

ORIGINAL

IN THE SUPREME COURT OF OHIO

KENNETH TICHON AND	:	CASE NO. 2012-1436
PENNIE TICHON	:	
	:	On Appeal from the Summit County
Plaintiffs/Appellees,	:	Court of Appeals, Ninth Appellate
	:	District
v.	:	
	:	
WRIGHT TOOL & FORGE, <i>et al.</i>	:	
	:	
Defendant/Appellant	:	

**APPELLEES, KENNETH TICHON AND PENNIE TICHON'S MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

Keith L. Pryatel, Esq. (0034532)  
 Kastner Westman & Wilkins, LLC  
 3480 West Market Street, Suite 300  
 Akron, Ohio 44333  
 Phone: (330) 867-9998  
 Fax: (330)867-3786

Counsel for Appellant,  
 Wright Tool and Forge

Steven J. Brian (0039716)  
 John Werren (0051829)  
 Abigail I. Marchisio (0083510)  
 Brian Law Offices  
 81 Maplecrest Street SW  
 North Canton, Ohio 44720  
 Phone: (330) 494-2121  
 Fax: (330)494-3259

Counsel for Appellees,  
 Kenneth Tichon and Pennie Tichon

**BRIAN LAW OFFICES**

81 Maplecrest Avenue, S.W.  
 North Canton, Ohio 44720  
 (330) 494-2121  
 sbrian@brianlaw.com

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 SEP 24 2012  
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EXPLANATION AS TO WHY THIS IS NOT A CASE OF  
GREAT PUBLIC OR GENERAL INTEREST

The issues presented for review by this Court have long been the subject of litigation. This Court has established and upheld the applicable statute of limitations for workplace intentional-tort causes of action. *Hunter v. Shenango Furnace Co. et al.*, (1988), 38 Ohio St. 3d 527, N.E.2d 871; *Funk v. Rent-All Mart, Inc. et al.* (2001), 91 Ohio St.3d 78, 742 N.E.2d 127, 2001-Ohio-270. Another review of this Court's long-standing ruling is no necessary and not of great public or general interest.

The Court of Appeals correctly reversed the trial court's decision that the one-year statute of limitations applicable in R.C. 2305.11 now controls workplace intentional-tort claims under R.C. 2745.01.<sup>1</sup> In reversing the trial court's decision, the Court of Appeals correctly applied the ruling of *Funk*, supra, which states: "except where circumstances clearly indicate a battery or other intentional tort specifically enumerated in the Revised Code, any cause of action alleging bodily injury as a result of an intentional tort by an employer prior to the effective date of R.C. 4121.80 is governed by the two-year status of limitations codified in R.C. 2305.10." *Funk*, 91 Ohio St.3d at 90. The appeals court found that:

[t]he character of Mr. Tichon's claim fits squarely within the latter group of cases. Mr. Tichon alleged that Wright Tool removed the safety guard, which the deliberate intent of causing injury. Thus, Mr. Tichon has pleaded an employer-intention 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 status of limitations.<sup>2</sup>

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<sup>1</sup> *Tichon v. Wright Tool & Forge*, Summit Cty. Case No. CV 2011-04-2304 (Comm. Pls. 2011); *Tichon v. Wright Tool & Forge*, 9<sup>th</sup> Dist. No. 26071, 2012-Ohio-3147 (Whitmore, P.J. dissenting).

<sup>2</sup> *Tichon*, 2012-Ohio-3147 at ¶14.

In so finding, the Appeals Court followed a long standing line of cases which have found employer intentional-tort claims subject to a two year statute of limitations.

This court initially made a ruling regarding the applicable statute of limitations in the case of *Hunter v. Shenango Furnace Company, et al.* (1988), 38 Ohio St.3d 235, 527 N.E.2d 871. This case addressed the statute of limitations for employer intentional tort cases prior to the enactment of R.C. 4121.80<sup>3</sup> and under the common law pursuant to *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572 and *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, 472 N.E.2d 1046. *Id.* The Court in *Hunter* found that R.C. 2305.01 will govern statute of limitations in an employer intentional tort case except in cases of battery. In so finding, the court found “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.” *Hunter*, 38 Ohio St.3d at 237 citing *Hambelton v. R.G. Barry Corp* (1984), 12 Ohio St.3d 179, 465 N.E.2d 1298; *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St.3d 79, 437 N.E.2d 1194. Thus, in examining the nature of an employer intentional tort action, this Court determined that a two year statute of limitations applies unless the “circumstances of an action clearly indicate a battery or any other enumerated intentional tort in the Revised Code.” *Id.* at 238. This Court upheld these findings in the case of *Gambill, et al. v. Ohio Bonded Oil Company, et al.* (1990) 52 Ohio St.3d 90, 556 N.E.2d 177.

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<sup>3</sup> The General Assembly enacted former R.C. 4121.80 in Am.Sub.S.B. No. 307, 141 Ohio Laws, Part I, 733-737, effective August 22, 1986. R.C. 4121.80 was declared unconstitutional in the case of *Brady, et al. v. Safety-Kleen Corporation, et al.* (1991) 61 Ohio St.3d 624, 576 N.E.2d 722.

R.C. 4121.80, which imposed a one year statute of limitations, was struck down as unconstitutional. *Brady, et al. v. Safety-Kleen Corporation, et al.* (1991) 61 Ohio St.3d 624, 576 N.E.2d 722. Thus, until the enactment of R.C. 2745.01, the common law test established in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, applied. *Kaminski v. Metal & Wire Products Company, et al.* (2010) 125 Ohio St.3d 250, 518 N.E.2d 61, 2010-Ohio-1027.

The Court in *Funk v. Rent-All-Mart, Inc. et al.* (2001), 91 Ohio St.3d 78, 742 N.E.2d 127, again addressed the issue of the statute of limitations applicable to employer intentional tort claims. In determining the statute of limitations, the Court again determined that it was necessary to “look at the actual nature or subject matter pleaded in the complaint.” *Id.* at 129. Thus, the court upheld the ruling in *Hunter*, 38 Ohio St.3d 235, finding that “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 Chemicals*, 68 Ohio St.2d 608, 23 O.O.3d 504, 433 N.E.2d 572, will be governed by the two-year statute of limitations established in R.C. 2305.01.” *Id.* at 130.

R.C. 2745.01 became effective on April 7, 2005, and was determined to be constitutional by this court in the case of *Kaminski v. Metal & Wire Products Company, et al.* (2010) 125 Ohio St.3d 250, 518 N.E.2d 61, 2010-Ohio-1027. In finding this statute constitutional, court in *Kaminski* notes that this statute “constrains rather than abolishes an employee’s cause of action for employer intentional tort.” *Id.* at 273. Furthermore, the Court found no need to “revisit the holding in *Blankenship* that employer intentional torts are outside the scope of employment.” *Id.*

As recited above, this Court has already determined the applicable statute of limitations for employer intentional tort cases. Despite the enactment of R.C. 2745.01, a new ruling on the applicable statute of limitations is not necessary. As noted in *Kaminski*, R.C. 2745.01 constrained, but did not eliminate, causes of action in employer intentional tort. Despite a change in the standard of proof required in an employer intentional tort case, the standard applied to the determination of the statute of limitations remains the same. Regardless of whether or not a statute has been enacted, the court must look at “the actual nature or subject matter of the cause, rather than the form in which the complaint is styled or pleaded.” *Hunter*, 38 Ohio St.3d at 237 citing *Hambelton v. R.G. Barry Corp* (1984), 12 Ohio St.3d 179, 465 N.E.2d 1298; *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St.3d 79, 437 N.E.2d 1194. In making its determination, the Court of Appeals followed this Court’s prior reasoning in *Hunter* and *Funk* in determining whether or not the cause of action filed in this case sounded in battery.<sup>4</sup> The Court of Appeals found, based on the facts of the instant case, that this case did not sound in battery and applied a two-year statute of limitations.<sup>5</sup>

The analysis of the actual nature of the suit, rather than the form of the complaint will control, whether or not common law or a statute is at issue. Thus, despite the enactment of R.C. 2745.01, the Court’s prior analysis in *Hunter v. Shenango Furnace Company, et al.* (1988), 38 Ohio St.3d 235 and *Funk v. Rent-All-Mart, Inc. et al.* (2001), 91 Ohio St.3d 78, remains the same. The court has already ruled on the applicable statute of limitations for employer intentional tort claims. Further rulings regarding this issue would be redundant and are not a matter of great public or great general interest given that this issue has long been decided and

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<sup>4</sup> *Tichon v. Wright Tool & Forge*, 9<sup>th</sup> Dist. No. 26071, 2012-Ohio-3147.

<sup>5</sup> *Id.*

applied in employer intentional tort cases. The Court of Appeals followed this Court's already established framework of analysis regarding the statute of limitations for employer intentional tort cases. Thus, there is no reason for this Court to exercise discretionary jurisdiction to hear this matter.

ARGUMENTS IN SUPPORT OF APPELLEE'S  
POSITION FOR EACH PROPOSITION OF LAW

**Appellee's Response to Appellant's Proposition of Law No. 1:**

The Court of Appeals properly analyzed the facts of this case to determine that this cause of action did not sound in battery and thus, a two-year statute of limitations was applicable. In addressing the trial court's decision to dismiss this case, the Court of Appeals discussed the case of *Love v. Port Clinton*, 37 Ohio St.3d 98 (1988), which was cited by the trial court in support of that dismissal. *Tichon*, 2012-Ohio-3147 at ¶¶ 7-8. Appellant argues that the Court failed to focus on the General Assembly's chosen text in coming to a decision. Appellant's Memorandum in Support of Jurisdiction, 9. Appellants argue that the focus should fall squarely on the text of R.C. 2745.01. However, in order to determine the statute of limitations in a claim, the language of the Ohio Revised Code section cannot be discounted from the analysis. R.C. 2305.111(B) states:

Except as provided in section 2305.115 of the Revised Code and subject to division (C) of this section, an action for assault or battery shall be brought within one year after the cause of the action accrues. For purposes of this section, a cause of action for assault or battery accrues upon the later of the following:

- (1) The date on which the alleged assault or battery occurred;
- (2) If the plaintiff did not know the identity of the person who allegedly committed the assault or battery on the date on which it allegedly occurred, the earlier of the following dates:

(a) The date on which the plaintiff learns the identity of that person;

(b) The date on which, by the exercise of reasonable diligence, the plaintiff should have learned the identity of that person.

It follows that a determination as to the statute of limitations for a given action requires a determination as to the type of action alleged. The Court of Appeals correctly conducted an analysis of the meaning of “battery” in determining whether or not this cause of action fell within that category.

An analysis of R.C. 2745.01 is not dispositive of whether or not a complaint against an employer under this section sounds in battery. It follows then, that the meaning of battery must be determined and applied to the relevant facts. The Court of Appeals was correct in finding that “[f]or a complaint to sound in battery, the essence of the act complained must be an ‘intentional, offensive touching.’” *Tichon*, 2012-Ohio-3147 at ¶¶ 9. Furthermore, the Court of Appeals correctly found that “[a]lthough 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.” *Id.* at ¶¶ 12. Finally, the Court of Appeals did, in fact, consider R.C. 2745.01 in determining the applicable statute of limitations. The Court of Appeals properly determined that “[i]nstead, because R.C. 2745.01(C) required 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 battery.” *Id.* at ¶¶ 13.

**Appellee's Response to Appellant's Proposition of Law No. 2:**

The Supreme Court of Ohio has consistently held that 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. Neither the General Assembly in enacting O.R.C. Section 2745.01 nor the Court in *Kaminski*, supra, in any way modified this rule of law. In point of fact, the contrary is true. The General Assembly addresses the applicability of the two-year statute of limitations in the legislative history leading up to the passage of O.R.C. Section 2745.01. The Bill Analysis for Am. H.B. 498 states:

The act eliminates the requirement, declared, "null and void" by the Court (*Funk v. Rent-All Mart, Inc.* (2001), 91 Ohio St. 3d 78, 79, citing *Mullins v. Rio Algame* (1999, 85 Ohio St. 3d 361), that a cause of action for an intentional tort be brought within one year of the employee's death or 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 (O.R.C. 2305.10, not in the act, and *Funk* at 81).

H.B. Analysis, Am. H.B. 498, 125<sup>th</sup> General Assembly (2004).

As stated by the Supreme Court of Ohio in *Funk*, supra, (and as acknowledged by the General Assembly) "although a complaint may label its cause of action an intentional tort, we look to the actual nature or subject matter pleaded in the Complaint. If the essence of a Plaintiff's Complaint alleges bodily injury as the result of an employer intentional tort, the two-year statute of limitations in R.C. 2305.10 should apply." *Funk*, 91 Ohio St.3d at 192, citing *Hunter v. Shenango Furnace Co.* (1988), 38 Ohio St. 3d 235, 527 N.E.2d 871.

O.R.C. Section 2745.01, effective April 7, 2005, (and determined constitutional by the Supreme Court of Ohio in *Kaminski*, supra) provides in its entirety:

(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 tortuous 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.

Appellees, have not alleged that the Appellant committed a battery upon his person or any other enumerated intentional tort in the revised code and therefore the two-year statute of limitations embodied within O.R.C. Section 2305.10 applies. In this case, the essence of the Appellee's argument is that the Appellant's conduct in removing a safety guard in the form of a foot pedal falls squarely within the provisions of subsection (C) of R.C. Section 2745.01. This is obviously not a battery and obviously not therefore governed by the one year statute of limitations.

The *Kaminski* Court further remarks: "As an initial matter, we agree with the Court of Appeals that the General Assemblies intent in enacting R.C. 2745.01 as expressed particularly in

2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, *subject to sections (C) and (D).*” *Id.* at Page 19. (Emphasis added)

It is noted further that the Supreme Court in both *Funk*, supra, and *Hunter*, supra, note that while some employment based intentional tort cases may take the form of a battery, such as when an employee is “pushed from a truck” by a co-employee under the control of the employer (*Hunter*, 38 Ohio St.3d at 238); the two-year statute of limitations otherwise controls. In accordance with the Supreme Court’s holding in *Funk*, supra, and its predecessors, and further in conformity with the specifically addressed legislative analysis applicable to O.R.C. §2745.01 the Appellees properly filed their Complaint within two years injury and properly re-filed their Complaint within one year of the dismissal of said original action in accordance with Ohio’s so-called savings statute.

Respectfully submitted,

**BRIAN LAW OFFICES**

By: 

Steven J. Brian (0039716)

John Werren (0051829)

Abigail I. Marchisio (0083510)

Brian Law Offices

81 Maplecrest Street SW

North Canton, Ohio 44720

Phone: (330) 494-2121

Fax: (330) 494-3259

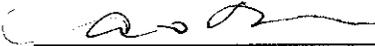
Email: [sbrian@brianlaw.com](mailto:sbrian@brianlaw.com)

[jwerren@brianlaw.com](mailto:jwerren@brianlaw.com)

[amarchisio@brianlaw.com](mailto:amarchisio@brianlaw.com)

**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent by regular U.S. mail on the 21<sup>st</sup> day of September, 2012, to Keith L. Pryatel, Esq., Kastner Westman & Wilkins, LLC, 3480 West Market Street, Suite 300, Akron, Ohio 44333.



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Steven J. Brian  
John Werren  
Abigail I. Marchisio