
IN THE SUPREME COURT OF OHIO

CASE NO. 2008-0972

Carl F. Stetter, *et al.*
Plaintiffs-Petitioners

Vs.

R.J. Corman Derailment Services LLC, *et al.*
Defendants-Respondents.

REPLY BRIEF OF PLAINTIFFS-PETITIONERS

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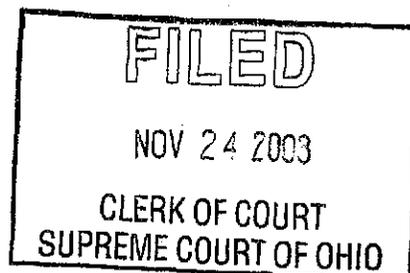


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INTRODUCTION

The present version of Ohio Revised Code Section 2745.01 codifies and preserves Ohio's common law cause of action for employer intentional tort while simultaneously creating a new, statutory cause of action for those particularly egregious torts in which the employer displays a deliberate intent to cause an employee to suffer injury. If R.C. 2745.01 is construed otherwise, so as to eliminate the common law cause of action for employer intentional tort, then it must be struck down as violative of the Ohio Constitution. The argument advanced in Respondents' brief, that R.C. 2745.01 eliminates the common law cause of action for employer intentional tort and passes constitutional muster under this Court's binding precedents, is wrong on both counts.

ARGUMENT

I. THIS COURT SHOULD CONSTRUE R.C. 2745.01 AS PRESERVING THE COMMON LAW CAUSE OF ACTION FOR EMPLOYER INTENTIONAL TORT.

1. Amended House Bill 498's Historical Context Supports Petitioners' Construction of R.C. 2745.01.

Respondents' brief begins its argument by taking umbrage with the fact that Petitioners' merit brief devoted substantial attention to the eighth certified question accepted by this Court. Specifically, that question asked, "Does R.C. 2745.01... do away with the common law cause of action for employer intentional tort?" (See Aug. 6, 2008 Order Accepting Certified Questions (amended Sep. 11, 2008), attached to Petitioner's Merit Brief at APX-1). Respondents' frustration aside, this Court did accept a certified question about the proper interpretation of the statute vis-à-vis the common law, and the answers to the other seven questions certified by this Court are logically dependent on this threshold issue of statutory construction.

With regard to this interpretation issue, Respondents' brief advances a mistaken construction of R.C. 2745.01, rooted primarily in news reports that Respondents attempt to glorify as "legislative history." (See Resp. Brief at 9-10). If there is any document that can properly be regarded as providing the "legislative history" of Amended House Bill 498 (which enacted the present version of R.C. 2745.01), it is the Final Bill Analysis provided by the Legislative Service Commission. That document, in its very first sentence, confirms Petitioners' construction of R.C. 2745.01 as heeding this Court's decisions and creating a new statutory cause of action, rather than eliminating the common law. The Bill Analysis begins, "The Act repeals a statute declared unconstitutional by the Ohio Supreme Court and creates a new statutory cause of action for intentional torts in employment (Johnson v. B.P. Chemicals Inc. (1999) 85 Ohio St. 3d 298)." Legislative Service Commission, Bill Analysis, Am. H.B. No. 498 (2004) (citation in original).

The true historical background for R.C. 2745.01, however, is to be found neither in bill analyses nor news reports. The statute must rather be read in view of the landscape on which it was erected, namely, this Court's constitutional decisions in Brady v. Safety-Kleen Corporation (1991), 61 Ohio St. 3d 624, 576 N.E.2d 722, and Johnson v. B.P. Chemicals, Inc. (1999), 85 Ohio St. 3d 298, 707 N.E. 2d 1107. Those decisions clearly provide that the General Assembly does not have the constitutional authority to "govern" intentional torts that occur within the employment relationship. See Johnson 85 Ohio St. 3d at 308. Consistent with this rule, R.C. 2745.01 stops short of *governing* employer intentional torts and codifies the common law cause of action alongside a new statutory cause of action for those employer intentional torts that are particularly egregious.

2. *The General Assembly's Choice of Language in Amended House Bill 498 Bears Out Petitioners' Construction that R.C. 2745.01 Preserves the Common Law Cause of Action.*

As a threshold matter, this case presents the question of how this Court should construe a curious statute that, if read in isolation from this Court's precedents, essentially provides that an employer shall not be liable for an intentional tort against an employee unless the tort was committed: (1) "with the intent to injure another" or (2) "with the deliberate intent to cause an employee to suffer an injury." Cf. R.C. 2745.01(A) & R.C. 2745.01(B). The only thing that is plain about the meaning of such a statute is that the legislature has set forth two alternative bases for a cause of action against one's employer. What may be less than plain, from the face of the statute alone, is the nature of these alternative causes of action. Fortunately, a review of this Court's directly applicable precedents provides the clarity needed for further construction. As explained in Petitioners' merit brief, the statute can pass constitutional muster *only if* the "intent to injure another" cause of action is construed as incorporating the common law cause of action for employer intentional tort.

Respondents' merit brief disputes this construction of the statute not only by rejecting this Court's settled precedent, but by denying the fact that the statute uses the disjunctive "or" to set forth two different employer intentional torts. According to Respondents, the statute "limit[s] employer intentional torts to those cases where the injured employee can establish *deliberate intent* on the part of the employer." (Resp. Merit Brief at 1). Yet if any conclusion can be gleaned from the statutory language alone, it is certainly the opposite: the statute undeniably recognizes employer intentional torts where the employee can establish that the employer had *either* the "intent to injure another" OR the "deliberate intent to cause an employee to suffer

injury.” R.C. 2745.01(A); R.C. 2745.01(B). Despite this Court’s admonition that “significance and effect should, if possible, be accorded to every word, phrase, sentence, and part of an act,” Respondents’ construction of the statute would effectively write out the entire “intent to injure another” prong of R.C. 2745.01(A). Sarmiento v. Grange Mut. Cas. Co. (2005), 106 Ohio St. 3d 403, 408, 835 N.E. 2d 692. Thus, even setting aside its obvious constitutional infirmities, the construction urged by Respondents violates one of this Court’s most basic rules of statutory interpretation.

Respondents’ gloss on the statute also completely ignores the “rebuttable presumption” of an “intent to injure another” that is triggered under R.C. 2745.01(C) by an employer’s deliberate removal of an employee safety guard or deliberate misrepresentation of a toxic or hazardous substance. As explained in Petitioners’ merit brief, this “rebuttable presumption” of R.C. 2745.01(C) is conspicuously applied only to the “intent to injure another” prong of R.C. 2745.01(A). This focused application of the “rebuttable presumption” to the “intent to injure another” prong of the statute further elucidates the fact that R.C. 2745.01(A) sets forth separate and distinct causes of action through its use of the disjunctive “or.” Indeed, R.C. 2745.01(C)’s “rebuttable presumption,” applicable only to the “intent to injure another” prong, stands in stark contrast to the *definition* of “substantially certain” provided by R.C. 2745.01(B). In the first place, the fact that the “intent to injure another” cause of action is modified only by a statutory “rebuttable presumption” infers that a universe of circumstances exists beyond those which trigger the rebuttable presumption that also give rise to a cause of action based on an employer’s “intent to injure another.” Moreover, the restrained use of a “rebuttable presumption” to modify the “intent to injure another” prong of R.C. 2745.01(A) also signifies a legislative recognition that a statutory prong which incorporates the common law must heed this Court’s directive to

avoid going so far as to “govern intentional torts that occur within the employment relationship.” Johnson v. B.P. Chemicals, Inc. (1999), 85 Ohio St. 3d 298, 308, 707 N.E. 2d 1107.

Respondents’ argument that R.C. 2745.01 eliminates the common law cause of action for employer intentional tort is based partly on this Court’s statement in Bolles v. The Toledo Trust Co. (1944), 144 Ohio St. 195, 58 N.E.2d 381, that when the General Assembly codifies the law on a subject, “the statutory provisions are to govern to the exclusion of the prior non-statutory law unless there is a clear legislative intention expressed or necessarily implied that the statutory provisions are merely cumulative.” Id. at ¶13 of syllabus. Yet it is hard to imagine how R.C. 2745.01’s preservation of the common law could be more clearly or more necessarily implied. Indeed, the General Assembly’s intention to preserve the common law cause of action in the statute could not be less subtle. The main operative provision of the statute, R.C. 2745.01(A), actually quotes, almost verbatim, the common law standard for employer intentional tort as set forth in paragraph 1 of this Court’s syllabus in Jones v. V.I.P. Development Co. (1984), 15 Ohio St. 3d 90, 472 N.E.2d 1076. The implication is as necessary as it is obvious: if the statute does not intend to recognize and affirm the common law of employer intentional torts, then it is an attempt to govern intentional torts that occur within the employment relationship and therefore “cannot logically withstand constitutional scrutiny.” Johnson, 85 Ohio St. 3d at 308.

3. *This Court’s Dictum in Talik v. Federal Marine Terminals, Inc. Is Consistent with the Conclusion that R.C. 2745.01 Codifies the Common Law of Employer Intentional Torts.*

Respondents place a great deal of emphasis on this Court’s dictum in Talik v. Federal Marine Terminals, Inc. (2008), 117 Ohio St. 3d 496, 885 N.E.2d 204, that “the General Assembly modified the common-law definition of an employer intentional tort by enacting R.C.

2745.01, effective April 7, 2005.” Id. at 500. Far from dictating the outcome in this case, this Court’s suggestion of modification in Talik stands for nothing more than the uncontroversial observation that R.C. 2745.01 affects some degree of change on the law of employer intentional tort in Ohio. If anything, this Court’s observation that R.C. 2745.01 “modifies” the common law belies Respondents’ suggestion that the statute “*eliminates* the common law cause of action for employer intentional tort.” (Respondents’ Merit Brief at 3).

Properly speaking, the only modification to the *common law* of employer intentional tort made by R.C. 2745.01 is the statutory recognition of a “rebuttable presumption” of “an intent to injure another” contained in R.C. 2745.01(C). This same “rebuttable presumption” was earlier established by former R.C. 4121.80(G)(1), the statute which this Court later found to be unconstitutional in Brady v. Safety-Kleen Corporation (1991), 61 Ohio St. 3d 624, 578 N.E. 2d 722. This presumption, however, did not exist at common law, and this Court therefore held that it could not be applied retrospectively to actions arising before the effective date of former R.C. 4121.80. Fyffe v. Jenos Inc. (1991), 59 Ohio St. 3d 115, 119, 570 N.E.2d 1108.

Respondents’ apparent suggestion that this Court’s dicta in Talik controls the outcome of this case is without support. On the contrary, this Court’s decision in Talik explicitly declined to engage in the sort of interpretive analysis of R.C. 2745.01 that is now required to answer the eighth certified question presently before the Court. In any event, nothing contained in this Court’s opinion from Talik is inconsistent with a construction of R.C. 2745.01 that recognizes its preservation of the common law cause of action for employer intentional tort.

II. R.C. 2745.01 IS UNCONSTITUTIONAL UNLESS IT PRESERVES THE COMMON LAW CAUSE OF ACTION FOR EMPLOYER INTENTIONAL TORT

Respondents' merit brief asserts that a construction of R.C. 2745.01 as eliminating the common law cause of action for employer intentional tort can be deemed constitutional "even without overruling Johnson." (Resp. Brief at 11). This suggestion is remarkably disingenuous. In striking down the prior version of R.C. 2745.01, the Johnson Court rather explicitly attacked the former statute on the very same elements that Respondents now ask this Court resurrect in the statute's present version.

Under the construction of the statute urged by Respondents, R.C. 2745.01 would be read to "[limit] employer intentional torts to those cases where the injured employee can establish *deliberate intent* on the part of the employer." (Resp. Brief at 1) (emphasis added). Yet this Court's opinion in Johnson was nothing short of livid about the idea that an employee should have to demonstrate deliberate intent in order to bring an intentional tort action. The Court stated:

By establishing the foregoing standards in R.C. 2745.01, the General Assembly has created a cause of action that is simply illusory. Under the definitional requirements contained in the statute, an employer's conduct, in order to create civil liability, must be both *deliberate* and *intentional*. Therefore, in order to prove an intentional tort in accordance with R.C. 2745.01(D)(1), the employee, or his or her survivors, must prove, at a minimum, that the actions of the employer amount to criminal assault. In fact, given the elements imposed by the statute, it is even conceivable that an employer might actually be guilty of a criminal assault but exempt from civil liability under R.C. 2745.01(D)(1).

Johnson, 85 Ohio St. 3d at 306-307 (emphasis in original). In spite of this emphatic and unequivocal pronouncement, Respondents still persist in arguing not only that it would be *constitutional* to construe R.C. 2745.01 as requiring the plaintiff to prove deliberate intent, but

further that such a construction would be *consistent with* Johnson. This contention cannot be taken seriously.

Respondents also argue that the present version of R.C. 2745.01 eliminates the common law cause of action for employer intentional tort. (Resp. Brief at 3). Yet on this very point, this Court took the opportunity in Johnson to re-state its Brady holding that the statute was “totally repugnant” to the Ohio Constitution “*because, in enacting the legislation, the General Assembly eliminated an employee’s right to a common-law cause of action for an employer intentional tort that would otherwise benefit the employee.*” Id. at 304 *citing* Brady, 61 Ohio St. 3d at 633 (emphasis added). Yet Respondents belligerently assert that neither the Ohio Constitution *nor* the Johnson decision would be offended by a construction of R.C. 2745.01 that eliminates the common law cause of action for employer intentional tort. The assertion is patently false.

R.C. 2745.01 is obedient to this Court’s constitutional decision in Johnson only insofar as it can be construed to codify and preserve the common law cause of action for employer intentional tort. As the Johnson opinion stated, “[A]n attempt by the General Assembly to govern intentional torts that occur within the employment relationship...‘cannot logically withstand constitutional scrutiny.’” Id. at 308 *quoting* Brady at 634. In order to uphold both its prior decision in Johnson and the constitutionality of R.C. 2745.01, this Court must construe the present version of the statute as simply codifying the common law rather than as attempting to govern intentional torts within the employment relationship. The contrary interpretation urged by Respondents is simply not available; this Court’s decision in Johnson was too explicit.

CONCLUSION

The statutory language of R.C. 2745.01 and the constitutional background surrounding its enactment in Am. H.B. 498 both support a construction of the statute as preserving and codifying the common law cause of action for employer intentional tort. Respondents base their assertions to the contrary on nothing more than the reported perspectives of certain individuals at the time of the bill's passage. This Court should decline Respondents' invitation to engage in an analysis of commentators' reaction to the bill's enactment and should focus instead on an analysis of the General Assembly's reaction to this Court's clear constitutional mandate. Accordingly, Petitioners respectfully request that this Court answer the eighth certified question in the negative and maintain the common law cause of action for employer intentional tort. Alternatively, Petitioners request that this Court answer the first seven certified questions in this case in the affirmative.

Respectfully submitted,

BARKAN & ROBON LTD.

By: _____



Joseph R. Dietz, Jr.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Plaintiffs-Petitioners was served the 24th day of November, 2008 via ordinary U.S. Mail upon the following:

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