

No. 2008-0894

IN THE SUPREME COURT OF OHIO

JONATHON KLAUS,

Plaintiff-Appellee,

v.

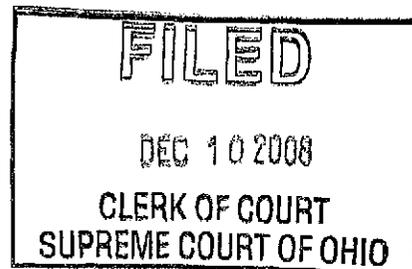
UNITED EQUITY, INC., *et al.*,

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
REPLY BRIEF**

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Confusing the Legal Significance of the Same Set of Facts

Plaintiff-appellee Jonathon Klaus's responsive brief underscores the conflicting legal significance Ohio trial and appellate courts, and litigants, attach to the same set of undisputed facts. The brief also demonstrates the extent to which the courts and litigants confuse an "inferred intent" intentional tort (i.e., a "substantial certainty" intentional tort) with negligence.

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, Alan McMichael, started the auger after misunderstanding what another co-worker, Phillip O'Neill, had said. This accident might not have happened if Klaus had pulled the lever to the electrical panel that would have disconnected the power to the auger. A "pulled" lever – the standard "rule of thumb" safety practice – signified to other employees that the auger was under repair. Klaus readily admitted that he did not follow this uniformly understood rule of thumb; instead, he asked O'Neill to "watch" the fuse box, which O'Neill denies. It should again be noted that United Equity is a very small company with basically five employees working at the Spencerville grain facility. Consequently, on-the-job training was constant and in its 23 years of prior operation, no such accidents had occurred.

So when McMichael saw the fuse box lever was in the upright position, he naturally thought the repair was complete. And he even took the additional step of checking with O'Neill to be sure that the repair was done. Understanding O'Neill to say that the repair was complete, McMichael pushed the "on" button setting the auger in motion.

Klaus aptly points out that if McMichael had taken the additional step to check whether the man-lift that Klaus had taken to the third floor had returned to the first floor, McMichael might not have started the auger and Klaus might not have lost his hand. (Klaus Merit Brief, p. 6.)¹ Klaus himself recognizes that the events of that day were an “accident,” and he admits that he did not disconnect the power to the upright auger because he was in a “hurry.”

Despite these facts, Klaus contends that a genuine issue of material fact exists as to whether United Equity consciously failed to train him on its written lock-out/tag-out policy or consciously failed to make sure all employees followed that policy. (Klaus Merit Brief, pp. 2-4.) Similarly, Klaus contends that because a written LO/TO safety protocol existed but was not followed or enforced raises a genuine issue of material fact as to whether United Equity held a “belief” that an injury was substantially certain to occur. (Klaus Merit Brief, pp. 3-4 & 16.) Roughly translated, Klaus argues that the existence of written safety standards creates a genuine issue of material fact as to whether the employer had the requisite “belief” (which is a “lesser standard” than “knowledge”) that an injury is substantially certain to occur if the employer does not enforce those standards. (Klaus Merit Brief, p. 16.)

These facts, however, squarely demonstrate the type of negligence-based, employer-intentional-tort case that the General Assembly tried to eliminate when it

¹ While Klaus contends that McMichael “never checked to see if the one man-lift was gone which would indicate a person was still on the third floor,” Klaus cites no part of the record for this statement of fact. (Klaus Merit Brief, p. 6.) Regardless, if evidence exists to support this factual proposition, it suggests that at least one proximate cause of Klaus’s injury stems from the negligence of a fellow employee. See *Pintur v. Republic Tech. Int’l, LLC*, 9th Dist. No. 05CA008656, 2005-Ohio-6220, ¶3 &15. Klaus has not explained how the negligence of a co-worker rises to the level of an employer’s intentional tort.

enacted R.C. 2745.01. By requiring the employee to show that the employer had “*deliberate* intent to cause an employee to suffer an injury, a disease, a condition, or death,” the General Assembly tried to focus Ohio trial and appellate courts on what the employer *actually knew* and away from considering what the employer *should have known*, which is a lesser degree of awareness that Ohio law attaches to negligence and recklessness. The “actual knowledge” standard helps preserve the integrity of Ohio’s workers’ compensation system. It also reserves for the courts’ resolution those truly egregious cases brought against Ohio employers, thus ensuring the continued viability of Ohio employers and availability of Ohio jobs.

Eliminating the Confusion

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.)

As an initial matter, United Equity’s two propositions of law are connected by one salient point: the employer’s *actual knowledge* or *conscious awareness* of both an egregious risk of harm and the substantial certainty of injury if an employee is exposed to that egregious risk of harm. Because the degree of knowledge and the probability of risk are the keys to distinguishing negligence and recklessness from

“inferred intent” (i.e., “substantially certain”) intentional torts, United Equity addressed its propositions of together.

I. No redundancy exists between R.C. 2745.01’s “specific intent” and “deliberate intent” employer intentional torts.

Klaus suggests that the General Assembly’s definition of a “substantially certain” intentional tort in R.C. 2745.01(A) and (B) created a redundancy because it requires an employee to prove that the employer acted with (1) specific intent to injure or (2) deliberate intent to injure. According to Klaus, “specific intent” and “deliberate intent” are the same thing. (Klaus Merit Brief, p. 15.) Klaus’s argument, however, lacks merit.

Section (A) of R.C. 2745.01 recognizes both the “specific intent” intentional tort and “inferred intent” (i.e., “substantially certain”) intentional tort:

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.

Section (B), however, further defines the “inferred intent” intentional tort: “As used in this section, ‘substantially certain’ mean that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” If, in fact, the General Assembly intended to eliminate the “inferred intent” branch of the common-law employer intentional tort, it could have done so simply by leaving out the phrase “or with the belief that the injury was substantially certain to occur” and the entirety of Section (B). But the General Assembly obviously had no intent to eliminate the “inferred intent” employer intentional tort. The General Assembly simply intended to refine it.

A. *Deliberate intent means “actual knowledge.”*

As United Equity previously explained, no redundancy exists if one construes “deliberate intent” to mean that the employer has a *conscious awareness* that (1) a dangerous condition exists within its control, which presents an egregious risk of injury beyond the ordinary risk of injury to which an employee generally is exposed, and (2) an employee is virtually certain to sustain an injury if exposed to that dangerous condition. Thus, the employer must have *actual knowledge* of both (1) the existence of a dangerous process, procedure, or instrumentality and (2) the substantial certainty (i.e., virtual or practical certainty) of injury if the employer subjects the employee to that dangerous process, procedure, or instrumentality. (United Equity Merit Brief, p. 25.) In this way, the term “deliberate intent” is not redundant nor is it ignored. See *East Ohio Gas Co. v. Public Utilities Comm.* (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875.

Klaus proposes, however, that a significant difference exists between “knowledge” and term “belief” in the context of “deliberate intent.” (Klaus Merit Brief, p. 15.) He argues that “the word ‘belief’ creates a lesser standard than the actual knowledge that injury would be substantially certain to occur” (Id. at 16.) If that were true, then the statute’s effect would be to relegate an employer’s knowledge to what the employer “should have known.” What anyone “should know” about the risk of injury comports with a negligence or recklessness standard.

B. *The “actual knowledge” standard complies with legislative intent.*

The General Assembly, however, had no intention of reducing “intent” to a negligence or recklessness standard. If it did, the General Assembly also would have

eliminated the workers' compensation system altogether,² thereby precluding double recovery for the same injury and leaving the employee to litigate his claims the same way the courts handled them at the turn of the last century.

But the General Assembly intended, instead, to arm R.C. 2745.01 with the power needed to correct Ohio court decisions that had reduced the "substantial certainty" intentional tort "to a negligence-based standard that is far below any reasonable definition of an intentional tort," thereby opening "the door for employees to continue to sue employers for workplace injuries in addition to availing themselves of the 'no fault' workers' compensation system." Ohio Capital Connection, Minutes of House Commerce & Labor Committee (Aug. 25, 2004), p.1. Thus, General Assembly's purpose in enacting R.C. 2745.01 is satisfied when the courts require an employee who brings an intentional tort action against an employer to prove that the employer had *actual knowledge* of both (1) the existence of a dangerous process, procedure, or instrumentality and (2) the substantial certainty (i.e., virtual or practical certainty) of injury if the employer subjects the employee to that dangerous process, procedure, or instrumentality.

II. The employer must have actual knowledge of both (1) an egregious risk of injury, and (2) the substantially certain of harm if the employee is exposed to that egregious risk.

Klaus also apparently takes the position that the mere existence of safety standards creates a genuine issue of material fact as to whether the failure to enforce those standards is an intentional act. Essentially, Klaus argues that "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." (Klaus Merit

² Sections 34 and 35 of Article II of the Ohio Constitution do not mandate the creation of state-run system to compensate injured workers. Those sections do nothing more than allow the legislature to do so.

Brief, p. 17.) Accordingly, Klaus contends that United Equity's purported failure to enforce the written policy "created a work environment where any reasonable person would believe injury was substantially certain to occur." (Id.) This, however, is not the law under R.C. 2745.01 nor was it the law under *Fyffe*.

As United Equity explained in its Merit Brief, Ohio law differentiates negligence, recklessness, and "inferred intent" intentional torts by the extent of the actor's knowledge of a risk of injury, and the increasing degree of probability of injury when another is exposed to that risk. While the negligent actor *should know* that a *chance* (i.e., possibility) of injury exists, and a reckless actor *should know* that an injury is *probable* (not just possible), the actor who commits an "inferred intent" (i.e., substantially certain) intentional tort must *actually know* that an injury is *substantially certain* (i.e., virtually or practically certain) to occur. (United Equity Merit Brief, pp. 29-33.) An injury that is "substantially certain to occur" denotes an "egregious risk of injury" – a risk with the highest probability (i.e., a virtual certainty) of inflicting injury. See *Sanek v. Duracote Corp.* (1989), 43 Ohio St.3d 169, 539 N.E.2d 1114; *VanFossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 116, 522 N.E.2d 489.

So to infer an employer's *actual knowledge* of the *substantial certainty* of injury from what an employer *should know* presents *risk* of injury is nothing short of equating negligent conduct with an "inferred intent" intentional tort. This is precisely the impermissible inference stacking that *Hurt v. Charles J. Rogers Transportation Co.* forbids. (1959), 164 Ohio St. 329, 130 N.E.2d 820, paragraph one of the syllabus. It also contradicts the purpose of R.C. 2745.01, which was to eliminate the negligence and recklessness-based "employer intentional tort."

A. The mere existence of safety standards does not establish an egregious risk of injury, i.e., one that is substantially certain to occur.

Nor can one logically conclude that, because written LO/TO safety standards exist, any risk of injury from the failure to follow or enforce those standards is thereby substantially certain, virtually certain, or practically certain to occur. *Foust v. Magnum Restaurants, Inc.* (1994), 97 Ohio App.3d 451, 457, 646 N.E.2d 1150 (concluding that an operations manual that noted that filtering oil from a fryer was “perhaps the most dangerous job in the restaurant” was insufficient to establish substantial certainty of injury). Indeed, the fact that the “rule of thumb” worked for 92 repairs over 23 years without injury demonstrates that an injury was *not* substantially certain to occur *when the employees followed the rule*. See *Spurlock v. Buckeye Boxes, Inc.*, 10th Dist. No. 06AP-291, 2006-Ohio-6784, ¶18 (finding that the employer could reasonably expect an employee to follow the employer’s policies and “‘culture’ . . . not to place hands near moving rollers”). Klaus and every other employee that worked the auger understood that lowering the lever to cut off the electricity signified to fellow employees that the auger was under repair. See *Tipton v. Bernie’s Elec. Sales & Serv.*, 6th Dist. No. WM-02-009, 2003-Ohio-1629, ¶30-34 (finding “immaterial” that the “policy” to turn off the electricity when working near electrical wires was not reduced to writing when co-employees had trained the employee to “cut the power before doing repairs near electrical wires,” and concluding that the employer “could hardly be expected” to anticipate that the employee would fail to turn off the electricity before doing repairs); *Spurlock*, 2006-Ohio-6784, ¶18 (noting that, while other devices might have been available that may have provided “a higher degree of safety,” the injury would not have occurred had the employee used the safety devices that *were* available at the time of his

injury); *Foust*, 97 Ohio App.3d at 456 (concluding that employee failed to demonstrate the substantial certainty of injury where the employer provided safety equipment but the employee chose not to use it).

An injury occurred on the auger on this single occasion, when an employee did *not* follow the established non-written protocols or “rule of thumb” and did *not* disconnect the electricity to the electrical panel. Not only does the record lack any evidence demonstrating that the rule of thumb was insufficient to prevent Klaus’s injury, *Foust*, 97 Ohio App.3d at 456, the record lacks evidence showing that United Equity instructed Klaus to repair the auger with the electricity on, *Tipton*, 2003-Ohio-1629, ¶33. As such, Klaus failed to establish that an injury was substantially certain to occur using the “rule of thumb” – which, he readily admits, he did not follow. *Goodin v. Columbia Gas* (2000), 141 Ohio App.3d 207, 224, 750 N.E.2d 1122 (concluding that an employer cannot anticipate the substantial risk of injury where the employee has a “safer alternative to accomplish his task” but does not use it).

Rather, this case is one of simple human error and the combined negligence of more than just one person. See *Pintur v. Republic Tech. Int’l, LLC*, 9th Dist. No. 05CA008656, 2005-Ohio-6220, ¶3 &15 (noting that danger existed only as the result of the combined actions of the employer, a fellow employee, and the decedent-employee).

B. *And the mere existence of safety standards does not establish that an employer has actual knowledge of the substantial certainty of injury.*

The existence of written safety standards also does not signify that the employer has *actual knowledge* of the substantially certain risk of injury. See Proposed

Final Draft No. 1 (Apr. 6, 2005), Restatement of the Law, Third, Torts: Liability for Physical Harm, §1 Intent, Comment *a*. United Equity's decision to adopt written, LO/TO safety procedure for the purpose of decreasing the risk of injury might demonstrate that it recognized a chance of injury. The mere knowledge or appreciation of a risk of injury, however, does not rise to the level of intent. *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus. Rather, an employer must have “*actual knowledge* of the exact dangers which ultimately caused the’ injury.” *Sanek*, 43 Ohio St.3d at 172, quoting *VanFossen*, 36 Ohio St.3d at 112. Indeed, the non-written protocols in place had worked for over 23 years without injury. As such, actual knowledge could not exist.

An employer's lack of constant effort to ensure that its employees were trained in and used at all times LO/TO to eliminate both the power source and the chance that an employee might accidentally reenergize the auger might indicate negligence (i.e., what an employer should have known would present a chance of injury if the employees were exposed to that risk). See *Foust*, 97 Ohio App.3d at 456 (Negligence falls far short of an “inferred intent” intentional tort because “mere knowledge and appreciation of a risk does not constitute intent”), citing *Fyffe*, 59 Ohio St.3d 115 at paragraph two of the syllabus; *Goodin v. Columbia Gas* (2000), 141 Ohio App.3d 207, 224, 750 N.E.2d 1122 (“Knowledge of some risk, however, falls far short of knowledge [of] a substantial certainty [of injury].”). For example, virtually every workplace accident violates some type of safety protocol, either written or unwritten. If Ohio courts allow juries to infer an employer's actual knowledge simply from the existence of written safety protocols and a failure to enforce or train on those protocols, then *every employee who suffers a*

workplace injury can create a “genuine issue of material fact” in every employer-intentional-tort case simply by saying that his or her training was not adequate. Such logic defeats the purpose of R.C. 2745.01, just as it contradicts Fyffe.

But Klaus’s training was adequate. He knew the “rule of thumb”: he and every other employee that worked the auger understood that lowering the lever to cut off the electricity signified to fellow employees that the auger was under repair. See *Tipton v. Bernie’s Elec. Sales & Serv.*, 6th Dist. No. WM-02-009, 2003-Ohio-1629, ¶¶30-34 (finding “immaterial” that the “policy” to turn off the electricity when working near electrical wires was not reduced to writing when co-employees had trained the employee to “cut the power before doing repairs near electrical wires,” and concluding that the employer “could hardly be expected” to anticipate that the employee would fail to turn off the electricity before doing repairs). And every employee that worked the auger understood this as an accepted safety practice. No employee had sustained an injury on the auger using this “rule of thumb” safety practice in the 23 years that United Equity ran the grain elevator.

But even if one assumes that an injury under these circumstances is virtually certain to occur, Klaus still failed to establish that United Equity had actual knowledge that an employee would not follow the “rule of thumb.” Indeed, “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.” Proposed Final Draft No. 1, Restatement of the Law, Third, *supra*, Comment c. Nothing in the record demonstrates that any United Equity employee (other than Klaus on this single occasion) repaired the upright auger without disconnecting the power in some manner – making

sure, at the very least, that the lever was down. Thus, Klaus failed to demonstrate that United Equity had actual knowledge of the exact danger that caused his injury.

III. An expert cannot fabricate an employer's actual knowledge of the exact danger that caused the injury or the substantial certainty of injury from facts that show nothing more than negligence.

Moreover, Klaus's expert, Albert C. Rauck, adds nothing to the inquiry of whether (1) United Equity had *actual knowledge* of both (1) the existence of a dangerous process, procedure, or instrumentality which *caused* Klaus's injury and (2) the substantial certainty (i.e., virtual or practical certainty) of injury if Klaus were subjected to that dangerous process, procedure, or instrumentality. See *Sanek*, supra (requiring the employer to have actual knowledge of the exact danger that caused the injury). Contrary to Klaus's argument, the "evidence" Rauck's affidavit presents does not create a genuine issue of material fact. (Klaus Merit Brief, p. 3.) Rather, the affidavit does nothing more than affix legal "buzzwords" (like "substantially certain" and "intentional") to conduct that constitutes negligence or recklessness in an attempt to create an "inferred intent" intentional tort.

"[S]imply because an expert concludes that an accident is substantially certain to occur does not necessarily establish that element as a legal conclusion." *Gibson v. Precision Strip, Inc.*, 12th Dist. No. CA2007-08-201, 2008-Ohio-4958, ¶ 36. Rather, "[t]he expert's opinion must create a genuine issue of material fact from a legal standpoint." *Teal v. Colonial Stair & Woodwork Co.*, 12th Dist. No. CA2004-03-009, 2004-Ohio-6246, ¶17.

As explained above, an employer's creation of a safety policy constitutes nothing more than knowledge that a *risk* of injury exists. The failure to enforce or train employees on that safety policy does not, as a matter of law, constitute either the substantial certainty of injury *or* an employer's knowledge of the substantial certainty of injury. *Teal*, 2004-Ohio-6246, ¶17 & 21; *Gibson*, 2008-Ohio-4958, ¶36. At most, it constitutes recklessness. *Vance v. Akers Pkg. Serv., Inc.*, 12th Dist. No. CA2006-05-105, 2006-Ohio-7032, ¶37. Thus, Rauck's conclusions cannot create a genuine issue of material fact as to whether United Equity committed an "inferred intent" intentional tort. *Teal*, 2004-Ohio-6246, ¶17-18 & 21.

Moreover, Rauck does not acknowledge the exact danger that resulted in Klaus's injury: the *failure to pull the lever de-energizing the auger, signifying to other employees that the auger was under repair and McMichael's purported failure to make sure the man-lift was on the first floor* – both of which were beyond United Equity's control. Even if Klaus had been trained on LO/TO, nothing in the record supports the further inference that he would have used it rather than ask O'Neill to watch the electrical panel as he did on this occasion. For these reasons, Rauck's affidavit does not create a genuine issue of material fact that would survive summary judgment under R.C. 2745.01 of *Fyffe*.

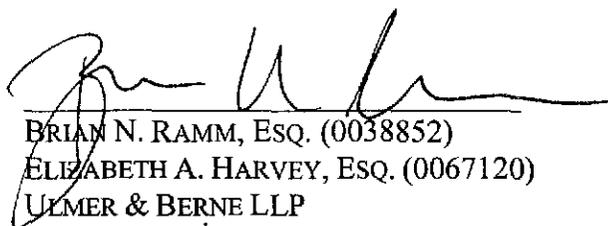
Conclusion

As United Equity has explained, 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. By requiring the employee to establish that the employer actually knew both that an egregious risk of danger existed and that an injury is substantially certain to occur if an is exposed to that danger, then the term “deliberate intent” as used in R.C. 2745.01 is neither redundant nor is it ignored. Adopting a “lesser” standard as argued by Klaus would relegate “inferred intent” employer intentional torts to the level of negligence or recklessness and defeat the purpose of R.C. 2745.01, which would, in turn, establish a jury question on each and every case - contrary to the intent of the General Assembly.

Requiring *direct* evidence of an employer’s knowledge rather than circumstantial evidence of what the employer should have known 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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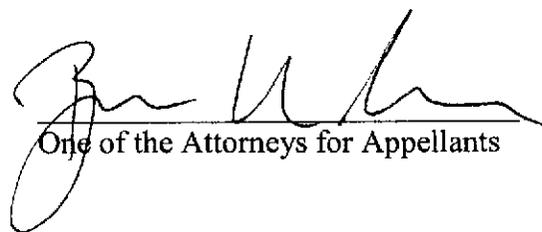
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A copy of the foregoing Appellant United Equity, Inc.'s Reply Brief was served by regular mail on December 10, 2008 on the following:

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