

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE SEVENTH DISTRICT COURT OF APPEALS,  
COLUMBIANA COUNTY, OHIO

ROSE KAMINSKI,	:	
	:	CASE NO. 2008-0857
Plaintiff-Appellant,	:	
	:	[Discretionary Appeal from
v.	:	Columbiana App. No. 2007CO-
	:	00015]
METAL & WIRE PRODUCTS CO.,	:	
	:	
Defendant-Appellee.	:	

BRIEF OF AMICUS OF OHIO AFL-CIO  
IN SUPPORT OF PLAINTIFF-APPELLANT ROSE KAMINSKI

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## **I. STATEMENT OF THE CASE AND FACTS**

Rose Kaminski was seriously injured when a heavy, unstable coil fell on her legs and feet. [Court of Appeals op. at para. 2.] The coils were balanced in an unsafe manner when changed and, as the Court of Appeals found, the "evidence shows that [the employer], through its supervisors, knew of the unsafe method used to balance the unsteady coils." [Court of Appeals op. at para. 60.]

The employer knew of the danger from these heavy, unstable coils because supervisors had seen problems with similar coils a number of times before the coil fell on Ms. Kaminski and had warned their supervisors of the danger. [Court of Appeals op. at para. 55, 56, 68.] A former supervisor at the plant had shown the plant manager safety equipment which could have made coil changing safer, but been told that the employer would not pay for the equipment. [Court of Appeals op. at para. 67].

The Court of Appeals found that "changing the heavy, unstable coils was a necessary part" of Ms. Kaminski's employment and that changing the coils "was a part of the job of being a press operator." [Court of Appeals op. at para. 61, 83.]

After her injury, Ms. Kaminski filed an intentional tort suit against the employer. The Court of Appeals reversed the trial court's grant of summary judgment in favor of the employer and found R.C. 2745.01 unconstitutional.

## II. ARGUMENT

### PROPOSITION OF LAW I:

**R.C. 2745.01 VIOLATES OH. CONST. ART. II, SEC. 34  
BECAUSE IT DOES NOT PROMOTE WORKPLACE SAFETY.**

#### A. Introduction

The purpose of R.C. 2745.01 is no different than that of the previous intentional tort statutes which this Court has found unconstitutional: "the overriding purpose of the [intentional tort] statute is to shield employers from civil liability for employee injuries caused by the intentional tortious conduct of the employer." Johnson v. B.P. Chemicals, Inc. (1999), 85 Ohio St.3d 298, at fn. 9 (bracketed material added).

This Court has recognized that providing an employer with immunity from intentional tort liability is contrary to the purpose of providing for workplace safety:

one of the avowed purposes of the Act is to promote a safe and injury-free work environment. (R.C. 4101.11 and 4101.12.)  
**Affording an employer immunity for his intentional behavior certainly would not promote such an environment,** for an employer could commit intentional acts with impunity.

Blankenship v. Cincinnati Milacron Chemicals, Inc. (1982), 69 Ohio St.2d 608, 615 (emphasis added, footnote omitted).

R.C. 2745.01 eliminates the common law intentional tort remedy unless the employer had an "intent" to injure. This violates Oh. Const. Art. II, Sec. 34, which exists to promote

workplace safety, providing:

[l]aws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes, and no other provision of the Constitution shall impair or limit this power.

Because legislation eliminating the common law intentional tort is directly opposite to legislation providing for the "comfort, health, safety and general welfare" of employees, this Court has twice previously recognized that a statute which eliminates the common law intentional tort by providing a requirement of "deliberate intent" violates Oh. Const. Art. II, Sec. 34. Brady v. Safety-Kleen Corp. (1991), 61 Ohio St.3d 624; Johnson v. B.P. Chemicals, Inc. (1999), 85 Ohio St.3d 298.

**B. This Court Has Already Determined That an Intentional Tort Statute Which Defines "Substantially Certain" to Require "Deliberate Intent" Violates Art. II, Sec. 34.**

In Brady this Court found an intentional tort statute which was virtually identical to R.C. 2745.01 was "totally repugnant to Section 34, Article II" of the Ohio Constitution. Brady at 633. There is no reason for this Court to ignore, or overrule, its clear holding in Brady that a statute such as R.C. 2745.01, which provides immunity to employers for acts which are "substantially certain" to occur under any normal meaning of those words (and for which they would be liable under the common law intentional tort), is unconstitutional.

The intentional tort statute in Brady, R.C. 4123.80(G)(1), provided that an intentional tort is an act committed:

with the intent to injure another or committed with the belief that the injury is substantially certain to occur.

R.C. 2745.01 provides that an intentional tort is an act committed:

with the intent to injure another or with the belief that the injury was substantially certain to occur.

Although the "intentional tort" definitions in both R.C. 4123.80 and current R.C. 2745.01 contain language that there may be an intentional tort when an injury is "substantially certain", both statutes defined "substantially certain" in a way which tortures the meaning of those words and makes them meaningless.

Under R.C. 2745.01, as under the statute in Brady, an act is only considered "substantially certain" if it results from "deliberate intent."<sup>1</sup>

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<sup>1</sup> R.C. 4123.80(G)(1), the statute at issue in Brady, provided that:

"Substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.

R.C. 2745.01 currently provides that:

"substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

R.C. 2745.01, like the intentional tort statute in Brady "attempts to remove a right to a remedy under common law that would otherwise benefit the employee [and] cannot be held to be a law that furthers the . . . comfort, health, safety, and general welfare of all employees.'" Brady at 633. Therefore, R.C. 2745.01 violates Art. II, Sec. 34.

**C. Redefining "Substantially Certain" to Mean "Deliberate Intent" Violates Art. II, Sec. 34.**

R.C. 2745.01 improperly gives immunity to employers that engage in (or require employees to engage in) dangerous acts which are "substantially certain" to cause harm because of the requirement that there be "deliberate intent." The requirement of "deliberate intent" harms workplace safety because it gives employers immunity to engage in activities harmful to employees which under standard tort law would be sufficient to demonstrate intent. Under the common law standard

If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, **he is treated by the law as if he had in fact desired to produce the result.**

Kunkler v. Goodyear Tire and Rubber Co.  
(1980), 36 Ohio St. 3d 135, 139  
(emphasis added).

Under R.C. 2745.01 an action which is "substantially certain" in the normal sense of the words is not compensable as an intentional tort.

The common law intentional tort provides an incentive for employers to further workplace safety. An employer subject to an intentional tort remedy has an incentive to prevent accidents which are "substantially certain" to occur.

In the present case, Ms. Kaminski was helping change a heavy, unstable coil under unsafe conditions. The employer knew that this unsafe act was required; the employer knew that there had been near accidents in the past; the employer knew that there were safer measures which could be adopted. The employer ignored this knowledge.

Under the normal meaning of "substantially certain", the harm to Ms. Kaminski was "substantially certain" and under the common law of tort the "substantial certainty" of injury would be sufficient to establish intent.

By requiring "deliberate intent" to cause harm, R.C. 2745.01 gives employers (such as the employer in the present case) immunity from being considered to have intended harm when such harm is the natural consequence of the employer's acts.

R.C. 2745.01 does not promote safety, it disparages safety. R.C. 2745.01 does the complete opposite of furthering the "health, safety and general welfare of all employees." Therefore R.C. 2745.01 violates Art. II, Sec. 34. R.C. 2745.01 unconstitutionally provides employers with immunity for their intentionally tortious acts:

any statute created to provide employers with immunity from liability for their intentional tortious conduct cannot withstand constitutional scrutiny.

Johnson at 304.

**D. Oh. Const. Art. II, Sec. 34 Limits the Legislature's Power and Prevents Adoption of a Law Harmful to Workplace Safety.**

Like the intentional tort statutes found unconstitutional in Brady and Johnson, R.C. 2745.01 eliminates the common law intentional tort remedy by requiring "deliberate intent." As is discussed above, Brady at 633 indicated that an intentional tort statute which eliminates the common law intentional tort by requiring "deliberate intent" is "totally repugnant to Section 34, Article II."

Because R.C. 2745.01 also would eliminate the common law intentional tort by requiring "deliberate intent", R.C. 2745.01 is also "totally repugnant" to Art. II, Sec. 34:

A legislative enactment that attempts to remove a right to a remedy under common law that would otherwise benefit the employee cannot be held to be a law that furthers the " \* \* \* comfort, health, safety and general welfare of all employes \* \* \*."

Brady at 633.

Because R.C. 2745.01 is "totally repugnant" to Art. II, Sec. 34, the legislature lacks authority to enact it.

In the present case the employer and its amici claim that the legislature has authority to enact R.C. 2745.01. The same

arguments regarding the claimed authority of the legislature to eliminate the common law intentional tort by statute were made by the employer and its amici in Johnson. [Johnson at 303.] This Court in Johnson rejected the claim that the legislature could act contrary to Art. II, Sec. 34 and eliminate the common law intentional tort by statute because the statute

cannot logically withstand constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of constitutional empowerment."

Johnson at 308.

The employer (and its amici) in the present case would have this Court ignore Art. II, Sec. 34, and permit R.C. 2745.01. There is no basis for this Court to ignore or reject its previous holdings regarding the importance of Art. II, Sec. 34 as a protection for the workers of Ohio; nor is there any basis for permitting the legislature to violate Art. II, Sec. 34 by eliminating the common law intentional tort.

**PROPOSITION OF LAW II:**

**R.C. 2745.01 VIOLATES OH. CONST. ART. I, SEC. 16 BECAUSE IT  
ELIMINATES THE COMMON LAW INTENTIONAL TORT.**

Under the common law intentional tort definition, an injured worker had to prove that

an act [was] committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.

Jones v. VIP Development (1984) 15 Ohio St. 3d 90, Syl. 1, bracketed material added.

Under the common law intentional tort, if "the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, **he is treated by the law as if he had in fact desired to produce the result.**" Eyffe v. Jenos, Inc. (1991), 59 Ohio St.3d 115, syl. 2 (emphasis added).

Under R.C. 2745.01, an employer that knows an injury is substantially certain to occur as a result of its conduct (given the normal meaning of "substantially certain") is exempt from intentional tort liability. Even though the employer ignored the safety of its employees and acted in a way which was certain to cause harm, there would be no tort liability because it did not "deliberately" intend to cause the harm. It just disregarded the fact that the harm was going to result from its actions.

R.C. 2745.01 eliminates the intentional tort suit unless

there is "deliberate intent" - no matter how "certain" or likely an injury is to occur from an employer's knowing disregard of workplace safety. As the Court of Appeals recognized in para. 31 of its opinion: "under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury."

This violates Oh. Const. Art. I, Sec. 16. Art. I, Sec. 16 requires that there be a **meaningful** remedy. Hardy v. VerMeulen (1987), 32 Ohio St.3d 45, 47:

When the Constitution speaks of remedy and injury to person, property or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner.'

\* \* \* **Denial of a remedy and denial of a meaningful remedy lead to the same result: an injured plaintiff without legal recourse. This result cannot be countenanced.**

Gaines v. PreTerm-Cleveland, Inc.  
(1987), 33 Ohio St.3d 54, 60, emphasis added.

R.C. 2745.01 violates Art. I, Sec. 16 by creating "injured plaintiffs without legal recourse." The intentional tort is a common law remedy which is based on the common law tort of battery.<sup>2</sup> Such a common law remedy cannot be eliminated where there is no "reasonable substitute" provided:

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<sup>2</sup> "Employer intentional tort actions are nothing but a special case of the common-law tort of battery." Brady at 640 (Brown, J., concurring).

Where a right or action existed at common law at the time the Constitution was adopted, that right is constitutionally protected, by the access-to-the-courts provision, from subsequent legislative action which abrogates or impairs that right without affording a reasonable substitute. See, generally, Gentile v. Altermatt (1975), 169 Conn. 267, 363 A.2d 1. Cf. Haskins v. Bias (1981), 2 Ohio App.3d 297. Thus, through the theory of "constitutional incorporation," one of construction, **legislation which serves to abolish or severely impair common-law remedies existing at the time the Constitution was adopted is invalid unless a reasonable substitute is provided** for the remedy which is lost.

Mominee v. Scherbarth (Ohio 1986), 28 Ohio St.3d 270, 291-292, (Douglas, J., concurring), emphasis added.

### III. CONCLUSION

Ohio has long recognized the importance of workplace safety. Art. II, Sec. 34 of the Ohio Constitution was enacted in 1912 to further workplace safety.

Not only does R.C. 2745.01 not further workplace safety - it hinders workplace safety. Under R.C. 2745.01, an employer may engage in unsafe acts which are "substantially certain" to harm employees, but avoid liability because they did not "intend" to harm the employee.

There is no justification for providing employers with immunity when they disregard safety in situations where they know harm will occur because they did not "deliberately intend" the harm.

The complete disregard of safety encouraged by R.C. 2745.01 is demonstrated by considering the criminal law. Under the criminal law, a person may be guilty of felonious assault when they "knowingly" harm another. R.C. 2903.11. "Knowingly" is defined by R.C. 2901.22(B) as follows:

**A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause** a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

[Emphasis added.]

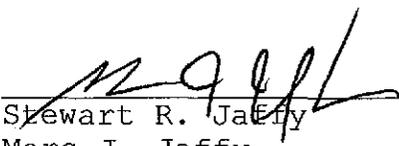
This means that an employer could engage in an act which satisfies the criminal felonious assault definition -- that is,

committed "knowingly", with knowledge that circumstances will probably cause injury -- but be free from intentional tort liability because they did not act "deliberately and intentionally."

R.C. 2745.01 is also unconstitutional because it violates Oh. Const. Art. I, Sec. 16 which "protects the right to seek redress in Ohio's courts when one is injured by another." Brennaman v. R.M.I. Co. (1994), 70 Ohio St.3d 460, 466. R.C. 2745.01 eliminates the common law intentional tort remedy against an employer, under the guise of "codifying" it. Art. I, Sec. 16 of the Constitution prohibits the legislature from eliminating a right under guise of codifying it.

For all of the foregoing reasons, R.C. 2745.01 is unconstitutional and the Court of Appeals' should be affirmed.

Respectfully submitted,



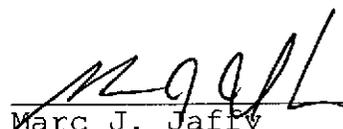
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**CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing has been served upon the following by depositing a copy in the United States Mail, postage prepaid, this 12<sup>th</sup> day of December 2008 addressed to: [1] Irene C. Keyse-Walker, Benjamin c. Sasse, TUCKER ELLIS & WEST, 1150 Huntington Building, 925 Euclid Ave., Cleveland, OH 44115, Attorneys for Defendant-Appellant Metal & Wire Products Co.; [2] David A. Forrest, Jarrett J. Northup, JEFRIES, KUBE, FORREST & MONTELEONE, 1650 Midland Building, 101 Prospect Ave. West, Cleveland, OH 44115, Attorneys for Plaintiff-Appellee Rose Kaminski; [3] Preston J. Garvin, Michael J. Hickey, GARVIN & HICKEY LLC, 181 E. Livingston Ave., Columbus, OH 43215, Attorneys for Amicus Ohio Chamber of Commerce; [4] Anne Marie Sferra, Thomas R. Sant, BRICKER & ECKLER, LLP, 100 S. Third St., Columbus OH 43215, Attorneys for Amicus National Federation of Independent Business, et al.; [5] Robert A. Minor, VORYS, SATER, SEYMOUR AND PEASE LLP, 52 E. Gay St., PO Box 1008, Columbus, OH 43216, Attorney for Amicus Ohio Self-Insurers Association; [6] Benjamin C. Mizer, Elizabeth A. Long, Todd A. Nist, OHIO ATTORNEY GENERAL'S OFFICE, 30 E. Broad St., 17<sup>th</sup> Floor, Columbus, OH 43215, Attorneys for Amicus Attorney General; [7] J.H. Huebert, PORTER WRIGHT MORRIS & ARTHUR LLP, 41 S. High St., Columbus, OH 43215, Attorney for Amicus Ohio Association of Civil Trial Attorneys; and [8] David P. Kamp, Carl J. Stich, Jr., WHITE GETGEY & MEYER CO., LPA, 1700 Fourth & Vine Tower, One West Fourth St., Cincinnati OH 45202, Attorneys for Amicus Amantea Nonwovens, LLC.

  
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**Appendix A**

**OH. Const. Art. I, Sec. 16**

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

**Appendix B**

**OH. Const. Art. II, Sec. 34**

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power.

## **Appendix C**

### **R.C. 2745.01**

(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.

**Appendix D**

**R.C. 2901.22(B)**

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

**Appendix E**

**R.C. 2903.11, excerpts**

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

\* \* \*

(D)(1) Whoever violates this section is guilty of felonious assault, a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

**Appendix F**

**Former R.C. 4121.80, excerpts**

(G) As used in this section:

(1) "Intentional tort" is an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.

Deliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance is evidence, the presumption of which may be rebutted, of an act committed with the intent to injure another if injury or an occupational disease or condition occurs as a direct result.

"Substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.