

IN THE SUPREME COURT OF OHIO

JONATHON KLAUS : CASE NO.: 2008-0894
: :
Appellee, : :
: : ON APPEAL FROM THE COURT
vs. : : OF APPEALS THIRD APPELLATE
: : DISTRICT
: :
UNITED EQUITY, INC. : COURT OF APPEALS
: : CASE NO. C.A. 2007-0063
Appellant. : :

APPELLEE, JONATHON KLAUS' MEMORANDUM IN RESPONSE
TO APPELLANT, UNITED EQUITY, INC.'S MEMORANDUM IN SUPPORT OF
JURISDICTION ON DISCRETIONARY APPEAL

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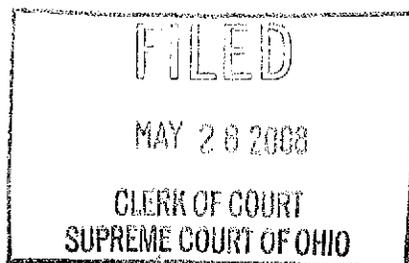


TABLE OF CONTENTS

	Page
EXPLANATION OF WHY THIS CASE IS “NOT” OF PUBLIC OR GREAT GENERAL INTEREST	1
ARGUMENT AGAINST APPELLANT’S PROPOSITIONS OF LAW	6
I. PROPOSITION OF LAW NO. 1	6
II. PROPOSITION OF LAW NO. 2	8
CONCLUSION	10
PROOF OF SERVICE	11

**EXPLANATION OF WHY THIS CASE IS “NOT” OF PUBLIC OR
GREAT GENERAL INTEREST**

Once again, this Court is being asked to address the definition of the phrase “substantial certainty of injury” as applied in employer intentional tort cases. “This case gives this Court the opportunity to define the boundary of ‘substantially certain’ intentional torts and give Ohio citizens a definitive meaning to that phrase as used by the General Assembly in R. C. § 2745.01 – or by this Court in *Fyffe*.” (Appellant Memorandum, p. 1). Because this Court has addressed the boundaries of “substantially certain” as applied in employer intentional tort cases extensively, this is not a case of first impression.

The instant matter arises from an employee-employer intentional tort claim. The trial court awarded summary judgment to the employer on the basis the employer “. . . failed to show a genuine issue with regard to whether defendant (employer) knew that an injury was substantially certain to occur.” (Judgment Entry, p. 8) The employee appealed and the Third District Court of Appeals reversed finding “. . . that material questions of fact preclude summary judgment in this case.” 2008-Ohio-1344, ¶ 26.

Appellant herein states that “[t]his appeal is not about correcting error. It is about guiding Ohio courts, lawyers and litigants in understanding and applying the new statute.” (Appellant Memorandum, p. 1). Thus, United seeks an advisory opinion, not to reverse the Court of Appeals and reinstate the trial court’s decision, but to esoterically merge R. C. § 2745.01 with *Fyffe v. Jenos, Inc.* (1991) 59 Ohio St.3d 115 upon the rationale that this case is one of the first decisions after the most recent amendment of R. C. § 2745.01 to be decided against an employer. This should not constitute a reason for a case being of public or great general interest.

There are significant errors or misstatements presented in appellant's Statement of the Case and Facts. Some of the error arises from how one reads and interprets the testimony of a given witness, and some result from the reading of the Third District's Opinion. 2008-Ohio-1344. Notwithstanding the reason, appellee is compelled to raise the issue.

From the beginning, this case has been characterized as an "intentional tort vs. human error" case by United. The evidence presented to the trial court for its initial ruling on the employer's motion for summary judgment and to the Court of Appeals for its *de novo* review was the same. The Court of Appeals, however, assessed that evidence differently from the trial court. Thus, a different result.

Appellant states at page 2 of its Memorandum In Support that Klaus argued on appeal "that the trial court erred in failing to follow the 'reduced standard of substantial certainty' contained in R. C. § 2745.01. 2008-Ohio-1344, ¶ 27" Appellant then concludes the "Third District apparently accepted Klaus' interpretation of R. C. § 2745.01."

Even a cursory review of the Third District's Opinion will reveal that paragraph 27 of the opinion states only the simple language that Klaus' first and second assignments of error are sustained. Neither of these assignments address a "reduced standard" of substantial certainty under the most recent version of R. C. § 2745.01.

Klaus did set forth and argue in his fourth assignment of error, that R. C. § 2745.01 did outline a reduced standard. The Court of Appeals did not address this issue and specifically determined the fourth assignment was moot. If, as United wrongly concludes, the Third District used a "reduced standard" then the fourth assignment was not moot. The Court of Appeals applied both the statute and *Fyffe* appropriately in deciding the matter before it.

The undisputed facts are not, as stated by United, undisputed. However, this brief is not the time or the place to argue the facts. Klaus would be remiss however in not indicating that certain discrepancies in fact exist which, in the Third District's opinion, create genuine issues of material fact and prevents summary judgment. 2008-Ohio-1344, ¶¶ 19-26.

The Court of Appeals addressed the evidence in its *de novo* review and applied both R. C. § 2745.01 and *Fyffe* in its analysis. The conclusion reached and argued by United at page 8 of its memorandum "as the Court's decision demonstrates, its understanding of 'substantial certainty' under R. C. § 2745.01 has nothing to do with an employer's knowledge of the substantial certainty of injury or the substantial certainty of injury" is flat out wrong. When taken as a whole, the Court of Appeals Opinion correctly applies the law for summary judgment determination to an alleged intentional tort.

Appellant implies that the Third District applied the standards set forth in *Fyffe* in a manner which equates to a "negligence" standard, and which renders meaningless the elements set forth in R. C. § 2745.01. To imply that the appellate court utilized negligence standards instead of the requirements set forth in R. C. § 2745.01 and *Fyffe* in its decision is a misrepresentation to this Court. The appellate court reversed the trial court's grant of summary judgment to the employer, United, finding that "several questions of fact remain that could convince a juror on the elements of substantial certainty." 2008-Ohio-1344, ¶ 19.

As stated above, the proceeding before the appellate court was a *de novo* review of United's motion for summary judgment. The appellate court looked to both R. C. § 2745.01 and *Fyffe* in reaching its determination. A reading of the appellate court's decision reveals that it determined, when construing the evidence in favor of the nonmoving party, several genuine

issues of material fact existed. The Third District correctly stated that summary judgment should only be granted with caution; the purpose being not to try issues of fact, but rather to determine whether triable issues of fact exist. (Citations omitted) 2008-Ohio-1344, ¶ 11.

The standard for establishing an intentional tort “emerges not so much from the words used to formulate the test as it does from the decisions rendered in response to specific fact situations.” *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 139. Cases involving workplace intentional torts must be judged on the totality of the circumstances surrounding each incident. *Gibson v. Drainage Products, Inc.*, (2002), 95 Ohio St.3d 171, 178. Because of the fact-specific nature of employer intentional tort cases, including the case at bar, any further attempts to redefine “substantially certain” as applied in such cases, will not provide meaningful guidance to the bench or bar.

Lastly, appellant correctly notes to this Court that pending before it is *Kaminski v. Metal & Wire Prods. Co.*, Sup. Ct. No. 08-0-857, on appeal from the 7th Dist. No. 07-CO-15, 2008-Ohio-1521. In *Kaminski*, this Court has been asked to address the constitutionality of R. C. § 2745.01. R. C. § 2745.01 provides:

2745.01 Liability of employer for intentional tort - intent to injure required - exceptions.

(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

(B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

* * *

Section (B) of R. C. § 2745.01 defines the phrase, "substantially certain". The *Kaminski* Court, in its decision, discusses the definition of "substantially certain" at length:

When we consider the definition of "substantial certainty" it becomes apparent that an employee does not have two ways to prove an intentional tort claim as R.C. 2745.01(A) suggests. The employee's two options of proof become: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure. Thus, under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury. The *Johnson* Court held that this type of action was simply illusory:

"Under the definitional requirements contained in the statute, an employer's conduct, in order to create civil liability, must be both *deliberate* and *intentional*. Therefore, in order to prove an intentional tort * * * the employee, or his or her survivors, must prove, at a minimum, that the actions of the employer amount to criminal assault. In fact, given the elements imposed by the statute, it is even conceivable that an employer might actually be guilty of a criminal assault but exempt from civil liability under [former] R.C. 2745.01(D)(1)." *Johnson*, 85 Ohio St. at 306-307.

Furthermore, the Ohio Supreme Court has explicitly held that a specific intent to injure is *not* necessary to a finding of intentional misconduct. *Jones*, 15 Ohio St.3d at 95.

Pursuant to the Ohio Supreme Court's holdings in *Brady*, *supra*, and *Johnson*, *supra*, and consistent with Sections 34 and 35, Article II of the Ohio Constitution, we must conclude R.C. 2745.01 is unconstitutional. Because of its excessive standard of requiring proof that the employer intended to cause injury, "it is clearly not `a law that furthers the "* * * comfort, health, safety and general welfare of all employe[e]s." *Johnson*, 85 Ohio St.3d at 308, quoting *Brady*, 61 Ohio St.3d at 633, quoting Section 34, Article II of the Ohio Constitution. Additionally, "because R.C. 2745.01 is an attempt by the General Assembly to

govern intentional torts that occur within the employment relationship, R.C. 2745.01 cannot logically withstand constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of constitutional empowerment.” Id., quoting *Brady*, at 61 Ohio St.3d at 634.

Kaminski, 2008-Ohio-1521 ¶¶ 31-34.

In addressing the constitutionality of R. C. § 2745.01 as presented in the pending case, this Court must address R. C. § 2745.01(B). While Klaus disputes that this is the issue *sub judicie*, such an important issue should not be piecemealed between two different cases. Judicial economy will not be served by this Court’s acceptance of this discretionary appeal.

ARGUMENTS AGAINST APPELLANT’S PROPOSITIONS OF LAW

I. PROPOSITION OF LAW NO. 1:

To satisfy the “deliberate intent” requirement of R. C. § 2745.01(B), the employee must establish that the employer had a conscious awareness of the consequences of an egregious risk of injury that falls outside the risks to which the employee is ordinarily exposed.

R. C. § 2745.01(A) clearly allows a cause of action for a workplace injury where “the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.” Appellant correctly cites the Restatement of Torts’ definition of the second prong of “intent” and *Jones v. VIP Development Company* (1984), 15 Ohio St.3d 90, for the language found in R. C. § 2745.01(A). However, appellant then makes a giant leap from the scope of R. C. § 2745.01(B) and (C) by asking this Court to define “deliberate intent” by requiring that the definition contain the elements of “an **egregious risk of injury that falls outside the risks** to which the employee is ordinarily exposed.” (Emphasis added) (Appellant’s Memorandum, p. 10).

The law of employer intentional tort has slowly evolved over the past twenty-five years. The language quoted above and found in appellant's Proposition of Law No. 1 has not been addressed in any of the cases dealing with this subject matter by this Court. This Court's adoption of United's Proposition of Law constitutes judicial legislating. This proposed language greatly exceed the standards set forth by this Court in *Fyffe*, as well as the language set forth in R. C. § 2745.01(B) and (C).

Appellant lobbies this Court to interpret R. C. § 2745.01(B) in a manner that would require a criminal intent by the employer to support a statutory cause of action for employer intentional torts. In construing statutes, "our paramount concern is the legislative intent in enacting the statute." *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355. To discern this intent, we first consider the statutory language, reading words and phrases in context and construing them in accordance with rules of grammar and common usage. *State ex rel. Rose v. Lorain Cty. Bd. of Elections* (2000), 90 Ohio St.3d 229, 231. "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545. Unambiguous statutes are to be applied according to the plain meaning of the words used, *Roxane Laboratories, Inc. v. Tracy* (1996) 75 Ohio St.3d 125, 127, and courts are not free to delete or insert other words. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 220.

R. C. § 2745.01(B) states:

(B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause and employee to suffer an injury, a disease, a

condition, or death.

In reading this statute, there is nothing ambiguous that would require the Court's insertion of the words "egregious risk of injury that falls outside the risks to which the employee is ordinarily exposed." Appellant is attempting to bootstrap this restrictive language into the statute by limiting the definition of "deliberate intent." Further, if the legislature had wanted those specific limitations within the definition of "substantial certainty", it surely knew how to do so and would have done so. Rewriting legislation serves no public or great general interest.

II. PROPOSITION OF LAW NO.: 2

A mere showing that harm is substantially certain to result from an employer's conduct is not sufficient to prove intent under R. C. § 2745.01(B); it must also be shown that the actor is aware that harm is substantially certain to occur. (Restatement of the Law, Third, Torts: Liability for Physical Harm (Proposed Final Draft No. 1, Apr. 6, 2005), § 1 at comment c, adopted.)

The majority of appellant's disjointed argument¹ discusses its hypothesis that Ohio courts continue to wrongly apply a standard of negligence and/or recklessness to employer intentional tort cases in spite of this Court's efforts to define "substantial certainty" in *Fyffe*. Appellee disagrees with appellant's hypothesis, and takes exception to appellant's allegation that the Third District Court of Appeals applied a lesser standard than required in R. C. § 2745.01 *et. seq.* (Appellant Brief, pgs. 2 and 14). This general degradation of Ohio courts lacks support and serves no public or great general interest to be addressed and given credence.

The essence of appellant's Proposition of Law No. 2 is a request that this Court adopt, as

¹Appellant does not comply with SCt. R. III (B)(4) in that it presents both of its propositions of law together and then presents general argument, none of which are specific to each proposition.

the law of Ohio, the proposed draft of the Restatement of Law 3d. However, United presents only a single sentence of Comment c and thus distorts the context within which the comment is set forth. Comment c reads as follows:

c. Purpose and substantially certain knowledge: coverage and relationship. A purpose to cause harm makes the harm intentional even if harm is not substantially certain to occur. Likewise, knowledge that harm is substantially certain to result is sufficient to show that the harm is intentional even in the absence of a purpose to bring about that harm. Of course, a mere showing that harm is substantially certain to result from the actor's conduct is not sufficient to prove intent; it must also be shown that the actor was aware of this. Moreover, under Subsection (b) it is not sufficient that harm will probably result from the actor's conduct; the outcome must be substantially certain to occur.

This proposition has nothing to do with the application of R. C. § 2745.01. The legislature clearly did not include the Restatement standard in the statute. This Court should not now legislate such a result.

Appellee submits to this Court that R. C. § 2745.01(A), which sets forth the “guts” of intentional tort under the current statute, is a codification of *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, Syl.1. Apparently appellant believes the courts of Ohio can handle this portion of the statute and, in the matter *sub judice*, the Third District has done so.

Appellant now suggests that the “substantially certain” definition, contained in R. C. § 2745.01(B) can only be satisfied when applied to R. C. § 2745.01(A) if the employer knows that injury is substantially certain to occur. Section (B) says “deliberate” intent. However, the scienter set forth in Section (A) includes “. . . or with the belief that the injury was substantially certain to occur.”

If one accepts appellant's premise of what the law ought to be, notwithstanding what R.

C. § 2745.01 states, the proposed version would read:

the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the knowledge that its tortious act was deliberately intended to cause an employee's injury to occur.

Even in criminal law, the intent does not have to be directed to the specific victim for the culpability standard to be met. Surely, an employer does not have to commit a crime to be liable for its intentional tort. See R. C. § 2901.22(A) and (B). If indeed, the legislature wanted to make the employer intentional tort a crime, it would have done so. To adopt the proposed version as argued by United, serves no public or great general interest.

CONCLUSION

The Third District Court of Appeals has not confused “intent” with a lesser standard than the “substantial certainty” standard set forth in R. C. § 2745.01 and *Fyffe* to establish an employer's liability for an intentional tort. Imposing a criminal duty culpability standard to establish a violation of the duty of “substantial certainty of injury” is not appropriate. The “deliberate intent” standard the General Assembly adopted in R. C. § 2745.01 is significantly more than mere negligence.

Defining the scope of the “deliberate intent” standard contained in R. C. § 2745.01 is unnecessary as the General Assembly's intent is unambiguous. This Court does not need to further revisit or explain “recklessness” for purposes of an employer-intentional-tort claim. The line between “substantial certainty” and everything else has been sufficiently drawn. This Court, need not turn its attention to *substantial certainty* of injury and the *employer's knowledge of it* to lecture the courts of Ohio about straying into the concept of an employer's “duty” under OSHA

or other industry standards to establish the basis for intentional-tort liability. The Ohio courts clearly understand the law.

For these reasons, Klaus respectfully requests this Court deny jurisdiction over this appeal and permit the remand for trial to stand.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Memorandum in Response to Appellant, United Equity, Inc.'s Memorandum in Support of Jurisdiction on Discretionary Appeal was served upon the following this 27 day of May, 2008:

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