

IN THE SUPREME COURT OF OHIO

12-1436

**KENNETH TICHON and PENNIE
TICHON,**

Plaintiffs/Appellees,

v.

WRIGHT TOOL & FORGE, et al.,

Defendant/Appellant

: CASE NO. _____
:
: On Appeal from the Summit County Court of
: Appeals, Ninth Appellate District
:
: Court of Appeals
: Case No. 26071
:
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:

**APPELLANT, WRIGHT TOOL & FORGE'S MEMORANDUM IN SUPPORT OF
JURISDICTION**

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EXPLANATION AS OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST

This case presents two important issues for all employers within the State of Ohio, to wit: (1) what is the correct statute of limitations that applies to Ohio's recently enacted intentional tort statutory cause of action, R.C. 2745.01,¹ and (2) whether this Court's prior statute of limitations analysis for the pre-existing common law workplace intentional-tort cause of action (*Funk v. Rent-All Mart, Inc.*, 91 Ohio St. 3d 78, 2001-Ohio-270, 742 N.E. 2d 127 (2001)) should solely control the analysis used to determine the correct statute of limitations governing R.C. §2745.01 causes of action.

In reversing the trial court's decision² that the one-year assault and battery limitations period in R.C. 2305.111 now controls R.C. 2745.01 workplace intentional-tort claims, the split³ decision by the court of appeals not only erred in adopting the two year "bodily injury" statute of limitations period under R.C. 2305.10, but also erred in adopting and applying the non-statutory statute of limitation selection analysis which pre-dated R.C. 2745.01 when Ohio workplace intentional tort claims were derivative of the common law. Where, as here, the available civil cause of action is a creature of statute rather than the common law, the limitations-selecting analysis is primarily driven by the General Assembly's statutory text. *Ohio Bureau of Workers' Compensation v. McKinley*, 130 Ohio St. 3d 156, 2011-Ohio-4432, 956 N.E. 2d 814, ¶¶ 16-30; *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St. 3d 296, 2005-Ohio-1736, 825 N.E. 2d 599, ¶¶ 12-13. When overriding the pre-R.C. 2745.01 intentional tort common law, the General

¹ Am. H.B. No. 498, 150 Ohio Laws, Part VI, 5533 (April 7, 2005).

² *Tichon v. Wright Tool & Forge*, Summit Cty. Case No. CV 2011-04-2304 (Comm. Pls. 2011).

³ *Tichon v. Wright Tool & Forge*, 9th Dist. No. 26071, 2012-Ohio-3147 (Whitmore, P.J., dissenting).

Assembly used clear, concise, and unambiguous text in demanding “the intent to injure another” or “deliberate intent to cause an employee to suffer injury” resulting from “deliberate removal by an employer of an equipment safety guard”. R.C. 2745.01(A)-(C). The General Assembly’s unambiguous text is the quintessential definition of an assault or battery rather than simple negligence-based “bodily injury”.

It is no longer subject to genuine debate that the General Assembly enacted R.C. 2745.01 in derogation of the then developed common law, so as “...to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury”. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, 927 N.E. 2d 1066, ¶ 56. *See also, Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St. 3d 496, 2008-Ohio-937, 885 N.E. 2d 204, ¶ 17 (The General Assembly in R.C. 2745.01 “modified the common-law definition of an employer intentional tort” by rejecting “the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct”). Certain members of this Court have even observed:

“Under the definitional requirements contained in the [R.C. §2745.01] 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.”

Kaminski v. Metal & Wire Prods. Co., 125 Ohio St. 3d 250, 2010-Ohio-1027, 927 N.E. 2d 1066, ¶ 116 (Pfeifer, J., *dissenting*) (quoting, *Johnson v. BP Chems., Inc.*, 85 Ohio St. 3d 298, 306, 1999-Ohio-267, 707 N.E. 2d 1107).

The decision by the majority members of the court of appeals ignores both the unambiguous text of R.C. 2745.01, and this Court’s interpretation of that statutory text in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, 927 N.E. 2d 1066

and *Stetter v. R.J. Corman Derailment Svcs., LLC*, 125 Ohio St. 3d 280, 2010-Ohio-1029, 927 N.E. 2d 1092. By selecting the more general “bodily injury” statute of limitations period in R.C. 2305.10, the appellate panel majority chose a limitations period that has been traditionally reserved for *negligence* based causes of action. *Rome v. Flower Memorial Hosp.*, 70 Ohio St. 3d 14, 16, 1994-Ohio-574, 635 N.E. 2d 1239; *Doe v. First United Methodist Church*, 68 Ohio St. 3d 531, 536, 1994-Ohio-531, 639 N.E. 2d 402. Moreover, by relying solely on this Court’s earlier-stated workplace intentional tort statute of limitations analysis which pre-dated R.C. 2745.01 (*Funk v. Rent-All Mart, Inc.*, 91 Ohio St. 3d 78, 2001-Ohio-270, 742 N.E. 2d 127), the appellate panel majority invoked and applied the wrong legal analysis to the exclusion of the General Assembly’s carefully chosen text.

The implications of the decision of the court of appeals affect every employer and business in Ohio. Invariably, when a new statute is enacted by the General Assembly, a host of pure legal issues are brought to the forefront. Is the statute on its face Constitutional? *But see, Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, 927 N.E. 2d 1066. Do the procedural nuances of the statute pass Constitutional muster? *But see, Stetter v. R.J. Corman Derailment Svcs., LLC*, 125 Ohio St. 3d 280, 2010-Ohio-1029, 927 N.E. 2d 1092. What are the outer contours and accompanying burdens of proof in applying the new statute? *Houdek v. Thyssenkrupp Materials NA, Inc.*, Ohio S. Ct. Case No. 2011-1076 (2012). And, when the General Assembly enacts a statute providing for a new or amended cause of action “...without providing a statute of limitations, it shifted that [statute of limitations selection] burden to this [Supreme] Court”. *Cosgrove v. Williamsburg of Cincinnati Mngmt. Co., Inc.*, 70 Ohio St. 3d 281, 293, 1994-Ohio-295, 638 N.E. 2d 991, 999 (1994) (Moyer, C.J., Sweeney, Douglas, Wright, JJ., *concurring*).

This Court has historically been vigilant in defining for Ohio litigants the governing statute of limitations for statutory-based claims. *Ohio Bureau of Workers' Compensation v. McKinley*, 130 Ohio St. 3d 156, 2011-Ohio-4432, 956 N.E. 2d 814; *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St. 3d 296, 2005-Ohio-1736, 825 N.E. 2d 599; *Oker v. Ameritech Corp.*, 89 Ohio St. 3d 223, 2000-Ohio-139, 729 N.E. 2d 1177; *Cosgrove v. Williamsburg of Cincinnati Mngmt. Co., Inc.*, 70 Ohio St. 3d 281, 1994-Ohio-295, 638 N.E. 2d 991; *Meyer v. UPS*, 122 Ohio St. 3d 104, 2009-Ohio-2463, 909 N.E. 2d 106; *Nadra v. MBAH*, 119 Ohio St. 3d 305, 2008-Ohio-3918, 893 N.E. 2d 829. Indeed, having clarity and certainty over the appropriate statute of limitations that controls a given General Assembly enactment benefits both plaintiffs and defendants. Plaintiffs will have comfort in knowing the outside date in which their asserted claims can be commenced without being procedurally barred. "Once expired, the statute forecloses the claim and provides repose for potential defendants". *Liddell v. SCA Srvc. of Ohio*, 70 Ohio St. 3d 6, 10, 1994-Ohio-328, 635 N.E. 2d 1233. Defendants gain the certainty of knowing the point in time in which arguably relevant data, records, and electronically stored information can comfortably be discarded because the limitations bar has lapsed.

As it stands right now, R.C. 2745.01 is fraught with uncertainty. The trial court when examining the text and structure of R.C. 2745.01 determined that the one-year assault and battery statute of limitations period in R.C. 2305.111 controlled Plaintiffs' claim. *Tichon v. Wright Tool & Forge*, Summit Cty. Case No. CV 2011-04-2301 (Comm. Pls. 2011). Two members of the appellate panel were of the opinion that the pre-R.C. 2745.01 limitations period for "bodily injury" codified at R.C. 2305.10(A) should govern. *Tichon v. Wright Tool & Forge*, 2012-Ohio-3147, ¶ 14 (Moore, Carr, JJ.). A third member of the appellate panel was of the opinion that the one-year assault and battery limitations period should govern. *Tichon v. Wright Tool & Forge*,

2012-Ohio-3147, ¶ 24 (Whitmore, P.J., *dissenting*). There does presently exist, then, a wide divergence of opinion amongst distinguished jurists as to what the law is.

And, because this Court has previously defined the limitations-selecting analysis when workplace intentional torts were governed by the common law (*Funk v. Rent-All Mart, Inc.*, 91 Ohio St. 3d 78, 2001-Ohio-270, 742 N.E. 2d 127), it is vitally important to visit the limitations-selecting analysis now that workplace intentional torts are statutorily based, and defined in such a manner that the developed common law has been effectively overruled.⁴

The analysis and the decision of the Court of Appeals are contrary to the General Assembly's intent, and the detailed text of R.C. 2745.01. This Court should, accordingly, exercise its discretionary jurisdiction to hear this important case and review the decision by the Ninth Appellate District.

STATEMENT OF THE CASE AND FACTS

On March 9, 2010, Plaintiffs Kenneth Tichon and Pennie Tichon filed a civil suit in the Summit County Court of Common Pleas against, *inter alia*, Wright Tool & Forge ("Wright Tool"), Kenneth Tichon's former employer (Case No. CV-2010-03-1617).⁵ That Complaint alleged that Wright Tool had committed a "substantially certain" "intentional tort" against Plaintiff Kenneth Tichon through an industrial injury that he had suffered on March 10, 2008 and that Ms. Pennie Tichon had suffered and experienced loss of consortium (First Compl. ¶¶ 20,

⁴ *Restatement of the Law (Second) Torts*, Section 8(A) ("The word 'intent' is used throughout the Restatement of this subject to denote that the actor desires to cause the consequences of his act or that he believed the consequences are substantially certain to result from it"). *But see, Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St. 3d 496, 2008-Ohio-937, 885 N.E. 2d 204, ¶ 17 (R.C. §2745.01 eliminated "the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct").

⁵ <http://www.cpcclerk.co.summit.oh.us/Dockets.asp?CaseID=CV2010031617&CT=C&Suffix>. The complaint directly implicated in this appeal was designated by Plaintiffs' counsel as a "re-filed" matter.

33). On May 17, 2010, Plaintiffs voluntarily dismissed their first-filed complaint, without prejudice under Ohio R. Civ. P. 41(A)(1).

On April 26, 2011, Plaintiffs re-filed their civil suit in the Summit County Court of Common Pleas, again naming Wright Tool & Forge as one of many Defendants. Plaintiffs' re-tooled complaint alleged: "*On March 10, 2008*, Plaintiff, KENNETH TICHON, while operating the hammer press [at Wright Tool] described above during the course and scope of his agency and/or employment with Defendant, WRIGHT, did sustain permanent and serious personal injury when the press cycled" (emphasis added). It was specifically alleged by Plaintiffs that Wright Tool "had actual knowledge of the dangerous condition and characteristics of the hammer press" and deliberately removed a safety guard, all "with intent to injure [Plaintiff Kenneth Tichon]".⁶ On May 17, 2011, Defendant Wright Tool moved, under Ohio R. Civ. P. 12(B)(1) and (6), to summarily dismiss Plaintiffs' Complaint because it was time-barred by application of the one-year statute of limitations period in R.C. 2305.111. Plaintiffs opposed that motion, urging the trial court to instead adopt and apply the two-year statute of limitations period under R.C. 2305.05.

⁶ Plaintiffs' second-filed complaint also claimed and alleged that Defendant Wright Tool operated the at-issue hammer press "...in violation of the applicable regulations and/or standards...set forth in Ohio Administrative Code, including, but not limited to, O.A.C. § 4123:1-505(D)(2) requiring the Defendant to disengage equipment to include the noted hammer press from its power supply and O.A.C. § 4123:1-5-11(C)(1) requiring blocking of equipment including, but not limited to, the hammer press while work was being performed on said press". In its Ohio R. Civ. P. 12(B)(6) petition, Wright Tool argued that any alleged violations of Ohio's published specific safety regulations for workplaces were matters within the exclusive jurisdiction of the Ohio Industrial Commission. See, *State ex rel. Kirby v. S.G. Loewendick & Sons* (1992), 64 Ohio St. 3d 433, 438, 596 N.E. 2d 460 ("An employee can file a VSSR [Violation of Specific Safety Regulation] application only with the Commission"). In their appellate brief to the Ninth Appellate District, Plaintiffs did not pursue or otherwise challenged this aspect of the trial court's summary dismissal order.

Plaintiffs' Complaint, as pled, alleged certain facts so as to fit Plaintiffs' claims within the narrow confines of R.C. 2745.01. Thus, it was specifically alleged that Defendant "had actual knowledge of the dangerous condition and characteristics of the hammer press" and deliberately, and purposely removed a safety guard, all "with intent to injure [Plaintiff Kenneth Tichon]". The lone claim asserted against Wright Tool was one under R.C. 2745.01, and the date of Plaintiff's workplace injury – "on March 10, 2008" – was expressly pled.

On July 13, 2011, the trial court issued a Memorandum Opinion and Order, and corresponding Judgment Entry determining that the appropriate statute of limitations to apply to a R.C. 2745.01 intentional tort cause of action, and particularly to the cause of action as pled by Plaintiffs here, was the one-year limitations period in R.C. 2305.111. Because, as pled, Plaintiff Kenneth Tichon's alleged "intentional tort" industrial injury occurred on March 10, 2008, and because neither the first-filed nor second-filed complaints of Kenneth Tichon were commenced within one-year as required by R.C. 2305.111, the matter was ordered dismissed, with prejudice. Since Ms. Pennie Tichon's loss of consortium claim was wholly derivative of Plaintiff Kenneth Tichon's underlying intentional tort cause of action, the trial court ordered it dismissed, as well.⁷ Because Plaintiffs' second-filed Complaint included other causes of action, asserted against other parties, the trial court anointed its Judgment Entry with the Ohio R. Civ. P. 54 "No Just Cause for Delay" phrase. On August 11, 2011, Plaintiffs noticed their appeal.

On July 11, 2012, a fractured court of appeals reversed the Summit County Court of Common Pleas, and held that R.C. 2745.01 claims are more properly subject to the two-year statute of limitations period under R.C. 2305.10(A). *Tichon v. Wright Tool & Forge*, 9th Dist. No.

⁷ There was no claim or argument in the trial court by Plaintiffs' counsel that Ms. Pennie Tichon's loss of consortium claim should be subject to an alternative statute of limitations period, or that it should not be summarily dismissed in the wake of Plaintiff Kenneth Tichon's intentional tort claim being dismissed.

26071, 2012-Ohio-3147, ¶ 14. In reaching this pure legal conclusion, the Ninth Appellate District did not draw its determination from R.C. 2745.01's exacting text, but rather used only the limitations-period selecting analysis for common law workplace intentional tort claims. *Id.* at ¶ 6. Although the appellate court found that, as pled, Plaintiffs had alleged that Defendant had committed an "affirmative, overt act", the Court nevertheless concluded that the one-year assault and battery statute of limitations in R.C. 2305.111(B) could only be invoked where there is offensive physical contact by the Defendant. *Id.* at ¶ 10. Without a requisite "personal touching", according to the court of appeals, there could not possibly exist an assault or battery notwithstanding that R.C. 2745.01 "...permit[s] recovery for employer intentional torts only when an employer acts with specific intent to cause an injury".⁸ *Id.* at ¶ 11.

Ninth Appellate District Presiding Judge Beth Whitmore dissented. *Id.* at ¶¶ 16-24. Judge Whitmore held that the mere common law analysis for limitations-selection "is no longer viable" in light of the General Assembly's codification of workplace intentional torts in R.C. §2745.01. *Id.* at ¶ 17. Drawing upon the Ninth Appellate District's prior rulings,⁹ dissenting Judge Whitmore observed:

A person is subject to liability for battery when he acts intending to cause a harmful or offensive contact, and when a harmful contact results. To make the actor liable for battery, the harmful bodily conduct must be caused by an act done by the person whose liability is in question. In order to be classified as a battery, the actual nature of the action must claim an overt, positive, or affirmative act on the part of the Defendant.

Id. at ¶ 19.

⁸ *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, 927 N.E. 2d 1066, ¶ 56.

⁹ *Dawson v. Astrocosmos Metallurgical, Inc.*, 9th Dist. No. 02CA0025, 2002-Ohio-6998, ¶¶ 20-21.

Dissenting Judge Whitmore was of the opinion that: “The trial court correctly concluded that the Tichons pleaded a battery and that their claims against Wright Tool are barred by the one-year statute of limitations contained in R.C. §2305.111(B)”. *Id.* at ¶ 24.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: When Selecting the Statute of Limitations that Controls a Statutory-Based Claim, the Analysis Should Focus on the General Assembly’s Chosen Text.

In its opinion, the court of appeals retreated to a common law analysis in the face of the General Assembly’s promulgated statutory text at R.C. 2745.01. Thus, the court of appeals became mired in defining exactly what is a common law “battery”, demanding not only an overt act,¹⁰ but concurrent “intentional, offensive touching”. *Tichon v. Wright Tool & Forge*, 9th Dist. No. 26071, 2012-Ohio-3147, ¶¶ 9-13. Additionally, the majority panel ignored the R.C. 2745.01 statutory text when performing its limitations-selection analysis, and instead summoned forth case law that established the tests for choosing a statute of limitations when purely common law causes of action are at bar. *Id.* at ¶¶ 6-7 (citing, *Funk v. Rent-All Mart, Inc.*, 91 Ohio St. 3d 78, 2001-Ohio-270, 742 N.E. 2d 127; *Love v. Port Clinton*, 37 Ohio St. 3d 98, 524 N.E. 2d 166 (1988)). This analytical approach had the effect of undermining the General Assembly’s conscious desire to overturn what was the former, established common law through its enactment of R.C. 2745.01. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, 927 N.E. 2d 1066, ¶ 56.

¹⁰ The court of appeals correctly concluded that Plaintiffs’ Complaint, as drafted, alleged the existence of the requisite “affirmative, overt act” by Defendant. *Tichon v. Wright Tool & Forge*, 9th Dist. No. 26071, 2012-Ohio-3147, ¶ 10.

The dissent, on the other hand, took into account the General Assembly's carefully chosen text in R.C. 2745.01. *Id.* at ¶¶ 20-21. The dissent also properly considered exactly what Plaintiffs had pled in their complaint so as to arguably fall within the umbrella of R.C. 2745.01. *Id.*

When civil claims have been defined and made available by the General Assembly through a statute, this Court has instructed the lower courts that the limitations-selection analysis should commence with an examination of the language of the statute since that is the most accurate way to ascertain legislative intent. *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St. 3d 296, 2005-Ohio-1736, 825 N.E. 2d 599, ¶ 12; *Cosgrove v. Williamsburg of Cincinnati Mngmt. Co., Inc.*, 70 Ohio St. 3d 281, 283, 1994-Ohio-295, 638 N.E. 2d 991. The statutory text selected by the General Assembly controls, even where the developed common law may apply an altogether different meaning to words and phrases. *Ohio Bureau of Workers' Compensation v. McKinley*, 130 Ohio St. 3d 156, 2011-Ohio-4432, 956 N.E. 2d 814, ¶¶ 20-22.

Through R.C. 2745.01, the General Assembly defined the limited exception to Ohio's statutory immunity for industrial injuries by carefully defining the statutory cause of action as a battery:

(A) In an action brought against an employer by an employee, or by the defendant's 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 tortuous act *with intent to injure another* or with 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 rebuttal 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.

R.C. 2745.01(A)-(C)(emphasis added). Thus, although the common law phrase “substantially certain” was kept intact by the General Assembly, that phrase took on an altogether new and more restrictive meaning:

“When we consider the definition of ‘substantial certainty’, it becomes apparent that an employee does not have two ways to prove an intentional tort claim as R.C. §2745.01(A) suggests. The employees’ two options of proof become:

- (1) The employer acted with intent to injure; or
- (2) The employer acted with deliberate intent to injure.

Thus, under R.C. §2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury”.

Kaminski v. Metal & Wire Prods. Co., 7th Dist. No. 07-CO-15, 175 Ohio App. 3d 227, 2008-Ohio-1521, *adopted and approved in*, *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, 927 N.E. 2d 1066.

Even if invoking solely common law analytical principles to the exclusion of statutory text were the proper legal approach, the court of appeals nevertheless erred in opining that only “offensive touching” could arguably rise to the level of a civil battery. *Alteri v. Colasso*, 168 Conn. 329, 362 A. 2d 798 (1975); *Hill v. State*, 63 Ga. 578, 1879 Ga. LEXIS 284 (1879); *People v. Walker*, 291 Ill. App. 3d 597, 683 N.E. 2d 1296; *People v. Hartzol*, 43 Ill. App. 3d 924, 357 N.E. 2d 729; *Cooper v. Indiana*, 2009 Ind. App. Unbup. LEXIS 617.

Proposition of Law No. II: The One Year Statute of Limitations in R.C. §2305.111(B) Governs Statutory Workplace Intentional Tort Claims Under R.C. §2745.01.

The drafted complaint in this dispute was replete with references to purported “overt, positive or affirmative acts”. Thus, Plaintiffs alleged that Wright Tool & Forge “provided training...and did by their instruction and supervision *require that Plaintiff’s hands come into direct contact with the hammer press....*” Additionally, Plaintiffs alleged that Wright Tool “did deliberately remove a guard” that would have precluded Plaintiff Kenneth Tichon’s contact with the working components of the injurious hammer press. These sort of allegations smack of civil battery.

What’s more, Plaintiff’s lone alternative statute of limitations argued before the trial and appellate courts, R.C. 2305.10 for “bodily injury,” cannot carry the day because that particular statute of limitations period has generally been reserved for negligent-based claims. *Doe v. First United Methodist Church* (1994), 68 Ohio St. 3d 531, 1994-Ohio-531, 629 N.E. 2d 402; *Rome v. Flower Memorial Hosp.*, 70 Ohio St. 3d 14, 1994-Ohio-574, 635 N.E. 2d 1239. Additionally, R.C. 2305.11 is the more specific statute of limitations to apply, rather than the general R.C. 2305.10 “bodily injury” statute of limitations. R.C. 1.51 (specific governs over the general in the statutory application exercise).

Although not part of the majority panel’s analysis, Appellees argued in the courts below that a vague, non-descript gratuitous comment by the Legislative Services Commission served to demonstrate that a one-year statute of limitations should not be applied to R.C. 2745.01. The sum and substance of that Legislative Services Commission comment was: “*It appears then that the statute of limitations for an employment intentional tort would be two years*”. The Legislative

Services Commission's gratuitous opinions have often been rejected by this Court. *City of Lima v. State of Ohio*, 122 Ohio St. 3d 155, 2009-Ohio-2597, 909 N.E. 2d 616; *Dialysis Clinic v. Leven Tax Comm.*, 127 Ohio St. 3d 215, n. 3, 2010-Ohio-5071, 938 N.E. 2d 329. In fact, the Legislative Services Commission and its *ipsi dixit* does not even enter into the legal analysis. *Browning v. Burt*, 66 Ohio St. 3d 544, 566-68, 1993-Ohio-178, 613 N.E. 2d 993.

Ohio is not the only state to have codified its "intentional tort" exception to worker's compensation exclusivity. Thus, Michigan's workplace intentional tort statute reads:

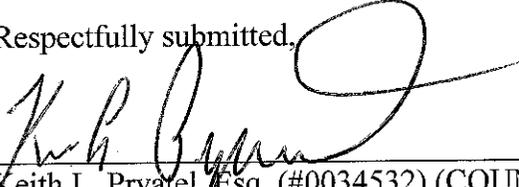
An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury.

M.S.A. §13.237(131)(1); M.S.L. §418.131(1). Like R.C. 2745.01, "substantial certainty" that injury was likely to occur is not enough to meet the Michigan statutes high demands. *Oaks v. Twin City Foods*, 198 Mich. App. 296, 297, 497 N.W. 2d 196 (1993). Michigan has selected and applies its assault and battery limitations periods to its intentional tort workplace injury statute. *Burrow v. Overton*, 1996 Mich. App. LEXIS 2160, *8 (Mich. App: 1996) (applying M.S.A. §27A. 5805(2)). The State of Montana has followed suit with respect to its statutory workplace intentional tort exception to worker's compensation immunity. *Markovich v. Cenex Harvest States Co-Op*, 2003 ML 1832, 2003 Mont. Dist. LEXIS 3023 (applying section 39-71-413). Ohio should follow suit.

CONCLUSION

For the reasons detailed above, this case involves matters of public and great general interest. Appellant Wright Tool & Forge respectfully requests that this Court accept discretionary jurisdiction in this case so that the important, statewide issues presented can be reviewed on the merits.

Respectfully submitted,



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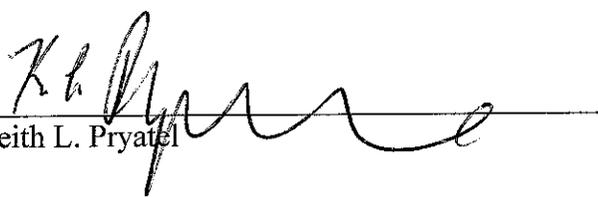
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Appellant Wright Tool & Forge's Memorandum in Support of Jurisdiction was served upon the following by first-class U.S. mail, postage prepaid, on this 22nd day of August, 2012:

Clerk of Courts
Supreme Court of Ohio
65 South Front Street, 8th Floor
Columbus, Ohio 43215-3431

and

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APPENDIX

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY DANIEL HARRIGAN

KENNETH TICHON, et al.,)

Plaintiffs,)

vs.)

WRIGHT TOOL & FORGE, et al.,)

Defendants.)

2011 JUL 13 PM 3:29
CASE NO.: CV2011-04-2304
SUMMIT COUNTY
CLERK OF COURTS
JUDGE PAUL J. GALLAGHER

JUDGMENT ENTRY

This matter is before the Court upon Defendant Wright Tool & Forge's Motion to Dismiss. Plaintiffs have responded in opposition.

FACTUAL & PROCEDURAL HISTORY

Plaintiffs' complaint for personal injuries states Kenneth Tichon was employed by Wright Tool & Forge as a hammer press operator and on March 10, 2008, during the course of his employment, he sustained severe injury when the press cycled, requiring amputation above the elbow of his right arm. Mr. Tichon alleges the hammer press and its controls were in a dangerous condition, that Wright Tool & Forge had knowledge of the dangerous condition and the dangerous circumstances under which Mr. Tichon was required to perform his job. Mr. Tichon alleges that the hammer press and / or the manner in which he was required to operate the press was in violation of certain standards set forth in the Ohio Administrative Code and that Wright Tool & Forge had deliberately removed a guard from the hammer press or the foot pedal of the press that would have prevented accidental contact with the operating mechanism for the press or its foot pedal. Pursuant to R.C. §2745.01(C) an employer's deliberate removal of an equipment safety guard "creates a rebuttable presumption that the removal...was committed with the intent to injure another if an injury or an occupational disease or condition occurs as a direct result." R.C. §2745.01(C). And, Mr. Tichon asserts Wright Tool & Forge "act[ed] with deliberate intent to injure" him.

In the second claim for relief, Mr. Tichon asserts Wright Tool & Forge's conduct was willful, wanton, intentional and / or with actual malice, thus entitling him to punitive damages.

He also asserts product liability claims against Defendants Ajax Manufacturing Co., Chambers Engineering Co., and John Does 4 and 5, alleging that the hammer press and its controls were defective and unreasonably dangerous and negligently designed, manufactured, repaired, modified, altered, and / or maintained. He states the hammer press and its controls were defective in manufacture or construction, defective in design or formulation, defective due to inadequate warnings or instructions and / or were defective because they did not conform to manufacturer's representations.

The third claim for relief sets forth a loss of consortium claim for Mr. Tichon's spouse, Pennie Tichon.

Wright Tool & Forge moved to dismiss the claims alleged against it as barred by the statute of limitations and for failure to state a claim upon which relief could be granted. First, Wright Tool & Forge asserts any alleged violations of the Ohio Administrative Code lie within the exclusive jurisdiction of the Industrial Commission of Ohio. Second, it asserts that Mr. Tichon's employer intentional tort claim, pursuant to R.C. §2745.01 is subject to the one-year statute of limitations governing assault and battery as set forth in R.C. §2305.111, and the complaint is facially time-barred.

In opposition, Plaintiffs state the allegations associated with certain violations of the Ohio Administrative Code are simply further evidence of Defendants' liability pursuant to R.C. §2745.01 and the Industrial Commission has already investigated these claims and issued a full report. Plaintiffs do not request an independent determination as to whether certain code provisions were violated, but they intend to present evidence of code violations through expert witness testimony independent of the Industrial Commission. Plaintiffs also argue the employer intentional tort enumerated in R.C. §2745.01 is governed by the two-year statute of limitations set forth in R.C. §2305.10 and as established in *Funk v. Rent-All Mart*, 91 Ohio St.3d 78, 2001-Ohio-270, 742 N.E.2d 127.

LAW & ANALYSIS

Standard of Review for Motion to Dismiss

"In ruling on a motion to dismiss under Civ.R. 12(B)(6), the material allegations of the complaint are taken as admitted." *Love v. City of Port Clinton* (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166, quoting *Phung v. Waste Mgmt., Inc.* (1986), 23 Ohio St.3d 100, 102, 491 N.E.2d 1114. In order to grant the motion, "* * * it must appear beyond doubt from the

complaint that the plaintiff can prove no set of facts entitling him to recover.” *Id.*, quoting *O’Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus.

Statute of Limitations for Employer Intentional Tort

R.C. §2745.01, effective April 7, 2005, provides in its entirety:

(A) In an action brought against an employer by an employee, or by the dependant 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 is 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.

This statute does not eliminate the common law cause of action for an employer intentional tort. *Stetter v. R.J. Corman Derailment Services, LLC*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, at paragraph three of the syllabus. Under common-law, “in order to establish intent for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to

perform the dangerous task.” *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, at paragraph one of the syllabus. Under this common-law employer intentional tort, it was held: “Unless the circumstances of an action clearly indicate a battery or any other enumerated intentional tort in the Revised Code, a cause of action alleging bodily injury as a result of an intentional tort by an employer pursuant to *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St.2d 608, 23 Ohio Op.3d 504, 433 N.E.2d 572, will be governed by the two-year statute of limitations established in R.C. 2305.10. (*Hunter v. Shenango Furnace Co.* [1988], 38 Ohio St.3d 235, 527 N.E.2d 871, approved and extended).” *Funk v. Rent-All Mart*, 2001-Ohio-270, syllabus.

Funk v. Rent-All Mart, 2010-Ohio-270 is clearly distinguishable, and here, Plaintiffs specifically pled an employer intentional tort pursuant to R.C. §2745.01. “Under R.C. §2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury.” *Kaminski v. Metal Wire Products Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066. Plaintiffs allege that Wright Tool & Forge “provided training...and did by their instruction and supervision require that Plaintiff’s hands come into direct contact with the hammer press...” Complaint at ¶16. Further, Wright Tool & Forge “did deliberately remove a guard” that would have prevented accidental contact with the operating mechanism of the hammer press, which creates a presumption that the removal was committed with the intent to injure another. Complaint at ¶19. With these acts, Wright Tool & Forge “subjected Plaintiff to a dangerous condition or process despite knowledge that Plaintiff and others similarly situated were substantially certain to be injured did act with deliberate intent to injure Plaintiff.” Complaint at ¶22. Plaintiffs plead intentional affirmative acts done with intent to harm.

“* * * [I]n determining which limitation period will apply, courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial.” *Love v. City of Port Clinton*, 37 Ohio St.3d at 99, quoting *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183, 465 N.E.2d 1298. Thus, “[w]here the essential character of an alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery governs even if the touching is pled as an act of negligence.” *Id.*, at syllabus. Plaintiffs labeled their complaint as a “civil action for personal injuries.” They allege an intentional tort by Mr. Tichon’s employer pursuant to R.C. §2745.01. The essential

character of the employer's intentional tort as defined in R.C. §2745.01 is an act intending to cause harm.

As noted by Justice Pfeifer, dissenting in *Stetter*:

R.C. §2745.01 purports to grant employees the right to bring intentional-tort actions against their employers, but in reality defines the cause of action into oblivion. An employee may recover damages under the statute only if his employer deliberately intends to harm him. It is difficult to conjure a scenario where such a deliberate act would not constitute a crime...

Stetter v. R.J. Corman Derailment Services, LLC, 2010-Ohio-1029, at ¶99 (Pfeifer, J., dissenting).

The closest definition the civil law contains for an act done with intent to harm is a battery.

A person is subject to liability for battery when he acts intending to cause a harmful or offensive contact, and when a harmful contact results. *Restatement of the Law 2d, Torts* (1965), 25, Section 13. Contact which is offensive to a reasonable sense of personal dignity is offensive contact. See *Restatement of the Law 2d, Torts, supra*, at 35, Section 19.

Love v. City of Port Clinton, 37 Ohio St.3d at 99.

“Battery not only protects individuals from harmful contact, but protects them from any offensive contact: A harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such contact, * * * is a battery.” *Perkins v. Lavin* (1994), 98 Ohio App.3d 378, 382, 648 N.E.2d 839, citing Prosser, *Law of Torts* (5 Ed. 1984), 39 Section 9; and see *Love v. City of Port Clinton, supra*.

This Court cannot apply the general (negligence) two-year statute of limitations for bodily injury in R.C. §2305.10 where the essential nature of the tort is an intentional, offensive touching. See *Love, supra*. The word “intent” in relation to the intentional tort of battery does not signify that it is necessary to intend the specific harmful result – it is sufficient to intend the offensive contact that causes the injury. *Feeney v. Eshack* (1998), 129 Ohio App.3d 489, 493; see also, *Estill v. Waltz*, 10th Dist. App. No. 02AP-83, 2002-Ohio-5004, ¶20. By deliberately removing an equipment safety guard a rebuttable presumption was created that the act of removal was committed with intent to injure another. This is an overt, positive and affirmative act which caused harmful bodily contact, as distinguished from conduct alleged in the nature of

an omission. Accordingly, the statute of limitations governing the intentional tort of battery as set forth in R.C. §2305.111 applies to the allegations set forth in Plaintiffs' First Claim for Relief and this claim is time-barred. Dismissal is not meant as an exoneration of the acts alleged in the complaint but dismissal is warranted because this claim should have been brought within one-year as stated in the statute of limitations for the intentional tort or battery based on the facts plead.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiffs' First Claim for Relief asserted against Defendant Wright Tool & Forge is dismissed and the derivative loss of consortium claim, asserted against Wright Tool & Forge is also dismissed. This is a final and appealable Order; there is no just cause for delay.

It is so Ordered.



JUDGE PAUL J. GALLAGHER

cc: Attorney Keith L. Pryatel
Attorney Gregory H. Collins
Attorney Steven J. Brian
Attorney John V. Rasmussen

COURT OF APPEALS
DANIEL J. TICHON

STATE OF OHIO)
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
ss: 2012 JUL 11 AM 8:55

KENNETH TICHON, et al.,

C.A. No. 26071
CLERK OF COURTS

Appellants

v.

WRIGHT TOOL & FORGE, et al.,

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2011 04 2304

DECISION AND JOURNAL ENTRY

Dated: July 11, 2012

MOORE, Judge.

{¶1} Appellants, Kenneth and Pennie Tichon, appeal from the judgment of the Summit County Court of Common Pleas. This Court reverses.

I.

{¶2} On April 26, 2011, Mr. and Mrs. Tichon filed a complaint against several parties, including Wright Tool & Forge ("Wright Tool"), wherein they alleged the defendants' liability as to a work-place injury suffered by Mr. Tichon through his employment with Wright Tool on March 10, 2008. In their complaint, the Tichons set forth that it was a "re-filed action," and referred to a previously filed case, wherein the Tichons had filed a complaint on March 9, 2010. In their re-filed complaint, Mr. Tichon set forth a claim against Wright Tool for an intentional employer tort pursuant to R.C. 2745.01, and Mrs. Tichon asserted a derivative claim against Wright Tool for loss of consortium. Wright Tool responded with a motion to dismiss pursuant to Civ.R. 12(B)(6), arguing that the claims against it were barred by the one-year statute of

limitations applicable to a claim for battery, and neither the initial complaint nor the re-filed complaint was filed within one year of the date that Mr. Tichon was injured. The trial court agreed and issued a judgment entry granting Wright Tool's motion to dismiss and setting forth that there was no just cause for delay pursuant to Civ.R. 54. The Tichons timely filed a notice of appeal and present one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING[] WRIGHT TOOL[']S MOTION TO DISMISS.

{¶3} In their sole assignment of error, the Tichons argue that the trial court erred in granting Wright Tool's motion to dismiss because the one-year statute of limitations was not applicable to Mr. Tichon's complaint against Wright Tool. We agree.

{¶4} "We review de novo a trial court's disposition of a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted." *White v. Roch*, 9th Dist. No. 22239, 2005-Ohio-1127, ¶ 11. When reviewing a motion to dismiss under Civ.R. 12(B)(6), we must presume that the allegations set forth in the plaintiff's complaint are true. *Id.*

{¶5} Here, the Tichons alleged that Wright Tool "had actual knowledge of the dangerous condition and characteristics of the hammer press" that Mr. Tichon was operating. They further alleged that Wright Tool intentionally removed a safety guard from the press "with intent to injure [Mr. Tichon]." The Tichons relied upon these allegations in support of Mr. Tichon's claim against Wright Tool for an employer intentional tort pursuant to R.C. 2745.01. That statute in part provides,

(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.

{¶6} The legislature did not set forth a specific statute of limitations within R.C. 2745.01. In the context of an employer intentional tort involving bodily injury, the claim will be subject to a two-year statute of limitations unless the underlying act sounds in a cause of action otherwise subject to a one-year statute of limitations. *See Funk v. Rent-All Mart, Inc.*, 91 Ohio St.3d 78 (2001), syllabus (common law employer intentional tort claim subject to two-year statute of limitations unless complaint sounds in assault or battery); *see also* R.C. 2305.10(A) (“an action for bodily injury * * * shall be brought within two years after the cause of action accrues * * *”). When a claim sounds in assault or battery, however, it is subject to the one year statute of limitations set forth in R.C. 2305.111(B).

{¶7} Here, the trial court determined that Mr. Tichon’s claim against Wright Tools alleged a battery because he had contended that Wright Tools engaged in an overt, affirmative action, intending to cause harm to Mr. Tichon. In its entry, the trial court relied upon *Love v. Port Clinton*, 37 Ohio St.3d 98 (1988), for the proposition that an act that is intended to cause harm to a person constitutes a battery.

{¶8} However, *Love v. Port Clinton* does not support the trial court’s conclusion, as it is distinguishable on its facts from the case at hand. In *Love*, an individual alleged that he was recklessly subdued by a police officer. He sued the city of Port Clinton and the officer, alleging

that the officer's actions caused his injuries. The Ohio Supreme Court held in its syllabus, that "[w]here the essential character of an alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery governs even if the touching is pled as an act of negligence." In reaching this conclusion, the Court reasoned that, although the plaintiff there styled his pleading as an action in negligence, the plaintiff alleged that an officer had subdued and handcuffed him, causing him injury. *Id.* at 99. Noting that "'subduing' and 'handcuffing' []are acts of intentional contact which, unless privileged, constitute a battery," the Court determined that the essential character of the plaintiff's complaint was one that sounded in battery regardless of how it was styled. *Id.* at 99-100. In its very brief opinion, the Court quoted Restatement of the Law 2d, Torts, 25 Section 13 (1965) for the proposition that "A person is subject to liability for battery when he acts intending to cause a harmful or offensive contact, and when a harmful contact results." *Id.* at 99. The quotation in *Love*, however, must be considered within the context of the facts before the Court. The Court had before it an officer who was alleged to have physically touched Mr. Love without privilege and, in doing so, had allegedly caused him injury. *Id.* A fair reading of this case does not lead to the conclusion that *any act* which is intended to cause harm to a person constitutes a battery.

{¶9} For a complaint to sound in battery, the essence of the act complained of must be an "intentional, offensive touching." See *Love* at 99; *Anderson v. St. Francis-St. George Hosp., Inc.*, 77 Ohio St.3d 82, 84 (1996) ("battery requires proof of an intentional, unconsented to touching"); see also *Snyder v. Turk*, 90 Ohio App.3d 18, 23 (2d Dist.1993) (a battery is an "intentional, unconsented-to contact with another"), *Williams v. York Intern. Corp.*, 63 Fed.Appx. 808, 811, 2003 WL 1819637 (6th Cir.2003) (to establish a battery claim in Ohio, a plaintiff must show that defendant offensively touched plaintiff), *Anderson v. St. Francis-St.*

George Hosp. 83 Ohio App.3d 221, 225 (1st Dist.1992) (“a person commits a battery when he unlawfully strikes or touches another”), accord *Allore v. Flower Hospital*, 121 Ohio App.3d 229, 236 (6th Dist.1997), *Jerningham v. Lutheran Medical Center*, 8th Dist. No. 67680, 1995 WL 116961, *1 (1995), and *Wilson v. Chatman*, 3d Dist. No. 3-02-38, 2003-Ohio-2818. Here, the act complained of was the act of removing a safety guard, which is not itself an “intentional, offensive touching.” See *Love* at 99.

{¶10} Further, the trial court concluded that the removal of a safety guard is an affirmative, overt act. We agree that this is an affirmative act; however, in order to constitute a battery, the affirmative, overt act must itself be one of offensive contact, as discussed above. This holding is consistent with cases where courts have found allegations that a defendant “caused” offensive contact to the plaintiff to be insufficient to constitute a battery, where there is no affirmative, overt act. See, e.g., *Hunter v. Shenango Furnace Co.*, 38 Ohio St.3d 235, 237-238 (1988). In *Hunter*, an employee sued his employer for injuries sustained when his legs were trapped and crushed between two molds. *Id.* at 235-236. He alleged in his complaint that the company “intentionally caused [his] injuries in that they allowed a condition to exist regarding the molds that was substantially likely to cause injury to the Plaintiff.” *Id.* at 236. The Supreme Court held that the action alleged was not a battery “because the actual nature of the action does not claim an overt, positive or affirmative act on the part of the defendant-employer.” *Id.* at 237-238.

{¶11} Although the Court decided *Hunter* on the basis that there existed no positive, overt act required for a battery, the case further presented no allegations of personal touching. See also *Dawson v. Astrocosmos Metallurgical, Inc.*, 9th Dist. No. 02CA0025, 2002-Ohio-6998, ¶ 26 (allegation that the employer “acted” to cause the worker to perform unsafe work did not

sound in battery), and *Callaway v. Nu-Cor Automotive Corp.*, 166 Ohio App.3d 56, 2006-Ohio-1343, ¶ 15-18 (10th Dist.) (allegation that the employer instructed the worker to prematurely pour molten aluminum into inadequately heated sow where doing so was substantially certain to cause injury did not sound in battery). In contrast, *Love* involved specific allegations of unconsented-to, offensive touching, and the Court held such allegations to constitute a battery. *See also, Zehnder v. Tuscarawas Cty. Engineers*, 5th Dist. No. 86 AP 100074, 1987 WL 11871, *1 (1981) (complaint alleging that defendant-employer participated in the pushing of the plaintiff from a truck and to the ground sounded in battery),

{¶12} Although these cases demonstrate that a cause of action in battery requires an overt act, common also to these cases is that the complaints sounded in battery where the act complained of was itself an act of offensive contact. Although we agree with the trial court that removing a safety guard is an affirmative, overt act, it is not itself an act of offensive contact. Rather, it is one that may be substantially certain to cause offensive contact.

{¶13} Lastly, we acknowledge that, due to the enactment and interpretation of R.C. 2745.01, it will often be the case that a plaintiff pleading an employer-intentional tort will also plead a cause of action in battery. Nonetheless, however broad the overlap between these causes of action, an employer-intentional tort does not *necessarily* incorporate an action in battery. Instead, because R.C. 2745.01(C) requires an intentional act (here removal of safety guards) which directly causes an injury, the act itself complained of need not be the act of intentional and offensive, physical contact. Therefore, there exist cases where the plaintiff may successfully plead an employer-intentional tort without pleading a battery.

{¶14} The character of Mr. Tichon's claim fits squarely within the latter group of cases. Mr. Tichon alleged that Wright Tool removed the safety guard, with the deliberate intent of

causing injury. Thus, Mr. Tichon has pleaded an employer-intentional tort under R.C. 2745.01(C). However, because the act complained of, removal of the safety guard, is not itself an act of offensive touching, Mr. Tichon's claim against Wright Tool did not sound in battery. Therefore, the Tichons' claims against Wright Tool were subject to a two-year statute of limitations. See *Funk*, 91 Ohio St.3d 78. Because the Tichons filed their complaint within two years of the act complained of, we conclude that the trial court erred in dismissing this action on that basis.

III.

{¶15} Accordingly, the Tichons' assignment of error is sustained. The judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

Judgment reversed and
cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.



CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS.

WHITMORE, P.J.
DISSENTING.

{¶16} I would affirm the judgment of the trial court because I would conclude that the Tichons' complaint is time-barred pursuant to the one year statute of limitations contained in R.C. 2305.111(B). As such, I respectfully dissent.

{¶17} R.C. 2745.01 governs statutory causes of action for employer intentional torts. Although R.C. 2305.112 originally set forth a one year statute of limitations for employer intentional tort claims, R.C. 2305.112 was repealed after the Ohio Supreme Court struck down a prior version of R.C. 2745.01 in *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298 (1999). *Funk v. Rent-All Mart, Inc.*, 91 Ohio St.3d 78, 79 (2001) ("R.C. 2305.112 is no longer viable in light of *Johnson v. BP Chemicals.*"). The General Assembly ultimately amended R.C. 2745.01, and the new version of the statute became effective on April 7, 2005. See R.C. 2745.01; *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, syllabus (holding that the current version of R.C. 2745.01 is constitutional). R.C. 2305.112 was not revived, however, so the Revised Code does not contain a statute of limitations that specifically applies to employer intentional tort claims brought under R.C. 2745.01. Instead, one must look to the more general provisions that govern statutes of limitations for tort claims to determine the applicable statute of

limitations in a given action. *See Funk* at 80; *Hunter v. Shenango Furnace Co.*, 38 Ohio St.3d 235, 237-238 (1988).

{¶18} “In determining the applicable statute of limitations in a given action, * * * the crucial consideration is the actual nature or subject matter of the cause, rather than the form in which the complaint is styled or pleaded.” (Alteration omitted.) *Dawson v. Astrocosmos Metallurgical, Inc.*, 9th Dist. No. 02CA0025, 2002-Ohio-6998, ¶ 21, quoting *Hunter*, 38 Ohio St.3d at 237. “[A]n action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues.” R.C. 2305.10(A). On the other hand, “an action for assault or battery shall be brought within one year after the cause of the action accrues.” R.C. 2305.111(B). “Unless the circumstances of an action clearly indicate a battery or any other enumerated intentional tort in the Revised Code, a cause of action alleging bodily injury as a result of an intentional tort by an employer * * * will be governed by the two-year statute of limitations established in R.C. 2305.10.” *Funk* at syllabus.

{¶19} This Court previously has described the necessary elements of a battery for purposes of identifying the applicable statute of limitations in an employer intentional tort claim. *Dawson* at ¶ 20. In *Dawson*, we explained:

A person is subject to liability for battery when he acts intending to cause a harmful or offensive contact, and when a harmful contact results. To make the actor liable for a battery, the harmful bodily contact must be caused by an act done by the person whose liability is in question. In order to be classified as a battery, the actual nature of the action must claim an overt, positive, or affirmative act on the part of the defendant.

(Internal citations and quotations omitted.) *Id.* A conclusory averment in a complaint that an employer “acted” is insufficient to categorize the alleged cause of action as a battery. *See id.* at ¶ 25-26 (concluding that the plaintiff did not allege a battery simply because he wrote that his employer “acted to require [him] to continue to perform” the work by which he was injured).

{¶20} R.C. 2745.01 “permit[s] recovery for employer intentional torts only when an employer acts with specific intent to cause an injury * * *.” *Kaminski*, 2010-Ohio-1027, at ¶ 56. The Tichons specifically pleaded in their complaint that Wright Tool engaged in conduct that violated R.C. 2745.01. Their complaint contained all of the following allegations: (1) the hammer press on which Kenneth injured himself and its controls “were in a dangerous condition”; (2) Wright Tool “require[d] [Kenneth’s] hands [to] come into direct contact with the hammer press”; (3) Wright Tool had “actual knowledge of the dangerous circumstances under which it was requiring [Kenneth] to perform”; (4) Wright Tool “did deliberately remove a guard and specifically a guard preventing accidental contact with the operating mechanism for the hammer press or the foot pedal for said press”; (5) by subjecting Kenneth to a “dangerous condition” with knowledge that he was “substantially certain to be injured,” Wright Tool “did act with deliberate intent to injure [Kenneth]”; and (6) Kenneth’s injuries were the “direct and proximate result of the intentional, deliberate and wrongful misconduct and conduct” of Wright Tool.

{¶21} The Tichons’ complaint specifically alleged that Wright Tool deliberately removed a safety guard on the hammer press or its foot pedal. “Deliberate removal by an employer of an equipment safety guard * * * creates a rebuttable presumption that the removal * * * was committed with intent to injure another if an injury * * * occurs as a direct result.” R.C. 2745.01(C). The Tichons acknowledged this rebuttable presumption in their complaint and relied upon it to argue that Wright Tool “act[ed] with deliberate intent to injure [Kenneth].” This case is distinctly different from one where a defendant-employer simply failed to correct or exposed its employee to a dangerous condition. *See, e.g., Dawson*, 2002-Ohio-6998, at ¶ 25-26; *Hunter*, 38 Ohio St.3d at 237-238. *See also Callaway v. Nu-Cor Automotive Corp.*, 166 Ohio

App.3d 56, 2006-Ohio-1343, ¶ 13 (10th Dist.) (“The employer’s overt, positive, or affirmative act must cause the harmful bodily contact; the action does not constitute a battery when the conduct alleged is in the nature of an omission.”). The conduct the Tichons alleged here was not an omission, but rather an “overt, positive, or affirmative act on the part of the defendant.” *Dawson* at ¶ 20, citing *Hunter* at 237-238. That is, the Tichons alleged that Wright Tool, by purposely removing a safety guard, actually acted to create the dangerous condition that proximately caused Kenneth’s injury. See *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90, 96-97 (1984) (categorizing defendant-employer’s conduct in removing a safety cover as an intentional tort). The Tichons themselves asserted that Wright Tool “act[ed] with deliberate intent to injure.” See *Kaminski*, 2010-Ohio-1027, at ¶ 56. The record, therefore, supports the trial court’s conclusion that the Tichons alleged a battery and the one-year statute of limitations set forth in R.C. 2305.111(B) applies.

{¶22} To the extent the Tichons argue that the Legislative Service Commission’s bill analysis of R.C. 2745.01 supports their argument that the two-year statute of limitations contained in R.C. 2305.10(A) applies here, I do not agree. In its bill analysis of the act enacting the current version of R.C. 2745.01, the Legislative Service Commission wrote:

The act eliminates the requirement, declared “null and void” by the Court (*Funk v. Rent-All Mart, Inc.*, 91 Ohio St.3d 78, 79 (2001), citing *Mullins v. Rio Algom*, 85 Ohio St.3d 361 (1999)), that a cause of action for an intentional tort be brought within one year of the * * * the date on which the employee knew or through the exercise of reasonable diligence should have known of the injury, condition, or disease (sec. 2305.112, repealed by the act). The act does not specify a time limit to file a cause of action. It appears, then, that the statute of limitations for an employment intentional tort is two years, unless a battery or any other enumerated intentional tort occurs (sec. 2305.10, not in the act, and *Funk* at 81).

{¶23} HR Bill Analysis, 125th Leg., Am.H.B. No. 498, 2004 Ohio Laws File 143. Although the bill analysis notes that it “appears” the two-year statute of limitations generally

applies to employer intentional tort cases brought under R.C. 2745.01, it also specifically notes the following exception: “unless a battery or any other enumerated intentional tort occurs.” *Id.* The language in the bill analysis, therefore, is no different from the Supreme Court’s pronouncement in *Funk*. See *Funk*, 91 Ohio St.3d at syllabus (“Unless the circumstances of an action clearly indicate a battery or any other enumerated intentional tort in the Revised Code, a cause of action alleging bodily injury as a result of an intentional tort by an employer * * * will be governed by the two-year statute of limitations established in R.C. 2305.10.”). Because the Tichons pleaded a battery here, the two-year statute of limitations does not apply.

{¶24} The trial court correctly concluded that the Tichons pleaded a battery and that their claims against Wright Tool are barred by the one-year statute of limitations contained in R.C. 2305.111(B). Therefore, I would affirm the trial court’s decision to dismiss the Tichons’ complaint.

APPEARANCES:

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