

No. 2008-0894

IN THE SUPREME COURT OF OHIO

JONATHON KLAUS,

Plaintiff-Appellee,

v.

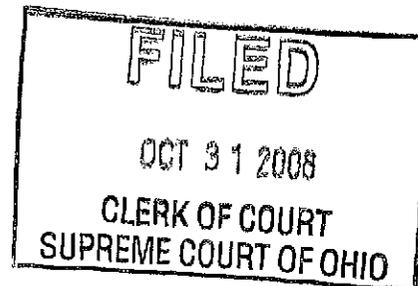
UNITED EQUITY, INC., *et al.*,

Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
THIRD JUDICIAL DISTRICT
No.1-07-63, 2008-OHIO-1344
COMMON PLEAS COURT, ALLEN COUNTY, OHIO
CASE NO. 06-CV-0696

**APPELLANT UNITED EQUITY, INC.'S
MERIT BRIEF**

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Statement of the Case and Facts

I. Drawing Lines between Negligence and Recklessness, and Intentional Tort

All jobs involve certain inherent risks. Risks mature into events, and events cause injuries. And anyone can trace every workplace injury back in time to a point where someone “messed up.” Messing up, however, falls short of an intentional tort.

Indeed, what should be a thick, black line separating simple negligence and recklessness from an intentional tort thins to the point of non-existence when courts *infer* that an employer has knowledge of a dangerous process, procedure, or instrumentality simply because safety procedures or OSHA regulations exist and *infer* that an employer has knowledge of the “substantial certainty” that an employee may be injured when the employer fails to enforce safety precautions to establish the existence of an “inferred intent” (i.e., “substantially certain”) intentional tort. That is exactly what happened in this case now under this Court’s review.

Ohio law, however, abhors conclusions based on inferences derived from other inferences. So when the trial and appellate courts infer an employer’s “actual knowledge” from evidence that demonstrates only possible or probable knowledge (i.e., what the employer should have known based on the totality of the circumstances) to find a genuine issue of material fact as to whether an employer has committed an inferred intent (rather than direct intent) intentional tort, then Ohio courts subject employers to liability based solely on speculation and allow employees to easily circumvent the exclusivity of the workers’ compensation system.

The General Assembly tried to take these inferences out of employer-intentional torts when it codified R.C. 2745.01(B) in April 2005, by using the phrase “deliberate intent” to describe an “inferred intent” intentional tort. While this Court has had some concern with the “deliberate intent” phrase in the past, we can surmise, however, that the General Assembly did not intend to eliminate “substantial certainty” employer-intentional torts first recognized in *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St. 2d 608, 433 N.E.2d 572. We also can discern from this phrase that the General Assembly intended to separate the “substantially certain” employer-intentional torts from reckless (often referred to as “wanton”) or negligent conduct.

The question whether Sections 34 and 35 of Article II of the Ohio Constitution limits the General Assembly’s power to modify or abolish the common law, and whether R.C. 2745.01(B) offends Sections 34 and 35 is subject to a separate appeal.¹ Assuming this Court decides those questions in the negative, the question remains: How do trial and appellate courts apply the “deliberate intent” standard contained in R.C. 2745.01(B)? United Equity, Inc. proposes that the “deliberate intent” standard eliminates inferences of employer’s knowledge derived from circumstantial evidence and requires direct evidence of an employer’s *actual* knowledge of the exact danger that caused the employee’s injury and *actual* knowledge that that danger presented an egregious risk of injury falling outside the ordinary risks to which an employee ordinarily is exposed. And just as the employer must have actual knowledge that the danger presented an egregious

¹ *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App.3d 227, 2008-Ohio-1521, 886 N.E.2d 262, discretionary app. allowed, 119 Ohio St.3d 1407, 2008-Ohio-3880, 891 N.E.2d 768 (S.Ct. No. 2008-0857).

risk of injury, that “egregious risk” of injury must be one that is virtually, practically, substantially certain to occur. Indeed, regardless of the adjective one uses to describe the word “certain,” the probability of injury must approach – if not equal – 100%.

But even if this Court decides those questions of constitutionality in the affirmative, United Equity, Inc. proposes that requiring direct – not circumstantial – evidence of an employer’s actual knowledge of an egregious risk of injury that falls outside the natural risks of employment places *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 116, 570 N.E.2d 1108, in a perspective consistent with the rest of Ohio law on the stacking of inferences. It also preserves the purpose of the workers’ compensation system while guaranteeing employees the common-law right to sue employers for inferred intent (“substantially certain”) intentional torts.

II. Employer Intentional Tort v. Human Error

Plaintiff-appellee Jonathan Klaus lost his hand on February 13, 2006 as he repaired the upright auger on the third floor of the grain building at United Equity Inc., when one co-worker started the auger after misunderstanding what another co-worker had said.

Klaus readily admits that he did not pull the lever disconnecting the power to the fuse box. Pulling the lever was not only the standard safety practice the employees followed, it signified to other employees that the auger was under repair. Instead of disconnecting the power, Klaus asked one co-worker to “watch” the fuse box – something that co-worker denies. So when a second co-worker thought the repair was complete, he pushed the “on” button setting the auger in motion. Klaus himself described the events of that day as an “accident” and admits that he did not disconnect the power to the upright auger because he was in a “hurry.”

A. Grinding Feed

United Equity is a small-town employer, with no more than five employees working at its Spencerville grain facility. **No employee had suffered an industrial injury in the 23 years United Equity operated the facility.**

Klaus spent much of his time at the Spencerville grain facility “mainly grinding feed.” (Deposition of Jonathon Klaus, p.36 (“Klaus Dep.”); Dkt. No. 26; Supp. p. 4.) He learned the process by watching Phillip O’Neill and another co-worker, Allen McMichael. (Klaus Dep., pp. 38-39, 53; Supp. pp. 6-7, 16.)

After weighing the feed, an auger “took the corn from the scale up to the grinder,” from the grinder, the corn traveled to a mixer and, once mixed with supplements, Klaus would either “bag it out” for sale or run it up an “upright auger” that “runs it up to the two storage bins.” (Klaus Dep., pp. 37, 39-40, 42; Deposition of Phillip O’Neill, pp. 11-13 (“O’Neill Dep.”), Dkt. No. 29; Supp., pp. 5, 7-8, 10, & 34-36.) The “run-up” or “upright auger” ran from the first-floor grinding room to the third floor. (O’Neill Dep., pp. 19-20; Supp., pp. 38-39.) One took a man-lift to access the third floor, a weighted lift that used “a stationary rope with a floor brake.” (Deposition of Allen McMichael, pp. 20-21 (“McMichael Dep.”), Dkt. No. 28; Supp., pp. 67-68.)

B. Powering the “Run-Up” or “Upright” Auger

Klaus or his co-workers operated each of three augers from separate electrical panels – which McMichael spoke of as a “fuse box” – located just inside the door of the building. (Klaus Dep., pp. 40-42; Supp., pp. 8-10.) Each of the three separate fuse boxes had a lever that (when up) activated or (when down) eliminated the power supply. The operator turned the auger on or off using paired buttons located immediately

below the auger's fuse box. (Klaus Dep., pp. 42-44; McMichael Dep., pp. 25-26; Supp., pp. 10-12 & 69-70; see O'Neill Dep., p. 27; Supp., p. 43.)

A person would disconnect the power to the augers only "to work on it" or at day's end when they would lock out the fuse boxes. (Klaus Dep., pp. 57-58 & 61-62; Deposition of Cory Haehn, p. 21, Dkt. No. 25; Supp., pp. 20-21, 24-25, & 104.)²

C. Making Repairs and "Throwing the Switch"

Klaus, McMichael, and O'Neill also repaired assorted equipment as part of their job. (Klaus Dep., pp. 35-36, 51; McMichael Dep., p. 10; Supp., pp. 3-4, 14, & 63.) Every three or four months, two bolts located on the upright auger at the third floor would shear. (McMichael Dep., p. 29; O'Neill Dep., p. 19-20; Supp., pp. 38-39 & 73.) Repairing the upright auger was a one-man job, which Klaus learned how to do when either O'Neill or McMichael "told [him] how to do it." (Klaus Dep., pp. 55-57; Supp., pp. 18-20; see O'Neill Dep., p. 20, Supp., p. 39.)

Before Klaus started his job at United Equity, the company provided LO/TO training in September and December 2004. (Deposition of Jackie Knippen, pp. 23-24, Dkt No. 27; Supp., pp. 119-120.) Cory Haehn, the general manager, indicated that he did not have a formalized training program for the employees: "it was hands-on training. . . . I worked with all of these guys as far as working on equipment and stuff." (Haehn Dep., p. 26; Supp., p. 109.)

While United Equity provided locks and tags for use in repairs, no one used them. (Haehn Dep., pp. 19-23; Supp., pp. 102-106.) Instead of using LO/TO, Haehn would "kill the power" (pull the lever down) to the upright auger and remove the fuses.

² A master electrical panel, located on the side of the building opposite from the location of the auger panels, controlled the power to the entire building. (Klaus Dep., p. 45; McMichael Dep., p. 25; Supp., pp. 13 & 69.)

(Haehn Dep., pp. 24-25; Supp., pp. 107-108.) Unless the lever was down, the fuse box would not open. (Haehn Dep., p. 24; Supp., p. 107.) “[T]he fact the door was open and the fuses were out, that would be warning saying this machinery is down.” (Haehn, p. 25; Supp., p. 108.) Although O’Neill, McMichael, and Klaus did not remove the fuses from the fuse box, they would disconnect the power to the on/off switch by throwing the lever to the down or “off” position. (O’Neill Dep., pp. 25-26, 29; McMichael Dep., pp. 30-31, 64; Klaus Dep., pp. 59-62; Supp., pp. 22-25, 41-42, 45, 74-75 & 92.)

McMichael admitted he “knew what the [lock] was for” – he just never locked out the switch after disconnecting the power: “[I]t really wouldn’t take very long to change the bolts so we’d just throw the switch and go up [the man-lift] and change the bolt.” (McMichael Dep., p. 30, 49-50, & 64-65; Supp., pp. 74, 86-87 & 92-93.) O’Neill did not lock out either. Although he would shut the power off at either the main switch or the auger “disconnect switch,” he did not “lock out.” (O’Neill Dep., pp. 29-30; Supp., pp. 45-46.) When asked why he did not use the locks, he simply said, “Just didn’t do it.” (O’Neill Dep., p. 29; Supp., p. 44.)

McMichael explained why he considered it enough to throw the switch at the fuse box before repairing the upright auger: “It was a rule of thumb out there if a switch is throwed you find out why it’s throwed.” (McMichael Dep., p. 32; Supp., p. 76.) No one had ever been injured while repairing the upright auger, and no one had been injured on any of the other augers. (O’Neill Dep., p. 36; McMichael Dep., p. 61; Supp., pp. 50 & 89.)

D. The Day of the Accident

On the morning of the accident, O’Neill and Klaus were remixing feed as McMichael unloaded the feed from the bulk truck into the mixer. (O’Neill Dep., p. 37;

McMichael Dep., pp. 10, 34-36; Supp., pp. 51, 66 & 78-80.)³ O'Neill remembered that they needed to replace a sheared bolt on the upright auger. (O'Neill Dep., pp. 37-38; McMichael Dep., p. 33; Supp., pp. 51-52 & 77.) According to McMichael, "I just told them you guys go ahead and get the bolt fixed, auger fixed." (McMichael Dep., p. 33; Supp., p. 77) He then went back outside and set to work regulating the grain flow from the truck and into the mixer. (McMichael Dep., p. 36; Supp., p. 50.)

Klaus "[j]ust took it upon" himself to repair the upright auger: "McMichael said it was broke and so me and O'Neill found a bolt and I went upstairs." (Klaus Dep., p. 63; Supp., p. 26; see O'Neill Dep., p. 46; Supp., p. 58.) Klaus had repaired the upright auger three or four times by himself before the accident. (Klaus Dep., p. 62; Supp., p. 25.) As Klaus took the man-lift to the third floor, O'Neill went back to the tool room to get a wrench to fix a belt on the first-floor roller mill. (O'Neill Dep., pp. 39-41 & 52-53; Supp. pp. 53-55 & 60-61.)

Klaus, however, did not cut the power supply to the auger by throwing down the power switch lever. Instead, he says he asked O'Neill to "keep an eye on the power supply" – something O'Neill denies. (Klaus Dep., p. 64; O'Neill Dep., p. 46; Supp., pp. 27 & 58) Klaus had never before asked one of his co-workers to "keep an eye on" the fuse box. (Klaus Dep., p. 64; Supp., p. 27.)

E. It Was a Miscommunication

When McMichael returned to the grinding room from the truck, he asked O'Neil "are you guys done yet and he shook his head yes, and that's when I went over and threw on the power switch." (McMichael Dep., p. 36; Supp., p. 80.) O'Neill,

³ Haehn was on the road "picking up a load of feed." (Haehn Dep., p. 16; Supp., p.106.)

however, thought McMichael had asked whether he and Klaus had found the bolt they needed -- not whether they had finished the repair:

Allen came in . . . and we was talking and he asked me if we got it, and I thought he meant found a bolt because he knew we was hunting bolts and I said yes we got one, and then I come back over to the roller mill and I heard it [the upright auger] kick on. [O'Neill Dep., pp. 41-42; Supp., pp. 55-56.]

Because the arm to the fuse or the "disconnect" switch was not in the down position signifying that the power was disconnected, McMichael pushed the start button on the auger. (O'Neill Dep., p. 46; Supp., p. 58.)

[T]he switch wasn't thrown, you know, so that indicated to me that they was done and that's when I asked O'Neill "You guys done yet?" and he shook his head yes, and I went over and proceeded to turn the augers on. [McMichael Dep., p. 47; Supp., p. 84.]

McMichael believed he had the answer to his question whether the repair was done, so he pushed the "on" button, which set the upright auger in motion. (McMichael Dep., p. 48; Supp., p. 85.) As a result of this miscommunication, Klaus lost his hand. Klaus does not blame either O'Neill or McMichael: **"No. It was an accident."** (Klaus Dep., p. 67; Supp., p. 28.)

III. The Third District's Decision

After considering these facts, the Third District apparently applied both R.C. 2745.01 and *Fyffe*, and equated an employer's alleged failure to follow or institute a safety plan with the substantial certainty of injury. First, the court held that United Equity's purported "conscious" choice to no longer use safety consultants and its disregard of both its operations safety plan and "safety protocols" created a genuine issue of fact about whether an injury was "substantially certain" to occur. 2008-Ohio-1344, ¶19-21. As the court indicated, the record contained evidence "from which a rational

trier of fact could find that United consciously disregarded its LO/TO policy, *creating a substantial certainty that an employee injury would result.*” Id. at ¶21 (emphasis added).

Second, the court applied its understanding of the term “substantial certainty” to the “rule of thumb.” Klaus admitted that the day of the accident was the first time he had asked someone to just “watch” the fuse box. And Klaus, O’Neill, McMichael, and Haehn consistently testified that they disconnected the power to the fuse box before repairing the auger. But the court found Haehn’s testimony that he *also* removed the fuses created a genuine issue of material fact: “the jury might well decide that United failed to have *any* safety policy, written or otherwise, *and that could lead the jury to find that the injury was substantially certain to occur.*” Id. at ¶23 (emphasis added).

Finally, the Third District noted that the trial court had “inappropriately weighed the fact” that no person had sustained an injury while making a repair 92 times over a 23-year period. “[T]he reason that no employee has been injured was because this repair was so infrequent, not because United’s safety policies were working.” Id. at ¶25.

As the Third District’s decision demonstrates, its understanding of “substantial certainty” under R.C. 2745.01 – or under *Fyffe* – has nothing to do with (1) an employer’s actual knowledge of a danger that presents an egregious risk of injury, (2) the degree of certainty of injury, or (3) actual knowledge of the substantial certainty of injury.

Argument

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.

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.)

I. Drawing *Distinct* Lines between Negligence and Reckless Conduct, and “Inferred Intent” Intentional Torts

As discussed above, the problem Ohio courts have had in applying *Fyffe* and will have in applying R.C. 2745.01 lies here: when considering or reviewing orders on summary judgment motions, courts *infer* from circumstantial evidence an employer’s knowledge of both the existence of a dangerous condition and the substantial certainty of injury to satisfy the elements of an “*inferred* intent” intentional tort. Inferring an employer’s “actual knowledge” from evidence that demonstrates only possible or probable knowledge (i.e., what the employer should have known) to then *infer* intent to arrive at the conclusion that an employer committed a “substantial certainty” intentional tort means that an employee can survive summary judgment based solely on speculation. A conclusion based on speculation not only defies basic rules of evidence that apply to every other area of Ohio law, it defeats the exclusivity provisions of the workers’ compensation system.

Of course employers know about risks of injury: that's why they take safety precautions and that is also why R.C. 2745.01(C) presumes that an employer's knowledge that a dangerous condition exists when the employer removes a safety guard or exposes employees to toxic chemicals. But the existence of safety regulations, whether created by OSHA or formulated by industry standards, standing alone does not establish either the existence of an egregious risk of injury or knowledge of an egregious risk of injury.

Indeed, the distinction between ordinary risks of injury (those that are possible or probable) and egregious risk of injury lies in certainty of injury. While possibility or probability of injury may denote negligence or recklessness, the substantial, virtual, or practical certainty of injury (those risks that are egregious) denotes an inferred intent intentional tort. Thus, to preserve the purpose of the workers' compensation system, the inquiry on summary judgment – under R.C. 2745.01 or *Fyffe* – should be this: Does the employer have a conscious awareness that a dangerous condition within the employer's control presents an *egregious* risk of injury (i.e., where an injury is virtually certain to occur) to an employee if an employee is exposed to that dangerous condition? Only after the evidence demonstrates that the employer had actual knowledge of a dangerous condition, that the employee is virtually certain to sustain an injury if exposed to that condition, and that the employer had actual knowledge of the certainty of injury from exposure to that condition should the a court consider whether the evidence demonstrates that the employer required the employee to engage in a task that exposed him to that dangerous condition. If the record contains no proof of an employer's actual knowledge of the exact danger that caused the employee's injury, of the substantial

certainty of injury, or of the employer's actual knowledge of the substantial certainty of injury, then the "deliberate intent" employer-intentional tort fails as a matter of law.

The following provides a history of Ohio's employer-intentional tort statutes and case law, discusses this Court's continued attempts to define and explain employer-intentional torts and the confusion among appellate and trial courts, and offers a solution to properly preserve the exclusivity of the Workers' Compensation Act while preserving an employee's right (either by common law or through R.C. 2745.01) for compensation for an employer's intentional tort.

A. A History of Blurred Lines

1. Early legislative attempts to define employer intentional torts

The line between Ohio law governing an employee's rights against his employer from the early 1900's through to the General Assembly's latest attempt to legislate employer-intentional torts is a line with many curves and twists. Originally, an employee in Ohio could recover for workplace injuries by filing a common-law claim against the employer. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 109, 522 N.E.2d 489. The employee not only had the burden of proving the employer's fault, the employer could assert common-law defenses such as contributory negligence and assumption of the risk. *Id.* But "[t]his litigation-based system became widely criticized as not meeting the needs of injured workers." *Id.* at 110.

In 1911, the Ohio legislature enacted the first law addressing compensation for industrial injuries. *Id.* at 110. This Court has observed that the act had no "specific constitutional genesis." *Id.* The state, however, later adopted Section 35, Article II of the Ohio Constitution in 1912, which "specifically empowered the General

Assembly to provide for the compensation of injuries or occupational diseases ‘occasioned in the course of such workmen’s employment’ and authorized legislation compelling employers’ contribution into a state-wide fund to accomplish this goal. *Id.*

As this Court has noted, “The constitutional provision and the derivative legislative Acts were public policy trade-offs. Employees relinquished their right to bring common-law actions against their employers in exchange for no-fault recovery, *i.e.*, automatic entitlement to reduced benefits for such injuries.” *Id.* “This trade-off, which obtained for the employee a certain and speedy recovery in exchange for granting a more limited liability to the employer, benefits employers, employees and the public alike.” *Id.*

The original statutory provisions allowed an employee to elect remedies between workers’ compensation benefits and a common-law action against the employer where the employer committed a “willful act” that resulted in injury or when the employer failed to comply with lawful safety requirements. *Id.* Since the statute did not define “willful act,” employers defended themselves in “considerable legal activity” involving such claims. *Id.*

In 1914, the General Assembly amended the workers’ compensation act and defined “willful act” as an act by the employer committed “knowingly and purposely with the direct object of injuring another.” *Id.* “Before this amendment it was found that suits were being brought upon allegations of willful conduct or for such gross negligence as amounted to willful conduct. So concerned was the legislature by reason of the insidious attack thus made in weakening the structure of the Workmen's Compensation Law” *Patton v. Aluminum Castings Co.* (1922), 105 Ohio St. 1, 11, 136 N.E. 426.

This amendment apparently did little to clarify the type of employers' willful acts that fell outside of the workers' compensation system. *Van Fossen*, 36 Ohio St.3d at 110. By 1924, this Court ruled that "[t]he term 'willful act' . . . imports an act of will and design and of conscious intention to inflict injury upon some person. Gross negligence or wantonness can no longer be a willful act under this section, unless conjoined with a purpose or intention to inflict such injury." *Gildersleeve v. Newton Steel Co.* (1924), 109 Ohio St. 341, 142 N.E. 678, paragraph one of the syllabus.

But effective January 1, 1924, the people of the state of Ohio amended Section 35, Article II which, "[o]n its face, . . . grant[s] immunity to complying employers from *any* common-law actions for injuries suffered by employees in the workplace." *Van Fossen*, 36 Ohio St.3d at 110-111. By 1939, however, this Court concluded that neither Section 35 of Article II nor the existing provision in the General Code, G.C. 1465-70, took away an employee's right to sue his employer if an injury he sustained resulted from a non-compensable occupational disease. *Triff v. Natl. Bronze & Aluminum Foundry Co.* (1939), 135 Ohio St. 191, 20 N.E.2d 232, paragraph two of the syllabus; *id.* at 194 (noting that case involved allegations of fact that covered a period when silicosis was not included in the schedule of compensable occupation diseases).

In response to *Triff*, the General Assembly then amended G.C. 1465-70 to restore the exclusivity-of-remedy rule, extending to employers who complied with the workers' compensation laws immunity from suit at common law or by statute – regardless of whether the injury was compensable. *Van Fossen*, 36 Ohio St.3d at 111 (citing 118 Ohio Laws 422, 426-427). The General Assembly later re-codified this law at R.C. 4123.74, where, after various amendments, it now reads as follows:

Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or not such injury, occupational disease, bodily condition, or death is compensable under this chapter.

2. Judicially created exceptions to exclusivity of the Workers' Compensation Act

In 1982, a judicially pronounced exception to exclusivity-of-remedy rule came out of *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572, syllabus, where this Court held that neither the Ohio Constitution nor the workers' compensation laws precluded an employee from enforcing his common-law remedies against an employer for an intentional tort. As this Court pointed out in *Blankenship*, the General Assembly "expressly limited the scope of compensability" to those injuries "received or contracted by any employee in the course of or arising out of his employment." *Id.* at 612 (quoting R.C. 4123.74). "No reasonable individual would equate intentional and unintentional conduct in terms of the degree of risk which faces an employee nor would such individual contemplate the risk of an intentional tort as a natural risk of employment." *Id.*

But "reasonable individuals" had difficulty distinguishing between intentional and unintentional conduct. Just two years later, this Court decided *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, 472 N.E.2d 1046, where it tried to clarify the rule in *Blankenship*. Adopting the definition of "intentional tort" found at 1 Restatement of the Law 2d, Torts (1965), 15, Section 8(A), this Court held that "[a]n

intentional tort is an act committed with the intent to injure another, or committed with the belief that such an injury is substantially certain to occur.” *Jones*, supra at paragraph one of the syllabus. Thus, this Court extended the common-law employer-intentional-tort action to those cases where the employer’s intent could be *inferred*:

[A] specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is *substantially certain*, not merely likely, to occur. It is this element of substantial certainty which distinguishes a merely negligent act from intentionally tortious conduct. Where a defendant acts despite his knowledge that the risk is appreciable, his conduct is negligent. Where the risk is great, his actions may be characterized as reckless or wanton, but not intentional. **The actor must know or believe that harm is a substantially certain consequence of his act before intent to injure will be inferred.** The existence of this knowledge or intent on the part of the actor may be inferred from his conduct and surrounding circumstances.” [Id. at 95 (emphasis added).]

After *Jones*, trial courts misconstrued the phrase “substantially certain to occur.” *Van Fossen*, 36 Ohio St.3d at 115; e.g., *Burkey v. Teledyne Farris* (June 30, 2000), 5th Dist. No. 1999AP030015, 2000 Ohio App. LEXIS at *12 (noting that “[t]he *Jones*’ decision altered intentional tort law by changing ‘intent’, in the employment setting, to mean ‘substantially certain to occur’”). Cases “ranged from simple negligence to reckless and wanton disregard of the duty to protect the health and safety of employees, none of which present[ed] an act which is substantially certain to occur.” *Van Fossen*, supra. As this Court observed, the confusion “within the bench and bar . . . manifests itself in a failure to distinguish intentionality from recklessness and negligence, and from finding intentional tort in facts which show only recklessness.” *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St. 3d 135, 139 n.3, 522 N.E.2d 477.

“Nebulous as this area might be to define,” this Court emphasized in *Van Fossen v. Babcock & Wilcox Co.*, that the employee had the burden to present evidence demonstrating that an employer had “knowledge” of both the danger and the substantial certainty of injury:

Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed. 1984), in order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty and not just a high risk; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. [*VanFossen*, 36 Ohio St.3d 100, paragraph five of the syllabus; *id.* at 116.]

As this Court also held, “the mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent.” *Id.* at paragraph six of the syllabus.

Explaining *Jones*, this Court adopted the standard of proof described in Comment *b* of Section 8A of the Restatement of the Law 2d, Torts, 15:

To establish the intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. Where the risk is great and the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still

proceeds, he is treated by the law as if he had in fact desired to produce the result. [*Van Fossen*, 36 Ohio St.3d 100, paragraph six of the syllabus.]

Accord *Pariseau v. Wedge Prods., Inc.* (1988), 36 Ohio St.3d 124, 128-129, 522 N.E.2d 511.

Less than three years later, this Court addressed again “a rather frequently recurring legal question of what may constitute an ‘intentional tort’ alleged to have been committed by an employer against his employee.” *Fyffe*, 59 Ohio St.3d at 116. Apparently, the trial and appellate courts believed “that there had to be showing of actual subjective intent upon the part of the employer to produce the resulting harm to the employee, or that there had to be a finding that the employer had knowledge of the specific harm that might befall the injured employee.” *Id.* at 117. This Court then modified its holdings at paragraphs five and six of *Van Fossen*, removing references to “high risk” of harm and “where the risk is great” and setting these new rules forth at paragraphs one and two of *Fyffe v. Jenos Inc.*:

1. Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed. 1984), in order to establish “intent” for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St. 3d 100, 522 N.E. 2d 489, paragraph five of the syllabus, modified as set forth above and explained.)

2. To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St. 3d 100, 522 N.E. 2d 489, paragraph six of the syllabus, modified as set forth above and explained.)

Finally, in *Gibson v. Drainage Products, Inc.*, decided in 2002, this Court softened the third prong of *Fyffe*. 95 Ohio St.3d 171, 2002-Ohio-2008, 766 N.E.2d 982, ¶27. Although *Fyffe* specifically requires that the employee produce evidence demonstrating that the employer, with knowledge of the dangerous condition and the substantial certainty of harm “did act to require the employee to continue to perform the dangerous task,” a majority of this Court concluded that “nothing in the language of the third element or in our prior case law” would lead to the conclusion that the employer “must specifically require” the employee to engage in the dangerous task. *Id.* at ¶26. “Rather, the primary concern is whether [the employer], through its policies and conditions of employment, placed [the employee] in a position where he was subjected to a ‘dangerous process, procedure, instrumentality or condition’ and harm was substantially certain to follow.” *Id.* at ¶27.

3. More legislative attempts to define “substantial certainty” intentional torts committed by employers

When the General Assembly amended the Workers’ Compensation Act in 1986, it placed various conditions on the employer-intentional-tort action. See *Van Fossen*, 36 Ohio St.3d at 103. The Ohio legislature not only used the same definition of “intentional tort” and the same “deliberate intent” language to define “substantially certain” in former R.C. 4121.80(G)(1) (repealed by 144 S.B. 192, eff. 12/1/92) as found in R.C. 2745.01(B), it placed a “clear and convincing” burden of proof of the employee. This Court decided that the statute violated the constitutional prohibition against retroactive laws because “R.C. 4121.80(G) removes an employee’s potential cause of action against his employer by imposing a new, more difficult standard for the ‘intent’ requirement than that established in *Jones*” *VanFossen*, 36 Ohio St.3d 100 at paragraph four of the syllabus.

Just two years later this Court concluded in *Brady v. Saftey-Kleen Corp* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, paragraph two of the syllabus, that “R.C. 4121.80 exceed[ed] and conflict[ed] with the legislative authority granted to the General Assembly pursuant to sections 34 and 35, Article II of the Ohio Constitution, and is unconstitutional *in toto*.” In doing so, this Court also reiterated the holding in *Blankenship* and concluded that neither Section 35 of Article II nor R.C. 4123.74 and 4123.741 preempted an employee’s common-law right to sue an employer for an intentional tort. *Brady*, supra at paragraph one of the syllabus. This Court emphasized, however, that “[w]hile such cause of action contemplates redress of tortious conduct that occurs during the course of employment, an intentional tort alleged in this context necessarily occurs outside the employment relationship.” *Id.*; see 6-103 Larson’s

Workers' Compensation Law (Lexis Nexis 2008), §103.1 (concluding that the “most fictitious theory of all” to support the intentional-tort exception to the exclusivity of workers compensation acts is that the employer’s conduct “does not arise out of the employment; for the assault is no less so because the assailant happens to be the employer”).

The General Assembly tried again, in 1995, to “govern when and under what circumstances an intentional tort claim may be commenced and maintained by an employee against his or her employer” and this Court, once again, found that attempt an unconstitutional exercise of legislative power under Sections 34 and 35 of Article II of the Ohio Constitution. In *Johnson v. BP Chemicals, Inc.*, this Court addressed the former version of R.C. 2745.01(D)(1), which defined an “employment intentional tort” as “an act committed by an employer in which the employer *deliberately and intentionally* injures, causes an occupational disease of, or causes the death of an employee.” 85 Ohio St.3d 298, 303 n.2, 1999-Ohio-267, 707 N.E.2d 1107 (emphasis added) (reciting Section 1, Am. H. B. No. 103, 146 Ohio Laws, Part I, 756-757). In pertinent part, this Court noted that, to prove an intentional tort under R.C. 2745.01(D)(1), the employee “must prove, at a minimum, that the actions of the employer amount to a criminal assault.” *Id.* at 306. The cause of action created by the statute was, therefore, “illusory.” *Id.*; see *id.* at 310 (Cook, J., dissenting)(noting that “the General Assembly sought to statutorily narrow that common-law definition to ‘direct intent’ torts only” when it enacted R.C. 2745.01).

B. The General Assembly's Latest Attempt to Draw Lines

1. Using “deliberate intent” to establish an “inferred intent” intentional tort

For the third time in less than 20 years, the General Assembly tried again in 2005 to limit the Ohio courts' interpretation of “substantially certain” employer-intentional torts. See *50 v H 498* (eff. 4-7-05). R.C. 2745.01(A) allows an employee to sue an employer for a tortious act when that employer commits the tort with the specific intent to injure, or “with the belief that the injury was substantially certain to occur”:

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.** [Id. (emphasis added).]

Paragraph (B) of R.C. 2745.01 defines “substantially certain” differently from this Court's definition in *Fyffe*: “**substantially certain' means that an employer acts with deliberate intent** to cause an employee to suffer an injury, a disease, a condition, or death.”

2. What does “deliberate intent” mean?

This definition of “substantially certain” is not new. As noted above, the Ohio legislature used the same definition of “intentional tort” and the same “deliberate intent” language to define “substantially certain” in former R.C. 4121.80(G)(1), which this Court found unconstitutional in toto. *Brady*, 61 Ohio St.3d 624, at paragraph two of the syllabus. Regardless, this Court has had varying interpretations of R.C. 4121.80(G)(1)'s definition of “substantially certain.”

Although this Court did not apply R.C. 4121.80(G)(1) to the case before it, this Court noted that R.C. 4121.80(G)(1)'s definition of "substantially certain" "appears to focus on the consequence of an act rather than upon the act itself." *Kunkler*, 36 Ohio St. 3d at 139 n.3. This Court further observed that the definition of intentional tort "is not necessarily antagonistic to, or different from, the standard set by the Restatement [in 1 Restatement of the Law 2d, Torts (1965) 15, 8A]." *Id.* The majority's observation in *Kunkler*, however, is at odds with paragraph four of the syllabus in *VanFossen*, a companion case issued the same day, which held that R.C. 4121.80(G) "impos[ed] a new, more difficult standard for the 'intent' requirement than that established in *Jones*"

One commentator interpreted R.C. 4121.80(G) with a similar limitation on the "substantially certain" intentional tort: "This limited definition of 'substantial certainty' indicated a legislative intent to disregard the expansive interpretation of intentional tort as found in *Jones*, and attempted to bring Ohio in line with most other jurisdictions." Claybon, Ohio's "Employment Intentional Tort": A Workers' Compensation Exception, or the Creation of an Entirely New Cause of Action? (1996), 44 Clev. St. L. Rev. 318, 395. Another commentator proposed that if one understood "deliberate intent" in R.C. 4121.80(G) to mean actual, "subjective intent" then substituting the "deliberate intent" definition for "substantially certain" led to a redundancy. Hertlein, Intentional Torts by Employers in Ohio, The General Assembly's Solution: Ohio Revised Code Section 4121.80 (1987), 56 U. Cin. L. Rev. 247, 257. "If the two phrases of the definition [of "intentional tort"] are not to be redundant, then the other phrase must allow some lesser standard of culpability to meet the intentional tort

requirements. Willful, wanton, or reckless misconduct probably will meet this standard.”
Id.

This Court, however, recently considered the definition of “substantially certain” in R.C. 2745.01(B), and it concluded that the General Assembly “reject[ed] the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct as defined in *Universal Concrete v. [Bassett (1936)]*, 130 Ohio St. 567, 5 O.O. 214, 200 N.E.843, paragraph two of the syllabus.” *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, 885 N.E.2d 204, ¶17; see *id.* (noting that the *Fyffe* standard applied because the accident predated the April 7, 2005 enactment of R.C. 2745.01).

3. “Deliberate intent” means that the employer had actual knowledge of the dangerous condition and actual knowledge of the substantial certainty of harm

Certainly, as this Court deduced in *Talik*, the General Assembly had no intention of loosening the basic concept of “intentional tort” in a way that would allow more employees, whose claims against their employers ordinarily would be covered by the Workers’ Compensation Act, to file more intentional tort cases against their employers. As R.C. 2745.01’s sponsor explained to the House Commerce & Labor Committee, Ohio court decisions had “opened the door for employees to continue to sue employers for workplace injuries in addition to availing themselves of the ‘no fault’ workers’ compensation system” by reducing the employer-intentional-tort standard “to a negligence-based standard that is far below any reasonable definition of an intentional tort.” Ohio Capitol Connection, Minutes of House Commerce & Labor Committee (Aug. 25, 2004), p. 1.

Moreover, “deliberate intent” cannot mean the same thing as “specific intent” because to do so would negate the “substantially certain” prong of the employer-intentional tort under R.C. 2745.01(A). *East Ohio Gas Co. v. Public Utilities Comm.* (1988), 39 Ohio St.3d 295, 530 N.E.2d 875 (holding that “words in statutes should not be construed to be redundant, nor should any words be ignored”). Rather, for that phrase to make sense without redundancy, one must equate “deliberate intent” with the element of an employer’s *actual knowledge* of two, distinct elements before a plaintiff can establish an “*inferred intent*” intentional tort. The employee must establish the employer’s actual knowledge of both (1) the existence of a dangerous process, procedure, or instrumentality and (2) the substantial certainty (i.e., absolute, virtual, or practical certainty) of injury if the employer subjects the employee to that dangerous process, procedure, or instrumentality. See Webster’s Ninth New Collegiate Dictionary (1989), 336 (defining “deliberate” as “1: characterized by or resulting from careful and thorough consideration < a ~ decision> 2: characterized by awareness of the consequences <~ falsehood> 3: slow, unhurried, and steady as though allowing time for decision on each individual action involved <a ~ pace>”). Thus, an employer must have a *conscious awareness* that (1) a dangerous condition exists within its control, which is beyond the ordinary risk to which an employee would be exposed, and (2) an employee is virtually certain to sustain an injury if exposed to that dangerous condition.

II. Direct Proof of “Actual Knowledge”

As this Court explained in *VanFossen*, and again *Sanek v. Duracote, Inc.*, the plaintiff has the burden to establish that “the employer had actual knowledge of the exact dangers” that ultimately caused an employee’s injury or death. *VanFossen*, 36

Ohio St.3d at 112; *id.* at 116 (interpreting “*Jones* to require knowledge on the employer as a vital element of the requisite intent”); *Sanek* (1989), 43 Ohio St.3d 169, 172, 539 N.E.2d 114; but cf. *Pariseau*, 36 Ohio St. 3d at 127 (citing *Van Fossen* for the proposition that “the burden to demonstrate knowledge amounting to a substantial certainty that an injury would take place never leaves the plaintiff”). And without using the term “actual” to describe an employer’s knowledge of the substantial certainty of injury, this Court’s later decision in *Fyffe* tried to make clear that an employer’s knowledge of the substantial certainty of injury was critical to establishing an “inferred intent” employer-intentional tort. *Fyffe*, 59 Ohio St.3d at 117-118 (discussing “high risk” and great risk in context of inferring intent). But *Fyffe* did little to help differentiate the first and second prongs of the *VanFossen* test, just as it failed to draw a broad, black line between intentional torts and conduct amounting to recklessness or negligence.

A. Inferring Knowledge from Circumstantial Evidence – or Stacking Inferences – Reduces the “Inferred Intent” Intentional Tort to Negligence or, at Most, Recklessness

Ohio courts dilute the “inferred intent” intentional tort when they find genuine issues of material fact from inferences of an employer’s knowledge derived from circumstantial evidence. As this Court noted in *Jones*, “The existence of [the employer’s] knowledge or intent on the part of the actor may be inferred from his conduct and surrounding circumstances.” 15 Ohio St.3d at 95 (emphasis added); see, e.g., *Kaminski*, 175 Ohio App.3d 227 at ¶54 (noting that plaintiff may demonstrate an employer’s actual or constructive knowledge that a dangerous process or procedure existed within its business operations); *Ford v. Complete Gen. Constr. Co.*, 10th Dist. No. 06AP-394, 2006-Ohio-6954, ¶15 (“The existence of the employer’s knowledge may be inferred from the surrounding circumstances and surrounding conduct.”); see also *Estate*

of *Merrell v. M. Weingold & Co*, 8th Dist. No. 88508, 2007-Ohio-3070, ¶45-56 (concluding that failure to implement and train on lock-out program for “heavy mechanical equipment” at a different work site was “sufficient evidence” of employer’s “knowledge of the substantial certainty of injury” from which jury could conclude that “it was only a matter of time before someone was injured or killed” when cleaning out a baler without locking it out). And while this Court’s decision in *Jones* pre-dates its “actual knowledge of the exact danger” language in *VanFossen* and *Sanek*, this Court’s 1998 decision in *Hannah v. Dayton Power & Light Company* adopted an inference-upon-inference standard when it held that “proof of the three elements of employer intentional tort may be made by direct or *circumstantial* evidence.” 82 Ohio St.3d 482, 485, 1998-Ohio-408, 696 N.E.2d 1044 (emphasis added).

Since a “substantially certain” intentional tort is an “inferred intent” intentional tort, allowing a plaintiff to prove each of the three elements of an employer intentional tort based on circumstantial evidence is an impermissible stacking of one inference upon another.⁴ “An inference based solely and entirely upon another inference, unsupported by any additional fact or another inference from other facts, is an inference on an inference and may not be indulged in by a jury.” *Hurt v. Charles J. Rogers Transp. Co.* (1959), 164 Ohio St. 329, 130 N.E.2d 820, paragraph one of the syllabus; see *Motorists Mut. Ins. Co. v. Hamilton Twp. Trustees* (1986), 28 Ohio St.3d 13, 502 N.E.2d

⁴ “Circumstantial evidence is defined as ‘[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved.’” *State v. Nicely* (1988), 39 Ohio St.3d 147, 150, 529 N.E.2d 1236, quoting Black’s Law Dictionary (5th Ed. 1979) 221. See Black’s Law Dictionary (8th Ed. 2004), 595 (defining circumstantial evidence as “[e]vidence based on inference and not on personal knowledge or observation”); see, also, OJI, §5.10.

204, syllabus. Indeed, “[t]he only inferences of fact which the law recognizes are *immediate* inferences from facts proved.” *McDougall v. Glenn Cartage Co.* (1959), 169 Ohio St. 522, 160 N.E.2d 266, paragraph two of the syllabus (emphasis added). But, as this Court explained in *McDougall*, “a given state of facts may give rise to two or more inferences, and in such case one inference is not built upon another but each is drawn separately from the same facts.” *Id.*

To help explain the difference between inference stacking and logical reasoning, *McDougall* painted a vivid picture of acceptable parallel inferences and unacceptable inference stacking:

It is of course basic that an inference can not be predicated upon a fact the existence of which rests on another inference. For example, if a seasick passenger on a ship in mid-ocean was last seen standing by the rail and he then disappeared completely, the inference may properly be drawn that he fell overboard and was drowned, but the additional inference that he intentionally jumped overboard and committed suicide can not be indulged. However, if it is shown that the passenger was in desperate financial and domestic trouble, was visibly depressed and had on several occasions threatened to do away with himself, then from such facts the inference can be drawn that he deliberately threw himself overboard and committed suicide. Again, if a pedestrian was observed walking along a road and he was found unconscious and injured at the side of the road immediately after the passing of an automobile, it may logically be inferred that such automobile struck him, but it can not be inferred further that the driver of the car was negligent. [169 Ohio St. at 525-526.]

With a similar brush stroke, proving an employer-intentional tort requires either proof of *specific* intent or proof of *inferred* intent (i.e., that the employer held a “belief that such an injury is substantially certain to occur”). *Jones*, 15 Ohio St.3d 90 at paragraph one of the syllabus; accord R.C. 2745.01(A); 1 Restatement of the Law 2d, Torts (1965), 15, Section 8(A). A reasonable jury, however, cannot infer an employer’s intent to injure an employee from proof that an employer *might* know of the existence of

a dangerous process, procedure, instrumentality, or condition within its business operation or that an employer *might* know that exposing an employee to such dangerous process, procedure, instrumentality, or condition is substantially certain to cause injury or death to an employee. To allow a jury to find that an employer committed an “inferred intent” intentional tort based solely on knowledge inferred from circumstantial evidence does not comport with *Hurtz* nor does it further the purpose of the Workers’ Compensation Act.

B. Distinguishing Recklessness and/or Willful and Wanton Conduct and Negligence from an “Inferred Intent” Intentional Tort

Requiring a plaintiff who asserts a “substantially certain” employer-intentional tort to produce direct evidence of the employer’s *actual* knowledge will prevent Ohio trial and appellate courts from crossing the line into the “recklessness” or “willful and wanton conduct” and negligence realm, where courts judge an actor’s state of mind on what the actor should have known. *Fyffe* and *VanFossen* identified (without defining) the “recklessness” and negligence benchmarks to differentiate a “substantial certainty” intentional tort from other conduct,⁵ but *Talik* pulled “wanton misconduct” into the equation. 117 Ohio St.3d 496, ¶17.

1. Wanton misconduct is recklessness

“Wanton misconduct,” however, falls within the general ambit of “recklessness.” As this Court ultimately determined in *Universal Concrete*, “no such thing” as “wanton negligence” exists. 130 Ohio St. at 574. Rather, after addressing the

⁵ *VanFossen*, 36 Ohio St.3d 100, at paragraph six of the syllabus; *Fyffe*, 59 Ohio St.3d 115 at paragraph two of the syllabus.

tension between previous decisions defining and describing “wanton negligence,”⁶ this Court approved the definition of “reckless disregard of safety of others” in the original Restatement of the Law of Torts, and formulated the definition of “wanton misconduct” as follows:

Wanton misconduct is such conduct as manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditions, that his conduct will in all common probability result in injury. [130 Ohio St. 567 at paragraph two of the syllabus.]

The Second Restatement of Torts describes “reckless disregard of the safety of others” a bit differently from this Court’s definition of “wanton misconduct,” but it has an analogous meaning:

[A person acts in reckless disregard of the safety of others when the person] does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. [*Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705, adopting Restatement of the Law, 2d, Torts (1965), Sec. 500; *Marchetti v. Kalsih* (1990), 53 Ohio St.3d 95, 96 fn. 2, 559 N.E.2d 699.]

In recent years, this Court has used “wanton misconduct” interchangeably with “recklessness.” *Thompson*, 53 Ohio St.3d at 104 fn. 1 (“Our comments regarding recklessness apply to conduct characterized as willful and wanton as well.”); see Restatement of the Law, Second, Torts (1965), Sec. 500 at special note. But regardless of the words one uses to describe the conduct, “wanton misconduct” and “recklessness” are essentially the same thing. “Wanton misconduct” uses the term “perversity” to describe

⁶ See 130 Ohio St. at 574, discussing *Higbee Co. v. Jackson* (1920), 101 Ohio St. 75, 128 N.E.61 and *Payne v. Vance* (1921), 103 Ohio St. 59, 133 N.E. 85.

the actor's state of mind, and perversity denotes a state of mind that is "obstinate in opposing what is right, reasonable, or accepted." Merriam Webster's Collegiate Dictionary (10th Ed. 1996), 868 (defining "perverse"). "Recklessness" uses a phrase ("knowing or having reason to know of facts" that "would lead a reasonable man to realize" that "his conduct creates an unreasonable risk of physical harm to another") to refer to the actor's state of mind, but that phrase could be equated with "perversity." And both wanton misconduct and recklessness refer to the likelihood of injury in terms of probability: the definition of wanton misconduct describes that likelihood as occurring "in all common probability" while the definition of recklessness describes that likelihood as being "substantially greater" than an injury that would occur as the result of negligence.

"Negligence," of course, "is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." Second Restatement, *supra*, Section 282. "The word 'risk' standing by itself denotes a chance of harm. In so far as risk is of importance in determining the existence of negligence, it is a chance of harm to others which the actor should recognize at the time of his action or inaction." *Id.* at Comment g.

The distinction between each of the three categories (negligence, recklessness, and intentional conduct) lies in both (1) the degree of the actor's knowledge (what he should have known compared to what he actually knew) and (2) the probability of injury. Thus, one can describe negligence, recklessness, and an "inferred intent" intentional tort as follows:

- (1) a negligent actor *should* know that a *chance* (i.e., possibility) of *injury exists*;

- (2) a “reckless” actor *should* know that an *injury is probable* – not just possible;⁷ and
- (3) the actor committing an “inferred intent” tort must *actually know* that an injury is *substantially certain* (i.e., “virtually certain”) to occur.

2. An egregious risk of harm denotes a substantial certain injury

“When the actor chooses to engage in conduct with knowledge that harm is certain to follow, this choice, with its known consequence, provides a distinctive argument in favor of liability.” Proposed Final Draft No. 1 (Apr. 6, 2005), Restatement of the Law, Third, Torts: Liability for Physical Harm, §1 Intent, Comment *a*. But not only must the employee establish that the employer had actual knowledge of the substantial certainty of injury, the employee must prove that the injury was substantially certain to occur. *Cheriki v. Black River Indus. Inc.*, 9th Dist. No. 07 CA009230, 2008-Ohio-2602, ¶29 (holding that an employer’s “general appreciation of the risk” is “not tantamount to substantial certainty that harm would result”); see Proposed Final Draft No. 1, Restatement of the Law, Third, *supra*, Comment *c* (“[A] mere showing that harm is substantially certain to result for the actor’s conduct is not sufficient to prove intent; it must also be shown that the actor is aware of this.”).

In this respect, “it is not sufficient that harm will probably result from the actor’s conduct; the outcome must be substantially certain to occur.” *Id.* As the drafters

⁷ “[The act] must be intended by the actor [but] the actor does not intend to cause the harm which results from it. It is enough *that he realizes or*, from the facts which he knows, *should realize* that there is a *strong probability* that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.” Restatement, *supra* at Sec. 500, comment *f* (emphasis added).

of the proposed Third Restatement of Torts suggest, “either ‘practically certain’ or ‘virtually certain’ might be an improvement over ‘substantially certain’ in terms of the understandability of the phrase in ordinary speech.” *Id.* at Reporters Notes, Comment *a.*⁸ Indeed, it is the virtual certainty of injury that creates the egregious risk of harm. See *Sanek*, 43 Ohio St.3d at 172. In some instances, the virtual certainty of injury may fall within the common knowledge of the jury; in others, it may require opinion testimony from an expert. But in all cases, the certainty of injury must approach – if not equal – 100%.⁹

C. Safety Standards and OSHA citations

And the substantial certainty of injury cannot simply be based on the existence of safety standards or, for that matter, an OSHA citation. When Congress drafted the Occupational Health and Safety Act, it made certain that the Act and OSHA rules would not affect the rights between employers and employees under state statutory or common law. As 29 U.S.C. 653(b)(4) provides:

Nothing in this Act shall be construed to supersede *or in any manner affect* any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties,

⁸ The drafters further acknowledge that this improvement in terminology is “sufficiently marginal as to render it appropriate for this Restatement to adhere to the ‘substantially certain’ terminology that has become common in judicial opinions on account of the Second Restatement. Still, for purposes of instructing juries, courts can take into account the interchangeability of these various phrases.” Proposed Final Draft, *supra*, Comment *a.*

⁹ Cf. *Travis v. Dreis & Krump Manuf. Co.* (1996), 453 Mich. 149, 551 N.W.2d 132, 143 (“When an injury is “certain” to occur [and not merely ‘substantially certain to occur’], no doubt exists with regard to whether it will occur. Thus, the laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury.”); *Giles v. Ameritech* (2003), 468 Mich. 897, 73, 660 N.W.2d 72 (“An accident ‘certain to occur’ cannot be established by reliance on the laws of probability, the mere occurrence of a similar event, or conclusory statements of experts. * * * Rather, it must be sure and inevitable.”).

or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. (Emphasis added.)

As the plain language of the Act reveals, neither the Act nor OSHA regulations set the standard for an employee's rights, the employer's duties owed to an employee, or the employer's liability to an employee for the breach or violation of an OSHA regulation.

This Court took note of this point in *Hernandez v. Martin Chevrolet, Inc.*, 72 Ohio St.3d 302, 303, 1995-Ohio-200, 659 N.E.2d 1215: "This mandatory disclaimer clearly indicates that Congress did not intend OSHA to affect the duties of employers owed to those injured during the course of their employment." This Court reasoned that "[i]f we held that a violation of OSHA constitutes negligence *per se*, we would allow OSHA to affect the duties owed by individuals to those injured in the course of their employment." *Id.* at 304; see *Sanek*, 43 Ohio St.3d at 172-173 (when "management fails to take corrective action, institute safety measures, or properly warn the employees of the risk involved" then the employer engages in nothing more than negligence or gross negligence).

OSHA's own rules are consistent with the statute: "the issuance of a citation [under OSHA] *shall not* constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act, or if contested, unless the citation is affirmed by the Review Commission. " 29 CFR 1903.14(e) (emphasis added). The face of any OSHA citation provides this same language. Even if the Review Commission affirmed a contested OSHA citation under 29 CFR 1903.14(e), and it found that the employer had violated OSHA, the Commission's ultimate finding shall "not in any manner affect" the common-law or statutory rights, duties, or liabilities

imposed upon an employer. Thus, evidence of the employer's violation of OSHA regulations and safety protocols to establish "deliberate intent" would run afoul of Congress' mandatory disclaimer in 29 U.S.C. 653(b)(4).

Since Congress and OSHA have dictated that OSHA citations "shall not affect" an employer's duties or liabilities in the employer-employee relationship context, then such documents – like OSHA reports made pursuant to the investigation process under 29 U.S.C. 657 and citations issued under 29 U.S.C 658 – are not relevant to any dispositive fact in issue in Ohio employer intentional tort claims. See Evid.R. 401.

III. Klaus Failed to Present Direct Proof of the Elements of an "Inferred Intent" Intentional Tort

A. No Direct Proof of Actual Knowledge of the Exact Danger to which Klaus Was Exposed

Applying the discussion of the law set forth above, Klaus failed to present any direct evidence demonstrating that United Equity had actual knowledge of the exact danger to which he was exposed. The exact danger to which Klaus was exposed (accidental start up while repairing the auger) materialized only when an employee (Klaus) failed to disconnect the power to the upright auger – whether by shutting the panel off or by shutting the panel off and removing the fuses – before replacing the bolt. The record demonstrates that, before repairing the upright auger, United Equity employees – including Klaus – consistently pulled down the power switch lever which signaled to fellow employees that the machine was in repair and that no one, during the previous 23 years, had been injured while repairing the upright auger. Thus, United Equity could not be charged with knowledge of the exact danger that caused Klaus's injury. Since no direct proof that United Equity had actual knowledge of the exact

danger to which Klaus was exposed, the trial court correctly granted summary judgment in United Equity's favor.

B. No Proof of the Substantial Certainty of Injury

And when the Third District equated the substantial certainty of injury with the failure to follow safety protocols – or the possibility that United Equity might not have safety protocols – the court relegated both the “substantial certainty of injury” requirement in R.C. 2745.01(B) and the “egregious risk of injury” requirement of *Sanek* to a negligence standard. As the court held, United Equity's purported “conscious” choice to no longer use safety consultants and its disregard of both its operations safety plan and “safety protocols” created a genuine issue of fact about whether an injury was “substantially certainty” to occur. 2008-Ohio-1344, ¶19-21. The record contained evidence “from which a rational trier of fact could find that United consciously disregarded its LO/TO policy, *creating a substantial certainty that an employee injury would result.*” Id. at ¶21 (emphasis added). Similarly, the court concluded that, based on United Equity employees' differing means of disconnecting the power before replacing bolts on the upright auger, “the jury might well decide that United failed to have any safety policy, written or otherwise, *and that could lead the jury to find that the injury was substantially certain to occur.*” Id. at ¶23 (emphasis added).

If an employer need not have actual knowledge of the exact danger that caused an injury, and an employer's failure to follow or enforce safety protocols creates a genuine issue of material fact about whether an injury is substantially certain to occur, then an employee easily can create genuine issues of material fact for virtually all workplace injuries. So every action involving a workplace injury where someone

“messed up” would bypass the “deliberate intent” requirement of R.C. 2745.01 and find its way past summary judgment and into the jury room. This would defeat the underlying premise of the workers’ compensation system – a “trade-off” between “certain and speedy recovery” for the employee in exchange for limiting the employer’s liability – since employers would have no benefit of any bargain purportedly created by that system. *Van Fossen*, 36 Ohio St.3d at 110. Rather, the employers would have double liability.

Regardless, the facts here demonstrate only that an injury could occur if: (1) the employee repairing the auger fails to shut the power off at the switch and (2) another employee, who believes that the repair is done (because the power is not shut off), starts the auger without verifying whether the repair is done. The fact the auger had been repaired at least 92 times over the previous 23 years, when taken in the context that the employees knew not to start the auger when the power switch was disconnected, establishes that his injury was not the kind that was virtually certain to occur. Here, McMichael started the auger only after he misunderstood from O’Neill that the repair was complete. Every link in this causative chain leads back to the negligence of an employee.

C. No Direct Proof of the Employer’s Actual Knowledge of the Substantial Certainty of Injury

Setting aside for the moment Klaus’s inability to demonstrate that his injury was substantially certain to occur, the record lacks any evidence that United Equity had actual knowledge of the substantial certainty of injury. Rather, the Third District applied the attenuated “inference upon inference” standard and concluded that the “intentional disregard for safety policies was relevant in showing that the employer had knowledge that an injury was substantially certain to occur.” 2008-Ohio-1344, ¶20,

citing *Dailey v. Eaton Corp.* (2000), 138 Ohio App.3d 575, 2000-Ohio-1754, 741 N.E.2d 946. But even the intentional disregard of safety policies does not evince an employer who acts with conscious awareness of the virtually certain result of his failure to enforce safety protocols. Indeed, the evidence necessary to establish the employer's actual knowledge of the substantial certainty of injury must be direct – not circumstantial or anecdotal. For this reason, Klaus failed to sustain his burden of proof on summary judgment and the trial court correctly granted summary judgment in United Equity's favor.

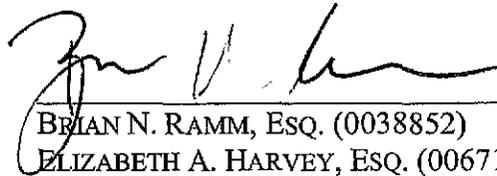
CONCLUSION

As United Equity explained above, one must read the “deliberate intent” standard in R.C. 2745.01 to eliminate from consideration on summary judgment in employer-intentional-tort cases any inference of employer's knowledge derived from circumstantial evidence. Rather, the “deliberate intent” standard requires the employee to produce direct evidence of an employer's *actual* knowledge of the exact danger that caused the employee's injury and *actual* knowledge that the danger presented an egregious risk of injury falling outside the ordinary risks to which an employee ordinarily is exposed.

And just as the employer must have actual knowledge that the danger presented an egregious risk of injury, that “egregious risk” of injury must be one that is virtually, practically, substantially certain to occur. Indeed, regardless of the adjective one uses to describe the word “certain,” the probability of injury must approach – if not equal – 100%.

Requiring direct evidence of an employer's knowledge places the employer-intentional-tort claim in a perspective consistent with the rest of Ohio law on the stacking of inferences. It also furthers the public-policy purpose of the workers' compensation system: guaranteeing that employees obtain a speedy, no-fault recovery for workplace injuries while limiting employers' liability for those injuries.

In these respects, United Equity asks this Court to adopt its propositions of law and, in so doing, reverse the decision of the Third District Court of Appeals and affirm the trial court's decision awarding summary judgment in United Equity's favor.



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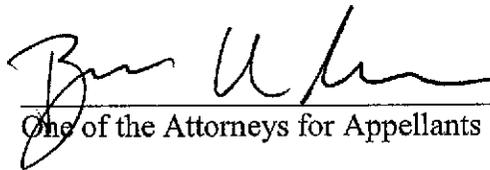
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CERTIFICATE OF SERVICE

A copy of the foregoing Appellant United Equity, Inc.'s Merit Brief was served by regular mail on October 31, 2008 on the following:

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APPENDIX

No. 08-0894

IN THE SUPREME COURT OF OHIO

JONATHON KLAUS,

Plaintiff-Appellee,

v.

UNITED EQUITY, INC., *et al.*,

Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
THIRD JUDICIAL DISTRICT
No.1-07-63, 2008-OHIO-1344
COMMON PLEAS COURT, ALLEN COUNTY, OHIO
CASE NO. 06-CV-0696

**DEFENDANT-APPELLANT UNITED EQUITY, INC.'S
NOTICE OF APPEAL**

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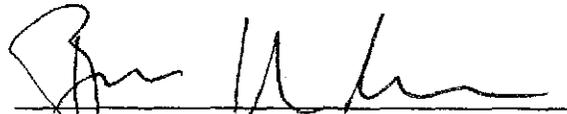
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** Counsel of Record*

Notice of Appeal of United Equity, Inc.

Appellant United Equity, Inc. hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Allen County Court of Appeals, Third Appellate District, entered in the matter titled *Jonathon Klaus v. United Equity, Inc.*, No. 1-07-63, 2008-Ohio-1344, on March 24, 2008.

This appeal presents matters of public and great general interest.



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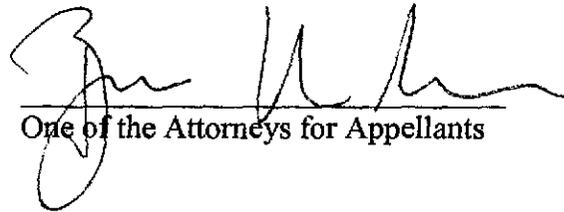
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A copy of the foregoing Appellant United Equity, Inc.'s Notice of Appeal
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IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

ALLEN COUNTY

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JONATHON KLAUS,

CASE NUMBER 1-07-63

PLAINTIFF-APPELLANT,

JOURNAL

v.

ENTRY

UNITED EQUITY, INC.,

DEFENDANT-APPELLEE.

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is reversed at the costs of the appellee for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

~~It is further ordered that the Clerk of this Court certify a copy of this~~
judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

Vernon L. Boston
John R. Hart
John B. Williamson

JUDGES

DATED: March 24, 2008

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

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LISA D. STALEY-CURRIE
CLERK OF COURTS
ALLEN COUNTY, OHIO

JONATHON KLAUS,

CASE NUMBER 1-07-63

PLAINTIFF-APPELLANT,

v.

OPINION

UNITED EQUITY, INC.,

DEFENDANT-APPELLEE.

CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: March 24, 2008

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PRESTON, J.

I. Facts/ Procedural Posture

{¶1} Plaintiff-appellant, Jonathon Klaus (hereinafter “Klaus”), appeals the Allen County Court of Common Pleas grant of summary judgment in favor of defendant-appellee, United Equity, Inc. (hereinafter “United”). For reasons that follow, we reverse.

{¶2} Around 1983, the Delphos Equity Elevator Company and the Spencerville Farmers’ Union merged into one corporation called United Equity. (Knippen Depo. at 11-12). United’s Spencerville facility grinds, mixes, loads, and packages grain products and feed. (Haehn Depo. at 7). In order to accomplish these tasks, United uses various pieces of mechanical equipment, including various augers, which move and grind grain. United has five employees at its Spencerville facility: Cory Haehn, general manager/supervisor; Jacqueline

Knippen, general manager/bookkeeper; Allen McMichael, laborer/truck driver; Phillip O'Neill and Jonathon Klaus, laborers. (Haehn Depo. at 33).

{¶3} In April 2005, United hired Klaus as a general laborer at the Spencerville grain facility. (Klaus Depo. at 52). Klaus was trained by his fellow employees, McMichael and O'Neill, to grind, mix, load, and package grain. (Id. at 38-40). Occasionally, equipment at the Spencerville facility would need repairs. Klaus helped his fellow employees with the repairs and on occasion would make some small repairs himself. (Id.; Id at 53-56)

{¶4} As a part of United's operational safety plan, it implemented a written lock-out/tag-out (LO/TO) procedure for repairing power equipment. However, Klaus never received LO/TO training nor is it clear he ever received a written LO/TO policy when he began his employment. (Klaus Depo. at 66); (O'Neill Depo. at 47). ~~United's employees and management did not follow or~~ enforce the written LO/TO policy; rather, each employee developed their own safety "rules of thumb." (Haehn Depo. at 21); (O'Neill Depo. at 17, 22, 31); (McMichael Depo. at 30-32). Haehn removed fuses from the electrical boxes before repairing equipment, while others, like Klaus and O'Neill, simply turned off the power switch or made sure someone else had turned off the power. (Klaus Depo. at 59); (Haehn Depo. at 21).

{¶5} On February 13, 2006, Klaus was informed that two shear bolts on a grinding auger needed to be replaced. Klaus had replaced these shear bolts three

or four times prior and proceeded to make the repairs this time as well. (Klaus Depo. at 62). The shear bolts that needed to be replaced were located in the section of the auger located on the facility's third floor. (McMichael Depo. at 27-28). The power source for the auger is located on the facility's first floor. (O'Neill Depo. at 26). The person on the third floor cannot see the first floor power source while repairing the auger and there is no communication device for employees to use while making the repair. (Klaus Depo. at 59); (O'Neill Depo. at 45); (Rauck Aff. at ¶14).

{¶6} Klaus found a shear bolt to make the repair. Klaus told O'Neill to turn off the power to the auger and keep an eye on the power switch. (Klaus Depo. at 64). Klaus went to the man-pull lift and ascended to the third floor. Klaus began making the repairs. McMichael came into the facility and asked O'Neill if they "got it." (O'Neill Depo. at 42). O'Neill thought McMichael was asking if Klaus found a shear bolt and said "yes, we got one." (Id.). McMichael thought O'Neill meant that Klaus was finished repairing the auger, and McMichael activated the power. (Id.); (McMichael Depo. at 36). Klaus was not finished repairing the auger and, when the power was activated, his hand was amputated. (McMichael Depo. at 45-46).

{¶7} On July 12, 2006, Klaus filed a complaint against United alleging an intentional tort as a result of the injuries he sustained. On September 8, 2006, United filed its answer. On June 1, 2007, United filed a motion for summary

judgment. On July 23, 2007, the trial court granted United's motion. On September 10, 2007, the trial court entered its judgment entry dismissing the complaint.

{¶8} On September 14, 2007, Klaus appealed to this Court asserting four assignments of error.

II. Standard of Review

{¶9} We review a decision to grant summary judgment de novo. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243, citing *Grafton v. Ohio Edison* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is proper where: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can reach but one conclusion when viewing the evidence in favor of the non-moving party, and the conclusion is adverse to the non-moving party. Civ.R. 56(C); *Grafton*, 77 Ohio St.3d at 105, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 219, 631 N.E.2d 150.

{¶10} Material facts are those facts "that might affect the outcome of the suit under the governing law." *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, 617 N.E.2d 1123, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202. "Whether a genuine issue exists is answered by the following inquiry: Does the evidence present 'a sufficient disagreement to

require submission to a jury' or is it 'so one-sided that one party must prevail as a matter of law[?]'” Id., citing *Liberty Lobby, Inc.*, 477 U.S. at 251-52.

{¶11} Summary judgment should be granted with caution, resolving all doubts in favor of the nonmoving party. *Perez v. Scripts-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, 217, 520 N.E.2d 198. “The purpose of summary judgment is not to try issues of fact, but is rather to determine whether triable issues of fact exist.” *Lakota Loc. Schools Dist. Bd. of Edn. v. Brickner* (1996), 108 Ohio App.3d 637, 643, 671 N.E.2d 578.

III. Analysis

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED WHEN IT MISAPPLIED CIV.R. 56(C) BECAUSE IT FAILED TO CONSTRUE ALL THE EVIDENCE IN FAVOR OF THE NONMOVING PARTY.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT’S MOTION FOR SUMMARY JUDGMENT PURSUANT TO CIV.R. 56 BY FINDING THAT PLAINTIFF DID NOT DEMONSTRATE AN ISSUE OF FACT THAT HIS INJURY WAS SUBSTANTIALLY CERTAIN TO OCCUR.

{¶12} Since assignments of error one and two raise similar issues surrounding the trial court’s application of Civ.R. 56(C), we will combine them for analysis.

{¶13} In support of his first assignment of error, Klaus alleges the trial court failed to consider that he never received any LO/TO training and failed to

consider Albert C. Rauck's expert opinions. Furthermore, Klaus argues that the trial court inappropriately made findings of fact to render its opinion.

{¶14} United argues that the trial court did consider the fact that Klaus was not trained but found this fails as a matter of law to establish that his injury was substantially certain to occur. Furthermore, United asserts that the trial court did not ignore Rauck's expert opinion and, even if it did, the trial court was entitled to exclude it as merely conclusory.

{¶15} In support of his second assignment of error, Klaus argues that material issues of fact remain as to whether Klaus's injury was substantially certain to occur. Specifically, Klaus argues that United's failure to provide tag-out tags for down equipment, United's failure to train Klaus on LO/TO procedure, and United's decision not to enforce its LO/TO policy because of management's disagreement with the policy creates issues of fact from which a jury could find that his injury was substantially certain to occur. We agree.

{¶16} Effective April 7, 2005, R.C. 2745.01 provides, in pertinent part:

(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.

{¶17} To establish an employer-employee intentional tort, plaintiff must show: (1) the employer has knowledge of a dangerous process, procedure, instrumentality or condition within its business operation; (2) the employer knows that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. *Wehri v. Countrymark* (1992), 82 Ohio App.3d 535, 537, 612 N.E.2d 791, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus; *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus. These elements are collectively referred to as the *Fyffe* elements.

{¶18} In its judgment entry, the trial court found that Klaus demonstrated material facts sufficient to satisfy *Fyffe* element one, but he failed to demonstrate material facts sufficient to satisfy *Fyffe* element two's substantial certainty requirement. We disagree.

{¶19} Several questions of fact remain that could convince a juror on the element of substantial certainty. First, Klaus raised an issue of fact concerning whether or not United's management made a conscious decision not to follow its own written LO/TO policy. Jacqueline Knippen, one of United's general

managers, testified that the previous manager, Floyd Sisinger, stopped using safety consultants because “basically, [he] didn’t feel they were worth the money spent for them.” (Knippen Depo. at 16-17). Furthermore, she testified that Sisinger felt that the operations safety plan was “useless,” and he failed to enforce the safety plan beginning in the early 1990’s. (Id. at 17-18).

{¶20} This case is similar to the facts of *Dailey v. Eaton Corp.* (2000), 138 Ohio App.3d 575, 741 N.E.2d 946 wherein we found that an employer’s intentional disregard for safety policies was relevant in showing that the employer had knowledge that an injury was substantially certain to occur. Like *Dailey*, there is evidence in the record here from which a rational trier of fact could find that United consciously disregarded its LO/TO policy, creating a substantial certainty that an employee injury would result.

~~{¶21} The trial court below incorrectly relied upon the fact that no evidence existed in the record to suggest that United told Klaus *not* to follow the turn-off policy. Although this may be true, there was evidence to show that United had a history of failing to follow safety protocols and failed to provide Klaus with LO/TO training. (Haehn Depo. at 26; Knippen Depo. at 24). These material facts, if believed, could convince a jury that Klaus’ injury was substantially certain to occur.~~

{¶22} Second, Klaus raised an issue of fact regarding whether United had implemented a “rule-of-thumb” safety policy. Although United argued that it had

implemented a “rule-of-thumb” safety policy of disconnecting the machinery’s power source, the evidence was conflicting on this issue. O’Neill and McMichael simply turned off the power switch; Klaus turned off the power switch or made sure someone else had turned it off; Haehn, United’s general manager/supervisor, on the other hand, removed the fuses and placed them in his pocket. (O’Neill Depo. at 27-30); (McMichael Depo. at 29-30); (Klaus Depo. at 64-66); (Haehn Depo. at 19, 22). Given the different safety methods used by various United employees, it is reasonable to question whether any “rule-of-thumb” policy even existed.

{¶23} This issue of fact is material to finding whether the injury was substantially certain to occur. If a “rule-of-thumb” policy was in place and Klaus failed to follow it, then a jury might conclude that his injury was not substantially certain to occur. ~~On the other hand, the jury might well decide that United failed~~ to have any safety policy, written or otherwise, and that could lead the jury to find that the injury was substantially certain to occur.

{¶24} Third, the trial court inappropriately weighed the fact that no other person was injured during the company’s last twenty-three years. Although an absence of prior accidents suggests that an injury was not substantially certain to occur, a lack of prior accidents is not necessarily fatal to a plaintiff’s case. *Taulbee v. Adience, Inc., BMI Div.* (1997), 120 Ohio App.3d 11, 20, 696, 625,

citing *Cook v. Cleveland Elec. Illum. Co.* (1995), 102 Ohio App.3d 417, 429-30, 657 N.E.2d 356.

{¶25} In this case, the evidence demonstrated that no United employee was injured over the past twenty-three years. That fact viewed in isolation supports the trial court's finding that Klaus' injury was not substantially certain to occur; however, when viewed in its context, this fact is less persuasive. The particular repair job that Klaus conducted when he was injured was only done once every three to four months. (McMichael Depo. at 29). Thus, at most, this particular repair job was done only ninety-two (92) times over the past twenty-three years. When viewed in the appropriate context, the reason that no employee has been injured while repairing the auger at United appears to be because this repair was so infrequent, not because United's safety policies were working. We, therefore, are not persuaded that the lack of prior accidents renders summary judgment appropriate here.

{¶26} Weighing the evidence in Klaus' favor as the non-moving party, we find that material questions of fact preclude summary judgment in this case.

{¶27} Klaus' first and second assignments of error are, therefore, sustained.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ERRED IN FAILING TO ADDRESS THE ISSUE OF WHETHER R.C. 2745.01 IS AN AFFIRMATIVE DEFENSE WHICH MUST BE RAISED BY UNITED OR ITS DEFENSE IS WAIVED.

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRED IN FAILING TO APPLY THE REDUCED STANDARD OF "SUBSTANTIAL CERTAINTY" ENACTED IN R.C. 2745.01 [SIC] MOST RECENT AMENDMENT.

{¶28} Since we have determined that summary judgment was inappropriate for the reasons stated in Klaus' first and second assignments of error, we need not address assignments of error three and four as they have now become moot.

IV. Conclusion

{¶29} Having found error prejudicial to the appellant herein in the ~~particulars assigned and argued, we reverse the judgment of the trial court and~~ remand for further proceedings consistent with this opinion.

***Judgment Reversed;
Cause Remanded.***

SHAW, P.J., and WILLAMOWSKI, J., concur.

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COMMON PLEAS COURT
FILED

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GINA M. ...
CLERK OF COURTS
ALLEN COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

JONATHON W. KLAUS,
Plaintiff[s]

-v-

UNITED EQUITY, INC.,
Defendant[s]

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CASE NO.: CV2006 0696

JUDGMENT ENTRY
Civ. R. 56

This matter comes on for consideration of the defendants' motion for summary judgment filed on June 1, 2007, plaintiff's memorandum contra filed on June 28, 2007 and defendant's reply in support filed on July 10, 2007. The Court allowed oral argument on the motion on July 10, 2007, where both parties were present through respective counsel. The Court has considered all the pleadings and evidentiary material submitted in support of and contra defendants' motion.

This case was initiated with the plaintiff's complaint in which he alleged that defendants committed an intentional tort that resulted in his injury on February 13, 2006. The relevant facts include the following:

On February 12, 2006 plaintiff went to repair a sheared bolt in the upright "run-up" auger at his employer defendant's facility. The power to the

10B

auger was *not* cut off. The arm of the fuse or disconnect switch was *not* in the down position, signifying that the power was disconnected. Plaintiff said he asked a co-worker, Philip O'Neill, to keep an eye on the power supply while he did the work. Plaintiff did not turn the power off to the auger and said he was in a hurry. He said he "just didn't really think about it..." (Klaus Dep. p. 65) There was apparently a miscommunication between O'Neill and another co-worker Allen McMichael.¹ Thinking that the bolt had been replaced and that plaintiff and O'Neill were finished, McMichael, pushed the start button to the auger, the auger started and plaintiff's left hand was amputated.

Defendant has a written "lock-out/tag-out" policy but neither O'Neill, McMichael nor plaintiff ever saw the policy before plaintiff's injury and the policy was not followed. No employee had suffered a machinery-related accident at defendant's facility in the previous twenty-three years of operation.

Pursuant to Civ.R. 56(C), "the appositeness of rendering a summary judgment hinges upon the tripartite demonstration: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence

¹ McMichael said he asked O'Neill if they (O'Neill and Plaintiff) were done [with repairing the auger] and O'Neill shook his head "yes." O'Neill said he thought McMichael was asking whether they had found a replacement bolt.

construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

In *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus, the Ohio Supreme Court established the following three elements necessary to prove the existence of an employer's intentional tort: "(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be **a substantial certainty**; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." [Emphasis added]

The *Fyffe* test is a conjunctive test. That is, all three elements must be established in order to maintain a prima facie case of an intentional tort by an employer. It follows, therefore, that if there remains no genuine issue of material fact as to one of the elements discussion of the other elements becomes moot. See *Pintur v. Republic Technologies, Internatl., LLC*, 9th Dist. No. 05CA008656, 2005-Ohio-6220, at ¶ 11 (finding the issue of substantial certainty dispositive and not addressing the other *Fyffe* elements)

Effective April 7, 2005, R.C. 2745.01 provides, in part:

"(A) In an action brought against an employer by an 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..." [Emphasis added]

It has been suggested that this latest version of R.C. 2745.01, applicable in this case since the injury occurred on February 13, 2006, is another attempt to supersede the effect of the Ohio Supreme Court decisions in various cases regarding common law employer intentional tort claims, including *Fyffe*. *Estate of Merrell v. M. Weingold & Co.*, Cuyahoga App. No. 88508, 2007-Ohio- 3070. In any event, because the applicable standard is exceedingly difficult to satisfy, “[t]he intentional tort cause of action is limited to egregious cases.” *Sanek v. Duracote Corp.* (1989), 43 Ohio St.3d 169, 172, 539 N.E.2d 1114; *Smith v. Hancor, Inc.*, Hancock App.No. 5-04-44, 2005 -Ohio- 2243

“In paragraph two of the syllabus in *Fyffe*, we further outlined the proof necessary to establish intent on the part of the employer when we stated that “[t]o establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk-something short of substantial certainty-is not intent.”

Gibson v. Drainage Products, Inc. (2002), 95 Ohio St.3d 171, 174-75, 2002-Ohio-2008 at ¶ 16-17. 766 N.E.2d 982, 986-87.

Under the common law *and* the latest version of R.C. 2745.01 it is the

element of **substantial certainty** which differentiates negligence from an intentional tort. *Marks v. Goodwill Industries of Akron, Ohio, Inc.* (Mar. 27, 2002), 9th Dist. No. 20706, at *2, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 116. According to the court in *Marks*, “[t]he line must be drawn where the known danger ceases to be a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the [employer] a substantial certainty.” (Quotations omitted). *Marks* at *2.

Accordingly, the focus in this case is on the proof required to establish **substantial certainty** for the purpose of showing that defendant committed an intentional tort against plaintiff. While an employee need not demonstrate that the employer actually intended the exact harm to occur, “substantial certainty” is more than an employer's mere knowledge that such a condition presented a high risk of harm or danger. *Cope v. Salem Tire, Inc.*, 7th Dist. No.2001 CO 10, 2002-Ohio-1542; *Van Fossen v. Babcock & Wilcox Co.* (1998), 36 Ohio St.3d 100, 117, 522 N.E.2d 489. What actually constitutes a “substantial certainty” varies from case to case, but an employee must always show that the employer's actions were more than merely negligent, or even reckless. *Van Fossen*, at 117, 522 N.E.2d 489. Substantial certainty is “greater than an employer's knowledge of a high risk of harm or danger.” *Long v. International Wire Group, Inc.* 3rd Dist. No. 3-2000-11, 2000-Ohio-1751 citing *Cathey v. Cassens Transport Co.* 3rd Dist. No. 14-99-35, 2000-Ohio-1629.

The court, in *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App. 3d 281, 308, stated:

* * * [P]laintiff had to produce evidence that [the employer] knew of the substantial certainty of injury to plaintiff as a result of the dangerous condition. "[E]ven if an injury is foreseeable, and even if it is probable that the injury would occur if one were exposed to the danger enough times, 'there is a difference between probability and substantial certainty.'" * * * "[T]he mere knowledge and appreciation of a risk-something short of substantial certainty-is not intent." * * * Unless the employer actually intends to produce the harmful result or knows that injury to its employee is certain or substantially certain to result from the dangerous instrumentality or condition, the employer cannot be held liable. * * * Accordingly, an intentional-tort action against an employer is not shown simply because a known risk later blossoms into reality. * * * Rather, "the level of risk-exposure [must be] so egregious as to constitute an intentional wrong." * * *

An employee must prove that the employer knew that, because of the exact danger posed, the employee would be harmed or was substantially certain to be harmed in some manner similar to the injury the employee sustained. *Yarnell v. Klema Bldg., Inc.* (Dec. 24, 1998), Franklin App. No. 98AP-178.

In this case, construing the evidence in favor of plaintiff, including the evidence that defendant had instituted a policy that the power to the auger should have been turned off before an employee stuck his or her hand into it, there is at least a genuine issue as to whether defendant was aware of and appreciated the risk of an employee working on the auger without the power being turned off. Thus, the first prong of the *Fyffe* test is resolved in plaintiff's favor.

It is even safe to say that the evidence construed in favor of plaintiff, also presents a question as to whether the defendant was aware that an injury was *probable* if employees placed hands in the auger enough times when the power source was not turned off. However, even if it were probable that injury would occur if an employee was exposed to a danger

enough times, it has been held that "there is a difference between probability and substantial certainty." *Heard v. United Parcel Service* (July 20, 1999), Franklin App. No. 98AP-1267, quoting *Ruby v. Ohio Dept. of Natural Resources* (Dec. 3, 1992), Franklin App. No. 92AP-947. Substantial certainty is "greater than an employer's knowledge of a high risk of harm or danger." *Long v. International Wire Group, Inc.* 3rd Dist. No. 3-2000-11, 2000-Ohio-1751 citing *Cathey v. Cassens Transport Co.* 3rd Dist. No. 14-99-35, 2000-Ohio-1629.

Construing the evidence most strongly in favor of plaintiff, there was evidence of a lack of application of the defendant's policy about turning the power supply off before an employee put his or hands in the auger, and evidence that management knew that the employees were not following the policy. Defendant's knowledge that employees, like plaintiff, did not always follow its written policy to turn off power to the auger before repairing it does not rise to level of substantial certainty. See *Foust v. Magnum Restaurants, Inc.* (1994), 97 Ohio App.3d 451, discretionary appeal not allowed *Foust v. Magnum Restaurants, Inc.* (1995) 71 Ohio St.3d 1466. Defendant's actions fall short of the higher standard of substantial certainty. The mere knowledge and appreciation of a risk does not constitute intent. *Fyffe, supra*, paragraph two of the syllabus.

Further, there is no evidence in the record that defendant told plaintiff not to follow the turn-off policy or that defendant interfered with plaintiff's ability to shut the power off.

The fact that no person had ever been injured when repairing

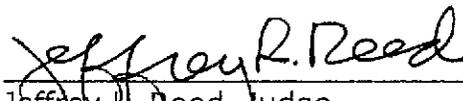
defendant's auger when the power was not shut off is a significant indicator that defendant could not have been aware to a substantial certainty that Klaus' putting his hand in the auger to repair a bolt would result in injury. Although the plaintiff need not provide evidence of previous accidents in order to prove substantial certainty (*Taulbee v. Adience* (1997), 120 Ohio App.3d 11; *Cook v. Cleveland Elec. Illum. Co.* (1995), 102 Ohio App.3d 417), "[t]he absence of prior accidents strongly suggests that injury from this procedure was not substantially certain to occur." *Thomas v. Barberton Steel & Iron, Inc.* (Apr. 1, 1998), 9th Dist. No. 18546, at *3. See, also, *Zink v. Owens-Corning Fiberglas Corp.* (1989), 65 Ohio App.3d 637, 643-644 (evidence showing lack of prior accidents negates daunting standard of substantial certainty and intentional tort).

Construing the evidence most strongly in favor of plaintiff, it is the conclusion of this Court that plaintiff failed to show a genuine issue with regard to whether defendant knew that an injury was substantially certain to occur. Thus, there is no genuine issue, based on the evidence presented, that the second prong of *Fyffe* cannot be satisfied in favor of plaintiff.

For these reasons, defendant's motion for summary judgment is granted and defendant is entitled to judgment as a matter of law.

It is so ORDERED.

July 20, 2007



Jeffrey L. Reed, Judge

1 of 1 DOCUMENT

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH OCTOBER 27, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 20, 2008 ***

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2745. EMPLOYMENT INTENTIONAL TORT

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ORC Ann. 2745.01 (2008)

§ 2745.01. Employer's liability for intentional tort

(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.

(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

HISTORY:

150 v H 498, §§ 1, 2, eff. 4-7-05.

NOTES:

Section Notes

Analogous to former RC § 2745.01 (146 v H 103, Eff 11-1-95), repealed 150 v H 498, § 2, eff 4-7-05.

Analogous to former RC § 2745.01 (145 v H 107), repealed 146 v H 103, § 2, eff 11-1-95.

The provisions of §§ 3, 4 of HB 103 (146 v --) read as follows:

SECTION 3. The General Assembly hereby declares its intent in enacting *sections 2305.112 and 2745.01 of the Revised Code* to supersede the effect of the Ohio Supreme Court decisions in *Blankenship v. Cincinnati Milacron Chemicals, Inc. (1982), 69 Ohio St.2d 608* (decided March 3, 1982); *Jones v. VIP Development Co. (1982), 15 Ohio*

St.3d 90 (decided December 31, 1982); *Van Fossen v. Babcock & Wilcox* (1988), *36 Ohio St.3d 100* (decided April 14, 1988); *Pariseau v. Wedge Products, Inc.* (1988), *36 Ohio St.3d 124* (decided April 13, 1988); *Hunter v. Shenago Furnace Co.* (1988), *38 Ohio St.3d 235* (decided August 24, 1988); and *Fyffe v. Jeno's, Inc.* (1991), *59 Ohio St.3d 115* (decided May 1, 1991), to the extent that the provisions of sections 2305.112 and 2745.01 of the Revised Code are to completely and solely control all causes of actions not governed by Section 35 of Article II, Ohio Constitution, for physical or psychological conditions, or death, brought by employees or the survivors of deceased employees against employers.

SECTION 4. If any provision of a section of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.