Gerald T. Noel, Jr. *Legislative Service Commission*

S.B. 120

124th General Assembly
(As Introduced)

Sen. Johnson

BILL SUMMARY

- Specifies that a defendant is jointly and severally liable in tort for all compensatory damages that represent economic loss if more than 50% of the tortious conduct is attributable to that defendant.
- Specifies that a defendant is liable in tort only for that defendant's proportionate share of the compensatory damages that represent economic or noneconomic loss if 50% or less of the tortious conduct is attributable to that defendant.
- Specifies how to determine the percentages of tortious conduct attributable to a party in a tort action under the joint and several liability, contributory fault, or product liability contributory fault provisions of the bill.
- Establishes a right of contribution among tortfeasors even though judgment has not been recovered against all or any of the tortfeasors.
- Specifies the guidelines for the right of contribution among tortfeasors.
- Provides that the contributory fault of a plaintiff may be asserted as an affirmative defense to a negligence claim or to a tort claim other than a negligence claim.
- Requires a court to diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of tortious conduct that is determined to be attributable to the plaintiff when there is contributory fault.

- Provides that the general contributory fault provisions of the bill apply to the portion of the compensatory damages in a judgment that represents economic loss and for which joint and several liability attaches.

- Provides that express or implied assumption of the risk, contributory negligence, or other contributory tortious conduct may be asserted as an affirmative defense to a product liability claim.

- Specifies the guidelines for the affirmative defenses to a product liability claim.

- Provides that the product liability contributory fault provisions of the bill apply to the total amount of compensatory damages in a judgment that would be recoverable.

- Makes other technical changes.

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CONTENT AND OPERATION

Joint and several liability

Determination of joint and several liability

Subject to the provisions under "***Determining the percentages of tortious conduct attributable to a party***" and "***Limitation on application of joint and several liability provisions***," below, and except as provided in another section of the Revised Code that expressly establishes joint and several tort liability for specified persons, under the bill joint and several tort liability must be determined as follows (R.C. 2307.22(A)):

(1) In a tort action in which the trier of fact determines that two or more tortfeasors proximately caused the same injury or loss to person or property or the same wrongful death and in which the trier of fact determines that more than 50% of the tortious conduct is attributable to one defendant, that defendant is jointly and severally liable in tort for all compensatory damages that represent economic loss.

(2) If paragraph (1), above, is applicable, each defendant who is determined by the trier of fact to be legally responsible for the same injury or loss to person or property or the same wrongful death and to whom 50% or less of the tortious conduct is attributable is liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent economic loss. The proportionate share of a defendant must be calculated by multiplying the total amount of the economic damages awarded to the plaintiff by the percentage of tortious conduct as determined under "***Determining the percentages of tortious conduct attributable to a party***," below, that is attributable to that defendant.

In a tort action in which the trier of fact determines that two or more tortfeasors proximately caused the same injury or loss to person or property or the same wrongful death and determines that 50% or less of the tortious conduct is attributable to each defendant, each defendant is liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent economic loss. The proportionate share of a defendant must be calculated by multiplying the total amount of the economic damages awarded to the plaintiff by the percentage of tortious conduct that is attributable to that defendant. (R.C. 2307.22(B).)

In a tort action in which the trier of fact determines that two or more tortfeasors proximately caused the same injury or loss to person or property or the same wrongful death, each defendant who is determined by the trier of fact to be legally responsible for the same injury or loss to person or property or for the same

wrongful death is to be liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent noneconomic loss. The proportionate share of a defendant must be calculated by multiplying the total amount of the noneconomic damages awarded to the plaintiff by the percentage of tortious conduct that is attributable to that defendant. (R.C. 2307.22(C).)

The contribution provisions of the bill (see "***Right of contribution among tortfeasors***, ***Covenant not to sue or not to enforce judgment***," and "***Exclusion of contribution provisions***," below) apply to joint and several tort liability in a tort action in which the trier of fact determines that two or more tortfeasors proximately caused the same injury or loss to person or property or the same wrongful death and in which the trier of fact determines that more than 50% of the tortious conduct is attributable to one defendant (R.C. 2307.22(D)).

Determining the percentages of tortious conduct attributable to a party

In determining the percentages of tortious conduct attributable to a party in a tort action under the joint and several liability, contributory fault, and product liability contributory fault provisions of the bill, the court in a nonjury action must make findings of fact, and the jury in a jury action must return a general verdict accompanied by answers to interrogatories, that specify all of the following: (1) the percentage of tortious conduct that proximately caused the injury or loss or the wrongful death that is attributable to the plaintiff and to each party to the tort action from whom the plaintiff seeks recovery in this tort action, (2) the percentage of tortious conduct that proximately caused the injury or loss or the wrongful death that is attributable to each person from whom the plaintiff does not seek recovery in this tort action, including, but not limited to persons who have entered into a settlement agreement with the plaintiff, persons whom the plaintiff has dismissed from the tort action without prejudice, persons whom the plaintiff has dismissed from the tort action with prejudice, and persons who are not a party to the tort action, whether or not that person was or could have been a party to the tort action. (R.C. 2307.23(A).)

The sum of the percentages of tortious conduct as determined in the preceding paragraph must equal 100% (R.C. 2307.23(B)).

Limitation on application of bill's joint and several liability provisions

The above provisions regarding joint and several liability do not affect joint and several liability that is not based in tort. Additionally, they do not affect any other section of the Revised Code or the common law to the extent that the other section or common law makes a principal, master, or other person vicariously liable for the tortious conduct of an agent, servant, or other person. A principal and agent, a master and servant, or other persons having a vicarious liability

relationship must constitute a single party when determining percentages of tortious conduct in a tort action in which vicarious liability is asserted. (R.C. 2307.24.)

Right of contribution among tortfeasors

If two or more persons are jointly and severally liable in tort for the same injury or loss to person or property or for the same wrongful death, the bill generally establishes a right of contribution among them even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's proportionate share of the common liability, and that tortfeasor's total recovery is limited to the amount paid by that tortfeasor in excess of that tortfeasor's proportionate share. No tortfeasor may be compelled to make contribution beyond that tortfeasor's own proportionate share of the common liability. There is no right of contribution in favor of any tortfeasor who intentionally has caused or intentionally has contributed to the injury or loss to person or property or the wrongful death. (R.C. 2307.25(A).)

The bill further provides that a tortfeasor who enters into a settlement with a claimant is not entitled to contribution from another tortfeasor whose liability for the injury or loss to person or property or the wrongful death is not extinguished by the settlement, or in respect to any amount paid in a settlement that is in excess of what is reasonable (R.C. 2307.25(B)).

Additionally, the bill provides that a liability insurer that by payment has discharged in full or in part the liability of a tortfeasor and has discharged in full by the payment its obligation as insurer is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's proportionate share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship. (R.C. 2307.25(C).)

The bill's provisions regarding contribution do not impair any right of indemnity under existing law. If one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation. The bill's provisions regarding contribution also do not apply to breaches of trust or of other fiduciary obligations. (R.C. 2307.25(D) and (E).)

The bill provides that the proportionate shares of tortfeasors in the common liability must be based upon their relative degrees of legal responsibility. If equity requires the collective liability of some as a group, the group will constitute a single share, and principles of equity applicable to contribution generally will

apply. Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or loss or for the same wrongful death, contribution may be enforced by separate action. (R.C. 2307.25(F) and (G).)

Whenever the provisions of the "Federal Tort Claims Act," 60 Stat. 842 (1946), 28 U.S.C. 2671 et seq., are applicable to a tort and the United States is held liable in tort, the United States has no right of contribution under this section against the state pursuant to the waiver of sovereign immunity contained in Chapter 2743. (the Court of Claims Law) of the Revised Code (R.C. 2307.25(H)).

The bill also provides that, if a judgment that imposes joint and several liability has been entered in an action against two or more tortfeasors for the same injury or loss or for the same wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment debtors, by motion, upon notice to all parties to the action. If there is a judgment for the injury or loss or the wrongful death against the tortfeasor seeking contribution, that tortfeasor must commence any separate action to enforce contribution within one year after the judgment has become final by lapse of time for appeal or after appellate review. If there is no judgment for the injury or loss or the wrongful death against the tortfeasor seeking contribution, that tortfeasor's right of contribution is barred unless that tortfeasor has discharged by payment the common liability within the statute of limitations period applicable to the claimant's right of action against that tortfeasor and has commenced that tortfeasor's action for contribution within one year after the payment or has agreed while an action is pending against that tortfeasor to discharge the common liability and has paid within one year after the agreement the common liability and commenced that tortfeasor's action for contribution. (R.C. 2307.26.)

The bill provides that recovery of a judgment for an injury or loss to person or property or a wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury, loss, or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution. Valid answers to interrogatories by a jury or findings of fact by a court sitting without a jury in determining the percentage of liability of several defendants for an injury or loss to person or property or a wrongful death are binding as among those defendants in determining their right to contribution. (R.C. 2307.27.)

Covenant not to sue or not to enforce judgment

The bill provides that when a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons for the same injury or loss or the same wrongful death, both of the following apply: (1) the release or covenant does not discharge any of the other tortfeasors from liability

unless its terms otherwise provide, but it reduces the claim against the other tortfeasors to the extent of the greater of any amount stipulated by the release or the covenant or the amount of the consideration paid for it, and (2) the release or covenant discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor (R.C. 2307.28).

Exclusion of contribution provisions

The contribution provisions of the bill do not apply to a negligence or other tort claim to the extent that the joint and several liability provisions, the general contributory fault provisions, or the product liability contributory fault provisions of the bill make a party against whom a judgment is entered liable to the plaintiff only for the proportionate share of that party (R.C. 2307.29).

General contributory fault

Contributory fault of the plaintiff asserted as an affirmative defense

The bill provides that the contributory fault of the plaintiff may be asserted as an affirmative defense to a negligence claim or to a tort claim other than a negligence claim. The contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action. The court must diminish any compensatory damages recoverable by the plaintiff by an amount that is proportionately equal to the percentage of tortious conduct of the plaintiff. The general contributory fault provisions of the bill do not apply to actions described in section 4113.03 (see **COMMENT** 2) of the Revised Code. (R.C. 2315.32 and 2315.33.)

Allocation of damages

The bill provides that, if contributory fault is asserted and established as an affirmative defense to a negligence claim, the court in a nonjury action must make findings of fact, and the jury in a jury action must return a general verdict accompanied by answers to interrogatories, that specify the following: (1) the total amount of the compensatory damages that would have been recoverable on that negligence claim but for the tortious conduct of the plaintiff, (2) the portion of the compensatory damages that represents economic loss, (3) the portion of the compensatory damages that represents noneconomic loss, and (4) the percentage of tortious conduct attributable to all persons (see "***Determining the percentages of tortious conduct attributable to a party***," above (R.C. 2315.34).

Judgment

After the court makes its findings of fact or after the jury returns its general verdict accompanied by answers to interrogatories both of the following apply (R.C. 2315.35 and 2315.36):

(1) The court must diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of tortious conduct attributable to the plaintiff. If that percentage attributable to the plaintiff is greater than the sum of the percentages attributable to all parties to the tort action from whom the plaintiff seeks recovery plus all persons from whom the plaintiff does not seek recovery, the court is required to enter judgment in favor of the defendants.

(2) The court must enter a judgment in favor of the plaintiff that imposes liability if contributory fault is asserted as an affirmative defense to a negligence claim, it is determined that the plaintiff was contributorily at fault and that contributory fault was a direct and proximate cause of the injury, death, or loss to person or property that is the subject of the tort action, and the plaintiff is entitled to recover compensatory damages pursuant to this section from more than one party. (R.C. 2315.36.)

Application of the general contributory fault provisions

The general contributory fault provisions of the bill apply to the portion of the compensatory damages in a judgment that represents economic loss and for which joint and several liability attaches. Those provisions do not apply to tort actions based on a product liability claim. (R.C. 2315.37.)

Product liability contributory fault

Express or implied assumption of the risk as an affirmative defense

The bill provides that express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim. If express or implied assumption of the risk is asserted as an affirmative defense to a product liability claim and if it is determined that the claimant expressly or impliedly assumed a risk and that the express or implied assumption of the risk was a direct and proximate cause of harm for which the claimant seeks to recover damages, the express or implied assumption of the risk is a complete bar to the recovery of those damages. (R.C. 2315.42.)

Contributory negligence or other contributory tortious conduct as an affirmative defense

The bill provides that contributory negligence or other contributory tortious conduct may be asserted as an affirmative defense to a product liability claim. Contributory negligence or other contributory tortious conduct of a plaintiff or of a person for whom the plaintiff is the legal representative does not bar the plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if that contributory negligence or other contributory tortious conduct was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery and of all other persons from whom the plaintiff does not seek recovery. If the above applies, the compensatory damages recoverable by the plaintiff must be diminished by an amount that is proportionately equal to the percentage of negligence or other tortious conduct of the plaintiff or of the person for whom the plaintiff is legal representative. (R.C. 2315.43.)

Allocation of damages

If contributory negligence or other contributory tortious conduct is asserted and established as an affirmative defense to a product liability claim, the court in a nonjury action must make findings of fact, and the jury in a jury action must return a general verdict accompanied by answers to interrogatories, that specify the total amount of the compensatory damages that would have been recoverable on that product liability claim but for that negligence or other tortious conduct, the portion of the compensatory damages that represents economic loss and that represents noneconomic loss, and the percentage of negligence or other tortious conduct determined as specified under "***Joint and several liability; Determining the percentages of tortious conduct attributable to a party***," above. (R.C. 2315.44.)

Judgment

After the court makes its findings of fact or after the jury returns its general verdict accompanied by answers to interrogatories, the court must diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of negligence or other tortious conduct that is attributable to the plaintiff or the person for whom the plaintiff is legal representative. If that percentage of the negligence or other tortious conduct is greater than the total of the percentages of the tortious conduct that are attributable to all parties from whom the plaintiff seeks recovery and to all persons from whom the plaintiff does not seek recovery, the court must enter judgment in favor of those parties. (R.C. 2315.45.)

After it makes findings of fact or after the jury returns its general verdict accompanied by answers to interrogatories, a court must enter a judgment that is in

favor of the plaintiff and that imposes liability as described above in "***Determination of joint and several liability***," if all of the following apply: (1) contributory negligence or other contributory tortious conduct is asserted as an affirmative defense to a product liability claim, (2) it is determined that the plaintiff or the person for whom the plaintiff is legal representative was contributorily negligent or engaged in other contributory tortious conduct that was a direct and proximate cause of the injury, death, or loss involved, and (3) the plaintiff is entitled to recover compensatory damages from more than one party (R.C. 2315.46).

Exception

The product liability contributory fault provisions of the bill do not apply to actions described in section 4113.03 (see **COMMENT** 2) of the Revised Code (R.C. 2315.41(B)).

Definitions

The bill defines the following terms for Chapters 2307. (civil actions) and 2315. (trial procedure) of the Revised Code (R.C. 2307.011):

(1) "Conduct" means actions or omissions.

(2) "Contributory fault" means contributory negligence, other contributory tortious conduct, comparative negligence, or express or implied assumption of the risk.

(3) "Economic loss" means any of the following types of pecuniary harm:

(a) All wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property that is a subject of a tort action, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings;

(b) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of an injury, death, or loss to person that is a subject of a tort action, including expenditures for those purposes that were incurred as of the date of a judgment and expenditures for those purposes that, in the determination of the trier of fact, will be incurred in the future because of the injury, whether paid by the injured person or by another person on behalf of the injured person;

(c) All expenditures of a person whose property was injured or destroyed or of another person on behalf of the person whose property was injured or destroyed in order to repair or replace the property;

(d) Any other expenditures incurred as a result of an injury, death, or loss to person or property that is a subject of a tort action, except expenditures of the injured person, the person whose property was injured or destroyed, or another person on behalf of the injured person or the person whose property was injured or destroyed in relation to the actual preparation or presentation of the claim involved.

(4) "Negligence claim" means a civil action for damages for injury, death, or loss to person or property to the extent that the damages are sought or recovered based on allegation or proof of negligence.

(5) "Noneconomic loss" means nonpecuniary harm that results from an injury, death, or loss to person that is a subject of a tort action, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection; advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

(6) "Person" has the same meaning as in division (C) of section 1.59 of the Revised Code and additionally includes a political subdivision and the state.

(7) "Persons from whom the plaintiff does not seek recovery in this action" includes, but is not limited to, the following:

(a) Persons who have entered into a settlement agreement with the plaintiff;

(b) Persons whom the plaintiff has dismissed from the tort action without prejudice;

(c) Persons whom the plaintiff has dismissed from the tort action with prejudice;

(d) Tortfeasors who are not a party to the tort action whether or not that person was or could have been a party to the tort action.

(8) "Plaintiff" includes the person for whom the plaintiff is legal representative.

(9) "Political subdivision" and "state" have the same meanings as in section 2744.01 of the Revised Code.

(10) "Tort action" means a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a product liability claim but does not include a civil action for damages for a breach of contract or another agreement between persons.

(11) "Trier of fact" means the jury or, in a nonjury action, the court.

The bill also defines, for purposes of the joint and several liability provisions of the bill, "tortious conduct" to include, but not be limited to, both negligence and express or implied assumption of the risk. (R.C. 2307.21.)

For purposes of the general contributory fault provisions of the bill, the bill defines "tortious conduct" to include, but not be limited to, all of the following: negligence; contributory negligence or other contributory tortious conduct; comparative negligence; or express or implied assumption of the risk. (R.C. 2315.31.)

For purposes of the product liability contributory fault provisions of the bill, the bill defines "claimant," "harm," and "product liability claim" to have the same meanings as in the Product Liability Law. (See **COMMENT** 1.) The bill also defines "other contributory tortious conduct" or "other tortious conduct" to mean tortious conduct that contributes to the injury, death, or loss to person or property for which the plaintiff or the person for whom the plaintiff is legal representative is seeking relief, but does not include conduct constituting express assumption of the risk or implied assumption of the risk. (R.C. 2315.41.)

Technical changes and operations

Effective date

The bills' various sections, as amended or enacted, apply only to causes of action that accrue on or after the effective date of the bill. Any cause of action that accrues prior to the effective date of the bill is governed by the law in effect when the cause of action accrued. (Section 3.)

Technical operations

Sections 1775.14, 2315.18, and 4171.10 of the Revised Code, as they existed immediately prior to being amended by Am. Sub. H.B. 350 of the 121st General Assembly, are revived and amended and supersede the versions of those sections repealed by Section 2 of the bill. Sections 2315.18 and 4171.10 of the Revised Code also are amended to reenact the changes made to those sections by Am. Sub. H.B. 350. (Section 4(A).)

Section 4507.07 of the Revised Code, which has been amended by Am. Sub. S.B. 35 of the 122nd General Assembly subsequent to its amendment by Am. Sub. H.B. 350 of the 121st General Assembly, first is amended to remove matter inserted by, or to revive matter removed by, Am. Sub. H.B. 350 and then is amended to reenact the changes made to that section by Am. Sub. H.B. 350.

Amendments made to that section by Am. Sub. S.B. 35 are retained. (Section 4(B).)

The revival and amendment or amendment of sections 1775.14, 2315.18, 4171.10, and 4507.07 of the Revised Code by the bill as described above is in conformity with the Supreme Court of Ohio's decisions in *State, ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, and *Stevens v. Ackman* (2001), 91 Ohio St.3d 182 and is intended to clarify the status of those sections. (Section 4(C).)

Miscellaneous

The bill amends and renumbers various Revised Code sections in order to correct cross-references and create room in the Revised Code for the bill's new sections.

COMMENT

1. As used in the Product Liability Law:

"Claimant" means either of the following: (1) a person who asserts a product liability claim or on whose behalf such a claim is asserted, or (2) if a product liability claim is asserted on behalf of the surviving spouse, children, parents, or other next of kin of a decedent or on behalf of the estate of a decedent, whether as a claim in a wrongful death action or as a survivorship claim, whichever of the following is appropriate: (a) the decedent, if the reference is to the person who allegedly sustained harm or economic loss for which, or in connection with which, compensatory damages or punitive or exemplary damages are sought to be recovered, or (b) the personal representative of the decedent or the estate of the decedent, if the reference is to the person who is asserting or has asserted the product liability claim. (R.C. 2307.71(A).)

"Harm" means death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question. Economic loss is not "harm." (R.C. 2307.71(G).)

"Product liability claim" means a claim that is asserted in a civil action and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following: (1) the design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product, (2) any warning or instruction, or lack of warning or instruction, associated with that product, or (3)

any failure of that product to conform to any relevant representation or warranty. (R.C. 2307.71(M).)

2. R.C. 4113.03 states:

> In all actions brought to recover from an employer for personal injuries suffered by his employee or for death resulting to such employee from such personal injuries, while in the employ of such employer, arising from the negligence of such employer or any of such employer's officers, agents, or employees, it shall be held in addition to any other liability existing by law that any person in the employ of such employer, in any way having power or authority in directing or controlling any other employee of such employer, is not the fellow servant, but superior to such other employee; any person in the employ of such employer in any way having charge or control of employees in any separate branch or department shall be held to be the superior and not the fellow servant of all employees in any other branch or department in which they are employed; any person in the employ of such employer whose duty it is to repair or inspect the ways, works, boats, wharves, plant, machinery, appliances, or tools, in any way connected with or in any way used in the business of the employer, or to receive, give, or transmit any signal, instruction, or warning to or for such employees, shall be held to be the superior and not the fellow servant of such other employees of such employer.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-29-01	pp. 457-458

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