of Plaintiff-Appellant at 24-31, *Carrel* (No. 95-1773); and Amicus Curiae Brief of the Ohio Academy of Trial Lawyers at 4-6, *Carrel* (No. 95-1773). These briefs, together with those filed on behalf of Allied Products Corporation, were kindly provided by plaintiff's lead counsel, Richard Alkire.

[24]This assumes that the General Assembly will amend the Act to add language expressly stating that it is intended to abrogate all common law causes of action not incorporated into its provisions. Absent a significant change in the membership of the General Assembly, such an effort is likely.

Consistent with the principle that a court must not decide constitutional issues if a matter can be resolved on other substantive grounds, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993), the court did not discuss the constitutional issues posed in the briefs. If the General Assembly amends the Product Liability Act to overrule *Carrel*, the court will be forced to consider a wide gamut of constitutional assertions.

[25]Sorrell v. Thevenir, 633 N.E.2d 504, 508 (Ohio 1994). "All legislative enactments enjoy a strong presumption of constitutionality." *Id.* State v. Dorso, 446 N.E.2d 449, 450 (Ohio 1983). "Courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible (such statutes)." *Id.* State *ex rel.* Dickman v. Defenbacher,

B. A Brief Foray: The Constitutional Issues

Case law lends some credence to assertions that the statutory abolition of a claim for recovery based on negligent design violates the Ohio Constitution. Although appealing on the surface, these agruments should be rejected.

The core arguments against the statutory exclusion of a common law negligent design action are predicated on claims that abolition of this cause of action (1) deprives claimants of a vested right to seek redress in violation of the Ohio Constitution Article I, section 16 (open courts or right to remedy), and (2) violates both the due process mandate of Article I, section 16 and the equal protection clause of Article I, section 2.[27] To succeed, these arguments must establish that there is a fundamental right to a claim for negligent design under a strict scrutiny analysis. Moreover, it is essential to find that the courthouse door has been closed to those seeking recovery for harm caused by defective products. The door is open. Indeed, the Act codifies law that eased the burden upon product liability claimants through its adoption of no-fault strict liability principles.[28]

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128 N.E.2d 59, 60 (Ohio 1955). "An enactment by the General Assembly is presumed to be constitutional." *Id. See also* Brady v. Safety-Kleen Corp., 576 N.E.2d 722 (Ohio 1991); Mominee v. Scherbarth, 503 N.E.2d 717 (Ohio 1986).

[26] *See, e.g.*, Zoppo v. Homestead Ins. Co., 644 N.E.2d 397 (Ohio 1994)(allowing the court to set the amount of punitive damages in tort actions, section 2315.21(C)(2) of the Ohio Revised Code, violated the right to trial by jury); Brennaman v. R.M.I. Co., 639 N.E.2d 425 (Ohio 1994)(statute of repose limiting rights to proceed against designers and architects of improvements to real property, section 2305.131 of the Ohio Revised Code, violated the open courts provision); Sorrell v. Thevenir, 633 N.E.2d 504 (Ohio 1994)(abrogation of the collateral source rule, section 2307.45 of the Ohio Revised Code, violated the right to trial by jury, due process, equal protection, and the open courts provision); Burgess v. Eli Lilly & Co., 609 N.E.2d 140 (Ohio 1993) (accrual date for DES related injury, section 2305.10 of the Ohio Revised Code, violated open courts provision); Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991)(cap on general damages for medical malpractice claims in section 2307.43 of the Ohio Revised Code violated due process); Brady v. Safety-Kleen Corp., 576 N.E.2d 722 (Ohio 1991)(statutory changes in the law of intentional tort as an exception to workers' compensation immunity, section 4121.80 of the Ohio Revised Code, violated equal protection and the right to trial by jury; concurring justices also noted a violation of the open courts provision); Gaines v. Pre-Term Cleveland, Inc., 514 N.E.2d 709 (Ohio 1987)(medical malpractice statute, section 2305.11 of the Ohio Revised Code, violated open courts provision).

[27] A claim that abolition violates the privileges and immunity clause of Article I, Section 2, has also been raised. *See* Brief of Plaintiff-Appellant at 30, *Carrel* (No. 95-1773). This argument is no stronger or weaker than that of the broader equal protection argument. The right to trial by jury, OHIO CONST. art. I, § 5, is not implicated as where the General Assembly has the authority to abrogate a cause of action the absence of a right to trial on such a claim is foreclosed.

[28] OHIO REV. CODE ANN. § 2307.75 (Anderson 1998). The appellate decision asserts that the Act does not foreclose a remedy and creates two previously unavailable causes of action: post-market failure to warn liability and misrepresentation liability. *Carrel*, 1995 Ohio App. LEXIS 3091, at *22, relying on OHIO REV. CODE §§ 2307.76-.77 (Anderson 1994).

Neither the open courts provision nor any other constitutional mandate dictates that there is a vested right to common law actions. The furthest the Court has gone in this regard is to recognize that the abolition of a common law cause of action must comport with constitutional demands.

> No one has a vested right in rules of common law. Rights of property vested under the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will of the legislature *unless prevented by constitutional limitations*. The great office of statutes is to remedy defects in the common law as they are developed and to adapt it to new circumstances.[29]

Hardy v. VerMeulen recognized Ohio's right to remedy provision and mandated court access for those seeking redress for personal injury. Therefore, the court deemed the medical malpractice statute of repose unconstitutional because it closed the door to a remedy before a cause of action could accrue.[30] No similar slamming of the door can be found in the Product Liability Act.

Legislation which involves neither a fundamental right nor a suspect class is valid provided it comports with the rational basis test.[31] Perhaps most germane to the proper analysis of *Carrel* is the standard applicable to the right to remedy provision. If this right is violated, strict scrutiny becomes imperative since a fundamental right would be involved. In *Carrel*, plaintiff's counsel made precisely this argument, relying in part on *Fabrey v. McDonald Police Department*.[32]

Fabrey did not support a strict scrutiny analysis,[33] although it recognized that analysis of the right to remedy provision focused on whether a cause of action existed at the time the constitutional provision came into being.[34] The *Fabrey* court merely held that the General Assembly had the right to define the "contours of the state's liability, within the constraints of equal protection and

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[29] Hardy v. VerMeulen, 512 N.E.2d 626, 630 (Ohio 1987) (citations omitted). *See* Strock v. Pressnell, 527 N.E.2d 1235, 1241 (Ohio 1988).

[30] Hardy, 512 N.E.2d at 627-29. This author has consistently agreed with the court on this and several other points. *See* Stephen J. Werber, *A National Product Liability Statute of Repose - Let's Not*, 64 TENN. L. REV. 763 (1997); *Ohio Tort Reform Versus the Ohio Constitution*, 69 TEMP. L. REV. 1155 (1996); *The Constitutional Dimension of a National Products Liability Statute of Repose*, 40 VILL. L. REV. 985 (1995).

[31] Fabrey v. McDonald Village Police Dep't, 639 N.E.2d 31, 33 (Ohio 1994)(equal protection). The equivalent standard, in regard to due process concerns, is whether the legislation bears "a real and substantial relation to public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary." *Id.* at 34.

[32] *See* Brief of Plaintiff-Appellant at 26, *Carrel* (No. 95-1773). *Fabrey*, 639 N.E.2d at 33.

[33] The Court of Appeals in *Carrel* applied a rational basis standard of scrutiny to reject the contention that abolition of the common law negligent design theory violated the equal protection and due process clauses. *Carrel*, 1995 Ohio App. LEXIS 3091, at *22-27.

[34] *Fabrey*, 639 N.E.2d at 35.

due process, [and] the right to sue the state [was] not fundamental."[35] The *Fabrey* decision also recognized that prior case law invalidating legislation under the right to remedy provision involved "the serious infringement of a clearly preexisting right to bring suit."[36]

Neither the abolition of a common law cause of action for negligent design, nor the availability of an assumption of the risk defense to employment related product liability injury, works such a "serious infringement." Parties injured by defective products retain full access to the courts and full capacity to recover for harm caused by defective products. The fact that a cause of action for negligent design existed at any specific time is, therefore, irrelevant to the discussion and cannot be utilized to bootstrap a rational basis claim into a strict scrutiny analysis.

The sole purpose for retaining a negligent design cause of action has no bearing upon an injured party's capacity to seek relief. The Act amply provides such a remedy in a manner far more favorable to the claimant than a negligence action. By continuing this cause of action, the court imposed a "serious infringement" upon the rights of products liability defendants. These defendants have lost an otherwise complete defense - assumption of the risk - to principles of comparative negligence.

Assuming the Product Liability Act is amended to overrule *Carrel*, or upon reconsideration the court reverses field,[37] the abolition of a common law action for negligent design should pass constitutional muster. The court would be compelled to validate legislation clearly abrogating this cause of action despite its reluctance to accept tort reform as a proper legislative function.

Under a truly rational approach, one must conclude that abolition of the common law negligent design cause of action:

1. Has no effect on an injured party's ability to seek compensation for harm caused by a defective product;
2. Does not discriminate against members of a suspect class;
3. Does not impose a serious infringement on a fundamental right - even assuming that such a right exists; and

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[35] *Id.*

[36] *Id.* Relying on decisions invalidating repose provisions, Burgess v. Eli Lilly & Co., 609 N.E.2d 140 (Ohio 1993); Hardy v. VerMeulen, 512 N.E.2d 626 (Ohio 1987); and State *ex rel.* Christian v. Barry, 175 N.E. 855 (Ohio 1931) (invalidating a police department rule which made a remedy contingent on permission of an officer's superior).

[37] Such a reversal is possible. *See* Wilfong v. Batdorf, 451 N.E.2d 1185 (Ohio 1983) (overruling two comparative negligence decisions, Straub v. Voss, 438 N.E.2d 888 (Ohio 1982), and Viers v. Dunlap, 438 N.E.2d 881 (Ohio 1982)), *overruled in part by*, Van Fossen v. Babcock & Wilcox, 522 N.E.2d 489 (Ohio 1988). *See also* Roberts v. Ohio Permanente Medical Group, Inc., 76 Ohio St.3d 483 (1996) (redefining essential causation elements to permit a "loss of chance" action to proceed), *overruling* Cooper v. Sisters of Charity, 272 N.E.2d 97 (Ohio 1971).

4. Advances the legislative intent to bring greater fairness into tort law, including products liability law, and is rationally related to that important governmental interest.[38]

These four factors compel the conclusion that abrogation of the common law negligent design cause of action is constitutional. The *Carrel* court should have found that the Act abolished this cause of action, and the abolition was a proper exercise of legislative power. The court should have also determined that the lower courts properly granted summary judgment based on assumption of the risk, as no genuine issue of material fact existed.

C. *The Holdings*

The Ohio Supreme Court's analysis of legislative intent reflects an unstated objective validating the cliche of the "tail wagging the dog". The objective was to negate, if not demolish, assumption of the risk as a defense in products liability claims arising from workplace injury. With this understanding of the court's unstated objective, it becomes much easier to comprehend the court's selection of governing law and its semantic games. This means-to-an-end permitted the court to conclude that the Act did not abrogate the common law negligent design cause of action. Unlike the supreme court, the court of appeals addressed this most significant question in a straightforward and logical manner.

1. In the Ohio Court of Appeals

After a brief survey of the claims which an injured party could bring to seek relief for product-related injury before and after adoption of the Act, the court of appeals rejected the plaintiff's contention that the Act did not abrogate a common law negligent design theory. The court recognized that the General Assembly was well aware of where it wanted to retain a negligence theory and where it chose not to perpetuate a negligence theory. Though the court did not rely on the well-recognized principle of interpretation known as *expressio unius est exclusio alterius*,[39] this principle accurately summarizes the appellate court's approach.

In section 2307.72(D)(1), the Act preserves all common and civil law penalties arising from "contamination or pollution of the environment;" thus, the "legislature did not intend to supersede nonstatutory forms of relief in environmental actions."[40] Section 2307.78(A)(1) provides that a negligence claim may be brought against a supplier. This provision, designed to hold a supplier liable for its own misconduct rather than that of a product manufacturer, protects the consumer by permitting a cause of action in strict

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[38] This result is reached even if we accept the position that there is no litigation crisis and no insurance crisis.

[39] *See e.g.*, Craftsman Type, Inc. v. Lindley, 451 N.E.2d 768, 770 (Ohio 1983); State *ex rel.* Jackman v. Court of Common Pleas, 224 N.E.2d 906, 910 (Ohio 1967).

[40] *Carrel*, 1995 Ohio App. LEXIS 3091, at *19.

liability where an action against the manufacturer is not available or where the supplier has assumed the role of manufacturer.[41]

The significant "silence" of the legislature as to a negligent design claim in a product liability action against a manufacturer, in light of its recognition of negligence principles in specific situations, led the appellate court to conclude that such an action no longer exists. Therefore, to "maintain a products liability suit against a manufacturer, one must conform his cause of action to the statute."[42] The more obvious reason for concluding that the Act provides the exclusive means for recovery, the "subject to" language of section 2307.73 was not needed to support the appellate decision.[43]

2. In the Ohio Supreme Court

Rather than give the General Assembly credit for knowing its intentions and its knowledge of negligence concepts, the Supreme Court, in a true act of legerdemain, managed to distort rules of statutory construction, to misstate its own syllabus in *McAuliffe v. Western States Import Company*,[44] and to redefine the reasoning of *McAuliffe* to support its determination that the common law of negligent design defect remains viable.

To the extent it stressed the need to seek out the legislative intent, the court's approach to the effect of the Act was eminently correct. Precedent did require a clear expression of intent before a statute could be construed as abolishing a previously existing common law cause of action. The *Carrel* court started with the holding and reasoning in *State ex rel. Morris v. Sullivan*.[45] *Morris* supported the conclusion that there can be no abrogation of common law rights unless the statute contains express language to that effect.

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[41] OHIO REV. CODE ANN. § 2307.78(A) (Anderson 1998).

[42] *Carrel*, 1995 Ohio App. LEXIS 3091, at *20.

[43] The appellate court relied upon section 2307.72 of the Ohio Revised Code as the provision delineating the laws which were not superseded, but made no direct use of the "subject to" language of section 2307.72(A).

[44] *Carrel*, 677 N.E.2d at 800 (citing McAuliffe v. Western States Import Co., 651 N.E.2d 957 (1995)). The court properly ignored plaintiff's assertion that two appellate court decisions recognized the continued viability of this theory. *See* Brief of Plaintiff-Appellants, *Carrel* at 21 (No. 95-1773) (citing Falls v. Central Mut. Ins. Co., No. 95APE06-757, 1995 Ohio App. LEXIS 5645 (Ohio App. Dec. 21, 1995) and Mullins v. Clark Equip. Co., No. 14426, 1994 Ohio App. LEXIS 4832 (Ohio App. Oct. 26, 1994)). Though both cases involved products liability claims against manufacturers including a claim based on negligent design, neither addressed the validity of this claim. Resolution of a case on a specific issue, without addressing the validity of an alleged cause of action, provides no basis for interpreting the decision as a *sub silentio* approval of an alleged cause of action. *But see* Sikorski v. Link Elec. & Safety Control Co., No. 70187, 1997 WL 15274, at *6 (Ohio App. Jan. 16, 1997); Long v. Tokai Bank, 682 N.E.2d 1052, 1056 (Ohio App. 1996); Brown v. McDonald's Corp., 655 N.E.2d 440, 441 (Ohio App. 1995).

[45] State *ex rel.* Morris v. Sullivan, 90 N.E. 146 (Ohio 1909).

The *Morris* syllabus is not this restrictive: "the Legislature will not be presumed or held to have intended a repeal of the settled rules of the common law, unless the language employed by it clearly expresses *or imports* such intention."[46] Unless the *Morris* court included the words "or imports" as a redundancy, these words must have additional significance. Thus, precise words of abrogation need not be present if the thrust of the Act and the legislative intent creates that effect. *Morris* does not require the General Assembly to include a prefatory statement, nor the following language within given sections: "This Act is intended to abrogate all common law causes of action for products liability claims not enumerated herein."[47]

The Ohio Supreme Court also relies on two appellate court decisions to support its assertion that specific words are necessary to find an abrogation of the common law.[48] Both of these decisions unsuccessfully sought express words of intent, and both refused to extend a statute beyond its terms. In *Iron City Produce Co. v. American Ry. Express Co.*, the court recognized that judicial interpretation was an improper device to extend the application of a statute.[49] The *Iron City* court refused to include express companies within the venue provisions of legislation where the legislation designated a number of similar companies. Quite simply, since the legislation controlled judicial authority over a listed group of entities, it could not be extended to include any other entity. This reasoning supports the *expressio unius* principle and strongly parallels the action of the appellate court in *Carrel.* The supreme court, however, replaced section 2307.78 of the Act with its own section and modified section 2307.73(A)(1) to accommodate this previously omitted cause of action. Did someone say that courts do not legislate?[50]

Based on an approach demanding express words of abrogation, the court found that sections 2307.71(M), 2307.73, and even 2307.72(A), failed to include express wording which declared that the common law action of negligent design had been abrogated. Of course, this is correct. This does not mean,

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[46] *Id.* at syllabus 3 (emphasis added).

[47] The General Assembly could have placed such language in the Act. Somewhat similar language is found in some laws, including the Criminal Code. The absence of given language, where other language serves the same purpose, is not revealing. The analysis must focus on what was stated rather than what was not stated. The court wisely refrained from a line of argument predicated on more specific statutory language in other fields.

[48] Frantz v. Maher, 155 N.E.2d 471 (Ohio App. 1957); Iron City Produce Co. v. American Ry. Express Co., 153 N.E. 316 (Ohio 1926). The principle of law utilized in *Frantz* was proper, but could have been applied differently in *Carrel.* The *Frantz* decision held that a statute of frauds governing agreements to make a will or devise did not extend to a promise to die intestate.

[49] *Iron City*, 153 N.E. 316.

[50] Compare Justice Cardozo's well known advice in the field of contract law: "We are not at liberty to revise while professing to construe." Sun Printing & Publ'g. Ass'n. v. Remington Paper and Power Co., 139 N.E. 470, 471 (N.Y. 1923).

however, that the legislature adopted a major piece of products liability legislation without the intent to have it represent a comprehensive law establishing *all* legal theories under which a products liability claim may be brought.

The three decisions relied upon in *Carrel* could have yielded a result opposite to the court's decision. Both of the appellate decisions gave effect to the plain meaning of the relevant legislation, though both utilized the principle that clarity is required before a legislative act will be deemed to abrogate a common law action. Each refused to extend the effect of the legislation beyond that meaning.

The *Morris* decision was predicated on an ambiguity in the legislation. The question presented in that case was whether an outgoing governor had the power to appoint a commissioner where this would contravene an established common law doctrine that an officer could not make a valid appointment for a term which is not to begin until after expiration of the term of office of the appointing officer. This question was arguably answered by the fact that the legislation in question mandated only that appointments be made in January.[51] One week prior to the expiration of his term of office, on January 4th, the governor made an appointment.[52] The court held that the inclusion of the month of January in the legislation was insufficient to abrogate the common law.[53]

In *Morris*, the most relevant case relied upon in *Carrel*, the court faced a blatant effort to continue executive authority after the executive was not in office when there was "no present necessity . . . for the making of such appointment."[54] The common law and the statutory language could be read in *pari materia*, as they were not inconsistent. In effect, the common law complemented and clarified the legislation. At most, the court stretched to find the word "January" was insufficient to suggest the necessary legislative intent in a case where no other evidence of specific intent could be found.[55]

The court observed that the statute, "neither in express terms, *nor by necessary implication* from the language therein employed"[56] imposes the duty to appoint on the outgoing governor. This reasoning, which clarified the syllabus, establishes that the common law can be abrogated by either (1) express language, or (2) wording which imports - by necessary implication - the intent

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[51] *Morris*, 90 N.E. at 149.

[52] *Id.* at 148.

[53] *Id.* at 149-50.

[54] *Id.* at 150.

[55] *Cf.* Muczyk v. Cleveland State Univ., 675 N.E.2d 1283 (Ohio App. 1996) (the term "calendar year," as used in section 3307.35 of the Ohio Revised Code, defined to mean a period of twelve consecutive months).

[56] *Morris*, 90 N.E. at 150 (emphasis added).

to abrogate the common law. The *Carrel* decision failed to recognize the existence of the second methodology.

Rather, the *Carrel* court asserted that there was no explicit statement in section 2307.71(M) of the Ohio Revised Code which abrogated the common law cause of action. This section provides, in applicable part, that a products liability claim means:

> A claim that is asserted in a civil action and that seeks to recover compensatory damages from a manufacturer . . . for death, physical injury to person, emotional distress, or physical damage to property other than the product in question that arose from any of the following [design, formulation, production, construction creation, assembly, rebuilding, testing, or marketing of the product; warning or instruction defects; or failure to conform to any relevant representations or warranty].[57]

There is no explicit statement that this definition excludes other forms of common law actions for product defect litigation. Yet, it is hard to conceive of a broader definition that could better announce a legislative intent of exclusivity. The plain meaning standard of statutory interpretation, fully consistent with the reasoning and outcome of each of the cases relied upon in *Carrel*, supports the conclusion that the definition encompasses "design" claims. The section does not differentiate between types of design claims. The legislative intent is clear:

> The definition is intended to be broad and to embrace claims challenging virtually any aspect of commercial product design, manufacture, marketing, or warning. The definition does not distinguish one legal theory of recovery (e.g., negligence or strict liability) from another. Whether a civil action includes a "product liability claim" depends on what is sought and from whom it is sought.[58]

The cause of action in *Carrel* was (1) a civil action, (2) seeking compensatory damages from a manufacturer, (3) for physical injury, (4) arising from a design defect. The Act was designed to address all such claims. The plain rule and legislative intent expressed by draftsman of the bill mandate the same conclusion: the definition is comprehensive and all-inclusive, and excludes all forms of action not specified within its terms.

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[57] OHIO REV. CODE ANN. § 2307.71(M) (Anderson 1998).

[58] STANTON G. DARLING II, OHIO CIVIL JUSTICE REFORM ACT 46 (Banks-Baldwin 1987). Professor Darling was an advisor to the Office of the Speaker of the House and draftsman of a majority of the Act. This author testified before the relevant committee of the General Assembly and, at the request of the chairman, forwarded various comments and proposed language modifying initial drafts of the Act. Several of these proposals were incorporated into the legislation.

The *Carrel* court's treatment of the definition section of the Act avoids any close analysis in favor of a simplistic "it is not explicitly" palliative. This approach was not applicable to the argument that an explicit statement of intent negated any claim to the continued existence of common law actions. Section 2307.72(A) mandates that: "Any recovery of compensatory damages based on a product liability claim is subject to sections 2307.71 to 2307.79 of the Revised Code." The nine referenced sections of the Code comprise the Product Liability Act and carefully delineate each available theory of action. Although negligence actions are specifically carried forward in section 2307.72(D)(2)(b) and section 2307.78, there is no mention of a common law action for negligent design. Rather, design claims are specifically governed by the strict liability provisions of section 2307.75.

A basic rule of statutory interpretation is to ascertain and apply the plain meaning of the words chosen by the legislative body.[59] Accepting the claim of the Ohio Academy of Trial Lawyers as *amicus curiae*, the *Carrel* court determined that the phrase "'subject to' is not strong enough to completely eliminate unmentioned common-law theories."[60] The court then found that, under a principle of strict construction, the statute could not be extended by implication and, therefore, the common law action for negligent design was not abrogated. Even without trying to ascertain the meaning of "not strong enough to completely eliminate," the court's conclusion is mind boggling.[61]

There was no need for the court's approach. "Subject to" is strong enough, clear enough, and loud enough for any who want to listen. The legal definition of the term is so obvious that it can be found in a typical legal dictionary to include the meaning "governed or affected by."[62] An action "governed by"

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[59]Section 1.42 of the Ohio Revised Code states, in applicable part: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." *See also* O'Neill v. United States, 410 F.2d 888, 895 (6th Cir. 1969); United States v. Firestone Tire & Rubber Co., 518 F.Supp. 1021, 1034 (N.D. Ohio 1981); State *ex rel.* Luckey v. Etheridge, 583 N.E.2d 960, 961-62 (Ohio 1991); Dixon v. Bernstein, No. CA94-08-167, 1995 WL 448015 (July 31, 1995); John Ken Alzheimer's Ctr. v. Ohio Certificate of Need Bd., 583 N.E.2d 337, 339 (Ohio App. 1991).

In State v. Wilson, 673 N.E.2d 1347 (Ohio 1997), the court recognized that "the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose." *Id.* at 1349 (quoting State *ex rel.* Cleveland Elec. Illuminating Co. v. Euclid, 159 N.E.2d 756, 759 (1959)). In *Carrel*, of course, the General Assembly's insertion of the phrase "subject to" proved to be a "vain and useless thing."

[60]*Carrel*, 677 N.E.2d at 799.

[61]*Id.* This author cannot comprehend the meaning of the sentence. Is the court saying that some of the theories were not abrogated? If so, what could they be? Is the court saying that only some part of common law negligent design theory was abrogated? That intent makes no sense.

[62]BLACK'S LAW DICTIONARY 1425 (6th ed. 1990).

something can be subject to nothing else.[63] There was no need to seek further elucidation of legislative intent. It was right there.

Stanton G. Darling, a draftsman of the Act, again provides the requisite insight into the significance of this provision. His text makes clear that the intent to be comprehensive and to omit all other actions was incorporated into the simple phrase "subject to." He observed that under prior law "a product liability action . . . might be tried on any one or more of ten legal theories, including two different forms of strict liability in tort, five different warranty theories, negligence, and negligent or fraudulent misrepresentation."[64] He then makes the point clearly and concisely: "The provisions of R.C. 2307.71 to R.C. 2307.80, with one important exception . . . thus control the award of compensatory and punitive damages with respect to *any* 'product liability claim.' As to such a claim, *those provisions control despite any inconsistent prior Ohio common law.*"[65] This is the legislative intent and the point where the court's discussion should have both commenced and terminated. When viewed as a whole, with recognition of the interrelationship between sections 2307.71(M) and 2307.72(A), the plain meaning of the Act negates any necessity to apply other principles of statutory interpretation, even those which could be forced to yield a different result.

A reasonable reading of the express words of the Act makes it unnecessary to determine whether the lower courts in *Carrel* correctly held that the Act provided new causes of action so as to come within the ambit of a new statutory cause of action rather than a codification of some existing law. Such a reading also obviates the need to determine whether the inclusion of some negligence causes of action, without mention of other negligence based theories, requires a determination that negligent design claims were intentionally omitted and

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[63] Decisions such as Koske v. Townsend Eng'g, Co., 512 N.E.2d 437 (Ind. 1990), relied upon in Plaintiff-Appellant's Brief at 20, are consistent with this analysis. The court held that the Indiana Act did not affect the availability of the "open and obvious danger" common law defense to negligence based products liability claims despite the statement in Section 33-1-1.5-1 of the Indiana Code that the chapter "shall govern all products liability actions, including those in which the theory of liability is negligence or strict liability in tort." However, Section 33-1-1.5-3 of the Indiana Code provides that "[t]he common law of this state with respect to strict liability in tort is codified and restated as follows . . . ." *Id.* The court reasoned that this was limiting language revealing an intent to codify and preempt the common law as to only strict liability actions. The court's interpretation of the statute was predicated on standards similar to those asserted in this article and was affirmed by the legislature through a subsequent amendment of the Act. *See Koske*, 551 N.E.2d at 442, n.2.

[64] Darling, *supra* note 58, at 50.

[65] *Id.* (emphasis added). The exception is the special provision for environmental torts. This reasoning was applied by the Sixth Circuit Court of Appeals when it rejected market share liability under Ohio law. *See* Kurczi v. Eli Lilly Co., 113 F.2d 1426, 1434 (6th Cir. 1997). The Court based its decision, in part, on the conclusion that the Products Liability Act "is by its express terms exclusive." *Id.*

thus abrogated.[66] Recognizing an explicit statement of intent to abrogate, the court's own standard, suffices. Only the desire to circumvent the totality of an assumption of the risk defense explains the semantics and rationale of the *Carrel* decision.[67]

The majority's utilization of an improper standard for determining legislative intent is manifest in Justice Cook's dissent. Justice Cook's opinion establishes that reliance upon *Morris* is improper because it did not involve codification of actions previously known to the common law.[68] This improper reliance led the majority to conclude that the "subject to" language of the Act was insufficient.

The proper precedent for consideration is found in *Bolles v. Toledo Trust Co.*,[69] a case addressing codification of the law governing living trusts.[70] Justice Cook relied on a portion of the *Bolles* Syllabus that states: "[w]here the General Assembly has codified the law on a subject, such statutory provisions are to govern to the exclusion of the prior non-statutory law unless there is a clear legislative intention expressed or necessarily implied that the statutory provi-

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[66] Application of proper principles of statutory interpretation also negate any need for "strict construction," an approach briefly relied upon by the majority. *Carrel*, 677 N.E.2d at 799. This approach was utilized in cases such as Sabol v. Pekoc, 76 N.E.2d 84 (Ohio 1947).

[67] The court is right in one respect. Section 2315.20 of the Ohio Revised Code retains assumption of the risk as a complete defense to product liability claims. Assumption of the risk should be part of a comparative analysis in negligence actions and product liability actions. Regrettably, the court failed to seize the opportunities presented to achieve this goal when deciding cases such as *Anderson*, 451 N.E.2d 780, and *Wilfong*, 451 N.E.2d 1115, *overruled in part by* Van Fossen v. Babcock & Wilcox Co., 522 N.E.2d 489 (Ohio 1988). To accomplish this goal would now require the court to find, as it should, that section 2315.20 of the Ohio Revised Code violates the equal protection clause. The court, despite its willingness to overturn tort legislation, does not appear ready to take this step and combine it with adoption of a common law comparative fault standard. This judicial response was improperly rejected by the Court of Appeals in *Carrel* which found the different effects of assumption in tort actions as distinct from product liability actions was consistent with equal protection. *Carrel*, 1995 Ohio App. LEXIS 3091, at *26-27. On the other hand, corrective action by the General Assembly could, and should, be taken to assure a fair balance between product defects and user conduct or knowledge.

[68] *Carrel*, 677 N.E.2d at 802 (Cook, J. dissenting in part, concurring in part).

[69] *Bolles v. Toledo Trust Co.*, 58 N.E.2d 381 (Ohio 1944), *overruled on other grounds by*, Smyth v. Cleveland Trust Co., 179 N.E.2d 60 (Ohio 1961). To assert that this decision is inapplicable because the Act does not expressly mention or deal with negligence claims, is to have the conclusion precede the premise. The question is whether the Act includes such claims. Unlike *Morris*, the legal question posed in *Bolles* is virtually identical to that posed in *Carrel*.

[70] OHIO REV. CODE ANN. § 1335.01 (Anderson 1998) (corresponds to as suggested in Plaintiff-Appellant's Brief at 22, General Code §§ 8617, 10504-4, and 10504-47 and related sections).

sions are merely cumulative."[71] The *Bolles* court declared that in such cases "it is the statutory provisions which are to be followed and it is the legislative policy which is to be observed."[72] The *Carrel* decision observes neither of these principles.

The majority effectively turned the burden of proof around. Rather than an express declaration of abrogation, precedent requires a seeking of an express declaration of continuation. The focus of the search for legislative intent should have been to determine whether the Act "expressed or necessarily implied that it is merely cumulative to the common-law cause of action."[73] Nothing in the Act expressly or implicitly suggests a desire to retain any common law actions, nor does it reflect a mere cumulation of common law actions.[74] Applying the majority's correct determination that the only evidence of intent is the "subject to" language, it is apparent that this amply supports the conclusions of the lower courts.

The legislature intended to abrogate all actions other than those expressed in, and governed by, the Act. The majority opinion fails to follow the statutory provisions and ignores legislative policy. It, therefore, fails to meet the demands of the most pertinent precedent through ostrich-like behavior. Under any method of statutory interpretation relying on *Morris*, *Bolles*, or *McAuliffe*, the result should have been the same: a common law action for negligent design no longer exists.

D. Misuse of McAuliffe

In an effort to lend credence to its strained analysis, the court relied extensively on *McAuliffe* where, purportedly, the majority "implicitly recognized that the Product Liability Act did not supplant the common law

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[71] *Carrel*, 677 N.E. 2d at 802 (quoting *Bolles*, 58 N.E.2d at 384) (Cook, J. dissenting in part, concurring in part).

[72] *Bolles*, 58 N.E.2d at 392.

[73] *Carrel*, 677 N.E.2d at 802.

[74] Justice Cook points out that just the opposite is true in light of the provisions in section 2307.73(A)(1) of the Ohio Revised Code (limiting manufacturer liability to the actions set forth in sections 2307.74-2307.77); the exclusion of environmental claims found in section 2307.72(D)(1); and the retention of negligence liability for actions against suppliers in section 2307.78. Thus, "the absence of negligent design from R.C. 2307.75 is revealing." *Carrel*, 677 N.E.2d at 803.

This analysis is consistent with principles of comparative negligence. Contrary to plaintiff's assertion that section 2315.19 of the Ohio Revised Code recognizes that product liability negligence claims "continue to exist," this statute has no such effect. *See* Plaintiff-Appellant's Memorandum in Support of Jurisdiction at 7 and Brief at 18-19. The statute applies to *existing* causes of action within its ambit. Its application to negligent design claims is a function of the existence of such a law independent of the comparative negligence statute. Once a cause of action is abrogated, it cannot be resurrected by application of section 2315.19 as the section has nothing to which it can be applied.

applicable to products liability claims."[75] Not only was there no such implication, *McAuliffe* suggested the opposite conclusion. The majority analysis in *McAuliffe* began by taking out of context an essential principle found in its syllabus. The majority opinion in *Carrel* asserted that the *McAuliffe* syllabus states "the Act 'does not provide a cause of action that would not exist but for the statute.'"[76] The syllabus actually states: "Because R.C. 2307.73 does not provide a cause of action that would not exist but for the statute . . . ."[77] The distinction between a syllabus holding which references a section of a statute and a syllabus holding which references a complete Act is ignored. With this change in the law, the majority constructed the *McAuliffe* road to reach a decision inconsistent with its original blueprint.

Next, the *Carrel* majority correctly observed that the *McAuliffe* decision applied a "but for" test to determine that the Act did not create a previously unavailable cause of action and did not represent an action upon liability created by statute.[78] The holding in *McAuliffe* was directed solely to the question of whether the Act codified prior law so as to come within the personal injury statute of limitations or created a statutory cause of action subject to a longer statute of limitations.[79] It was silent as to whether application of the "but for" test also meant all common law product liability theories survived enactment of the Act. Unlike the restricted view taken in regard to the purported silence of the General Assembly, the *Carrel* court seized on this silence to attain its goal: the legislation did not create new law.[80]

Concluding that the legislation does not create new law is vastly different from concluding that the Act does not abrogate prior law. This logical distinction and its policy implications were not mentioned. Declaring two plus two equals four and only four, is not the same as declaring four must always

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[75] *Carrel*, 677 N.E.2d at 799-800 (relying on the dissenting opinions of Justice Douglas in Curtis v. Square-D Co., 652 N.E.2d 664 (Ohio 1995) and Byers v. Consolidated Alum. Corp., 652 N.E.2d 643, 644 (Ohio 1995)). Both majority decisions merely declare that, on the strength of *McAuliffe*, the two year statute of limitations of section 2305.10 of the Ohio Revised Code, rather than the six year period specified in section 2305.07 of the Ohio Revised Code, applies to product liability claims for personal injury. The virtually identical dissenting opinions provide no reasoning beyond reference to Justice F.E. Sweeney's dissenting opinion in *McAuliffe*. If the court is now declaring this core aspect of the *McAuliffe* dissent valid, one must wonder whether the majority is suggesting that *McAuliffe*, a properly decided case, was wrongly decided.

[76] *Carrel*, 677 N.E.2d at 799.

[77] *McAuliffe*, 651 N.E.2d at 958.

[78] *Carrel*, 677 N.E.2d at 799.

[79] The issue before the court in *McAuliffe* involved a discussion regarding which specific statutes of limitation applied to actions brought pursuant to the Act. This issue was far narrower than the issue of whether the Act supplanted the common law. The "implicit" recognition relied upon by the majority in *Carrel* reflects a misunderstanding of *McAuliffe*. *Carrel*, 677 N.E.2d at 803 (Cook J, dissenting in part and concurring in part).

[80] The Act can be viewed as creating new law. *See supra* note 28.

be a function of two plus two. Neither deductive nor inductive reasoning always works in both directions. The court created an equivalence where none exists.[81]

It must also be recognized that the "but for" test in *McAuliffe* supported the supreme court's reasoning and holding regarding statutory modification. Additionally, the test reinforced the court's determination that product liability actions preceded adoption of the Act.[82] In *McAuliffe*, unlike *Carrel*, the actions under discussion were limited to the four claims described in Ohio Revised Code section 2307.73. They did not involve allegations of common law negligent design. These provisions unquestionably reflect a codification of previously existing common law actions. Two of the three modifications discussed by the court, economic loss and express warranty theory, were also consistent with existing common law. The third modification, raising the standard for the imposition of punitive damages, was correctly viewed as unrelated to restricting the right to such damages; it did not create a liability, it merely modified the applicable standard of proof.

When limited to these seven points (four causes of action and three purported modifications), it is proper to conclude that there was a codification rather than the requisite transformation of law and creation of a statutory cause of action. When viewed from the perspective of the entire Act, the picture is quite different. To the extent personal injury recovery for product claims remains the core of the Act, it can be viewed as at least a partial codification of common law. This justifies application of the two year personal injury statute of limitations. Because a review of the full Act discloses (1) the creation of liability for post-market failure to warn[83] and for misrepresentation,[84] (2) the continuation of the statutory claims against suppliers,[85] (3) and limited express continuation of negligence theory,[86] it becomes apparent that the Act creates law and reflects an intent to preempt the field.

This analysis is consistent with Justice Cook's opinion in *Carrel*, which points out that proper application of *McAuliffe* provides a result contrary to the

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[81] Even a philosopher and logician as prominent as Alfred Lord Whitehead might have had difficulty with the court's analysis in this case.

[82] *McAuliffe*, 651 N.E.2d at 960.

[83] OHIO REV. CODE ANN. § 2307.76(A)(2)(b) (Anderson 1994).

[84] Section 2307.77. The statutory approach to conformance as to manufacturers' representations builds on, but differs from, the express warranty approach of Rogers v. Toni Home Permanent Co., 147 N.E.2d 612 (Ohio 1958).

[85] Section 2307.78 (retaining negligence principles in actions against suppliers).

[86] Section 2307.72(D)(1)(preserving negligence claims for environmental tort actions).

majority's view.[87] The logic applied by Justice Cook, unlike the majority's, is appropriate and pointed.

> To say that the Act did not create causes of action unavailable at common law, however, does not foreclose a determination that the Act supplants those common-law theories. In fact, the *McAuliffe* court's treatment of the Act as a codification of products liability law provides further support for application of the rule of statutory construction set forth in *Bolles* . . . and the ultimate conclusion that the common-law cause of action of negligent design has been abrogated by the Products Liability Act.[88]

McAuliffe had nothing to do with the question of the abrogation of common law causes of action. Only by ignoring the context of its holding and its reasoning can it be given the interpretation found in *Carrel*. The decision reached is not justified by the methodology of statutory interpretation utilized by the court or its interpretation of *McAuliffe*. The outcome was, however, absolutely predictable.

E. Assumption of the Risk

In the face of questionable statutory interpretation and a route negating the need for constitutional analysis, the question then becomes what happened when the court decided this case. To fully comprehend the *Carrel* decision's illogical determination that statutory construction leads to a conclusion that the legislature did not intend to abolish the common law claim for negligent design of a product, the court's motivation must be considered. The court's desire to continue a concept of negligent design recovery is devoid of relationship to any constitutional concern. Rather, the purpose was to allow injured claimants an approach which circumvents the effect of assumption of the risk.

In actions brought pursuant to the strict liability provision of the Act, as was the case at common law, assumption of the risk remains a complete defense.[89] In some cases this would mean judgment for the defense as a matter of law regardless of the level of assumptive conduct.[90] However, under the

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[87] *Carrel*, 677 N.E.2d at 803 (Cook, J. dissenting in part and concurring in part).

[88] *Id.*

[89] Assumption of the risk has been a complete defense to strict liability claims since their inception. *See* Onderko v. Richmond Mfg. Co., 511 N.E.2d 388 (Ohio 1987) (relying on Bowling v. Heil Co., 511 N.E.2d 373 (Ohio 1987) and RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965)). *Accord* OHIO REV. CODE ANN. § 2315.20(B)(2) (Anderson 1994).

[90] Although the grant of summary judgment based on a conduct-based affirmative defense is rare, such orders have been affirmed in proper cases. *See, e.g.*, Riley v. Burnup & Sims Comtec, Inc., No. 1-90-113, 1991 WL 216783 (Ohio App. Sept. 12, 1991)(negligence action); Meador v. Wagner-Smith, No. 11886, 1990 WL 73725 (Ohio App. June 1, 1990)(product liability action). *Accord* Monaco v. Ohio Expositions Comm., 659 N.E.2d 393 (Ohio Cl. Ct. 1995)(plaintiff's actions were proximate cause of harm

comparative negligence statute upheld and effectively made retroactive by the court,[91] assumption of the risk merges with contributory negligence permiting recovery unless and until the fact finder determines that plaintiff's conduct caused more than fifty percent of the harm for which relief is sought.[92] Posed differently, the effect of maintaining a negligent design theory is to give injured parties two bites of the apple when fairness dictates that one bite suffices.[93] Dr. Pangloss would appreciate the court's approach as it truly provides injured parties with the best of all possible worlds.

Prior precedent and language found within the *Carrel* opinion supports this analysis, though the court's language may not have been intended to be quite so revealing. The court's hostility to any effort which limits the theories under which an injured party can seek relief was manifest in *Crislip v. TCH Liquidating Co.*[94] In *Crislip*, wrongful death and personal injury claims were predicated on a variety of product liability theories including strict liability failure to warn.

The *Crislip* action involved an instruction manual that had multiple warnings but failed to expressly state that exposure to deadly carbon monoxide fumes could result from the venting of a gas furnace and defendant's wood-burning add-on furnace through the same flue. The appellate court reversed the trial court's directed verdict for the defendant and held that a strict liability failure to warn claim could be asserted based on its own prior decisional law.[95] This decision was in conflict with other case law rejecting this cause of action.[96] The supreme court found its precedents misinterpreted and

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sustained).

[91] Wilfong v. Batdorf, 451 N.E.2d 1185 (Ohio 1983).

[92] Anderson v. Ceccardi, 451 N.E.2d 780 (Ohio 1983); OHIO REV. CODE ANN. § 2315.19 (Anderson 1998). Curious George would appreciate the court's failure to raise an equal protection argument since product liability cases did not permit comparative principles even though those principles applied to all other personal injury plaintiffs. *But see* OHIO REV. CODE § 2315.20 (Anderson 1998).

[93] Bite one: a strict liability statutory action which carries forward the court's precedents easing the plaintiff's burden of proof, but exposing plaintiff to a complete assumption of the risk defense.

Bite two: a common law negligence action which carries a higher burden of proof, but largely negates the effect of plaintiff's assumption of the risk or contributory negligence.

[94] Crislip v. TCH Liquidating Co., 556 N.E.2d 1177 (Ohio 1990).

[95] *Id.* (citing Krosky v. Ohio Edison Co., 484 N.E.2d 704 (Ohio Ct. App. 1984)). *Krosky* was predicated on a strained reading of leading decisions such as Seley v. G.D. Searle & Co., 423 N.E.2d 831 (Ohio 1981), and *Temple*, 364 N.E.2d 267.

[96] *See, e.g.*, Hardiman v. Zep Mfg. Co., 470 N.E.2d 941 (Ohio App. 1984). *Hardiman* represented the prevailing view based on language found in Leichtamer v. American Motors Corp., 424 N.E.2d 568 (Ohio 1981) and *Temple*, 364 N.E.2d 267, which held (1) failure to warn claims must be predicated on negligence, and (2) the presence of an adequate warning is a defense to a claim of strict liability. *Accord* Overbee v. Van Waters & Rogers, 706 F.2d 768 (6th Cir. 1983)(discussing Ohio law).

taken out of context by those courts which held an action for failure to warn in strict liability was precluded. The court, in establishing the cause of action, recognized "the standard imposed upon the defendant in a strict liability claim grounded upon an inadequate warning is the *same as that imposed in a negligence claim based upon inadequate warning.*"[97]

The *Crislip* decision did not open the courthouse to a plaintiff that could not otherwise reach the door, and it did not ease the plaintiff's burden of proof. The reason for adopting this cause of action was made manifest by the court:

> We do not mean to suggest that a cause of action for negligent failure to warn or warn adequately is identical to one brought under strict liability. One important difference concerns the availability of comparative negligence as a defense in the two types of action. A finding of comparative negligence . . . in a cause of action for negligent failure to warn . . . reduces the amount of damages awarded, . . . [if plaintiff is partially at fault]. However, comparative negligence cannot be raised as a defense to a cause of action in strict liability.[98]

In other words, the court found a way to allow a plaintiff a strong likelihood of success by abolishing the defense of contributory negligence.[99] The reasoning candidly removes a defense without even seeking to establish a difference in the two forms of action. Despite the language of "*one* important difference," the *only* difference is in the abolition of an essential defense. This approach, a change in the substantive law which has a surface aura of creating a cause of action but which actually is directed to the elimination of a defense, comports fully with the court's policy objectives. It is, however, in direct contravention of the General Assembly's policy objectives. This is precisely the approach taken in *Carrel*. Its adoption of a negligence theory allows for application of comparative negligence, including assumption of the risk, where otherwise a determination that plaintiff had assumed any part of the risk would result in a judgment for the defense. In both cases the decision favored the injured party. *Carrel* makes clear that this was precisely the cause of this otherwise illogical decision. In a note the court observes:

> The doctrine of assumption of the risk also applies to appellant's negligent design claim. However, as applied to this claim the plaintiff's assumption of the risk is not a complete bar to recovery. Instead, it operates to reduce his recovery if the jury finds that the assumption of

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[97] *Crislip*, 556 N.E.2d at 1183 (emphasis added).

[98] *Id.* The court, therefore, noted that the failure to instruct the jury on a strict liability theory was harmless error.

[99] Contributory negligence and assumption of the risk have been merged for purposes of comparative negligence. *See supra* note 8. Contributory negligence is not a defense to strict liability actions. Bowling v. Heil Co., 511 N.E.2d 373, 377-78 (Ohio 1987); RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965), *adopted in* Temple v. Wean United, Inc., 364 N.E.2d 267 (Ohio 1977).

> the risk amounted to fifty percent or less of the total responsibility for the injuries incurred.[100]

Rejecting the contention that *Cremeans v. Willmar Henderson Manufacturing Co.*[101] abolished assumption of the risk in all product liability cases involving a work-related injury, the court also managed to create ambiguity in its discussion. Immediately after this rejection, the court declared: "[h]owever, we find that this defense is unavailable in those situations where the job duties require the employee to encounter the risk, and the employee is injured while engaging in normal job-related duties."[102] The rejection and its qualification create a murky situation. This reasoning creates problems requiring further definition. The reasoning suggests that virtually any plaintiff bringing a product liability claim where the injury occurred within the scope of employment is immune from an assumption of the risk defense. "Normal job duties" remains an undefined and possibly undefinable phrase.[103] The statement that "the defense in not available when the employee is required to encounter the risk while performing normal job duties"[104] contains another element of ambiguity: just when is an employee "required" to encounter a risk?

In *Carrel* the court found that these issues required a jury determination. Yet there was no evidence that the employer required (at least not in any recognized definition of the term) Mr. Carrel to ignore safety precautions with which he was familiar.[105] An employee can be required to perform a task yet assume a risk in doing so where that risk is avoidable. Unlike the seminal case of *Cepeda v. Cumberland Engineering Co.*,[106] where an employee was ordered to operate a

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[100] *Carrel*, 677 N.E.2d at 801 n.5 (citations omitted).

[101] Cremeans v. Willmar Henderson Mfg. Co., 566 N.E.2d 1203 (Ohio 1991).

[102] *Carrel*, 677 N.E.2d at 801.

[103] Courts have consistently struggled to define the somewhat similar terms, "arising out of" and "in the course of employment" for purposes of workers' compensation claims. But as to these terms:

> No precise formula can be laid down, however, which will automatically solve every case insofar as these factors are determinative, since the "sphere of the employment" is variable in extent, depending upon the nature of the particular work . . . each case must be determined in view of its peculiar facts and circumstances.

93 OHIO JUR. 3d, *Workers' Compensation* § 115 (1989) (citations omitted). *See also* MTD Prods. Inc. v. Robatin, 572 N.E.2d 661 (Ohio 1991); Durbin v. Ohio Bureau of Workers' Comp., 677 N.E.2d 1234 (Ohio App. 1996); Childers v. Whirlpool Corp., 665 N.E.2d 256 (Ohio App. 1995); Woodrum v. Premier Auto Glass Co., 660 N.E.2d 491 (Ohio App. 1995); Fletcher v. Northwest Mechanical Contractors, Inc., 599 N.E.2d 822 (Ohio App. 1991); Delker v. Ohio Edison Co., 546 N.E.2d 975 (Ohio App. 1989).

[104] *Carrel*, 677 N.E.2d at 801.

[105] *See infra* note 103.

[106] Cepeda v. Cumberland Eng'g Co., 386 A.2d 816 (N.J. 1978).

machine without its safety guard, *i.e.* required to assume the risk, no such employer mandated action appears in *Carrel*.

Similarly, no such requirement appeared in *Freas v. Prater Construction Corp.*[107] In *Freas*, plaintiff's decedent (Blankenship) ignored warnings and instructions regarding the proper means of removing the boom from a crane, a task within his normal job duties. Nevertheless, the court had no difficulty in affirming a summary judgment in favor of the defense. The holding was based on a determination that the warnings were adequate as a matter of law and that no evidence demonstrated that the defendant's actions were the proximate cause of the harm involved.[108] The opinion failed to directly address assumption of the risk which is, of course, what happens when a party fails to heed an adequate warning. Nevertheless, the court was well aware of this relationship, noting there was no need for additional warnings because "Blankenship was required to read the manual and was seen reading it. *The record indicates that Blankenship, in fact, knew the relevant dangers* if one should stand under the boom."[109] This at least suggests the viability of assumption of the risk as a valid alternative approach.

The question then becomes whether the *Carrel* court applied a proper interpretation of the *Cremeans* assumption of the risk standard,[110] or modified the definition of assumption of the risk to further limit the potential of this defense.[111] The court's demand that plaintiff not only appreciate the existence of a risk of harm, but also that he "appreciate the full danger of the press,"[112] may create a situation in which lower courts conclude an injured party's appreciation of danger is insufficiently "full" to allow for jury consideration of this affirmative defense. To the extent this occurs, the defense has been judicially eviscerated. A jury charge that requires plaintiff's "full appreciation of all danger" associated with a product is a far cry from the current Ohio jury instruction.[113]

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[107] Freas v. Prater Construction Corp., 573 N.E.2d 27 (Ohio 1991).

[108] *Id.* at 31-32. The court also reiterated the standard for failure to warn liability was identical whether sounding in strict liability or in negligence. *Id.* at n.1.

[109] *Id.* at 31 (emphasis added).

[110] *Cremeans*, 566 N.E.2d at 1203.

[111] The failure of the court to even mention *Freas* suggests that either (1) the assertion that *Freas* contains an implicit assumption of the risk aspect is not well taken, or (2) the court chose to ignore this implication as it led to a conclusion in conflict with its desired outcome.

[112] *Carrel*, 677 N.E.2d at 801.

[113] I OHIO JURY INSTRUCTIONS § 9.50(2)(1996) provides:

> IMPLIED ASSUMPTION OF THE RISK. The defendant claims that the plaintiff impliedly assumed the risk of injury if he/she had knowledge of a condition that was obviously dangerous to him/her, and voluntarily exposed himself/herself to that risk of injury.

Taking all of these factors into account, the conclusions are more than a bit terrifying. An assumption of the risk defense is theoretically available, but as a practical matter, it is unlikely that any set of facts will uphold a defense judgment predicated on the defense. If the judgment was as a matter of law, the court will find a jury issue existed and, if by the jury, the court will rule the defense should have been stricken as a matter of law.[114]

The facts in *Carrel* show that the plaintiff was well aware of the dangers encountered in adjusting the press on which he was working and that he was fully aware of how to prevent the harm that occurred.[115] His actual knowledge and experience equalled or exceeded that of plaintiff's decedent in *Freas*. This would appear to be conduct comprising assumption of the risk as a matter of law. That is, of course, unless the definitions of "full appreciation," "required," and "normal job duties" collectively mean assumption of the risk has been abolished in all work-related product liability actions, which is the effect of the *Carrel* decision. This result is wrong in law, logic, and policy. The likelihood of successfully raising an assumption of the risk defense in such cases has become virtually impossible.[116]

This *Carrel* result is remarkable since all members of the court agreed upon the applicable law as that expressed by Justice Brown's concurring opinion to

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[114]Alternatively, the court could openly declare its end objective by holding that assumption of the risk is not an available defense in work-related product liability actions. Instead of this direct route, the court has written its own version of Joseph Heller's CATCH 22.

[115]The key facts, as summarized by Justice Cook, were: Carrel was an experienced press operator. He was aware of the risk of injury if he placed his hand in the die space without taking precautions to prevent the press from cycling. He knew the press was equipped with several safety features which would prevent this occurrence. He knew that the safety horn sound was hard to distinguish from other machine sounds, and he knew that the size of the press made it impossible for him to see the co-employee who was in charge of controlling the press. Nevertheless, Carrel bypassed all of the safety features, not even pulling the safety cord as instructed by his employer, and exposed his hand within the die space. 677 N.E.2d at 804. Plaintiff recognized that he was "a knowledgeable press operator." Brief of Plaintiff-Appellant at 5 *Carrel* (No. 95-1773). During an extensive description of the safety defects in the press, plaintiff also acknowledged the importance of keeping one's hands out of the die space. *Id.* at 6-16.

[116]Although defense counsel should continue to raise assumption of the risk as an affirmative defense in such cases, doing so may now contain the risk of sanction under OHIO R. CIV. P. 11. Even before the exacerbation of the problem posed by *Carrel*, the *Cremeans* court declared "[w]hile not completely abolishing the defense of [assumption of the risk], the court leaves manufacturers little recourse when an employee brings a strict products liability suit." Samuel R. Guelli, *The Status of Assumption of the Risk in Product Liability in Ohio After* Cremeans v. Willmar Henderson Mfg., 566 N.E.2d 1203 (Ohio 1991), 18 U. DAYTON L. REV. 243, 255, (1992) *quoted in* Colboch v. Uniroyal Tire Co., 670 N.E.2d 1366, 1373 (Ohio App. 1996)(affirming the trial court's refusal to give an assumption of the risk jury instruction, though stating that the defense remains available in product liability work-related cases).

Cremeans.[117] This concurrence makes clear that the defense is not abolished and that a distinction must be made between "cases where the employee has elected to use a defective product (where the defense is viable) and those where the use of a defective product has been forced upon an employee by economic necessity (where the defense is precluded).[118] The proper focus recognizes that "[v]olition is the touchstone."[119] Even in its review of the areas in which genuine issues of material fact were said to exist, the majority opinion makes no mention of this controlling element.[120]

Justice Brown's approach in *Cremeans* framed the issue as whether an action was voluntary or one which the employee had to accept since rejection of the risk could mean a reduced likelihood of job advancement or even the loss of the job. Justice Brown found that the question of whether Cremeans assumed the risk was for the jury. In reaching this conclusion he rejected the majority conclusion that assumption of the risk was not available because *Cremeans'* injury occurred in the performance of normal job duties. If the majority in *Carrel* applied the law as stated by Justice Brown, it could not have focused its opinion as it did, nor could it have found a fact issue. Rather, by focusing on the volition touchstone, it would have been forced to conclude that summary judgment was correct because "[a]bsent employer compulsion forcing Carrel to take such a risk, a factor that Carrel has not attempted to demonstrate, his assumption of the risk was voluntary."[121]

Proper application of *Cremeans* required an affirmance of the Court of Appeals' dismissal of the action.[122] There was no evidence to support a claim that Carrel ignored the danger due to compulsion. Carrel failed to meet his burden of proof on this point. The existence of a defect which caused the danger did not call for a different answer; absent a defect, the question of assumption was not reached. The existence of a defect is irrelevant to consideration of affirmative defenses which assume its existence.[123] The only valid questions

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[117]"We believe that Justice Brown's concurrence sets forth the applicable law." *Carrel*, 677 N.E.2d at 801. "I agree with the majority that Justice Brown's concurring opinion in *Cremeans* . . . sets forth the applicable law for employee assumption of the risk in the workplace." *Id.* at 803 (Cook, J. dissenting in part and concurring in part).

[118]*Cremeans*, 566 N.E.2d at 1209-10 (Brown, J. concurring).

[119]*Id.* at 1210.

[120]*Carrel*, 677 N.E.2d at 801.

[121]*Id.* at 804 (Cook, J. dissenting in part and concurring in part).

[122]If, however, there is a common law action for negligent design, the extent of plaintiff's contribution to the harm will be predicated on comparative negligence. Only in rare cases would judgment as a matter of law be possible. *See supra* note 90. This is precisely what the majority opinion was seeking.

[123]The members of the majority were certainly aware of this, but focused their analysis on the presence of defect as here there were fact issues. *Carrel*, 677 N.E.2d at 801. Had summary judgment been based on the absence of a defect, a reversal would have been merited.

are whether plaintiff was aware of the danger arising from that defect and whether plaintiff voluntarily chose to encounter that risk.

By choosing not to address this question, the court was able to accomplish its ultimate purpose of providing an injured product user with an opportunity to recover from a manufacturer who, at least arguably, provided a defective product. Injured parties now have the opportunity for two bites of the apple where good public policy would limit them to the one bite permitted by a strict liability theory. Whether the distortion of law necessary to gain this objective was too high a price to pay is a different question. The price was much too high.

III. A NEW WRONGFUL DEATH ACT - *COLLINS v. SOTKA*

A. Background and Holding

In 1808, Lord Ellenborough sitting at *nisi prius*, stated that a civil court could not consider the death of a person as an injury.[124] This ruling was widely adopted in the United States.[125] Almost a century later it was adopted as part of the law of Ohio.[126] Despite the Ohio Supreme Court's ruling in *Collins v. Sotka*,[127] the underlying principle (that a wrongful death claim is the creation of the legislature and does not exist at common law) remains the governing law.

Collins presented the court with an opportunity to reconsider its historical deference to the right of the General Assembly to limit wrongful death actions in light of the fact that this was, from its inception, a statutory right.[128] The case presented an unusual fact pattern in that the death of plaintiff's decedent did not arise from a product defect or traditional negligence based tort action. Suit was filed against Sotka, the person who had abducted and killed a seventeen-year old member of the plaintiffs' family. The abduction took place on or about July 31, 1992 and decedent's body was discovered on December 15, 1992.[129] The coroner ultimately set the date of death as July 31, the date of decedent's disappearance. On January 4, 1993, a secret indictment was handed down against defendant Sotka. On February 5, 1993, Sotka pled guilty to several charges including the aggravated murder of plaintiffs' decedent.

Thereafter, on February 6, 1995, pursuant to Ohio Revised Code section 2305.02, the wrongful death action was filed.[130] The Court of Appeals affirmed

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[124]Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808).

[125]STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH 2D, § 1.1 n.2 (1975).

[126]Baltimore & Ohio R.R. Co., v. Chambers, 76 N.E. 91, *aff'd*, 207 U.S. 142 (1905).

[127]Collins v. Sotka, 692 N.E.2d 581 (Ohio 1998).

[128]"Without those [wrongful death] statutes, there would be no cause of action for wrongful death in Ohio." Collins v. Yanity, 237 N.E.2d 611, 614 (Ohio 1968) (relying on Pittsburgh, Cincinnati & St. Louis Ry. Co., v. Hine, 25 Ohio St. 629 (1874)).

[129]*Collins*, 692 N.E.2d at 581.

[130]*Id.* at 581-82.

a Summary Judgment predicated on the grounds that the complainant was not filed within two years from the date of death.[131] This ruling was consistent with a body of decisional law which held that "the two-year limitations period is a restriction which qualifies the right of action itself and is not merely a time limitation upon the remedy."[132] As this claim was filed beyond the two year period which commenced at the date of death, July 31, 1992, the lower courts were compelled to dismiss the action.

These decisions were reversed in an opinion that applied the discovery rule announced in *O'Stricker v. Jim Walter Corp.*[133] The court observed that "In deciding whether the discovery rule can be used to toll R.C. 2125.02(D), the two year statute of limitations for a wrongful death claim, we must revisit our decision in *Shover v. Cordis Corp.*"[134] *Shover*,[135] unlike *Collins*, involved a product liability claim.[136] The overruling of *Shover* carried with it the entire line of decisions which had previously held that the two year period was a limitation on the right to bring the action as distinct from a statute of limitations. This long overdue result was reached in an opinion focused on policy concerns that mandated application of the discovery rule. The court determined that the result in *Shover* was "ludicrous" and so deeply flawed that it had to be overruled.[137] The court stated the new law:

> we hold that the discovery rule applies to toll R.C. 2125.02(D), the two-year statute of limitations for a wrongful death claim. [Where death results from a murder] the statute of limitations begins to run when the victim's survivor's discover, or through the exercise of reasonable diligence, should have discovered [that defendant was convicted and sentenced].[138]

By any rational reading of *Collins*, an identical rule now exists for a product liability based wrongful death action. The rule announced is consistent with

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[131] *Id.* at 582.

[132] Taylor v. Black & Decker Mfg. Co., 486 N.E.2d 1173, 1177 (Ohio 1984). *See also* Bazdar v. Koppers Co., 524 F. Supp. 1194 (N.D. Ohio 1981), *appeal dismissed*, 705 F.2d 451 (6th cir. 1982); Keaton v. Ribbeck, 391 N.E.2d 307 (Ohio 1979); Burris v. Romaker, 595 N.E.2d 425 (Ohio App. 1991).

[133] O'Stricker v. Jim Walter Corp., 447 N.E.2d 727 (1983).

[134] *Collins*, 692 N.E.2d at 582.

[135] Shover v. Cordis Corp., 574 N.E.2d 457 (Ohio 1991).

[136] A defective pacemaker allegedly caused decedent's death. *Id.* Approximately four years later decedent's son read a newspaper article stating that the pacemaker's manufacturer had pled guilty to a charge of concealing its defect. *Id.* Shortly thereafter, but well beyond the two year period specified in the Act, an action was commenced. *Id.* The court affirmed a dismissal of the action holding that neither fraud nor a discovery rule could toll the two year period. *Id.*

[137] *Collins*, 692 N.E.2d at 584.

[138] *Id.* at 585.

the personal injury limitation period set forth in Ohio Revised Code section 2305.10 and the court's post *O'Stricker* jurisprudence.[139]

B. Right Result, Wrong Reason

In reaching its decision to engraft a discovery rule into Ohio Revised Code section 2125.02(D), and thereby negate a substantial body of preexisting law, the court relied on both logic and important policy concerns. First, the Wrongful Death Act requires that any claim be predicated on a wrongful act. In *Collins*, the court recognized that the fact of death has no relevance to whether death was caused by wrongful conduct.[140] Death gains relevance, in terms of a cause of action, only after the wrongful conduct has been discovered. Therefore, death by itself, cannot trigger a statute of limitations.[141] This logic is equally applicable to product related wrongful death claims. In *Shover*, until the son learned of the existence of purported defects in his father's pacemaker, the father's death could not trigger a statute of limitations.

Second, the court recognized that it misconstrued its own precedents in deciding *Shover*, because it relied on a belief that the discovery rule was traditionally linked to malpractice claims.[142] After describing a number of cases to establish that this narrow perspective was incorrect, the court focused on the need to liberally construe the time when a cause of action accrues where the injury complained of did not immediately manifest. In such situations the court had previously recognized that it was "unconscionable" to bar an injured party's right to recovery with a statute of limitations before plaintiff even knew of the injury and its cause.[143]

Finally, relying on the *Shover* dissent, the court recognized that a tortfeasor need only fraudulently conceal the cause of death for two years to be absolved of civil liability.[144] A failure to learn of this linkage need have no relation to fraudulent concealment. Exposure to a wide variety of toxic substances - chemicals, minerals, drugs - may result in substantial injury only after the passage of far more than two years. Even where injury manifests within two years of exposure, it may not be possible to link the resultant injury to a given product within that time frame.[145] Neither manufacturers nor science may

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[139] *See, e.g.*, NCR Corp. v. United States Mineral Prods. Co., 649 N.E.2d 175 (Ohio 1995); Liddell v. SCA Servs., 635 N.E.2d 1233 (Ohio 1994); Burgess v. Eli Lilly & Co., 609 N.E.2d 140 (Ohio 1993).

[140] *Collins*, 692 N.E.2d at 583.

[141] *Id.*

[142] *Id.*

[143] *Id.* at 584.

[144] *Collins*, 692 N.E.2d at 584 (relying on and quoting *Shover*, 574 N.E.2d at 471) (Douglas, J. dissenting).

[145] For example, numerous allegations of birth defects have been attributed to the drug Bendectin. Many, perhaps all, of the persons whose children first suffered this alleged injury had no inkling of the potential problem until the passage of more than two years

have reason to know or suspect such dangers until well after the initial effects are recognized.

Prior to *Collins*, the court's approach to the Act's two year commencement period gave it the same effect as a statute of repose. The law precluded a cause of action before it was possible for the injured party to plead a prima facie case. The "limitation" on the right was, in fact and law, the exclusion of the right. This result was consistent with the Alice in Wonderland, topsy-turvy approach so magnificently described over forty-five years ago.[146]

The efforts of the General Assembly to justify the constitutionality of its express and more liberal statute of repose in the amended Wrongful Death Act will not succeed.[147] Any statute of repose is too perverse to pass constitutional muster under Ohio law. No policy advanced by the General Assembly can overcome the importance of the policies expressed in *Carrel*.

The court's conclusion was right. The problem is that the court failed to reach its logical and policy directed result in a reasoned and valid manner. The means negated much of the value of the ends. Despite a laudable end result, application of a discovery rule to the statutory period in which a wrongful death action may be brought, the manner in which this objective was reached was improper. The court grossly misinterpreted the language of the Wrongful Death Act, when it determined that the "commence action" language was a statute of limitations.

As long recognized by the court, principles of statutory interpretation, demand that the words of a legislative enactment be given their plain meaning in accord with legislative intent. The *Collins* dissent aptly noted "[w]here a statute is clear and unambiguous, the court must enforce the statute as written. The court may not add to or subtract from the language of the statute."[148]

This principle consistently led the court to find that the words "shall be commenced within two years after decedent's death" mean precisely what they

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from the child's birth. As late as 1995, after remand from the Supreme Court of the United States, it was held that the evidence supporting a relationship between Bendectin and birth defects was too unreliable to be considered by a jury and that, therefore, the drug manufacturer was entitled to Summary Judgment. Daubert v. Merrell Dow Pharms. Inc., 43 F.3d 1311 (9th Cir. 1995).

[146] Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry . . . or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical "axiom" that a statute of limitations does not begin to run against a cause of action before that cause of action exists.

Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J. dissenting).

[147] *See* H.B. 350 § 5(L) (1996). Section 5(L)(1) declares that the General Assembly "respectfully disagrees [with court holdings] that a statute of repose violates Section 16, Article I of the Ohio Constitution." *Id.* The only government entity empowered to reach such a conclusion is the court. There is little to no possibility that the respectful disagreement will end by acceptance of the General Assembly's belief.

[148] *Collins*, 692 N.E.2d at 586 (Moyer, C.J. dissenting).

say. Heretofore, these words have meant: the right to bring a wrongful death claim is limited by a specified time frame. No such right could accrue after the passage of this time period. It was, and is, a restriction that qualifies the right of action as distinct from a time limitation. In contract terms, bringing the action within two years of the date of death is a condition precedent.

Rather than addressing the only rational meaning of the term, or even attempting to attack its logic, the majority opinion *ignored* it. From its statement that "[t]he discovery rule applies to toll R.C. 2125.02(D), the two-year statute of limitations for a wrongful death claim," to the last paragraph of the majority opinion declaring "we find that it was filed within the statute of limitations,"[149] there is no mention of the fact that, until this opinion, it was *not* a statute of limitations. Here, though perhaps it is not a rose, a rose by any other name is a completely different flower.

Compounding the error is the complete absence of any effort to define a statute of repose or a statute of limitations and to illustrate where the statutory language falls within these definitions. Nowhere does the legislative language reference a time within which to bring suit after a cause of action accrues — the common definition of a statute of limitations. The legislative language provides that all claims shall commence within a set time (two-years) after a specific event (death). A statute of repose establishes just such an event based time frame. Had the court declared this simple truth, it could have addressed the underlying problems of the Wrongful Death Act.

The rather unique facts of *Collins* also permitted the Plaintiff to have brought the action within the requisite time frame. Suit could have been filed upon any number of earlier events such as the time decedent's body was found, upon the final coroner's ruling as to date of death, or indictment of defendant Sotka. In this civil action, a Complaint could have been filed against a Doe defendant. This Complaint could then have been amended and served in time to fully protect Plaintiff's interests.[150] Plaintiff in *Collins* had a means to protect the cause of action, as there was no need to await a guilty verdict in the criminal action.[151] The designation of Doe defendants is a common practice in civil actions and is frequently observed in product liability claims. The failure to do so in *Collins* is no different from the failure of any Plaintiff whose action is dismissed as untimely pursuant to an applicable statute of limitations.

Had the court taken this route, it could have reiterated the claimant's obligation to meet their responsibilities under the civil rules, and the court

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[149] *Id.* at 585.

[150] *See* OHIO R. CIV. P. 3 and 15(D). In his dissent, Chief Justice Moyer more fully explains that proper utilization of these rules would have permitted the action. *Collins*, 692 N.E.2d at 587-90. The majority approach, setting the discovery date at the date of conviction, defies logic and ignores the different evidentiary standards applicable to criminal and civil matters. The only justification for this date selection was, that under the circumstances, it was the only date that permitted the action to go forward. Perhaps that is logic enough.

[151] *Id.* at 589.

could have used dicta to make clear to the General Assembly, the lower courts, and attorneys that this provision of the Act would be declared unconstitutional.[152] Advance warning of future rulings is a recognized feature of our judicial decision making process.[153] This approach would have left Collins without a remedy.[154] The cost of this effect, however unpleasant, would have been outweighed by a decision which observed the law. The court, of course, concluded that this price was too high.

C. Right Result, Right Reason

Rather than place reliance on a new and unsupportable characterization of the commencement language of the Act, the court should have exercised the type of judicial review it has utilized in prior decisions. The court should have created a common law action to supplement the Wrongful Death Act, or it should have held the entire Act unconstitutional to permit the creation of a common law action similar to that set forth in H.B. 350 absent its repose provision. Precedent exists for either approach.

Had the court taken such an approach to its objective, the previous critical analysis of *Collins* would have been inappropriate. Either of these more direct routes could have placed initial reliance upon the reasoning and holding of *Moragne v. States Marine Lines, Inc.*[155] In *Moragne* the United States Supreme Court recognized that the English rule lacked merit. It rejected the rule and established a non-statutory common law right to bring a wrongful death claim under maritime law.[156]

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[152]In *Shover* the court recognized that the legislative branch could change the law, and thus it deferred to the General Assembly. 574 N.E.2d at 462. *Collins* could have been utilized to make a clarion call to the General Assembly declaring: "NO statutes of repose." This call would certainly have been heeded by attorneys and the lower courts so that no wrongful death claimant would have been deprived of the right to bring suit where a discovery rule would have permitted that action to proceed.

[153]This can be accomplished through dicta or through concurring or even dissenting opinions. Is there any real doubt that the court, assuming its current majority remains in place, will soon "straighten out the punitive damages question as it relates to wrongful death"? *Collins*, 692 N.E.2d at 585 (Douglas, J. concurring). This remedy limitation was upheld in Rubeck v. Huffman, 374 N.E.2d 411, 413 (Ohio 1978) (relying on the statutory nature of the right and the power of the General Assembly to limit such rights).

[154]The court has recognized that there are limitations which can preclude a remedy even for a completely innocent injured party. In a negligent infliction of emotional distress action brought on behalf of a woman improperly diagnosed as being HIV positive, the court upheld a dismissal of the action, declaring "the facts of this case remind us that not every wrong is deserving of legal remedy." Heiner v. Moretuzzo, 652 N.E.2d 664, 670 (1995) (Douglas, J.).

[155]Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

[156]*Id.* at 409.

The Ohio Wrongful Death Act does not expressly indicate that it provides the exclusive remedy for such harm.[157] Therefore, the court could have created a parallel common law action. This was the approach taken in *Carrel*, where the court acted in disregard of statutory language mandating that the product liability claims provided in the Product Liability Act *were* exclusive.[158] This exact approach was appropriately taken in regard to the Ohio Comparative Negligence statute.[159]

In its initial review of this important change in the law, the Ohio Supreme Court held that, as a substantive modification of existing law, the statute's terms could not be given retroactive effect.[160] Shortly thereafter, the court was given the opportunity to reconsider its decision, and it adopted a common law rule of comparative negligence.[161] As a judicial creation, the law gained the legislatively precluded retroactive application.

In a concurring opinion, emphasis was placed on the principle that improving the law of Ohio did not require a rigid adherence to principles of *stare decisis* and that, "[b]ad law created by a court, even though only a day old, should be overruled by the creating court as soon as it recognizes the bad law."[162] Although it took the Ohio General Assembly considerably longer to recognize that parts of the Wrongful Death Act contained bad law, that recognition dawned.

H.B. 350[163] amended Ohio Revised Code section 2125.02. Perhaps the most significant change in the new provision was the language mandating that "[a]n

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[157]Although the statute implies exclusivity, implication would not seem to be a sufficient basis to find that, as a matter of law, it was intended as the exclusive remedy. Note, too, that in *Carrel* the legislation modified a body of pre-existing common law, whereas the Wrongful Death Act created a cause of action which did not exist at the common law. Despite its importance, this distinction will not be outcome determinative.

[158]*See* discussion *infra* Part II.

[159]OHIO REV. CODE ANN. § 2315.19 (Anderson 1998).

[160]*See* Straub v. Voss, 438 N.E.2d 888 (Ohio 1982) *overruled by*, Wilfong v. Batdorf, 451 N.E.2d 1185 (Ohio 1983); *and* Viers v. Dunlap, 438 N.E.2d 881 (Ohio 1982), *overruled by*, Wilfong v. Batdorf, 451 N.E.2d 1185 (Ohio 1983).

[161]*Wilfong* v. Batdorf, 451 N.E.2d 1185 (Ohio 1983), *overruled in part by*, Van Fossen v. Babcock, 522 N.E.2d 489 (Ohio 1988). This partial overruling did not restore viability to *Straub* or *Viers*. The *Wilfong* court declared:

> This court now adopts the comparative negligence standard set forth in R.C. 2315.19 as a modification of the common-law standard in Ohio. Such modification will avoid the harshness of an arbitrary date of enforcement of R.C. 2315.19 . . . . No longer will discussions or arguments develop over whether R.C. 2315.19 is procedural or substantive. The characterization of R.C. 2315.19 as either will not alter the common law in Ohio which, as of today, recognizes a doctrine of comparative negligence consistent with R.C. 2315.19.

451 N.E.2d at 1189.

[162]*Wilfong*, 451 N.E.2d at 1190 (J. P. Celebrezze, concurring).

[163]See discussion *supra* Part I.

action for wrongful death shall be commenced within two years after the decedent's death."[164] This language was continued in H.B. 350s amended Wrongful Death Act, but was substantially qualified by the addition of sections 2125.02(D)(2)(a) through (f). These sub-sections comprised a major change in the law. The time to commence an action for wrongful death predicated on a product liability claim is fifteen years where the claim could not have been filed within the two year period due to a disability (pursuant to Ohio Revised Code section 2305.16) or because the death was caused by a substance described in Ohio Revised Code section 2305.10. The Wrongful Death Act, as amended by H.B. 350, contains a "discovery" based statute of limitations coupled with a fifteen year statute of repose.

Despite the fact that *Collins* involved the commencement period where death was caused by murder rather than by a product defect, the court could have used the amended section 2305.02 as a model for a common law action in precisely the manner that comparative negligence legislation was utilized by the *Wilfong* court. The court needed only to declare that it was now adopting a common-law right to recover for wrongful death which would parallel the new legislation. That would have permitted the court to grant relief, under a discovery rule, to Plaintiffs in *Carrel*,[165] in *Shover*, and in virtually all other similar cases where identification of the tortfeasor was delayed for reasons beyond control of the plaintiff or for latent defect and disease based product liability claims.

Alternatively, the court could have declared the limitation period or the entire Act unconstitutional. This would have forced the court to create a common-law action. Again, that action could have modeled on the amended version of section 2125.02 while striking its repose provision.

The constitutional attack on this aspect of the Wrongful Death Act, being mounted in *Ohio Academy of Trial Lawyers*[166] is likely to succeed on both equal protection and open court grounds.[167] Because a substantial body of personal injury tort actions do not permit a statute of repose, it is hard to imagine that wrongful death victims represent a rational class which can be subject to such

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[164]OHIO REV. CODE ANN. § 2325.02(D) (Anderson 1998).

[165]This assumes adherence to the flawed date selected by the court for commencement of the statutory period.

[166]*Ohio Academy of Trial Lawyers*, 689 N.E.2d 971. See discussion *infra* Part I.

[167]This is not to say that other grounds cannot be asserted including due process and the right to trial by jury. For a fuller discussion of the constitutional infirmities of statutes of repose, with emphasis on the Congressional approach, see Stephen J. Werber, *The Constitutional Dimension of a National Products Liability Statute of Repose*, 40 VILL. L. REV. 985 (1995). *See also* Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579 (1981); Jerry J. Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N. CAR. L. REV. 663 (1978); David Schuman, *The Right to a Remedy*, 65 TEMPLE L.Q. 1197 (1992).

a provision.[168] Such an argument, in light of the approach and policy rational of *Collins*, can no longer be avoided, based on the principle that the legislature can control the actions which it created.[169] The *Collins* approach simply flanks this position. Without this line of argument, it is illogical to conclude that those who suffer death, the most serious injury, can be given less protection than those who sustain lesser injuries.

The open court provision provides an even stronger argument.[170] The court has struck down a ten year repose provision, applicable to those who made improvements in real property, by demanding that as an absolute minimum plaintiffs "have a reasonable time to seek compensation after the accident."[171] In its review of the personal injury statute of limitations, the court stressed that this statute could not begin to run before a party knew or should have known of the injury.[172] Moreover, the legislature can not regulate the time in which to bring an action until the potential claimant has reason to know of both the injury and its cause.[173] The open court provision commands that a party be granted an opportunity to seek relief at a "meaningful time and in a meaningful manner."[174]

In any case where the latency period prior to onset of illness caused by a toxic substance exceeds the statutory fifteen year period of amended section 2125.02 (D)(2), or where a product defect which caused death is of such a nature that the time frame passes before there is reason to know of a specific defect's relation to the death, a claimant will be deprived of the "meaningful" time and manner of seeking relief. Even though such potential is exceptional,[175] the

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[168]Personal injury actions are subject to a discovery rule with no statute of repose pursuant to OHIO REV. CODE ANN. § 2305.10. The court has ruled that the discovery period could not commence based on a mere possibility. Burgess v. Eli Lilly & Co., 609 N.E.2d 140 (Ohio 1993).

[169]*See* Werber, 69 TEMPLE L. REV. at 1177-78.

[170]This argument applies whether section 2125.02 is viewed in its original form or under the H.B. 350 amendment which contains an express statute of repose.

[171]Brennaman v. R.M.I. Co., 639 N.E.2d 425, 430 (Ohio 1994) (applying OHIO CONST., art. I, § 16).

[172]Burgess, 609 N.E.2d at 141-42 (relying on Hardy v. VerMeulen, 512 N.E.2d 626 (Ohio 1987)). *See also*, NCR Corp. v. United States Mineral Prods. Co., 649 N.E.2d 175 (Ohio 1995); Liddell v. SCA Services, Inc., 635 N.E.2d 1233 (Ohio 1994); Gaines v. Preterm-Cleveland, Inc. 514 N.E.2d 709 (Ohio 1987); O'Stricker v. Jim Walter Corp., 447 N.E.2d 727 (Ohio 1983).

[173]Burgess, 609 N.E.2d at 142.

[174]*Id.* (quoting Hardy).

[175]The likelihood of being unable to identify a murderer within two to three years after the crime is discovered is probably no more remote than a product defect related injury remaining undiscoverable for fifteen years. The exceptional nature of the facts in *Collins* did not deter the court. No such deterrence is likely when the court considers section 2125.02(D)(2).

court will not be detered from declaring a violation of the open court provision, no matter how sound the factual and policy support for the limitation.

Either of these approaches would have permitted the court to avoid the flawed reasoning that supported its proper conclusion in *Collins*. When the merits of H.B. 350 are determined, the court should take a more forthright position in regard to the Wrongful Death Act. Although the court should overturn this provision, other significant and highly important provisions enacted through H.B. 350 should not fail. Despite some flaws,[176] H.B. 350 represents a balanced approach to resolution of the conflict between those who are entitled to relief for harm caused by product defects, the rights of those who manufacture and sell products, and the contribution to harm made by the injured party.

IV. CONCLUSION

The Ohio Supreme Court has promoted a policy favoring compensation for injured parties. In many cases, such as adoption of strict liability in tort,[177] and enhanced injury or crashworthiness theory,[178] this judicial objective has yielded law of great benefit to all residents of Ohio. In some instances, however, the court has taken unto itself the task of speaking for the people where that role is more appropriately assigned to the General Assembly.

The court's haste to hear argument regarding the validity of H.B. 350, a consequence of its questionable assertion of mandamus jurisdiction in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, gives every appearance that it will result in a decision which subverts legislative intent and, to a great extent, will be detrimental to residents of Ohio and those who do business in this State. It is likely that a narrow majority of the court will invalidate substantial portions of this product liability reform effort.

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[176]Examples of such flaws include (1) retaining assumption of the risk as a complete defense in product liability claims, OHIO REV. CODE ANN. § 2315.20(B)(2)(Anderson 1998), rather than having this defense merged with contributory negligence as it is for other personal injury cases pursuant to § 2315.19(2); (2) retaining any form of joint and several liability, in contravention of the right to trial by jury, where a verdict is predicated on comparative negligence; and (3) excluding punitive damages from any recovery under the Wrongful Death Act.

[177]The principle, though not the name, was initially adopted in Lonzrick v. Republic Steel Corp., 218 N.E.2d 185 (Ohio 1966). The strict liability doctrine, as defined in RESTATEMENT (SECOND) OF TORTS § 402A (Ohio 1965) was adopted in Temple v. Wean, Inc., 364 N.E.2d 568 (Ohio 1977).

[178]Leichtamer v. American Motors Corp., 424 N.E.2d 267 (1981). More recent decisions of such benefit are illustrated by McAuliffe v. Western States Import Co., 651 N.E.2d 957 (1995) (two year statute of limitations applicable to product liability claims); Freas v. Prater Constr. Corp. Inc., 573 N.E.2d 27 (Ohio 1991) (assumption of the risk can apply in intentional tort actions); State Farm Fire & Cas. Co. v. Chrysler Corp., 523 N.E.2d 489 (1988) (use of circumstantial evidence to establish product defect); and Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983)(allowing claim for negligent infliction of emotional distress without contemporaneous physical injury).

Carrel v. Allied Products Corporation represents just such an assumption of judicial power. This decision distorts the Product Liability Act and its legislative intent to reestablish a negligent design cause of action which the court itself recognizes as imposing a greater burden upon injured parties than does the law set forth by the General Assembly. Written to avoid the application of assumption of the risk as a complete defense in product liability claims, *Carrel* reduces the responsibility of a party for his or her own actions. The unrecognized effect of this ruling is to take us one step further into a society that is quick to blame others for all that is wrong rather than a society which recognizes that, at least in some cases, responsibility must rest on the individual.

In order to gain a proper objective (the inclusion of a discovery rule in the Wrongful Death Act) *Collins* has negated a long standing body of the court's own decisions and circumvented legislative intent. The shame of this decision lies not in its result, but in its failure to take a more direct approach, consistent with prior precedent, which would have achieved the same end.

Perhaps this conclusion is overly pessimistic. Hopefully, the court will strike constitutionally infirm sections of H.B. 350 while affirming the validity of most of its provisions. In the mean time, *State ex rel. Ohio Academy of Trial Lawyers* presents the court with an opportunity to strike a proper balance between deference to the General Assembly, the need to protect both innocent consumers and innocent product manufacturers or sellers, the Constitution of the State of Ohio, and the appropriate role of judicial review. Despite the criticisms contained in this article, the court has far more often than not displayed the ability to achieve this balance. Let us hope that this and future decisions do not become foregone opportunities.