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Bill Analysis
Legislative Service Commission

S.B. 108

124th General Assembly
(As Passed by the Senate)

Sens. Jacobson, Austria, Amstutz, Spada, Wachtmann

BILL SUMMARY

- Repeals the Tort Reform Act, Am. Sub. H.B. 350 of the 121st General Assembly, 146 Ohio Laws 3867.
- Revives the law as it existed prior to the Tort Reform Act.
- Clarifies the status of the Revised Code sections affected by the Tort Reform Act.
- Continues any subsequent amendments made to sections in the Tort Reform Act that have been subsequently amended.
- Reorganizes certain tort-related provisions of the Revised Code.
- Declares an emergency.

BACKGROUND INFORMATION

The Tort Reform Act, Am. Sub. H.B. 350 of the 121st General Assembly

The Tort Reform Act, Am. Sub. H.B. 350 of the 121st General Assembly (hereinafter the "Act"), was a comprehensive civil justice reform act that made numerous changes in the laws pertaining to tort, product liability, and other civil actions. The Act had an effective date of January 27, 1997.

State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451

In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, the Supreme Court of Ohio, in a four to three decision, held the Act to be unconstitutional on two primary grounds. According to the Court, the Act usurped judicial power in violation of the Ohio constitutional doctrine of

separation of powers and, therefore, was unconstitutional. Additionally, the Court found that the Act violated the one-subject provision of Section 15(D), Article II of the Ohio Constitution and was unconstitutional *in toto*.

Whenever a bill contains more than one subject, the Court is permitted to ascertain which subject is primary and which subject is an unrelated add-on. According to the Court, severability was not an option in this case. The Court stated that the Act was "designed to comprehensively reform the civil justice system, and any attempt on our part to carve out a primary subject by identifying and assembling what we believe to be key or core provisions of the bill would constitute a legislative exercise wholly beyond the province of this court." Therefore, the Act was unconstitutional *in toto*. *Sheward* at 500-501. (See **COMMENT 1**.) Confusion ensued among the practicing bar and the lower courts on the meaning and application of the term "unconstitutional *in toto*" and on the validity of language enacted by the Act that was the subject of future bills. (See **COMMENT 2**.)

Stevens v. Ackman (2001), 91 Ohio St.3d 182

The Supreme Court further clarified its intent in *Sheward* in *Stevens v. Ackman* (2001), 91 Ohio St.3d 182. The Court held that R.C. 2744.02(C), as purportedly enacted in 1996 by Am. Sub. H.B. 350, was invalid and was neither enacted nor reenacted in 1997 by Am. Sub. H.B. 215. Under *Stevens* the Court discussed Am. Sub. H.B. 350 and the ramifications of *Sheward*. After discussion of *Sheward* and discussion on whether matter in sections in Am. Sub. H.B. 350 could be "reenacted" in subsequent Acts, (see **COMMENT 3**), the Court held at p. 195 that:

...Clearly, the General Assembly did not intend to reenact R.C. 2744.02(C) in Am.Sub.H.B. No. 215. Therefore, that act neither reenacted nor enacted R.C. 2744.02(C). When this court in *Sheward* struck down Am.Sub.H.B. No. 350, it struck down the version of R.C. 2744.02(C) that Am.Sub.H.B. No. 350 attempted to enact, and R.C. 2744.02(C) remains invalid as a result of *Sheward*.

...(W)e hold that R.C. 2744.02(C), as purportedly enacted in Am.Sub.H.B. No. 350, is invalid. Furthermore, R.C. 2744.02(C) was neither enacted nor reenacted by Am.Sub.H.B. No. 215....

In holding this "reenactment" theory invalid, the Court clarified that, for its purposes, the active statutory law currently in effect is the statutory law that existed prior to the enactment of Am. Sub. H.B. 350.

CONTENT AND OPERATION

Objective of the bill

It is the intent of the bill (1) to repeal the Tort Reform Act, Am. Sub. H.B. 350 of the 121st General Assembly, 146 Ohio Laws 3867, in conformity with the Supreme Court of Ohio's decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, (2) to clarify the status of the law, and (3) to revive the law as it existed prior to the Tort Reform Act (Section 1).

The bill has no substantive effect on current law. It simply lets the statutes reflect what the state of the law is.

Technical operation of the bill

The particular status of each Revised Code section dictates the particular technical method used to achieve the objective of the bill. What follows is a recitation of the particular technical methods used for each section along with the reason for using that method.

The bill amends the following sections, which have been amended by acts subsequent to their amendment by Am. Sub. H.B. 350 of the 121st General Assembly, to remove matter inserted by, or to revive matter removed by, Am. Sub. H.B. 350: sections 1701.95, 1707.01, 2305.25, 2305.251, 2305.37, 2307.60, 2307.61, 2743.18, 2743.19, 2744.01, 2744.02, 2744.03, 2744.05, 3123.17, 4112.02, 4507.07, 4513.263, 4582.27, and 5111.81 of the Revised Code. The bill retains in these sections amendments made by Am. Sub. H.B. 350 or the subsequent acts that are independent of the purposes of Am. Sub. H.B. 350. (Section 3(A)(1).)

The bill amends section 1901.18 of the Revised Code, as amended subsequently to Sub. H.B. 350 by Am. Sub. S.B. 1 and Sub. H.B. 302 of the 122nd General Assembly, to ratify a cross-reference correction made to the section by Am. Sub. H.B. 350 (Section 3(A)(2)).

The bill revives and amends the versions of sections 109.36, 2117.06, 2125.01, 2125.02, 2125.04, 2305.10, 2305.16, 2305.38, 2307.31, 2307.32, 2307.75, 2307.80, 2315.01, 2315.19, 2315.21, 2501.02, 2744.06, 3722.08, 4112.14, 4113.52, 4171.10, and 4399.18 of the Revised Code that existed immediately prior to the effective date of Am. Sub. H.B. 350. The revived and

amended versions of these sections supersede the versions of the same sections that the bill repeals and include amendments that gender neutralize the language of the sections (as contemplated by section 1.31 of the Revised Code) and that correct apparent error. (Section 3(A)(3).)

The bill revives the versions of sections 163.17, 723.01, 1343.03, 1775.14, 2305.01, 2305.11, 2305.35, 2307.33, 2307.71, 2307.72, 2307.73, 2307.78, 2315.18, 2315.20, 2317.62, 2323.51, 2744.04, 4112.99, 4909.42, 5591.36, and 5591.37 of the Revised Code that existed immediately prior to the effective date of Am. Sub. H.B. 350. The revived versions of these sections supersede the versions of the same sections that the bill repeals. (Section 3(A)(4).)

Notwithstanding its attempted repeal by Am. Sub. H.B. 350, the bill revives section 2305.27 of the Revised Code and amends the revived version of the section to gender neutralize the language of the section (Section 3(A)(5)).

The bill revives former sections 2307.31 and 2307.80 of the Revised Code, as they existed prior to being renumbered by Am. Sub. H.B. 350, and amends the sections to ratify a cross-reference correction made to the section. Am. Sub. H.B. 350 renumbered former sections 2307.31 and 2307.80 of the Revised Code and reassigned their numbers to new sections. The bill repeals only new sections 2307.31 and 2307.80 of the Revised Code, as enacted by Section 1 of Am. Sub. H.B. 350. (Section 3(A)(6).)

The bill amends section 3123.17 of the Revised Code as explained above to remove matter inserted into former section 3113.219 of the Revised Code by Am. Sub. H.B. 350. Am. Sub. S.B. 180 of the 123rd General Assembly amended and renumbered former section 3113.219 of the Revised Code as section 3123.17 of the Revised Code as part of its general revision of the child support laws. The bill retains the amendments of Am. Sub. S.B. 180. (Section 3(A)(7).)

The bill's repeal of sections 1901.041, 1901.17, 1901.181, 1901.20, 1901.262, 1905.032, and 1907.262 of the Revised Code as they result from Am. Sub. H.B. 350 is intended to enable the sections to remain in effect as they result from Am. Sub. H.B. 438 of the 121st General Assembly, 146 Ohio Laws 4823 (Section 3(B)(1)).

The bill's repeal of section 2317.45 of the Revised Code responds to the section having been held unconstitutional by the Supreme Court of Ohio's decision in *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415. The bill's repeal of section 3701.19 of the Revised Code as it results from Am. Sub. H.B. 350 is intended to enable the section to remain in effect as it results from Sub. H.B. 670 of the 121st General Assembly, 146 Ohio Laws 6440. (Section 3(B)(2) and (3).)

The bill amends sections 2744.01 and 2744.03 of the Revised Code, effective January 1, 2002, to continue the amendments made to those sections by Section 2.01 of the bill. Sections 2744.01 and 2744.03 were amended subsequently to Am. Sub. H.B. 350 by Am. Sub. S.B. 179 of the 123rd General Assembly, effective January 1, 2002. (Sections 2.03, 2.04, 2.05, and 3(C).)

Because Am. Sub. H.B. 551 of the 123rd General Assembly takes effect on October 5, 2001, all of the following apply (Section 4):

(A) Section 1707.01 of the Revised Code, which is presented in the bill as it results from Am. Sub. H.B. 551, takes effect as amended by the bill on October 5, 2001.

(B) Divisions (CC), (DD), (EE), (FF), (GG), and (HH) of section 1707.01 of the Revised Code, which were inserted into the section by Am. Sub. H.B. 350 of the 121st General Assembly, are suspended on the effective date of the bill, pending section 1707.01 of the Revised Code taking effect as amended by the bill on October 5, 2001.

(C) Sections 1707.432, 1707.433, 1707.434, 1707.435, 1707.436, 1707.437, and 1707.438 of the Revised Code, which were enacted by Am. Sub. H.B. 350, are suspended on the effective date of the bill, pending their repeal by Am. Sub. H.B. 551 taking effect on October 5, 2001.

The bill amends Section 3 of Am. Sub. H.B. 438 of the 121st General Assembly, which was amended by Am. Sub. H.B. 350 of the 121st General Assembly, to remove the language inserted by Am. Sub. H.B. 350 that attempted to provide an earlier effective date for section 2317.023. The bill states that, notwithstanding the attempted amendment of Section 3 of Am. Sub. H.B. 438 by Am. Sub. H.B. 350 of the 121st General Assembly, section 2317.023 of the Revised Code, as enacted by Am. Sub. H.B. 438 of the 121st General Assembly, took effect on July 1, 1997. (Sections 5.01, 5.02, and 5.03.)

The bill repeals Sections 3, 4, 5, 6, 7, 8, 9, 13, and 16 of Am. Sub. H.B. 350 of the 121st General Assembly (Section 6).

The bill states that in sections contained in the bill that have been amended by acts subsequent to their amendment by Am. Sub. H.B. 350 of the 121st General Assembly (other than section 1901.18 of the Revised Code), matter removed by Am. Sub. H.B. 350 is revived, and matter inserted by Am. Sub. H.B. 350 is removed, by amendment indicated as directed in rule 103-5-01 of the Administrative Code. But, notwithstanding rule 103-5-01 of the Administrative Code, in sections contained in the bill that have not been amended by acts subsequent to their amendment by Am. Sub. H.B. 350 of the 121st General

Assembly (1) matter removed by Am. Sub. H.B. 350 is revived by being reinserted without underlining, so as to indicate the intention that it is old law that is being revived and (2) matter inserted by Am. Sub. H.B. 350 is removed by being omitted, so as to indicate the intention that, by virtue of its noninclusion, it is being repealed because constitutionally meaningless. In section 1901.18 of the Revised Code, ratification of Sub. H.B. 350's cross-reference correction is indicated by amendment as directed in rule 103-5-01 of the Administrative Code. (Section 7.)

Reorganization of Code sections

R.C. 2315.37 is repealed, R.C. 2101.31 and 2313.46 are amended, and R.C. 2307.24, 2307.27, 2307.30, 2315.07, 2315.08, 2315.18, 2315.23, and 2315.24 are renumbered and amended to fix cross-references and cleanup their respective chapters.

Emergency clause

The bill states that it is an emergency measure necessary for the immediate preservation of the public peace, health, and safety, and the reason for the necessity is that the repeal of the Tort Reform Act and revival of prior law will clarify the status of law that is unsettled as a result of the act being held unconstitutional (Section 9).

COMMENT

1. See also *Burger v. Cleveland Hts.* (1999), 87 Ohio St.3d 18, for a discussion of the underlying jurisdictional question presented to the Court in *Sheward*.

2. See, e.g., *Thomas Vending, Inc. v. Slagle* (Ohio App. 3 Dist. 2000), 2000 WL 123804. (We note that this section of the Ohio Revised Code was amended, effective January 27, 1997, as part of Am. Sub. H.B. No. 350. In its recent decision of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Aug. 16, 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062, the Supreme Court of Ohio declared House Bill 350 unconstitutional in its entirety because it violated the one-subject provision of Section 15(D), Article II of the Ohio Constitution. Thus, this court does not have jurisdiction to hear Slagle's appeal under this section of the Ohio Revised Code. However, although R.C. 2744.02(C) was also part of Am. Sub. H.B. No. 350, this section of the Ohio Revised Code was amended and re-enacted in its entirety as part of House Bill 215, effective June 30, 1997. Thus, because R.C. 2744.02(C) appears to provide the requisite jurisdiction to consider this interlocutory appeal, our analysis will focus on whether this section properly applies to the matter at hand.)

But see, *Klein v. Portage Cty.* (Ohio App. 11 Dist. 2000), 139 Ohio App.3d 749, 751-752. (The addition of R.C. 2744.02(C) to R.C. Chapter 2744. was part of Am. Sub. H.B. No. 350, which became effective on January 27, 1997. However, on August 16, 1999, the Supreme Court of Ohio declared that Am. Sub. H.B. No. 350 violated the one-subject provision of Section 15(D), Article II of the Ohio Constitution and as such, was "unconstitutional *in toto.*" *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062, paragraph three of the syllabus. Hence, the language of R.C. 2744.02(C) was also declared unconstitutional, and no longer provides a jurisdictional basis for an appellate court to review interlocutory decisions of a trial court that denies immunity. *Tignor v. Franklin Cty. Bd. of Commrs.* (Apr. 27, 2000), Franklin App. No. 99AP-571, unreported, at 1, 2000 WL 490693; see, also, *Chambers v. Chambers* (2000), 137 Ohio App.3d 355, 738 N.E.2d 834....

Moreover, it is well-established that a decision of the Supreme Court striking down a statute as unconstitutional is generally given retrospective application. *Wendell v. AmeriTrust Co., N.A.* (1994), 69 Ohio St.3d 74, 77, 630 N.E.2d 368, 371. The *Sheward* decision, thus, has the retroactive effect of barring application of R.C. 2744.02(C) in the instant matter. The Supreme Court of Ohio has effectively returned the law relative to final appealable orders to its status prior to the adoption of R.C. 2744.02(C)....)

3. Excerpt from *Stevens* at 191-196.

Am. Sub. H.B. No. 215 and "Reenactment"

In one of the cases mentioned above, *Hubbard*, two justices dissented from the entry vacating the opinion of the court of appeals for lack of a final appealable order. In the *Hubbard* dissent, the following statement was made:

"Whether the judgment of the trial court denying immunity is final and appealable depends on whether R.C. 2744.02(C) was validly reenacted by the General Assembly in Am. Sub. H.B. No. 215, given that R.C. 2744.02(C) was declared unconstitutional as being part of Am. Sub. H.B. No. 350. That is, if Am. Sub. H.B. No. 215 validly reenacted this section, then the trial court's decision denying immunity to the board of education would be final, and the jurisdiction of the court of appeals would not be questioned by this court." 88 Ohio St.3d at 15, 722 N.E.2d at 1026 (Cook, J., dissenting).

Am. Sub. H.B. No. 215, effective June 30, 1997, contained an amendment to R.C. 2744.02(B)(2), which deals with the liability of political subdivisions for negligent acts by their employees with respect to proprietary functions. The sole purpose of the amendment was to insert a reference to a statute (R.C. 3314.07) that was not previously mentioned within R.C. 2744.02(B)(2). Am. Sub. H.B. No. 215 made no other changes to R.C. 2744.02. 147 Ohio Laws, Part I, 1149-1150.

Section 15(D), Article II of the Ohio Constitution requires that "[n]o law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed."

Consistent with this provision, Am. Sub. H.B. No. 215, in amending R.C. 2744.02(B)(2), reprinted the entire version of R.C. 2744.02 thought to be in existence at the time, including R.C. 2744.02(C) as purportedly enacted in Am. Sub. H.B. No. 350.

Middletown argues that, because Am. Sub. H.B. No. 215 amended R.C. 2744.02(B)(2) in compliance with the requirement of Section 15, Article II, the General Assembly thereby "enacted" an entirely new R.C. 2744.02 (including a new R.C. 2744.02[C]) in Am. Sub. H.B. No. 215. Middletown argues that, because Sheward found Am. Sub. H.B. No. 350 unconstitutional, and therefore the version of R.C. 2744.02(C) that the bill attempted to enact unconstitutional as well, then R.C. 2744.02(C) was never truly "enacted" until Am. Sub. H.B. No. 215 enacted the statute, because everything in Am. Sub. H.B. No. 350 was a nullity.

In a related vein, Middletown argues that, pursuant to Section 15, Article II, the General Assembly's actions within Am. Sub. H.B. No. 215 should be viewed as a "repeal" in its entirety of the version of R.C. 2744.02 believed to be in effect at the time. According to this "reenactment" argument, the act therefore repealed the version of R.C. 2744.02(C) that this court found

unconstitutional in *Sheward*, and replaced it with a later version of R.C. 2744.02(C) that was free of the constitutional infirmity that had caused Am. Sub. H.B. No. 350 to be struck down in *Sheward*. But, see, *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1, 14-17, 711 N.E.2d 203, 214- 216.

While the reenactment argument exposes an ambiguity and is plausible on its face, serious deficiencies in the argument emerge when its specifics are considered.

3

The Intent of the General Assembly

The essential goal of statutory construction is to give effect to the intent of the General Assembly. See *Carter v. Youngstown* (1946), 146 Ohio St. 203, 32 O.O. 184, 65 N.E.2d 63, paragraph one of the syllabus. The intent may be inferred from the particular wording the General Assembly has chosen to set forth the substantive terms of a statute. See *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 36 O.O. 554, 78 N.E.2d 370, paragraph five of the syllabus. Intent may also be revealed in the procedural passage of the legislative act under consideration, when that body passes legislation that enacts, amends, or repeals a statute. See *State v. Wilson* (1997), 77 Ohio St.3d 334, 336-337, 673 N.E.2d 1347, 1350; see, also, *State ex rel. Durr v. Spiegel* (1914), 91 Ohio St. 13, 22, 109 N.E. 523, 525; *In re Hesse* (1915), 93 Ohio St. 230, 235, 112 N.E. 511, 512 (both determining intent of General Assembly by considering the way the statute at issue was amended).

Thus, for Am. Sub. H.B. No. 215 to successfully enact or reenact R.C. 2744.02(C), the General Assembly must have intended the act to have that effect. It is readily apparent that no such intent was present. At the time Am. Sub. H.B. No. 215 was passed, the General Assembly had no reason to believe that the purported enactment of R.C. 2744.02(C), attempted a short time earlier in Am. Sub. H.B. No. 350, would later be found

to be unsuccessful. It is clear that while the General Assembly intended to make a minor amendment in Am. Sub. H.B. No. 215 to R.C. 2744.02(B), the General Assembly did not intend to take any action whatsoever with regard to R.C. 2744.02(C).

R.C. 101.53 (formerly 101.52, see 1998 H.B. No. 649, 147 Ohio Laws, Part III, 5043), provides:

"Bills shall be printed in the exact language in which they were passed, under the supervision of the clerk of the house in which they originated. New matter shall be indicated by capitalization and old matter omitted by striking through such matter. Prior capitalization in a Revised Code section shall be indicated by italicized type."

The editor's comment in Baldwin's Ohio Revised Code Annotated to Section 15, Article II of the Ohio Constitution makes some relevant comments regarding R.C. 101.53, and indicates a relationship between that statute and Section 15(D), Article II:

"When amending a law or reviving a law previously repealed many legislative bodies include in the act only the desired amending language or words of revivor, which can be confusing because the language does not appear in context with the law amended or revived. The General Assembly is prohibited from this practice by division (D) of this section, which also requires that the act repeal the amended section. R.C. 101.52 (now R.C. 101.53) provides devices for showing changes in context in the printed bill or act: matter to be deleted is shown struck through, and new matter to be inserted is shown in capital letters."

The printing format of Am. Sub. H.B. No. 215 indicates no intent to reenact or enact R.C. 2744.02(C). R.C. 2744.02(C) appears in the printed act in regular type, without the capitalization that would indicate new material pursuant to R.C. 101.53.

R.C. 1.54 provides: "A statute which is reenacted or amended is intended to be a continuation of the prior

statute and not a new enactment, so far as it is the same as the prior statute." In *In re Hesse*, 93 Ohio St. at 234, 112 N.E. at 512, this court stated:

"Section 16 [now Section 15(D)], Article II of the Constitution, requires that where a law is amended, the new act shall contain the section or sections amended, and the section or sections so amended shall be repealed. In compliance with this the general assembly, when it amended [the statute at issue], did repeal the section as it existed prior thereto. It is to be remembered that the only change made in the statute was the addition of two classes of misdemeanors. The provisions contained in the act as amended which were in the original act are not considered as repealed and again reenacted, but are regarded as having been continuous and undisturbed by the amendatory act. *In re Allen* [1915], 91 Ohio St. 315 [320-321, 110 N.E. 535, 537]."

In *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 206, 22 O.O. 205, 208, 39 N.E.2d 148, 152, this court stated:

"The courts have generally held, notwithstanding this [current Section 15(D), Article II] and similar constitutional provisions, that where an act is amended, the part of the original act which remains unchanged is to be considered as having continued in force as the law from the time of its original enactment, and new portions as having become the law only at the time of the amendment. Black on Interpretation of Laws (2d Ed.) 579 and 582, Sections 168 and 169; 1 Sutherland Statutory Construction (2d Ed.) 441 and 445, Sections 237 and 238; *McKibben v. Lester* [1859], 9 Ohio St. 627 [1859 WL 40]; *State ex rel. McLaughlin v. City of Newark* [1894], 57 N.J.L. 298, 30 A. 543."

"The court in the last cited case says that 'by observing the constitutional form of amending a section of a statute, the Legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is

indicated. Any other rule of construction would surely introduce unexpected results and work great inconvenience.' " See, also, *In re Petition to Annex 320 Acres to the Village of S. Lebanon* (1992), 64 Ohio St.3d 585, 595, 597 N.E.2d 463, 470, citing *In re Allen*, 91 Ohio St. at 320-321, 110 N.E. at 537, for the proposition that "when a statute is amended the part that remains unchanged is to be considered as having continued as the law from the time of its original enactment."

As the preceding discussion illustrates, Section 15(D), Article II sets out the form for the General Assembly to follow when amending a statute, but cases such as *Hesse*, *Allen*, and *Weil* explain the substantive significance of what is occurring, and give guidance for ascertaining the intent of the General Assembly when an amendment to a specific statute is contained within a particular act.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-08-01	pp. 351-352
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