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S. 307: OHIO'S NEW WORKERS' COMPENSATION LAW—AT LEAST FOR NOW

I. INTRODUCTION

On May 23, 1986, Ohio Governor Richard Celeste signed into law Amended Substitute Senate Bill 307, which substantially revises Ohio's workers' compensation law.¹ One of the most significant changes in the law is the addition of section 4121.80 of the Ohio Revised Code which provides for, defines, and limits an employee's right to pursue a cause of action based in intentional tort against his employer.² This section was a reaction to a recent string of Ohio Supreme Court decisions liberalizing the right of injured workers to sue at common law for injuries that allegedly resulted from the intentionally tortious conduct of their employers.³ The changes brought about by the addition of section 4121.80 will undoubtedly prompt constitutional challenges to the bill.⁴

The bill eliminates the right to trial by jury in actions based in intentional tort. The bill also changes the definition of what constitutes an intentional tort, and the bill limits the amount of damages recoverable in an action based in intentional tort. Finally, the bill provides for the retroactive application of all of these provisions.

This note provides a history of the workers' compensation law in Ohio, a survey of the cases leading to the passage of S. 307, and an analysis of the constitutionality of several of the provisions of S. 307 that are likely to prompt litigation in Ohio courts.

1. Act of May 15, 1986, 1986 Ohio Legis. Serv. 5-350 (Baldwin) (codified in scattered sections of tits. 1 and 4) OHIO REV. CODE ANN. (Anderson Supp. 1986).

2. OHIO REV. CODE ANN. § 4121.80 (Anderson Supp. 1986).

3. According to the sponsor of S. 307, Senator Richard Finan, the main purpose of the bill was "the reversal of the *Blankenship* problem for intentional tort and putting that back under the workers' compensation system, per se, instead of the court of common pleas." J. HARRIS, OHIO WORKERS' COMPENSATION ACT 31 (1986). Mr. Harris is an attorney specializing in workers' compensation, social security, and personal injury law. He was the plaintiff's attorney in *Blankenship* discussed *infra* notes 22-35 and accompanying text. Mr. Harris is also the editor of the *Workers' Compensation Journal of Ohio*. See J. HARRIS, *supra*, at About the Author. His book was the first extensive analysis of the Bill's provisions and impact. *Id.* at Preface.

4. *Id.* at 39. This note deals only with those provisions of S. 307 that seem to have generated the most concern within the legal community and the media and that are likely to receive the most initial attention in the courts. Other provisions which are likely to be challenged on constitutional grounds include, but are not limited to, section 4121.80(F) of the Ohio Revised Code, limiting attorney's fees, section 4121.80(A), changing the statute of limitations, and section 4121.80(D) providing for a setoff of damages awarded in an action in intentional tort in an amount equal to the benefits that an employer has received in workers' compensation benefits.

II. BACKGROUND

A. *The Early Workers' Compensation Law in Ohio*

Ohio's first workers' compensation law was enacted in 1911.⁵ The policy underlying the enactment of that law was articulated by the Ohio Supreme Court in *State ex rel. Munding v. Industrial Commission*.⁶

[T]he theory upon which the compensation law is based . . . is that each time an employee is killed or injured there is an economic loss which must be made up or compensated in some way, that most accidents are attributable to the inherent risk of employment—that is, no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than society as a whole, that a fund should be provided by the industry from which a fixed sum should be set apart as every accident occurs to compensate the person injured, or his dependents, for his or their loss.⁷

The 1911 Act was, for the most part, an exclusive remedy. An employee could still, however, maintain an action at common law when his injury resulted from the willful act of his employer or the employer's agent, or when the employer had failed to comply with a particular safety law.⁸ In 1924, the Ohio Constitution was amended to provide guidelines for the workers' compensation system.⁹

Article II, section 35 appears to make workers' compensation benefits an exclusive remedy. The amendment states that "[s]uch compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law . . . shall not be liable to respond in damages at common law."¹⁰ Ohio courts strictly upheld the exclusive remedy provision¹¹ of the amendment until 1939.

5. 1911 Ohio Laws 524.

6. 92 Ohio St. 434, 111 N.E. 299 (1915).

7. *Id.* at 450-51, 111 N.E. at 303.

8. OHIO GEN. CODE ANN. §§ 1465-76 (Anderson 1916) (repealed 1931). "Any employer . . . who shall pay into the state insurance fund the premiums provided by this act shall not be liable to respond in damages at common law or by statute, save as hereinafter provided . . ." *Id.* § 1465-57 (Anderson 1912) (repealed 1913). "But where a personal injury is suffered by an employe . . . and . . . such injury has arisen from the wilfull act of such employer . . . or from the failure of such employer . . . to comply with . . . any statute . . . such injured employe . . . may, at his option, . . . institute proceedings in the courts for his damage. . . ." *Id.* § 1465-61.

9. OHIO CONST. art. II, § 35 (did not originally include language granting a common-law cause of action to an employee who had been injured by the willful act of his employer or through his employer's failure to comply with a safety statute).

10. *Id.*

11. See *Zajachuk v. Willard Storage Battery Co.*, 106 Ohio St. 538, 542, 140 N.E. 405, 407 (1922) (holding that occupational diseases were not compensable under the workers' compen-

In *Triff v. National Bronze & Aluminum Foundry Co.*,¹² the Ohio Supreme Court held that an employee had the right to maintain an action at common law for injuries which were not compensable under the workers' compensation system.¹³ The court held that the intent of Article II, section 35, was to grant employer-immunity only for those injuries which were compensable under the Act.¹⁴ The Act was again amended in 1959 in an effort to restore employer immunity for injuries that were not compensable under the Act, but made occupational diseases compensable under the Act.¹⁵

B. Blankenship and Its Progeny

For a time, Ohio courts once again held the workers' compensation system to be an employee's exclusive remedy.¹⁶ Then in 1978, the Ohio Court of Appeals for Lucas County held in *Delamotte v. Unitcast Division of Midland Ross Corp.*¹⁷ that an employee's remedy under the Workers' Compensation Act was not an exclusive remedy and that an action could be brought when the employer had committed an intentional or malicious act resulting in injury to an employee.¹⁸ The *Delamotte* court relied on the language of section 4123.74 which provides in part: "Employers who comply with section 4123.35 shall not be liable to respond in damages at common law . . . for any injury . . . received or contracted by any employee in the course of . . . his employment . . ."¹⁹ The court stated that such language "clearly limits the categories of injuries for which the employer is exempt from civil liability."²⁰ The *Delamotte* court ruled that an intentional tort was not within the scope of employment and was thus beyond the immunity granted by the statute.²¹

The Ohio Supreme Court, in the 1982 landmark case of *Blankenship v. Cincinnati Milacron Chemicals Inc.*,²² cited the *Delamotte* deci-

sation system and that the constitution's statutory counterpart, General Code section 1465-70, precluded an employee from maintaining an action at common law).

12. 135 Ohio St. 191, 20 N.E.2d 232 (1939).

13. *Id.* at 197, 20 N.E.2d at 235.

14. *Id.*

15. 1959 Ohio Laws 1334.

16. See generally 39 O. JUR. 3D *Employment Relations* § 196 (1982).

17. 64 Ohio App. 2d 159, 411 N.E.2d 814 (1978).

18. *Id.* at 164, 411 N.E.2d at 816. Plaintiff alleged that his employer withheld information regarding a progressive lung condition discovered in the employer's physical examination of plaintiff. *Id.* at 160, 411 N.E.2d at 815.

19. OHIO REV. CODE ANN. § 4123.74 (Anderson 1980) (amended 1986).

20. *Delamotte*, 64 Ohio App. 2d at 161, 411 N.E.2d at 816.

21. *Id.*

sion with approval²³ and held that where an employee alleged that an intentional tort committed by his employer had caused him injury, the complaint was sufficient to withstand a motion to dismiss that was based on statutory immunity.²⁴ Such conduct, according to the court, was not within the scope of employment²⁵ and did not fall within the provision of former section 4123.74 providing employer immunity for injuries "contracted in the course of or arising out of" employment.²⁶

The court reasoned that the purpose of the Workers' Compensation Act is to protect an employer from actions based in negligence in exchange for the employer's compliance with the Act.²⁷ The court viewed the Act as a compromise: Employees give up their common-law remedies and accept fewer benefits in exchange for "a greater assurance of recovery."²⁸ Employers, on the other hand, "give up their common law defenses and are protected from unlimited liability."²⁹ Affording immunity from intentional tort actions would not promote one of the "avowed purposes of the Act [, namely] to promote a safe and injury-free work environment,"³⁰ because an employer could commit an intentional tort knowing that the harshest penalty that might befall him would be a slight increase in his workers' compensation premium.³¹ An employer might find it more economically efficient to ignore dangerous conditions and suffer a slight increase in premiums than to provide safety equipment or to correct such conditions. Further, the court noted that the workers' compensation system is based on insurance principles and that insurance policies do not protect their holders from liability for intentional torts.³²

In dissent, Justice Krupansky argued that the onslaught of employee suits resulting from the majority decision would result in increased costs for manufacturers which would inevitably be passed on to consumers.³³ Thus, goods manufactured in Ohio would be less competitive in the open market and businesses would be discouraged from locating in and staying in Ohio.³⁴ The result would be that, in the end,

23. *Id.* at 612-13, 433 N.E.2d at 576.

24. *Id.* at 615-16, 433 N.E.2d at 578.

25. *Id.* at 613, 433 N.E.2d at 576.

26. OHIO REV. CODE ANN. § 4123.74 (Anderson 1980) (amended 1986).

27. *Blankenship*, 69 Ohio St. 2d at 614, 433 N.E.2d at 577.

28. *Id.*

29. *Id.*

30. *Id.* at 615, 433 N.E.2d at 577.

31. *Id.*

32. *Id.*

33. *Id.* at 624, 433 N.E.2d at 582 (Krupansky, J., dissenting).

labor as a whole would suffer because there would be fewer jobs.³⁵

The *Blankenship* decision, while expanding the scope of workers' rights to sue at common law, left several issues unresolved. First, the court did not define what acts were sufficient to constitute an intentional tort. Second, the court did not address whether an employee who had received workers' compensation benefits could also initiate a civil suit based in intentional tort. Finally, the court left unanswered the question of whether an award won by an employee in a civil action would be reduced by the amount of any workers' compensation benefits received by the employee.

In 1984, these issues were clarified in *Jones v. VIP Development Co.*³⁶ The *Jones* court held that "an intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur."³⁷ The court then held that proof of purposeful injury is not necessary in an action based in intentional tort and that intent might be inferred from an actor's conduct and the surrounding circumstances.³⁸ The court emphasized that it is the "element of substantial certainty which distinguishes a merely negligent act from intentionally tortious conduct."³⁹ This decision apparently conflicted with an earlier supreme court case that had defined an intentional tort as an act committed with the specific intent or purpose to cause injury⁴⁰ and thus expanded opportunities for injured employees to seek remedies in civil actions outside the workers' compensation system.⁴¹

The *Jones* court also held that an employee was not barred from bringing an action based in intentional tort although he had previously received workers' compensation benefits.⁴² The court reasoned that to

35. *Id.*

36. 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).

37. *Id.* at 95, 472 N.E.2d at 1051.

38. *Id.*

39. *Id.*

40. *Payne v. Vance*, 103 Ohio St. 59, 133 N.E. 85 (1921) (distinguishing negligence from an intentional tort by saying that the additional element of intent had to be present for an intentional tort).

41. The three cases consolidated in *Jones* were: *Jones v. VIP Development Co.*, *Gains v. City of Painesville*, and *Hamlin v. Snow Metal Prods.* *Jones*, 15 Ohio St. 3d at 90, 472 N.E.2d at 1046. In *Jones*, the plaintiffs alleged that the employer had knowingly exposed plaintiff to high voltage lines and had failed to make the premises safe and to warn plaintiffs. *Id.* at 95-96, 472 N.E.2d at 1051-52. In *Gains*, the plaintiff alleged that the decedent's employer had "intentionally, maliciously, willfully and wantonly" removed a safety cover from a discharge chute and that the removal had led to decedent's death. *Id.* at 96, 472 N.E.2d at 1052. In *Hamlin*, the plaintiffs alleged that the employer exposed plaintiffs to chemicals that the employer knew were hazardous to plaintiffs' health and that the employer continued to assure plaintiffs that their working environment was safe. *Id.* at 97, 472 N.E.2d at 1053.

bar an employee from pursuing a common-law remedy simply because he had received workers' compensation benefits would encourage intentionally tortious conduct by employers.⁴³ Most employees would not be able to afford to wait for the conclusion of lengthy litigation before receiving some type of compensation.⁴⁴ If the employee was barred from initiating a civil suit by the receipt of workers' compensation benefit, employers would be in a position to prolong litigation and thereby force the injured employee to elect to receive benefits under the system.⁴⁵ Employers, for all practical purposes, would still be immune from actions at common law.⁴⁶

The *Jones* court also addressed the issue of double recovery. The court held that an employer is not entitled to a setoff of a judgment entered against him in an amount equal to the workers' compensation benefits received by the employee.⁴⁷ As in *Blankenship*, the court cited the insurance principles behind the workers' compensation system in reasoning that, as with general insurance, a wrongdoer is not entitled to a setoff in the amount of insurance benefits received by the injured party.⁴⁸

The *Jones* decision, as noted by Justice Holmes in his dissent in *Bradfield v. Stop-N-Go Foods, Inc.*,⁴⁹ led to the anomalous situation in which an employee who sued an employer that was in compliance with the Workers' Compensation Act could recover both workers' compensation benefits and damages in a civil suit,⁵⁰ whereas an employee who sued a noncomplying employer could recover only at common law.⁵¹ This situation could occur because under sections 4123.75⁵² and 4123.77⁵³ of the Ohio Revised Code, an employee who sued a noncomplying employer had to repay to the State Insurance Fund an amount equal to the workers' compensation benefits he had received if he prevailed in his common-law action.⁵⁴ Under *Jones*, an employee who sues

43. *Id.* at 99, 472 N.E.2d at 1054.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 100, 472 N.E.2d at 1055.

48. *Id.*

49. 17 Ohio St. 3d 58, 477 N.E.2d 621 (1985) (Holmes, J., dissenting). In *Bradfield*, a store clerk was stabbed by a robber while working in a convenience store. The plaintiff alleged that decedent was stabbed because of the employer's "malicious failure to provide reasonable measures for decedent's [safety] . . . in wanton disregard of their duty to protect . . . its employees." *Id.* at 58-59, 477 N.E.2d at 621.

50. *Id.* at 60, 477 N.E.2d at 622.

51. *Id.*

52. OHIO REV. CODE ANN. § 4123.75 (Anderson 1980).

53. *Id.* § 4123.77.

a complying employer and prevails is under no obligation to reimburse the State Insurance Fund for any benefits he may have received.⁵⁵ Consequently, employees who had identical injuries might receive widely disparate compensation.⁵⁶ Additionally, an employer who was in compliance with the law would, in effect, pay twice for the same injury, once in the form of workers' compensation premiums and once in the form of a civil judgment.⁵⁷ A noncomplying employer, on the other hand, would be required to pay only the civil judgment.⁵⁸ Justice Holmes felt that such a result would encourage noncompliance and frustrate the intent of the Act.⁵⁹

C. *The Passage of S. 307*

The liberalization of the right of employees to sue at common law led to demands from the Ohio business community for a legislative overruling of *Blankenship* and its progeny.⁶⁰ The supreme court decisions had, according to business, "created vast uncertainties for employers, stunting business planning and economic growth."⁶¹ Ohio developed, according to one editorial, a reputation as being antibusiness and persuading businesses to locate or expand in Ohio was becoming more and more difficult.⁶²

Whether the decisions were, in fact, having an impact on business in Ohio is not clear. What is clear, is that a perception arose that there was a workers' compensation "crisis" in Ohio.⁶³ Employers and their business organizations mounted an extensive media campaign to pressure the legislature to act by creating a public perception that Ohio was losing its competitive position and that the eventual result would be mass unemployment in Ohio.⁶⁴

Several bills were introduced in the Ohio legislature to remedy the situation during 1985.⁶⁵ Previously, almost all workers' compensation legislation was the result of labor management negotiations⁶⁶ and a subsequent approach to the legislature with the results of such negotia-

55. *Id.* (citing *Jones v. VIP Dev. Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984)).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. J. HARRIS, *supra* note 3, at 35.

61. *Workers' Compensation to Be Re-examined*, The Journal Herald, Jan. 15, 1986, at 17, col. 1.

62. *Workers' Compensation Bill Inspires Barrage of Hyperbole*, The Journal Herald, June 2, 1986, at 12 col. 1.

63. J. HARRIS, *supra* note 3, at 3.

64. *Id.*

65. *Id.* at 3-4.

tions.⁶⁷ That was not to be the case with S. 307.⁶⁸ Despite efforts by Governor Celeste to bring the two groups together, representatives of labor and management interests were unable to reach agreement on the contents of the new legislation.⁶⁹ The Ohio Senate passed S. 307 on February 6, 1986,⁷⁰ and the Ohio House passed its own workers compensation reform bill, H. 73, on February 7, 1986.⁷¹ Neither bill passed in the other chambers and a conference committee was appointed to work out the differences.⁷²

S. 307 was sent to and approved by the full House on May 13, 1986,⁷³ and by the Senate on May 15, 1986.⁷⁴ The hearings, votes, and approvals of the bill were conducted under extreme pressure.⁷⁵ Union officials threatened to withdraw financial support from democratic legislators and Governor Celeste if the bill was approved.⁷⁶

It was amid this climate of crisis, with threats of mass business defection and political retribution, that Ohio lawmakers passed the sweeping reforms of Ohio's workers' compensation system contained in S. 307. It may be that the pressure to resolve the crisis led the legislators to pass the bill without giving adequate consideration to the impact that its provisions would have. Whatever the reason for its haste, the Ohio Legislature has passed a bill that will result in controversy for some time to come.

III. PROVISIONS OF S. 307

A. *Elimination of the Right to Trial by Jury*

Unlike the former statute,⁷⁷ section 4121.80 of the Ohio Revised Code expressly permits an employee to bring an intentional tort action

67. *Id.*

68. *Id.*

69. *Id.* at 3.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 4.

74. Before the Bill was sent to the House and Senate for approval, eleven drafts were written, *see id.* at Forward by Senator Finan, and five revisions were made. *Id.* at 4.

75. *See id.* at Foreword by Representative Skeen. During one of the hearings, a United Auto Workers representative dangled a noose in front of legislators after their vote. *See Workers' Compensation Bill Fair to Workers, Employers*, The Journal Herald, Mar. 30, 1986, at 8 col. 1.

76. Hallet, *Ohio Workers' Protection Bill Signed into Law*, The Toledo Blade, May 24, 1986, at 1, col. 5. Milan Marsh, president of the Ohio AFL-CIO, called the bill's approval "an extremely serious breach of faith with the working citizens of this state," *id.*, and accused the governor and the legislature of bowing to pressure from irresponsible businessmen. White, *Workers' Comp Bill Is Signed*, Cincinnati Enquirer, May 24, 1986, at 1, col. 5.

77. A cause of action for intentional tort was recognized only judicially in *Blankenship*. *See supra* notes 22-32 and accompanying text.

in common pleas court.⁷⁸ However, section 4121.80(D) provides that in such an action the court determines only whether an intentional tort has been committed and whether the employer is liable for that tort.⁷⁹ The Ohio Industrial Commission then determines the amount of damages.⁸⁰ Although the language of 4121.80(D) does not so provide expressly, the provision is unmistakably intended to eliminate jury consideration even on the issue of liability.⁸¹ Since a judge acting without a jury determines liability and the Ohio Industrial Commission determines damages, the plaintiff employee is precluded from a trial by jury on both the issues of fact and damages.

B. *New Definition of Intentional Tort*

Section 4121.80(G)(1) of the Ohio Revised Code defines an intentional tort as "an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur."⁸² This definition is virtually identical to the one expounded by the Ohio Supreme Court in *Jones v. VIP Development Co.*⁸³ However, whereas the *Jones* court held that specific intent might be inferred from an actor's conduct and the surrounding circumstances,⁸⁴ section 4121.80(G)(1) provides that an employer must have acted with "deliberate intent to cause an employee to suffer injury, disease, condition, or death."⁸⁵ This provision obviously heightens the burden of proof placed upon an employee who alleges that his injury resulted from the intentional tort of his employer.

C. *Limitation on Damages*

Section 4121.80(D) of the Ohio Revised Code limits the amount

78. "If injury . . . results to any employee from the intentional tort of his employer, the employee . . . [has] a cause of action against the employer . . ." OHIO REV. CODE ANN. § 4121.80(A) (Anderson Supp. 1986).

79. *Id.* § 4121.80(D) ("[T]he court is limited to a determination as to whether or not the employer is liable for damages on the basis that the employer committed an intentional tort.").

80. *Id.*

81. 1986 Ohio Legis. Serv. 5-374, 5-376 (Baldwin); Telephone interview with Amy Showalter-Newman, legislative aid to Senator Finan, sponsor of S. 307 (Mar. 2, 1987); see also J. HARRIS, *supra* note 3, at 38. In the only case which has at this writing survived a motion to dismiss or summary judgment and proceeded to trial under § 4121.80, of the Ohio Revised Code, liability was determined by a jury. *Pratt v. National Distillers & Chem. Corp.*, No. C-1-83-249 (S.D. Ohio Sept. 19, 1986). However, this case was heard by a federal court whose applications of Ohio statutes are not binding on Ohio courts.

82. OHIO REV. CODE ANN. § 4121.80(G)(1) (Anderson Supp. 1986).

83. 15 Ohio St. 3d 90, 95, 472 N.E.2d 1046, 1051 (1984) ("[A]n act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.").

84. *Id.*

that an employee may recover in an action based in intentional tort to the "benefits payable under chapter 4123 of the Revised Code and the net financial loss to the employee caused by the employer's intentional tort . . . but in no event may an award under this section exceed one million dollars."⁸⁶ Consequently, an employee may receive an award from the Ohio Industrial Commission that is substantially less than he might receive in a traditional common-law action for injury to his person.⁸⁷

D. Retroactive Application of Section 4121.80

Section 4121.80(H) provides that section 4121.80 of the Ohio Revised Code applies to any action based in intentional tort that is "pending in any court on the effective date of this section."⁸⁸ Therefore, employees who have filed intentional tort actions but whose cases have not yet been finally adjudicated lose their right to trial by jury, are subject to the new definition of intentional tort, and are limited to a maximum damage award of one million dollars.⁸⁹ Since section 4121.80(H) applies to any action based in intentional tort pending in "any" court, it would appear that those cases pending in courts of appeals are also subject to the provisions of section 4121.80.

IV. ANALYSIS

A. Constitutionality of the Retroactive and Prospective Elimination of the Right to Trial by Jury

It is settled law that a workers' compensation act will not be deemed violative of the United States Constitution because it denies a trial by jury to an employee who comes within the scope of its provisions.⁹⁰ Therefore, if section 4121.80(D) is to be held unconstitutional it will be because it violates some right guaranteed by the Ohio Constitution. Article II, section 35 of the Ohio Constitution provides that a board may be established by the legislature to administer the workmen's compensation fund and that the board may be empowered to determine "all rights of claimants" to benefits under the fund.⁹¹ Article I, section 5, of the Ohio Constitution which guarantees a right to trial

86. *Id.* § 4121.80(D).

87. The statute makes no provision for compensatory damages for pain and suffering, medical expenses in excess of \$1,000,000, or for punitive damages.

88. OHIO REV. CODE ANN. § 4121.80(H) (Anderson Supp. 1986).

89. *Id.* § 4121.

90. See *Mountain Timber Co. v. Washington*, 243 U.S. 219, 236 (1917); see also *Hawkins v. Bleakly*, 243 U.S. 210, 216 (1917).

91. OHIO CONST. art. II, § 35.

by jury does not extend the right to all cases.⁹² Article I, section 5, provides only that the right to trial by jury shall be "inviolable."⁹³—that is, the right to trial by jury cannot be eliminated for those actions where, (1) it existed at common law or, (2) it was granted by statute at the time of the adoption of the Constitution in 1802.⁹⁴ If section 4121.80(D) is to be held constitutionally invalid, it will have to be either on the basis that it eliminates the right to trial by jury in an action where it existed at common law or that it was a right granted by a statute which was in effect prior to the adoption of the Ohio Constitution of 1802.

The continuing right to trial by jury in actions where the right existed at common law was granted statutorily by article II of the Ordinance of 1787.⁹⁵ The Ohio Constitution of 1802 provided in Schedule Section 1 that "all rights, suits, actions . . . shall continue, as if no change had taken place in this government."⁹⁶ The right to trial by jury in actions based in intentional tort was recognized at common law prior to the adoption of the Ordinance of 1797 and the adoption of the Ohio Constitution in 1802. Therefore, the right to trial by jury in actions based in intentional tort was provided for statutorily prior to the adoption of the Constitution of 1802 and was preserved by the enactment of that constitution.

Furthermore, a statutory guarantee of trial by jury in such actions has existed in some form since Ohio became a state. Currently, section 2311.04 of the Revised Code provides that there is a right to trial by jury in actions involving "issues of fact arising in actions for the recovery of money only."⁹⁷ Whether an action is one for money only depends on the nature of the decree that a court will be required to enter upon its journal.⁹⁸ Normally, only pecuniary damages are awarded in actions

92. *Id.* at art. I, § 5.

93. *Id.* ("The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.").

94. *See* *Mason v. State*, 58 Ohio St. 30, 55, 50 N.E. 6, 9 (1898) (no right to trial by jury where court could not find such a right to exist at common law or by statute); *see generally* 64 O. JUR. 3D *Jury* § 24 (1985). While the legislature may not eliminate the right to trial by jury, it may expand that right by statute. *Gunsaulius v. Pettit*, 46 Ohio St. 27, 28, 17 N.E. 231, 231 (1888).

95. U.S.C. vol. 1, at XLV, XLVI (1982), *reprinted in* OHIO REV. CODE ANN. app. at 343, 345 (Anderson 1979).

96. OHIO CONST. sched. § 1 (1802) (repealed 1851).

97. OHIO REV. CODE ANN. § 2311.04 (Anderson 1980).

98. *Lange v. Lange*, 69 Ohio St. 346, 350, 69 N.E. 611, 612 (1904) (The court held that it is "not the principles which the court is required to consider and apply in determining the rights of the parties, but what decree it is required to enter upon its journal" that determines whether a

for personal injuries.⁹⁹ Therefore, an action based in intentional tort would normally fall within the statutory provision guaranteeing trial by jury. Additionally, an action to recover damages for injury to person or property has always been recognized as entailing the right to a jury trial under Ohio common law.¹⁰⁰ Since the right to trial by jury was provided in actions in intentional tort prior to the enactment of the 1802 constitution and is guaranteed by the present statute, the elimination of that right by section 4121.80(D) violates article I, section 5 of the Ohio Constitution and should be found to be unconstitutional in both its retroactive and prospective application.

It can be argued that the legislature may prospectively eliminate common-law causes of action.¹⁰¹ In fact, it is because common-law causes of action were eliminated by statute for injuries incurred in the course of employment that workers compensation acts have been upheld as not violating the right to trial by jury.¹⁰² However, the Ohio General Assembly did *not* eliminate the common-law cause of action based in intentional tort by enacting S. 307. A close reading of sections 4121.80(A) and 4121.80(B) leads to the inescapable conclusion that the common-law cause of action is retained.¹⁰³ As the Ohio Supreme Court held in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*,¹⁰⁴ an intentional tort is not within the scope of one's employment.¹⁰⁵ Further, the court held that in recognizing the plaintiff's claim it was not creating a new cause of action but merely affirming the right to an existing one.¹⁰⁶ Section 4121.80(D) should not be found constitutional as having eliminated the cause of action altogether.

The retroactive application of section 4121.80(D) presents additional constitutional difficulties. Article II, section 28 of the Ohio Con-

99. See generally 30 O. JUR. 3D *Damages* § 43 (1981).

100. *State ex rel. Turner v. Fassig*, 18 Ohio N.P. (n.s.) 177, 185 (1915), *rev'd on other grounds*, 95 Ohio St. 233, 116 N.E. 104 (1917).

101. See *State ex rel. Yable v. Creamer*, 85 Ohio St. 349, 397, 97 N.E. 602, 606 (1912); see generally 16 O. JUR. 3D *Constitutional Law* § 306 (1979).

102. See *Metropolitan Casualty Ins. Co. v. Huhn*, 165 Ga. 667, 142 S.E. 121 (1928); see generally 81 AM. JUR. 2D *Workmens' Compensation* § 20 (1976).

103. Section 4121.80(A) provides that "if injury . . . results to [an] employee from the intentional tort of his employer . . . [the employee has] a cause of action against the employer" OHIO REV. CODE ANN. § 4121.80(A) (Anderson Supp. 1986). Section 4121.80(B) says that the purpose of section 4121.80 is to "remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury . . . except as herein expressly provided." *Id.* § 4121.80(B) (emphasis added). The exception that section 4121.80(B) refers to is the cause of action granted by section 4121.80(A). *Id.* § 4121.80(A). Consequently, the legislature has expressly retained a common-law cause of action from which it cannot eliminate the right to trial by jury.

104. 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

105. *Id.* at 613, 433 N.E.2d at 576.

106. *Id.* at 612, 433 N.E.2d at 576.

stitution prohibits the enactment of retroactive laws that impair vested substantive rights.¹⁰⁷ In 1864, the Ohio Supreme Court adopted Justice Story's classic statement, "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective,"¹⁰⁸ as the definition of retroactive as used in article II, section 28 of the Ohio Constitution.¹⁰⁹ Later in *Weil v. Taxicabs of Cincinnati, Inc.*,¹¹⁰ the Ohio Supreme Court applied Justice Story's definition and held that a statutory act which took away an accrued (vested) common-law right of action affected substantive rights and could not be retroactively applied even though it substituted a right to compensation under the Workers' Compensation Act.¹¹¹ Section 4121.80(D) applied retroactively impairs the employee's right to bring an action, as well as the employer's right to defend actions as they existed at common law.¹¹² Further, the right to trial by jury has been held to be a substantive right, not merely a remedial one.¹¹³ Since the right to trial by jury is a substantive right and since section 4121.80(D) and section 4121.80(H) combine to retroactively eliminate that right, the only remaining question is whether the statute eliminates an accrued (vested) right.

Generally, a cause of action accrues at the instant a wrong is committed and injury results. In *Industrial Commission V. Kamrath*,¹¹⁴ the court held that plaintiff's cause of action accrued under the Workers' Compensation Act at the instant of her husband's death.¹¹⁵ Consequently, employees who have suffered injuries and filed causes of action prior to the effective date of S. 307 have accrued (vested) common-law causes of action—substantive rights which cannot be impaired retroactively without violating article II, section 28 of the Ohio Constitution.

107. OHIO CONST. art. II, § 28.

108. *Society for Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156).

109. *Rairden v. Holden*, 15 Ohio St. 207, 210-11 (1864).

110. 139 Ohio St. 198, 39 N.E.2d 148 (1942).

111. *Id.* at 204-05, 39 N.E.2d at 151.

112. *See* OHIO REV. CODE ANN. § 4121.80(D) (Anderson Supp. 1986).

113. *Cleveland Ry. Co. v. Halliday*, 127 Ohio St. 278, 284, 188 N.E. 1, 3 (1933) (holding invalid a rule of court providing for a civil jury trial with six instead of the normal twelve jurors as impinging upon the constitutional right to trial by jury).

114. 118 Ohio St. 1, 160 N.E. 470 (1928).

115. *Id.* at 7, 160 N.E. at 472 (injured employee's cause of action accrued at the time of his death and his wife's cause of action as his dependant survivor accrued at the time of his death).

B. Constitutionality of the Retroactive and Prosepective Application of the New Definition of Intentional Tort

Section 4121.80(G)(1) of the Ohio Revised Code adopts the definition of intentional tort expounded by the Ohio Supreme Court in *Jones v. VIP Development Co.*:¹¹⁶ "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur."¹¹⁷ However, whereas the *Jones* court held that intent could be inferred from conduct and circumstances where evidence of purposeful injury was lacking,¹¹⁸ section 4121.80(G)(1) defines "substantially certain" to require "deliberate intent to cause an employee to suffer injury, disease, condition, or death."¹¹⁹ The new definition presents the injured employee with a higher burden of proof under section 4121.80(G)(1) than under the definition presented by the Ohio Supreme Court in *Jones*.

1. Constitutionality of the Retroactive Application

The validity of the retroactive application of this new definition depends on whether it impairs a vested substantive right or is merely remedial in nature.

The Ohio Supreme Court in *State v. Cincinnati Tin & Japan Co.*,¹²⁰ held that a statute which retroactively heightened the evidentiary burden imposed upon a party who had a vested right to property was void as infringing upon article II, section 28, and article I, section 19, of the Ohio Constitution.¹²¹ Additionally, Ohio courts have held that a vested right of action in tort is a property right and is constitutionally protected from arbitrary interference.¹²² Thus, employees who had vested causes of action pending in court on the effective date of S. 307 had vested property rights. The retroactive imposition of the new definition of intentional tort increases the evidentiary burden on those employees attempting to enforce that right.¹²³ Certainly, that burden impairs the vested right in that cause of action and may destroy it. Where employees are unable to prove the specific intent required under section 4121.80(G)(1), they will be denied a property right without due process of law as required by article I, section 19, of the Ohio Constitu-

116. 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).

117. *Id.* at 95, 472 N.E.2d at 1051.

118. *Id.*

119. OHIO REV. CODE ANN. § 4121.80(G)(1) (Anderson Supp. 1986).

120. 66 Ohio St. 182, 64 N.E. 68 (1902).

121. *Id.* at 200-02, 64 N.E. at 71.

122. See *Pickering v. Peskind*, 43 Ohio App. 401, 408-09, 183 N.E. 301, 303 (1930); see

also *Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N.E. 197 (1892).

123. See OHIO REV. CODE ANN. § 4121.80(G)(1) (Anderson Supp. 1986).

tion and the fourteenth amendment of the United States Constitution.

2. Constitutionality of the Prospective Application

The prospective application of the new definition raises different constitutional concerns. The Ohio Supreme Court held in *Fassig v. State ex rel. Turner*¹²⁴ that "no one has a vested right in the rules of common law."¹²⁵ The court held that while vested common-law rights may not be eliminated without due process of law, the purpose of the legislative power is "to remedy defects in the common law as they are developed and to adapt it to new circumstances."¹²⁶ Those employees whose causes of action accrued after the effective date of S. 307 have no vested right in the old definition. Further, there is no constitutional prohibition against prospectively increasing the burden of proof in a common-law cause of action.¹²⁷ However, since the common-law cause of action in intentional tort retained, there arises a question of the equal protections guaranteed by the fourteenth amendment to the United States Constitution. Injured employees bear a higher burden of proof than do plaintiffs in other classifications.¹²⁸ Plaintiffs in a classification other than that of employee need prove only the intent level established by decisional law—wherein intent may be inferred by indirect evidence¹²⁹—in actions based in intentional tort. Employees, on the other hand, are subject to the heightened burden of proof requiring evidence of deliberate intent established by section 4121.80(G)(1).¹³⁰

Workmen's compensation acts have generally been upheld as a valid exercise of the police power.¹³¹ Special or discriminatory treat-

124. 95 Ohio St. 232, 116 N.E. 104 (1917).

125. *Id.* at 248, 116 N.E. at 108.

126. *Id.*

127. *See* *Hammond v. State*, 78 Ohio St. 15, 84 N.E. 416 (1908) (legislature may determine what evidence is sufficient to state a cause of action provided it does not offend constitutional guarantees).

128. Under an equal protection analysis, the fifth and fourteenth amendments to the United States Constitution require that all of those falling within the same class be treated the same and that classifications not be unreasonable or arbitrary. *See State ex rel. Lampson v. Cook*, 44 Ohio App. 501, 514, 185 N.E. 212, 217 (1932). There need only be a reasonable grounds for the classification. In drawing the classifications, the legislature has wide discretion. *See Porter v. Oberlin*, 1 Ohio St. 2d 143, 151-52, 205 N.E.2d 363, 369 (1965).

129. The provisions of section 4121.80(G)(1) refer only to actions instituted by an employee against an employer. OHIO REV. CODE ANN. § 4121.80(G)(1) (Anderson Supp. 1986). Obviously, an individual who initiates an intentional tort action against someone other than his employer would not fall within the Act and would not be subject to its definition for intentional tort. Such a person would need only prove an intentional tort as defined in *Jones*, 15 Ohio St. 3d at 95, 472 N.E.2d at 1051.

130. OHIO REV. CODE ANN. § 4121.80(G)(1) (Anderson Supp. 1986).

131. *State ex rel Yapple v. Creamer*, 85 Ohio St. 349, 352, 97 N.E. 602, 604 (1912); *see also* *85 Am. Comp. & Workmen's Compensation* § 71 (1976).

ment based on employee status has been held not to violate article II, section 26 of the Ohio Constitution or the fourteenth amendment of the United States Constitution.¹³²

The classification of employees under workers' compensation acts has been held not to be arbitrary.¹³³ It is generally held that absent arbitrary classification, discrimination by the legislature based on that classification need only represent a reasonable means of attaining a valid state objective.¹³⁴ In order for an exercise of the police power to be reasonable, it need only equally affect all those subjects of legislation which stand in the same situation with respect to the evil remedied.¹³⁵ Only when a classification has no reasonable basis will a law be overturned as violative of equal protection.¹³⁶

Therefore, since workers' compensation acts are a valid exercise of the police power and since it can reasonably be concluded that the heightened burden of proof, which restricts tort claims that can be heard outside the workers' compensation system, is consistent with the "intent of the legislature to effect prompt resolution" of workers' compensation claims,¹³⁷ the prospective application of section 4121.80(G)(1) is likely to be upheld as a reasonable means of obtaining a valid state objective.

C. *Constitutionality of the Retroactive and Prospective Limitation on Damages*

1. *Contitutionality of the Retroactive Application*

Section 4121.80(D) of the Ohio Revised Code limits the amount of damages that an employee may receive in an action based in intentional tort to one million dollars.¹³⁸ This section is given retroactive application by section 4121.80(H).¹³⁹ Section 4121.80(D) makes no exceptions for cases in which economic damages exceed one million dollars and does not appear to provide for consideration of other noneconomic damages normally recoverable in actions based in intentional tort.¹⁴⁰

132. *Creamer*, 85 Ohio St. at 405, 97 N.E. at 608.

133. *See Mountain Timber Co. v. Washington*, 243 U.S. 219, 243-44 (1917).

134. *Id.* That is unless the classification is based on sex, race, wealth, or union membership, in which case the courts will scrutinize the justification for the classification much more closely. *See generally* 17 O. JUR. 3D *Constitutional Law* §§ 632-637 (1980).

135. *See Dillon v. Cleveland*, 117 Ohio St. 258, 272, 158 N.E. 606, 611 (1927).

136. *Id.*

137. OHIO REV. CODE ANN. § 4121.80(B) (Anderson Supp. 1986).

138. *Id.* § 4121.80(D).

139. *Id.* § 4121.80(H).

140. *Id.* § 4121.80(D) (providing that in making a damage award, the Ohio Industrial

There is a paucity of case law available on the constitutionality of statutes placing a fixed sum cap on damages awardable in personal injury actions. Several states, however, have passed damage cap statutes with regard to medical malpractice actions.¹⁴¹ Ohio's medical malpractice statute, section 2307.43 of the Ohio Revised Code, places a \$250,000 limit on general damages in medical malpractice actions not involving death.¹⁴² The case law surrounding such statutes provides at least a framework for analyzing the limitation imposed by section 4121.80(D).

In *Young v. Alberts*,¹⁴³ the court held that if the limitation on malpractice damages were to have been applied retroactively, it would have been constitutionally prohibited by article II, section 28 of the Ohio Constitution.¹⁴⁴ The court found that the retrospective application of the limitation impaired a substantive right.¹⁴⁵ Applying the rationale of *Young* to the retroactive application of the workers' compensation damage limitation imposed by section 4121.80(D) leads to the inescapable conclusion that a substantive right would be impaired thereby and that retroactive application of the limitation is therefore unconstitutional.

The retroactive application of the damage cap may also be said to constitute a deprivation of property without due process.¹⁴⁶ Not only is the right of action considered a property right, but so too may be the damages.¹⁴⁷ In *Cincinnati v. Hafer*,¹⁴⁸ the court implied that damages due in tort actions were property.¹⁴⁹ However, it is difficult to discern whether the court is referring to damages in a judgment received or in a judgment not yet rendered. Further, the court appears to merge the concepts of damages and of the cause of action as a single property

compensation benefits, and the "net financial loss to the employee," but in no case shall the award exceed one million dollars). Section 4121.80(D) appears to make no provision for consideration of mental anguish or suffering which is normally recoverable in an action to recover for personal injury in which the conduct of the tortfeasor was wanton, willful, or malicious. See *Cincinnati N. Traction Co. v. Rosnagle*, 84 Ohio St. 310, 318-19, 95 N.E. 884, 886 (1911). Section 4121.80(D) also does not appear to provide for an award of punitive damages which are normally recoverable in an action in which the plaintiff's injury was caused by the willful or reckless conduct of the tortfeasor. See *Petrey v. Liuzzi*, 76 Ohio App. 19, 27, 61 N.E.2d 158, 162 (1945).

141. See generally *Duren v. Surburban Community Hosp.*, 24 Ohio Misc. 2d 25, 482 N.E.2d 1358 (C.P. Ct. 1985) (analysis of California, Idaho, New Hampshire, and Texas statutes which limit damages in medical malpractice actions).

142. OHIO REV. CODE ANN. § 2307.43 (Anderson 1981).

143. 73 Ohio Op. 2d 32, 342 N.E.2d 700 (C.P. Ct. 1975).

144. *Id.* at 34, 342 N.E.2d at 701-02.

145. *Id.* at 34, 342 N.E.2d at 702.

146. J. HARRIS, *supra* note 3, at 52.

147. *Id.*

148. 49 Ohio St. 60, 30 N.E. 197 (1892).

right.¹⁵⁰

If, as is suggested by these cases, the limitation on damages impairs a substantive right, either the vested right in the cause of action or the vested right to damages, the retroactive limitation on damages must be found unconstitutional. Case law fails to sustain any argument that damages are a remedy and that as such do not constitute a substantive right.¹⁵¹ Courts that have ruled on the retroactive application of Ohio's medical malpractice statute have found that the limitation on damages is an unconstitutional impairment of a vested substantive right.¹⁵² Unless a rationale is formulated to distinguish workers' compensation damages, it would appear that the limitation on damages imposed by section 4121.80(D) would likewise impair a vested substantive right and would be violate the constitutional prohibition against retrospective laws.

2. Constitutionality of the Prospective Application

Challenges to the prospective application of limitations of awards in medical malpractice actions have been successful on equal protection grounds. In *Graley v. Satayatham*,¹⁵³ the court found that there was no satisfactory reason for treating the medical profession differently than other tortfeasors.¹⁵⁴ The court held that the classification was unreasonable and that to afford special protection to the medical profession simply because of its financial distress was violative of the equal protection clauses of the Ohio and United States Constitutions.¹⁵⁵ Similarly, in *Simon v. St. Elizabeth Medical Center*,¹⁵⁶ the court held it a violation of equal protection to treat the medical profession differently than any other defendant in tort actions.¹⁵⁷

The same argument would appear applicable to the special protection afforded to employers through the damage limitation imposed by section 4121.80(D).¹⁵⁸ This legislation again provides special treatment to a particular segment of society that has claimed financial distress¹⁵⁹ while other groups in society are afforded no special relief for their

150. *Id.*

151. *Cf. Duren*, 24 Ohio Misc. 2d at 25, 482 N.E.2d at 1358 (discussing medical malpractice damage limitation statutes that have been upheld in prospective application).

152. *See Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. Ct. 1976); *see also Graley v. Satayatham*, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. Ct. 1976).

153. 74 Ohio Op. 2d 316, 343 N.E. 2d 832 (C.P. Ct. 1976)

154. *Id.* at 320, 343 N.E.2d at 837-38.

155. *Id.* at 319, 343 N.E.2d at 836.

156. 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. Ct. 1976).

157. *Id.* at 167, 355 N.E.2d at 906.

158. OHIO REV. CODE ANN. § 4121.80(D) (Anderson Supp. 1986).

159. *See supra* notes 63-64 and accompanying text.

intentionally tortious conduct because of their financial status.

The classification of employees within workers' compensation acts, unlike that of medical care providers or patients, has repeatedly been upheld as valid. The intent of the legislation is to promote prompt resolution of disputes, to allow employers to plan around liability expenses, and, most importantly, to promote safety in the workplace.¹⁶⁰ While it may be arguable how effective limiting damages will be in encouraging employers to act responsibly, the objectives are nevertheless valid. The means chosen by the legislature need not be the wisest nor even the most effective means of achieving a valid state objective to be upheld against equal protection claims. They need only be a reasonable mode of obtaining that objective.

Since the classification of employees has been upheld as a reasonable means of effecting the objectives of workers' compensation systems, the analogy with the medical malpractice statutes loses much force as an argument against the prospective application of the damage cap imposed by section 4121.80(D), and it appears that this portion of the statute is likely to be found constitutionally valid.

V. CONCLUSION

In its zeal to remedy what it apparently believed to be a potentially disastrous situation, the Ohio Legislature has enacted a bill that will generate litigation for years to come. Whether acting in haste or in response to the pressure exerted by business interests, the result is an act fraught with constitutionally suspect provisions.

Given the history of the workers' compensation system in Ohio, however, it would be foolish to assume that S. 307 is the last chapter in the workers' compensation saga. Further, the complexion of recent Ohio Supreme Court decisions indicates that there may be substantial alterations in the law through judicial review. Nor can the plaintiff's bar be expected to accept the new law without a bitter fight.

It is unfortunate that a system with such admirable goals—the prompt and fair resolution of the claims of injured employees—should become the victim of a political football game. It seems a waste that labor, management, and our elected officials should spend so much time and effort haggling over a bill that is eventually going to have to be rewritten by the courts when the avowed purpose of that bill was to eliminate such bureaucratic headaches.

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