

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLEE JONATHON KLAUS

Victoria U. Maisch, (0063440)
Michael A. Rumer, (0006626)
Rumer & Maisch Co., LLC
212 N. Elizabeth Street, Suite 400
Lima, Ohio 45801
Telephone: 419-228-7640
Fax: 419-228-6214
Email: vmaisch@rmcolaw.net
Email: mrumer@rmcolaw.net

Attorneys for Appellee
Jonathon Klaus

Brian N. Ramm (0038852)
Elizabeth A. Harvey (0067120)
Ulmer & Berne, LLP
Skylight Office Tower
1660 West Second St., Suite 1100
Cleveland, Ohio 44113-1448
Telephone: 216-583-7000
Fax: 216-583-7001
bramm@ulmer.com
eharvey@ulmer.com

and

Michael J. Zychowicz (0029630)
Borgstahl & Zychowicz, Ltd.
West Central Ave., Suite 201
Toledo, Ohio 43617
Telephone: 419-842-1166
mzychowicz@buckeye-express.com

Attorneys for Appellant
United Equity, Inc.

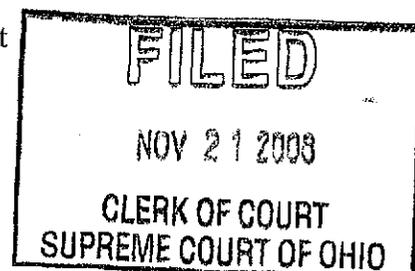


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STATEMENT OF CASE AND FACTS

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

United implies that this appeal is not about correcting error, but is about guiding Ohio courts, lawyers and litigants in understanding and applying R. C. § 2745.01. Thus, United seeks an advisory opinion, not to reverse the Court of Appeals and reinstate the trial court’s decision, but to esoterically merge R. C. § 2745.01 with *Fyffe v. Jenos, Inc.* (1991) 59 Ohio St.3d 115 upon the rationale that this case is one of the first decisions after the most recent amendment of R. C. § 2745.01.

Klaus will not reiterate the history of employer intentional tort law in Ohio. United’s outline mirrors the historical analysis presented in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100; *Kunkler v. Goodyear Tire & Rubber Co.* (1988) 36 Ohio St.3d 135; and *Jones v. VIP Development Co.* (1984) 15 Ohio St.3d 90. What Klaus will emphasize is that the central theme throughout the caselaw and the legislative attempts to address intentional tort in Ohio is the conclusion that employer intentional tort actions should exist. The application of the standards to be applied as to both causes of action and defenses is what has lead some trial courts

to lose their way. This has not been true on a systemic basis at the appellate level.

The standard approach for evaluating employer intentional tort cases has been to consider the totality of the circumstances. *Gibson v. Drainage Product, Inc.* (2002), 95 Ohio St.3d 171. United proposes a bright BLACK line should be drawn by this Court which, reduced to its simplest form, says that a simple denial by an employer that the employer did not understand nor actually know that such an injury would occur would be sufficient to support a finding of no intentional tort. This amounts to forcing an employee to assert and prove 100% probability (certainty). This would, in reality, eliminate such a cause of action, thus circumventing both R. C. § 2745.01(A) and this Court's precedents.

There are significant errors or misstatements presented in United's Statement of the Case and Facts. Some of the error arises from how one reads and interprets the testimony of a given witness, and some result from United's reading of the Third District's Opinion. (Appl. Brief Appx B) Notwithstanding the reason, Klaus is compelled to raise the issue that United's failure to separate its argument as to its propositions of law makes it difficult for Klaus to delineate for specific responses to each proposition.

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

Based upon the total record, the Third District determined that genuine issues of material

facts existed for which trial should be had. The Court applied both *Fyffe* and R. C. § 2745.01 in rendering its decision. There is no evidence in the record from which it can be concluded that the Third District “equated an employer’s alleged failure to follow or institute a safety plan with the substantial certainty of injury” as the sole basis of its decision as argued by United. In fact, the Court of Appeals decision specifically states that it considered the affidavit of Albert C. Rauck, (Appl. Supp. Pp. 122-137) Klaus’ expert, in its *de novo* review. (Appl. Brief Appx. B, ¶5) Rauck presents direct evidence, including photographs, from which proper inferences can be drawn. While it is unclear, it appears that the trial gave no consideration or did not review Rauck’s affidavit in rendering its decision.

United strongly desires this Court to announce a standard that an employer must prove: (1) “actual knowledge” by an employer of a dangerous or egregious risk of injury; (2) actual knowledge of the degree of certainty of injury; and (3) actual knowledge of the substantial certainty of injury. This has not been and should not become the law of Ohio. Let there be no mistake about it, the objective of this appeal is to eliminate the common law workplace intentional tort cause of action.

Klaus was injured and lost his hand as he repaired an upright auger at United’s grain facility. Klaus had worked for United for approximately 13 months as of the date of the accident. Klaus had no safety training as to any lock out/tag out procedures. (Knippen depo., p. 24, Appl. Supp., p.210) The only training he received was on the job training by watching others or being told what to do.

Before addressing the specific facts of what happened the day of the incident it is important to note that United had a written lock out/tag out policy in place (Knippen depo., p. 16;

Appl. Supp., p. 116). However, according to Jackie Knippen, United's general manager, she learned after the Klaus incident that the policy was not being followed by anyone. The plant's manager, Corey Haehn, did not personally lock out or tag out equipment, nor did he train his employees on the process. It was a hands on training program for all job tasks and no one used locks or tags when making repairs on energized equipment. (Haehn depo. pp. 19-23; Appl. Supp. 102-106). As noted in the deposition testimony below, each employee had his own style:

- Haehn - kill the power to the upright auger and remove the fuses (Haehn depo., pp. 24-25, Appl. Supp., pp. 107-108)
- McMichael - throw the switch (McMichael depo., p. 30 and 64, Appl. Supp., p. 74 and 92)
- O'Neill - either shut down the electrical box to the auger or the main power source to the whole grain room (O'Neill depo., pp. 28-30; Appl. Supp., pp. 44-46).
- Klaus - either the power was off or somebody said it was off (Klaus depo., p. 61, Appl. Supp., p 24)

O'Neill, McMichael and Haehn all had lock out/tag out training as to the company's policy, but none of them locked out the power source when making repairs. (McMichael depo., p. 30; Appl. Supp., p. 74; Haehn depo., p. 19-23; Appl. Supp., p. 102-106; O'Neill depo., p. 29; Appl. Supp., p. 45). These same three co-workers never used a tag to tag out the power source. However, in the employees' defense, using tags was impossible because there were no tags (O'Neill depo., p. 30; Appl. Supp., p. 46). The undisputed fact is that all of the employees worked under an unofficial "rule of thumb" policy that if a switch is thrown you find out why its thrown. (McMichael depo., p. 32, Appl. Supp., p. 76) However, there is a second element to the "rule of thumb" in the case of the run-up auger. The second element is that if the one man lift to

the third floor is not at its first floor location, someone is working on the auger on the third floor. (McMichael depo., p. 32; Appl. Supp., p. 76)

Klaus was the employee to repair the upright auger on the date of the incident: “McMichael said it was broke so me and O’Neill found a bolt and I went upstairs.” (Klaus depo., p. 63; Appl. Supp., p. 26; O’Neill depo., p. 46; Appl. Supp., p. 58.) Klaus had repaired the upright auger three or four times by himself before the incident. (Klaus depo., p.62; Appl. 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 depo., pp. 39-41 & 52-53; Appl. Supp., pp. 53-55 & 60-61). Only one person at a time can work on the third floor location because it is a one man lift. There was no method of communication between the first and third floors (Rauck aff., ¶ 14; Appl. Supp., p. 125). There was no guard on the upright auger on the third floor (Rauck aff. ¶¶4 & 12; Appl. Supp., p. 123 & 125)v

Klaus did not cut the power supply to the auger by pulling down the power switch lever. Instead, Klaus asked O’Neill to “keep an eye on the power supply.” O’Neill denies that this request was made. (Klaus depo., p. 64; O’Neill depo., p. 46; Appl. Supp., pp. 27 & 28)

When McMichael returned to the grinding room from the truck, McMichael asked O’Neill “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 depo., p. 36; Appl. Supp., p.80). O’Neill, however, thought McMichael was asking whether he and Klaus had found the bolt they needed – not whether they had finished the repair which Klaus was still performing.

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 depo., pp. 41-42; Appl. Supp., pp. 55-56]

Because the lever to the disconnect switch was not in the down position McMichael pushed the start button on the auger. (O'Neill depo., p. 46; Appl. 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 depo., p. 47; Appl. Supp., p.84]

McMichael assumed he had the answer to his question as to whether the repair was done, so he pushed the "on" button, which energized the upright auger. (McMichael depo., p. 48; Appl. Supp., p. 85) He never checked to see if the one man-lift was gone which would indicate a person was still on the third floor. As a result of McMichael's acts, Klaus lost his hand.

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.

Because this case arises as a summary judgment matter it appears on the surface that United is asking this Court to establish a hybrid procedure pursuant to Civ. R. 56 whenever an employee intentional tort is alleged. The rationale presented by United is that since inferences under Civ. R. 56 must be construed in the most favorable light of the non-moving party, i.e the employee, any determination utilizing an inference to conclude "actual knowledge" or "substantial certainty" on the part of the employer must be considered to be based solely on speculation. (Appl. Merit Brief, p.10) United then takes its misplaced logic one step further to suggest the use of such circumstantial evidence in a summary judgment decision defeats the

exclusivity provision of the workers' compensation system.

Klaus submits that the use of inferences as good evidence for the determination of fact is as old as the Hammurabi Code. The enactment of R. C. § 2745.01's most recent version does not, nor is there clear evidence of any legislative intent to, change the law to eliminate circumstantial evidence in intentional tort cases. Such action would effectively grant immunity to employers from intentional tort liability.

United argues that this Court wrongly adopted an inference upon inference standard in *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485 when it held that "proof of the three elements of employer intentional tort may be made by direct or circumstantial evidence." Klaus submits that United's argument is flawed because this language does not constitute approval of an inference upon inference approach. *Hannah* was a summary judgment case wherein an analysis of the third prong of *Fyffe* was at issue. The inferences drawn from the direct evidence, as to the third prong, overcame the employer's contention that Hannah was a volunteer and determined there was a genuine issue of fact for trial.

There is no question that "[a]n 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, Syl 1. Likewise, there is no question that more than one inference can be made from the same fact. *McDougall v. Glenn Cartage Co.* (1959), 169 Ohio St. 522, Syl 2. This is not inference stacking. It is done everyday in almost every trial.

Pursuant to R. C. § 2745.01(A) and *Fyffe*, to prove an intentional tort the employee must show that the employer committed the tortious act: (1) with the intent to injure; or (2) with the

belief that the injury was substantially certain to occur. Both the trial court and Third District Court of Appeals concluded there were sufficient material facts to satisfy the first prong of *Fyffe*. The Third District concluded in its *de novo* review that “[s]everal questions of fact remain that could convince a juror on the elements of substantial certainty.” (Appl. Appd. B, ¶19). The Third District did not use an inference upon an inference when it concluded there is a material issue of fact “concerning whether or not United’s management made a conscious decision not to follow its own LO/TO policy.” *Id.* The Court then presented the underlying facts, not inferences, upon which it made its conclusions. This is just one example of United’s misguided analysis.

United postulates that “the existence of safety regulations, whether created by OSHA or formulated by industry standards, standing alone does not establish the existence of an egregious risk of injury.” (Appl. Merit Brief, p.11) In other words, if all one has are the OSHA regulations there is not necessarily existence of a risk of injury. However, if an employer enacts safety rules for the protection of its employees and then admittedly does not enforce the policy for whatever reason, there is direct evidence from which an inference could be drawn that the employer’s conduct constitutes: (1) a conscious awareness of a dangerous condition within the employer’s control by establishing a policy; and (2) knowledge that the employer is aware that an injury is substantially certain to occur if such safety rules are not followed. Would United’s argument hold water if we were discussing a “no alcohol” policy at the work place which was not enforced? Klaus believes not. Just because the breach of duty is more obnoxious with alcohol, the same inferences can be used to establish a conscious awareness and knowledge of substantial certainty, absent direct proof of conscious awareness and actual knowledge. Just because inferences are used to prove an element does not reduce the quality of the evidence. If this were

the case, many criminal defendants currently housed in our prisons would have a “get out of jail free” card because of a conviction only on circumstantial evidence.

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

United correctly notes that pending before this Court is *Kaminski v. Metal & Wire Prods. Co.*, Sup. Ct. No. 2008-0857, on appeal from the 7th Dist. No. 07-CO-15, (2008) 175 Ohio App.3d 227. In *Kaminski*, this Court has been asked to address the constitutionality of R. C. § 2745.01. The constitutional issues were not raised in the case at bar. This case has been prosecuted and defended through summary judgment on the premise the statute is constitutional.

R. C. § 2745.01 provides:

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

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

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

condition, or death.

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

(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.

R. C. § 2745.01(A) clearly allows a cause of action for a workplace injury where “the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.” The statute also clearly recognizes it is only applicable to *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982) 69 Ohio St.2d 608 type intentional torts and not other workplace intentional torts as delineated in R. C. 2745.01(D).

The Restatement of Torts’ definition of the second prong of “intent” and *Jones v. VIP Development Company* (1984), 15 Ohio St.3d 90, sets forth the language found in R. C. § 2745.01(A). However, United then makes a giant leap to expand the scope of R. C. § 2745.01(B) and (C) by asking this Court to define the “deliberate intent” language contained therein by requiring that the definition include the elements of “**an egregious risk of injury that falls outside the risks to which the employee is ordinarily exposed.**” (Appl. Merit Brief p.10)

The law of employer intentional tort has slowly evolved over the past twenty-five years. The language quoted above, and presented in United’s Proposition of Law No. 1, has not been addressed by this Court in any of the cases dealing with this subject matter. This Court’s

adoption of United's Proposition of Law will constitute judicial legislation. This proposed language greatly exceeds the standards set forth by this Court in *Fyffe*, as well as the language set forth in R. C. § 2745.01 by the legislature.

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

R. C. § 2745.01(B) states:

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

While this statute may have some statutory construction problems which will be discussed hereafter, there is nothing ambiguous that would require the Court's insertion of the words "**egregious risk of injury that falls outside the risks to which the employee is**

ordinarily exposed.” Instead this Court should conclude that paragraph B is nonsensical when applied to paragraph A and refuse to use any definition other than the *Fyffe* standards. United is attempting to bootstrap this restrictive language into the statute by limiting the reconstructing definition of “deliberate intent.” This Court should not participate and allow that to happen.

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.)

Much of appellant’s disjointed argument discusses its hypothesis that Ohio courts continue to wrongly apply a standard of negligence and/or recklessness to employer intentional tort cases in spite of this Court’s efforts to define “substantial certainty” in *Fyffe*. Klaus disagrees with United’s hypothesis, and takes exception to United’s statement that the Third District Court of Appeals applied a lesser standard than required in R. C. § 2745.01 or *Fyffe*. This general degradation of Ohio courts lacks caselaw support and serves no public interest by being given credence.

The essence of United’s Proposition of Law No. 2 is a request that this Court adopt, as the law of Ohio, part of the proposed draft of the Restatement of Law 3d. However, United presents only a single sentence of Comment c and thus distorts the context within which the comment is set forth. Comment c reads as follows:

c. Purpose and substantially certain knowledge: coverage and relationship. A purpose to cause harm makes the harm intentional even if harm is not substantially certain to occur. Likewise, knowledge that harm is substantially certain to result is sufficient to show that the harm is intentional even in the absence of a purpose to bring about that harm. Of course, **a mere showing that**

harm is substantially certain to result from the actor's conduct is not sufficient to prove intent; it must also be shown that the actor was aware of this. Moreover, under Subsection (b) it is not sufficient that harm will probably result from the actor's conduct; the outcome must be **substantially certain to occur.** (Bold added)

United completely ignores “**knowledge that harm is substantially certain to result is sufficient to show that the harm is intentional even in the absence of a purpose to bring about that harm.**” This proposition has nothing to do with the application of R. C. § 2745.01. The legislature clearly did not include the Restatement standard in the statute. This Court should not now legislate such a result by its interpretation of the statute.

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

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

If one accepts United's premise of what the law ought to be, notwithstanding what R. C. § 2745.01 states, the proposed version would read:

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

Even in criminal law, the intent does not have to be directed to the specific victim for the culpability standard of knowingly or purposely to be met. Surely, an employer does not have to commit a crime to be liable for its intentional tort. See R. C. § 2901.22(A) and (B). If indeed, the legislature wanted to make the employer intentional tort a crime, it would have done so. To adopt the proposed version as argued by United serves no public interest and in fact endangers the very fabric of the common law commencing with *Blankenship* and ending with *Talik v. Fed. Marine Terminals, Inc.* (2008) 117 Ohio St.3d 496.

United incorrectly states that the definition of “substantially certain” now found in R. C. § 2745.01(B) is not new (Appl. Merit Brief p.22). United is correct that the Ohio legislature has repeatedly attempted to place the definition in the code. In addressing the current R. C. § 2745.01(B) definition in *Talik* this Court said at page 500:

The General Assembly modified the common-law definition of employer intentional tort by enacting R. C. 2745.01, effective April 7, 2005. The statute provides that in an action for intentional tort, an employee must prove 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.” A belief that injury is substantially certain to occur exists when the employer “acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” R. C. 2745.01(B). **The new statute, therefore, rejects the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct as defined in *Universal Concrete* 130 Ohio St. 567 paragraph two of the syllabus. (Bold added)**

Talik, and this dicta are not dispositive of the issue in the case at bar because *Talik* predated the statute and so only the *Fyffe* standard applied.

The problem presented herein is that when one applies the R. C. § 2745.01(B) definition to a R. C. § 2745.01(A) cause of action there is a redundancy. That does not necessarily make the statute unconstitutional, but it clearly makes it ambiguous and unuseable. “It is an axiom of

judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences.”

State, ex rel Dispatch Printing Co. v. Wells (1988), 18 Ohio St. 3d 382, 384.

Utilizing the statutory definition of “substantially certain” in paragraph (B) as applied to R. C. § 2745.01(A) means the paragraph would read in pertinent part:

(A) In an action brought against an employer by an employee for damages resulting from an intentional tort . . . , 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 acts were with deliberate intent to cause an employee to suffer an injury**

In other words the employee must either prove the employer: (1) acted with intent to injure the employee; or (2) acted with deliberate intent to injure the employee. Thus, under the statute the employee can only recover if the employer acted with intent to injure. The ambiguity of the application of the “substantial certainty” definition of paragraph (B) into paragraph (A) is clear due to the redundancy.

Klaus makes no claim that United specifically intended to injure him. This case deals with the second branch of the statute, i.e. the belief that the injury was substantially certain to occur. It is important to note that the *Fyffe* standards require an **employer’s knowledge of substantial certainty**. There is a significant difference between “knowledge” and “belief.”

The first step in the analysis of R. C. § 2745.01(A) must be to determine how the word “belief” is to be applied. Black’s Law Dictionary defines “belief” as follows:

A conviction of the truth of a proposition, existing subjectively in the mind, and induced by argument, persuasion, or proof addressed to the judgment . . . **A conclusion arrived at from external sources after weighing probability. Conviction of the mind, arising not from actual perception or knowledge, but by way of inference, or from evidence received or information derived from others.**

Knowledge is an assurance of a fact or proposition founded on perception by the senses, or intuition; **while “belief” is an assurance gained by evidence**, and from other persons. “Suspicion” is weaker than “belief,” since suspicion requires no real foundation for its existence, while “belief” is necessarily based on at least assumed facts. (Bold added)

“Black’s Law Dictionary,” (6th Ed., 1990) p.155.

The facts of this case, when construed most favorably to Klaus, clearly show that United possessed the requisite **belief** on February 13, 2006 that an injury was substantially certain to occur on the run-up auger because United had put in place a written LO/TO policy to prevent injury to its employees while repairing machinery. It is important to recognize that management believed a LO/TO policy was necessary to have even though it ignored the policy. Management also recognized that safety training was important to protect its employees since others received the training, even though Klaus did not. United did not train Klaus in safety procedures and did not enforce its LO/TO policy. The failure to do so, at the very least, creates a genuine issue of material fact for trial.

The legislature has defined “substantially certain” in R. C. § 2745.01(B) to modify the second branch of R. C. § 2745.01(A) to mean the same as the first branch, i.e. “deliberate intent to cause an employee to suffer an injury. . . .” R. C. § 2745.01(A) is written in the disjunctive. In the second branch of R. C. § 2745.01(A) it is the deliberate intent to cause **an employee** an injury, not to injure the specific employee. In branch one the intent must be directed specifically to an employee, not just any employee. Therefore, statutory construction dictates that the word “belief” creates a lesser standard than the actual knowledge that injury would be substantially certain to occur to **any** employee under the facts and circumstances of the occurrence.

In this case, United’s failure to enforce the LO/TO policy or train employees in the policy

demonstrates the basis for such a “belief.” United created the written LO/TO policy because it actually knew an employee could be seriously injured if a machine was energized while maintenance work was being performed. United’s failure to enforce the written LO/TO policy, coupled with its acceptance of the non-enforcement of its safety procedure by management, created a work environment where any reasonable person would believe injury was substantially certain to occur. This is a jury question.

CONCLUSION

Klaus strenuously argues that this Court should not require an employee to prove, via direct evidence only, that an employer is required to have actual knowledge of the exact danger and actual knowledge that the danger presented an egregious risk of injury outside the ordinary risks of employment in an employer intentional tort case.

Klaus further submits that this Court should not require only direct evidence be used in employer intentional tort cases, either for determining motions for summary judgment or for trials.

Finally, Klaus submits this Court should not equate the standard of “substantial certainty” to 100% probability. This proof standard would exceed our toughest standard in the law of “beyond a reasonable doubt.”

Based upon the argument set forth above, Klaus submits this Court should refuse to adopt either of the propositions of law presented by United and this Court should affirm the decision of the Third District Court of Appeals remanding the matter to the trial court for a jury determination of the facts.

Respectfully submitted,



Michael A. Rumer, (0006626)

and



Victoria U. Maisch, (0063440)

RUMER & MAISCH CO., LLC

Attorneys at Law

212 North Elizabeth Street, Suite 400

Lima, OH 45801

Telephone: (419) 228-7640

Fax: (419) 228-6214

E-Mail: mrumer@rmcolaw.net

E-Mail: vmaisch@rmcolaw.net

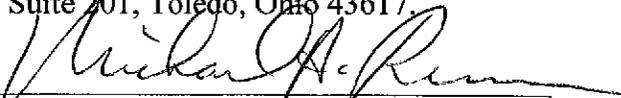
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellee Jonathon Klaus has been served upon the following, by regular U.S. Mail, postage prepaid, this 21 day of November, 2008:

- Brian N. Ramm and Barton A. Bixenstine, Counsel for Defendant-Appellant, at Ulmer & Berne, LLP, Skylight Office Tower, 1660 West Second Street, Suite 1100, Cleveland, Ohio 44113-1448,

- Michael J. Zychowicz, and Gene T. Borgstahl, Counsel for Defendant-Appellant, at Borgstahl & Zychowicz, Ltd. 6591 W. Central Avenue, Suite 201, Toledo, Ohio 43617.



Michael A. Rumer