

In the
Supreme Court of Ohio

ROSE KAMINSKI,	:	CASE NOS. 2008-0857
	:	
PLAINTIFF-APPELLEE	:	ON APPEAL FROM THE COLUMBIANA
	:	COUNTY COURT OF APPEALS,
V.	:	SEVENTH APPELLATE DISTRICT
	:	
METAL & WIRE PRODUCTS COMPANY,	:	
	:	COURT OF APPEALS CASE
DEFENDANT-APPELLANT.	:	NO. 07-CO-15

MERIT BRIEF OF *AMICUS CURIAE* AMANTEA NONWOVENS, LLC

DAVID A. FORREST (0006673)
JARRETT J. NORTHUP (0080697)
JEFFRIES KUBE FORREST & MONTELEONE
1650 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115
(216) 771-4050
(216) 771-0732 fax
dforrest@jkgmlaw.com

Counsel for Plaintiff-Appellee,
Rose Kaminski

DENNIS A. DIMARTINO (0039270)
604 Market Street
Boardman, Ohio 44512
(330) 758-7313
(330) 758-7313 fax
dimartino@zoominternet.net

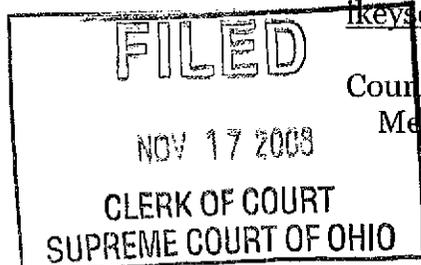
Co-Counsel for Plaintiff-Appellee,
Rose Kaminski

DAVID P. KAMP (0020665)
CARL J. STICH, JR. (0013300)
WHITE GETGEY & MEYER CO., LPA
1700 Fourth & Vine Tower
One West Fourth Street
Cincinnati, Ohio 45202
(513) 241-3685
(513) 241-2399 fax
cstich@wgmlpa.com

Counsel for *Amicus Curiae*
Amantea Nonwovens, LLC

IRENE C. KEYSE-WALKER (0013143)
BENJAMIN C. SASSE (0072856)
TUCKER ELLIS & WEST
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
(216) 592-5000
(216) 592-5009 fax
ikyse-walker@tuckerellis.com

Counsel for Defendant-Appellant,
Metal & Wire Products Company



NANCY H. ROGERS (0002375)
Attorney General of Ohio
BENJAMIN C. MIZER (0083089)
Solicitor General
ELISABETH A. LONG
(*pro hac* application pending)
Deputy Solicitor
TODD A. NIST (0079436)
Assistant Solicitor
30 Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
(614) 466-5087 fax
bmizer@ag.state.oh.us

Counsel for *Amicus Curiae*
Ohio Attorney General

CAROLYN A. TAGGART (0027107)
PORTER WRIGHT MORRIS & ARTHUR, LLP
250 East Fifth Street, Suite 2200
Cincinnati, Ohio 45202
(513) 369-4231
(513) 421-0991 fax
ctaggart@porterwright.com

J. H. HUEBERT (0078562)
PORTER WRIGHT MORRIS & ARTHUR, LLP
41 South High Street
Columbus, Ohio 43215
(614) 227-2114
(614) 227-2100 fax
jhuebert@porterwright.com

Counsel for *Amicus Curiae*
Ohio Association of Civil Trial Attorneys

ROBERT A. MINOR (0018371)
VORYS SATER SEYMOUR & PEASE, LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6410
(614) 719-4874
raminor@vssp.com

Counsel for *Amicus Curiae*,
Ohio Self-Insurers Association

PRESTON J. GARVIN (0018641)
MICHAEL J. HICKEY (0021410)
GARVIN & HICKEY, LLC
181 East Livingston Avenue
Columbus, Ohio 43215
(614) 225-9000
(614) 225-9080 fax
wclaw@garvin-hickey.com

Counsel for *Amicus Curiae*,
Ohio Chamber of Commerce

ANNE MARIE SFERRA (0030855)
THOMAS R. SANT (0023057)
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, Ohio 43215-4291
(614) 227-2300
(614) 227-2790
tsant@bricker.com

Counsel for *Amicus Curiae*,
Ohio Chapter of the National
Federation of Independent
Business and Ohio
Manufacturers Association

TABLE OF CONTENTS

TABLE OF CONTENTS **i**

TABLE OF AUTHORITIES **ii**

STATEMENT OF INTEREST **1**

 1. Despite the objective of R.C. 2745.01 to limit intentional
 torts to “deliberate intent,” employers in Ohio still have
 exceptional exposure to employee lawsuits **2**

 2. There is no public policy basis for prohibiting employers
 from insuring against workplace “intentional torts,”
 whether under the prior common law or under the standards
 contained in R.C. 2745.01 **3**

 3. The court’s decision in this action should anticipate the
 allowance of insurance or workplace intentional torts **7**

CONCLUSION **8**

CERTIFICATE OF SERVICE **9**

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Blankenship v. Cincinnati Milacron Chemicals, Inc.</i> (1982) 69 Ohio St. 2d 608	2
<i>Doe v. Shaffer</i> (2000) 90 Ohio St. 3d 388	6
<i>Harasyn v. Normandy Metals, Inc.</i> (1990) 49 Ohio St. 3d 173, 176	4, 5, 7
<i>Nieves-Perez, et al. v. Amantea Nonwovens, LLC, et al,</i> No. A0705349, Hamilton County Court of Common Pleas	1
<i>VanFossen v. Babcock & Wilcox Co.</i> (1988) 36 Ohio St. 3d 100	2
 STATUTES	
R.C. 2745.01	1, 2, 3, 5, 7, 8
R.C. 2745.01(C)	3

Statement of Interest

Amantea Nonwovens, LLC operates a manufacturing and warehouse facility in Hamilton County. Amantea was sued for an intentional tort in *Victor Nieves- Perez, et al. v. Amantea Nonwovens, LLC*, et al., No. A0705349, Hamilton County Court of Common Pleas.

At the time of the plaintiff's injury, Amantea had liability insurance through Cincinnati Insurance Company (CIC). As a part of the package, CIC sold Amantea an "Employers Liability Coverage Form – Ohio" covering workplace bodily injuries to employees "caused by an 'intentional act.'" The endorsement defines an "intentional act" as an act which is "substantially certain to cause 'bodily injury.'" It purports to exclude, however, "acts committed by or at the direction of an insured with the deliberate intent to injure."

The CIC policy and endorsement were issued on September 21, 2005 – five months after the effective date of R.C. 2745.01. On September 21, 2006 – approximately a month after the plaintiff was injured – CIC renewed Amantea's policy, including the Employers Liability endorsement. The price charged for the endorsement, however, was raised seven-fold.

CIC initially agreed to defend Amantea in the *Nieves-Perez* lawsuit under a detailed reservation of rights. CIC recently moved to intervene as a party in the lawsuit for the purposes of (1) seeking a declaration that it has no duty to defend or indemnify, and/or (2) to submit jury interrogatories on the coverage issue, if necessary. CIC's proposed intervening complaint alleges that it is "against public policy in Ohio for an insurer to insure against intentional torts."

It is unlikely that Amantea is alone in being sold coverage which the insurer is now disavowing as “against public policy.” Insurance companies have been selling such “stop-gap” coverage for years. Oddly enough, they have not offered to refund premiums to those who purchased what, by CIC’s account, is illusory coverage.

Amantea’s purpose here is not to advocate for either side in this case. Amantea’s concern is that the Court’s ruling, should R.C. 2745.01 be upheld, will be used by insurers to abrogate employers’ stop-gap coverage. Furthermore, the Court will ultimately be faced with the public policy question of whether workplace intentional tort claims are insurable under the new law. Amantea requests that the Court consider the implications of its ruling upon those interests, which are vital to Ohio employers.

1. **Despite the objective of R.C. 2745.01 to limit intentional torts to “deliberate intent,” employers in Ohio still have exceptional exposure to employee lawsuits.**

Since the abrogation of employer immunity in *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St. 2d 608, and the adoption of a definition of “intentional tort” based upon “substantial certainty” in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, workplace intentional tort litigation has become a cost of doing business for Ohio employers. Legal hair-splitting aside, plaintiffs (and some courts) view “intentional tort” as just another term for gross negligence. The passage of R.C. 2745.01 is unlikely to fully resolve that problem.

A plaintiff filing a personal injury suit normally has a menu of potential causes of action. If an intentional tort is alleged at all, it is typically an afterthought to allegations of negligence. An employee suing an employer, however, has only one door to the courthouse. Employees unsatisfied with their worker’s compensation benefits can only

survive dismissal on the pleadings by alleging an intentional tort. The legislature's most recent effort to restore balance to the litigation battlefield is well-intentioned, but unlikely to deter those plaintiffs who have nothing to lose by filing a lawsuit and artfully drafting the complaint to avoid dismissal. The employer must still defend, at no small cost.

Even under R.C. 2745.01, employers remain at unusual risk. The statute creates a rebuttable presumption of intent based upon the "deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance." R.C. 2745.01(C). A safety device removed or disabled decades ago, or an outdated material safety data sheet, or an inadequate workplace warning, could all lead to presumptions of deliberate intent. The employer then bears the burden of going forward with evidence to *disprove* the existence of intent. The standard of "deliberate intent" adopted in one part of the statute is effectively abandoned in another.

The literal application of the statute simply adds to the practical difficulty of defending even the most baseless claim. Employers must defend a state of mind, which by statute may now be presumed based upon events that had nothing to do with an intent to injure. It is well and good to say that the employer has the same right as any other litigant to defend its honor, but the costs and risks of litigation are high.

2. There is no public policy basis for prohibiting employers from insuring against workplace "intentional torts," whether under the prior common law or under the standards contained in R.C. 2745.01.

Oliver Wendell Holmes observed in the opening paragraph of *The Common Law* that "[t]he life of the law has not been logic; it has been experience." At one time, logic seemed to dictate that insurance should not cover a tortfeasor's simple negligence, for

fear that doing so would foster antisocial conduct. "As tort law evolved toward an emphasis on victim compensation, and 'it became apparent that no dire consequences in fact resulted,' public policy came to favor liability insurance for negligent acts as a means of assuring that innocent persons are made whole. This policy of assuring victim compensation has been extended to 'wanton' and 'reckless' torts." *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St. 3d 173, 176.

This Court's views on the insurability of intentional torts has also evolved with experience. *Harasyn* held that public policy permits employers to secure insurance for "compensatory damages sought by an employee in tort where the employer's tortious act was one performed with the knowledge that injury was substantially certain to occur." The Court distinguished "substantial certainty" (which is insurable) from "direct intent to injure" (which is uninsurable).

The Court recognized that the perceived evils of insuring intentional misconduct are not always clear-cut. A "blanket prohibition" was rejected because it made no distinction between the various forms of intentional wrongdoing, and failed to recognize that some torts might not be encouraged by the availability of insurance. The "better view is to prohibit insurance only for those intentional torts where 'the fact of insurance coverage can be related in some substantial way to the commission of wrongful acts of that character . . .'" *Id.* at 176 (citation omitted).

Thus *Harasyn* denies coverage for "direct intent" torts, where "the presence of insurance would encourage those who deliberately harm another," and allows coverage for "substantial certainty" torts where the presence of insurance has less effect on the tortfeasor's actions. "In the latter situation, the policy of assuring victim compensation

should prevail.” *Id.*

The decision to allow insurance for intentional torts was based on experience. Just as history dispelled the fear that insurance for simple negligence would encourage “antisocial conduct,” the Court saw that fears about insuring intentional conduct were exaggerated. In the wake of *Harasyn*, insurance companies recognized a market opportunity, and now have a brisk business selling “stop-gap” coverage for employee tort claims. Despite the passage of R.C. 2745.01 requiring proof of “deliberate intent,” insurers continue to sell stop-gap coverage. Amantea bought just such coverage from CIC.

The ruling in this case is almost certain to have a direct effect on the enforceability of that coverage. Two questions lurk in the background. First, will insurers be held to the existing obligations undertaken when they sold employers stop-gap coverage? Second, is there any reason to prohibit the future sale of insurance for “deliberate intent” workplace tort claims?

Just as the Court drew on experience to recognize that there is no valid public policy against insuring “substantial certainty” intentional torts, it should now draw on experience to expand coverage for workplace torts to include claims for “deliberate intent” torts. In the eighteen years since the court’s decision in *Harasyn*, there is no evidence that allowing insurance for intentional torts has encouraged employers to hurt workers. Experience tells us that employers have ample disincentives for conduct likely or intended to harm their employees. Employers face regulatory sanctions, criminal sanctions, punitive damages, increased premiums, and a blot upon their corporate image. The theory that employers will intentionally harm employees because the

conduct is insurable is unsupported by any empirical data, and contrary to the other interests of the employer.

If there were a valid public policy to be served by denying employers all coverage for the consequences of intentional conduct, then there would be no distinction between conduct harming other employees and conduct harming the non-employees. But public policy concerns have not prevented employers from being insured against the consequences of non-employee intentional torts. In *Doe v. Shaffer* (2000), 90 Ohio St. 3d 388, the Court held that an employer was entitled to coverage for claims arising from an employee's alleged sexual molestation of a resident at group home. The critical difference in *Doe* is that the organizational defendant was *not* the employer of the victim, so it was unnecessary for the plaintiff to allege an intentional tort. If the victim had been an employee, the complaint against the employer would simply bear a different label — but the claim would now be potentially uninsurable.

No public policy is served by permitting insurance for the defendant in *Doe*, but denying it to employers sued by an employee for identical behavior. Distinctions based on the employer's "intent" are flawed. The notion that an organizational employer can have a "state of mind" is a legal fiction. An organization can only act through its agents. An employee may engage in conduct a jury could view as intentional. The employer might then be compelled to answer for the employee's conduct. But to deny employers the ability to insure against the risk of employees injuring other employees is unfair. The unfairness is compounded in situations such as Amantea's, which paid a premium to an insurer who promised coverage for just such risks.

The time has come for the Ohio to fully abandon the notion that public policy

prohibits insurance for employer intentional torts. There is no reason to believe that employers have restrained themselves because insurance is available for “substantial certainty” torts, but not for “deliberate intent” torts. The distinction appears logical, but has no basis in experience. A meaningless distinction should not be the foundation of a public policy against insuring workplace tort claims. Employers should be allowed to insure against the risk of claims alleging workplace intentional torts, whether those claims are statutory or common law.

3. The court's decision in this action should anticipate the allowance of insurance or workplace intentional torts.

Although the insurability of intentional torts is not directly at issue in this case, a decision upholding the constitutionality of R.C. 2745.01 will directly affect companies throughout Ohio that have purchased liability insurance. Many may be in the same position as Amantea, which bought the insurance *after* the effective date of R.C. 2745.01. If the court adopts language providing insurers with an argument for denying coverage, the policies already purchased will be illusory. “[I]f such coverage is excluded, the insured is left with essentially no coverage in return for the premiums paid to secure the supplemental endorsement.” *Harasyn*, 49 Ohio St.3d at 178. For policies going forward, employers would be exposed to uninsurable risks based upon outmoded public policy concerns.

The decision in this case should not foreclose enforcement of the coverage obligations already undertaken by the insurers who sold policies after the effective date of R.C. 2745.01, nor to prohibit coverage in the future.

Conclusion

The purpose of R.C. 2745.01 may have been to protect employers from negligence claims disguised as intentional tort claims, but the affect may ultimately be to expose employers to the direct cost of defending those claims and deprive them of insurance for which they have already paid. The court's ruling in this case should not provide insurance companies with a license to disavow coverage for which they accepted premiums, nor should it foreclose the possibility of coverage in the future.

Respectfully submitted,



Carl J. Stich, Jr. (0013300) *DPK*
WHITE, GETGEY & MEYER CO., LPA
1700 Fourth and Vine Tower
One West Fourth Street
Cincinnati, Ohio 45202
Phone: (513) 241-3685
Fax: (513) 241-2399
Attorney for *Amicus Curiae* Amantea
Nonwovens, LLC

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing *Amicus Curia* Brief of Amantea Nonwovens, LLC was served by regular U.S. Mail, postage prepaid, this 14th day of November, 2008, upon the following:

DAVID A. FORREST
JARRETT J. NORTHUP
JEFFRIES KUBE FORREST & MONTELEONE
1650 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115

Counsel for Plaintiff-Appellee,
Rose Kaminski

DENNIS A. DIMARTINO
604 Market Street
Boardman, Ohio 44512

Co-Counsel for Plaintiff-Appellee,
Rose Kaminski

NANCY H. ROGERS
Attorney General of Ohio
BENJAMIN C. MIZER
Solicitor General
ELISABETH A. LONG
Deputy Solicitor
TODD A. NIST
Assistant Solicitor
30 Broad Street, 17th Floor
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Attorney General

CAROLYN A. TAGGART
PORTER WRIGHT MORRIS & ARTHUR, LLP
250 East Fifth Street, Suite 2200
Cincinnati, Ohio 45202

J. H. HUEBERT
PORTER WRIGHT MORRIS & ARTHUR, LLP
41 South High Street
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Association of Civil Trial Attorneys

IRENE C. KEYSE-WALKER
BENJAMIN C. SASSE
TUCKER ELLIS & WEST
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414

Counsel for Defendant-Appellant,
Metal & Wire Products Company

PRESTON J. GARVIN
MICHAEL J. HICKEY
GARVIN & HICKEY, LLC
181 East Livingston Avenue
Columbus, Ohio 43215

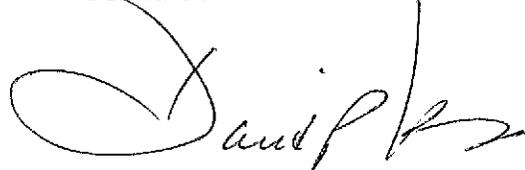
Counsel for *Amicus Curiae*,
Ohio Chamber of Commerce

ROBERT A. MINOR
VORYS SATER SEYMOUR & PEASE, LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008

Counsel for *Amicus Curiae*,
Ohio Self-Insurers Association

ANNE MARIE SFERRA
THOMAS R. SANT
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, Ohio 43215-4291

Counsel for *Amicus Curiae*,
Ohio Chapter of the National
Federation of Independent
Business and Ohio
Manufacturers Association



David P. Kamp