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Gallagher Sharp Newsflash: 8th District Declares EIT Statute Unconstitutional

In an opinion announced on July 24, 2008, the Eighth Appellate District, which is Ohio's largest appellate district located in Cleveland, became the second appellate district to declare R.C. 2745.01, the employer intentional tort statute, to be unconstitutional. See, *Barry v. A.E. Steel Erectors, Inc.*, 8th Dist. No. 90436, 2008-Ohio-3676.

Revised Code Section 2745.01 became effective on April 7, 2005. In March 2008, the Seventh Appellate District, with jurisdiction over eight counties near Youngstown and Ohio's eastern border with Pennsylvania, struck down R.C. 2745.01 as an unconstitutional exercise of the General Assembly's constitutional authority to legislatively regulate the employment relationship. See, *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App.3d 227, 2008-Ohio-1521, discr. appeal pending.

In *Barry*, the Eighth Appellate District held that the General Assembly's latest effort to legislatively restrict workplace intentional tort claims is indistinguishable from earlier attempts to do so which the Ohio Supreme Court has found unconstitutional. See, *Brady v. Safety-Kleen Corp.*(1991), 61 Ohio St.3d 624 and, more recently, *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 1999-Ohio-267. Agreeing with the Seventh Appellate District's analysis in *Kaminski*, the *Barry* court declared that "[w]hile the phraseology utilized in the latest enactment may be slightly different from its predecessors," "the latest version of R.C. 2745.01, which saddles victims of workplace accidents with an insurmountable 'deliberate intent' standard, essentially immunizes employers from liability for their intentional tortious conduct, because it sets forth only an illusory cause of action." The court did not address several other constitutional challenges, including whether R.C. 2745.01 violates the due process and equal protection clauses of the Ohio Constitution, and whether it infringes on the rights to a jury trial and open courts as guaranteed by the Ohio Constitution.

The constitutionality of R.C. 2745.01 appears to be headed to the Ohio Supreme Court for review and final resolution. Not only have two of Ohio's twelve appellate districts now declared R.C. 2745.01 to be unconstitutional, but several constitutional challenges to the statute have also been certified to the Supreme Court of Ohio by the United States District Court for the Northern District of Ohio.

Neither appellate district expressly addressed the inclusion in the statute of the two instances where "deliberate intent" is rebuttably presumed (i.e., removal of a safety guard and misrepresentation of a toxic or hazardous substance) which could prove critical to distinguishing this statute from its predecessors.

A copy of the Eighth Appellate District's opinion in *Barry* may be viewed by going to:
<http://www.sconet.state.oh.us/rod/docs/pdf/8/2008/2008-ohio-3676.pdf>

A copy of the Seventh Appellate Districts opinion in *Kaminski* may be viewed by going to:
<http://www.sconet.state.oh.us/rod/docs/pdf/7/2008/2008-ohio-1521.pdf>

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