

**TEMPORARY COMMENT TO CV 537.05 EMPLOYER INTENTIONAL TORT
INSTRUCTIONS FOR CASES ARISING ON AND AFTER 4/7/05**

R.C. 2745.01 is the third codification of Ohio's common law relative to employer intentional torts. The statute was enacted (effective 4/7/2005) after its two statutory predecessors were declared unconstitutional by the Supreme Court of Ohio in *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624 (striking down former R.C. 4121.80), and *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298 (striking down former R.C. 2745.01).

Four appellate districts have considered the constitutionality of current R.C. 2745.01. All four have declared it unconstitutional based on the two prior Supreme Court cases. See *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App.3d 227, 2008- Ohio-1521 (Seventh District); *Barry v. A.E. Steel Erectors, Inc.*, 8th Dist. No. 90436, 2008-Ohio- 3676; *Fleming v. AAS Serv., Inc.*, 177 Ohio App.3d 778, 2008-Ohio-3908 (Eleventh District); *Henson v. Cleveland Steel Container Corp.*, 11th Dist. No. 2008-P-0053, 2009-Ohio-180. But, see, *Smith v. Inland Paperboard & Packaging, Inc.*, 11th Dist. No. 2008-P-0072, 2009-Ohio-3148; *Rallya v. A.J. Rose Mfg. Co.*, 9th Dist. No. 08CA009327, 2008-Ohio-6351.

The question of the constitutionality of the statute was certified from a federal court to the Supreme Court of Ohio in *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 119 Ohio St.3d 1405, 2008-Ohio-3880. On February 18, 2009, the Supreme Court of Ohio heard oral argument on this issue in the *Kaminski* and *Stetter* cases.

The Committee believes that the instruction set forth in OJI-CV 537.05 (claims arising before 4/09/03) is the appropriate instruction to utilize in these four appellate districts until the Supreme Court of Ohio decides the issue.