ORIGINAL

IN THE SUPREME COURT OF OHIO

Larry Hewitt,	:	
Appellee,	:	Case No. 11-2013
v.	:	On appeal from the Court of Appeals for Cuyahoga County Eighth Appellate District Case No. 10 96138
The L.E. Myers Co.,	:	
Appellant.	:	

BRIEF OF AMICI CURIAE OHIO CHAMBER OF COMMERCE, OHIO CHAPTER OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND OHIO SELF-INSURERS ASSOCIATION IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

The Ohio Chapter of the National Federation of Independent Business (NFIB) is an association with more than 24,000 members, making it the state's largest association dedicated exclusively to serving the interests of small and independent business owners. NFIB's members typically employ fewer than ten people and record annual gross sales of less than $250,000.

The Ohio Chamber of Commerce (OCC) is a trade association of businesses and professional organizations in Ohio with direct business membership in excess of 4,500 business firms and individuals. A non-profit corporation organized and existing under the laws of Ohio, the OCC represents business, trade, and professional organizations doing business within the State and has frequently participated in legislative and administrative proceeds and as amicus curiae in issues involving employer liability.

The Ohio Self-Insurers Association (OSIA) was formed in 1974 to represent Ohio's self-insuring employers in workers' compensation and employer liability issues. It is only the statewide organization that represents self-insured employers exclusively and is devoted to the issue of workers' compensation and employer liability. There are over twelve hundred self-insuring employers in Ohio. Ohio's self-insuring employers represent a significant part of the Ohio workforce and its payroll. OSIA routinely files briefs amicus curiae to present its members interests to the Ohio Supreme Court as well as other courts throughout the state.

Amici's members are vitally concerned about the potential imposition of liability created by the lower court's decision in this case.

STATEMENT OF THE CASE AND FACTS

Amici curiae concur in the statement of the case and facts and in the arguments presented in the Merit Brief of Appellant L.E. Myers Co.

ARGUMENT

Proposition of Law

THE EXCEPTIONS TO THE "EMPLOYER INTENTIONAL TORT" LAW, R.C. 2745.01, ARE NARROW AND THE LANGUAGE OF R.C. 2745.01(C) MAY NOT BE EXPANDED BY AN INTERPRETATION THAT RENDERS THE PLAIN AND UNAMBIGUOUS WORDS OF THE STATUTE MEANINGLESS.

The Court of Appeals below construed R.C. 2745.01, the Ohio "employer international tort law", in a manner that undermines the intent of the General Assembly and is inconsistent with the decision of this Court in Kaminski v. Metal & Wire Prods. Co. (2010), 125 Ohio St. 3d 250. The case now before the Court involves an interpretation of the law specifying when an Ohio employer might be liable to pay twice for an industrial injury: once through the workers' compensation system; the other in a direct liability action. Virtually, every Ohio employer could be affected by this decision.

When this Court decided Blankenship v. Cincinnati Milacron Chemicals, Inc. (1982), 69 Ohio St. 2d 608, the constitutionally and statutorily prescribed exclusivity of the Ohio workers' compensation remedy vanished. Two years later, in Jones v. VIP Development (1984), 15 Ohio St. 3d 90, the Court not only defined the concept of an intentional tort in the employment setting but also held that an injured worker could recover workers' compensation benefits and pursue a direct liability claim: in essence, recover twice for the same injury. The General Assembly responded on four occasions to address the abrogation of the constitutional immunity for work-related injuries.

The Ohio workers' compensation law was enacted to create a comprehensive system for the resolution of workplace accidents and injuries. In exchange for the swift and certain compensating of employees who are injured in the course of their employment, Ohio employers are granted an immunity from liability. Section 35, Article II of the Ohio Constitution and Ohio Revised Code Section 4123.74 (hereinafter "R.C. 4123.74") both establish workers' compensation as the exclusive remedy for workplace injuries. This Court has recognized a limited exception to the exclusivity of the workers' compensation remedy: that is the rare case where an injury results from an employment intentional tort committed by the employer against its employee. Blankenship v. Cincinnati Milacron Chemicals, Inc., supra. Despite multiple attempts[1] by this Court to clarify the definition of an employment intentional tort, there remained uncertainty and inconsistency as to the degree of culpable conduct that could give rise to an employment intentional tort. For example, in his concurring opinion in Brady v. Safety-Kleen Corp. (1991), 61 Ohio St. 3d 624, 642, Justice Herbert Brown noted that immediately after the Court allowed intentional tort claims to proceed against employers, many actions which would otherwise sound in negligence were being filed and litigated as intentional torts:

> This trend reached the limit of absurdity in Van Fossen, when we were presented with an employer "intentional" tort based on the simple slip and fall. [citation omitted]

Thus, notwithstanding the exclusivity of the workers' compensation remedy, many Ohio employers were forced to defend costly intentional tort cases while at the same time

[1] See, e.g., Van Fossen v. Babcock & Wilcox Co. (1998), 36 Ohio St. 3d 100; Pariseau v. Wedge Products, Inc. (1988), 36 Ohio St. 3d 124; Kunkler v. Goodyear Tire & Rubber Co. (1988), 36 Ohio St. 3d 135; Fyffe v. Jeno's, Inc. (1991), 59 Ohio St. 3d 115.

their injured workers were receiving the compensation and benefits provided under the Ohio workers' compensation system for the very same injuries.

In 2005, the General Assembly enacted R.C. 2745.01, which provides in its entirety:

> (A) In an action brought against an employer by an employee, or by the defendant survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer should 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 the 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 a 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, a contract, promissory estoppel or defamation.

In two separate opinions issued on March 23, 2010, this Court upheld the constitutionality of R.C. 2745.01. Kaminski, supra: Stetter v. R.J. Corman Derailment Servs. (2010), 25 Ohio St. 3d 280. The history of the Ohio experience with employer intentional torts was set forth in detail in the majority's opinion in Kaminski. Reading that recitation makes it clear that R.C. 2745.01 was enacted in direct response to Ohio

courts' interpreting when an injured worker may pursue a direct liability action against his or her employer based on a claim of intentional tort, despite the constitutional and statutory immunity provided under the workers' compensation laws. In upholding the constitutionality of the Ohio employment intentional tort law, this Court observed in its majority decision that the exception to the exclusivity of the workers' compensation remedy was intended to be a narrow one:

> As an initial matter, we agreed with the Court of Appeals that the General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional tort only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D) .
>
> * * *
>
> This view is supported by the history of employer intentional-tort litigation in Ohio and by a comparison of the current statute to previous statutory attempts. See, e.g., Van Fossen, 36 Ohio St. 3d at 108-109, 522 N.E.2d 49, holding that former R.C. 4121.80(G) (which bore a marked resemblance to current R.C. 2745.01(B)) imposed "a new, more difficult statutory restriction upon" an employee's ability to bring an employer intentional-tort action; Johnson, 85 Ohio St. 3d at 310, 707 N.E.2d 1107 (Cook, J., dissenting) ("by enacting [former] R.C. 2745.01, the General Assembly sought to statutorily narrow [the] common-law definition [of employer intentional tort] to 'direct intent' torts only"). Accordingly, our task in this case and in Stetter is to determine whether the statute, insofar as it intends to significantly restrict actions for employer intentional torts, survives scrutiny under certain provisions of the Ohio Constitution.

Kaminski, supra, at page 263. The Court went on to hold that the legislative response to the problems created by the common law employer intentional tort remedy would survive such scrutiny.

In the case now before the Court, however, neither the trial court nor the court of appeals apparently felt constrained by the legislators' efforts or by this Court's majority holding. Accordingly, their decisions were not faithful to the statute nor were they faithful to this Court's interpretation of the statute in Kaminski. The case now before the Court was decided under the first phrase of division (C) of the statute:

> Deliberate removal by an employer of an equipment safety guard...creates a rebuttal presumption that the removal...was committed with the intent to injury another if an injury...occurs as a direct result.

The court of appeals chose to ignore the plain language of the statute so that it could create liability in accordance with its view of what conduct should be actionable:

> Just as in McKinney [citation omitted], in the instant case, L.E. Myers' actions cannot be described as reckless. Rather, after thorough consideration, L.E. Myers' supervisors made a deliberate decision to place Hewitt in close proximity to energized wires without wearing protective rubber gloves or sleeves. Their actions amounted to the deliberate removal of an equipment safety guard when they instructed Hewitt, a second-step apprentice lineman, not to wear his protective gloves and sleeves and by sending him alone and unsupervised up in the bucket to work with excessive amounts of electricity, despite the known safety measures and risks. (emphasis added)

Such an analysis and inference might have been appropriate in a case decided under the common law standard. However, this case arose after the effective date of R.C. 2745.01, a statute held by this Court in Kaminski (1) to be the exclusive vehicle for pursuing an employer intentional tort and (2) to be a statute that was to be strictly and narrowly construed. Mr. Hewitt was not injured while he was working on equipment -- he came into contact with a power line. Mr. Hewitt's injury did not arise because a guard was deliberately removed from equipment -- there never was a guard. The appellate court did not find that the power line itself had had a safety guard that had

been deliberately removed by the employer. Rather, the court found that gloves and sleeves were not provided which it found "amounted to" the deliberate removal of an equipment guard. The appellate court's notion of fairness may have been offended by the facts underlying Mr. Hewitt's work related injury. However, this Court has held that R.C. 2745.01 reflected the legitimate exercise of legislative authority and was constitutional. This Court further noted that the intent of the General Assembly was unmistakable: the intentional tort exception to exclusivity of the workers' compensation remedy was to be narrow. The appellate court's expansion of the exception is directly contrary to both the statute and this Court's decisions in Kaminski and Stetter.[2,3]

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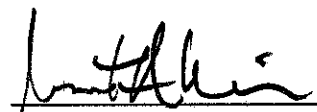
[2] For a discussion of the undefined terms of "equipment safety guard" and "deliberate removal", please see the decision in Fickle v. Conversion Technologies International, 2011 W.L. 2436750 (6th App. Distr., June 17, 2011). In that case, the Court adhered to the principle that undefined terms in a statute are to be given their plain and ordinary meaning. Importantly in the case involving Mr. Hewitt and L.E. Myers, nothing was ever removed, whether deliberately or inadvertently, from a piece of equipment.

[3] The appellate court also erred in interpreting a statute that is clear on its face and needs no interpretation. See, e.g., Cline v. Ohio Bureau of Motor Vehicles (1991), 61 Ohio St.3d 93.

CONCLUSION

For the above reasons, and those set forth in the Merit Brief of Appellant L.E. Myers Co., amici curiae respectfully request that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,



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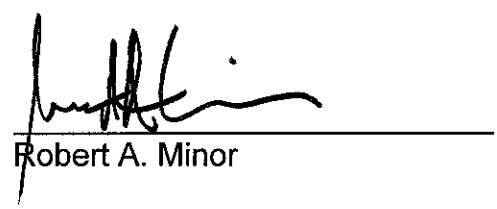

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