

ORIGINAL

IN THE SUPREME COURT OF OHIO

YOLANDA CANTU, et al.) CASE NO. 2013-0472
)
 Appellant,)
)
 v.) On Appeal from the Fulton
) County Court of Appeals,
) Sixth Appellate District
 IRONDALE INDUSTRIAL)
 CONTRACTORS, INC., et al.,) Court of Appeals
) Case No. F-11-018
 Appellee.)
)

APPELLANT IRONDALE INDUSTRIAL CONTRACTORS, INC.'S
 MOTION FOR RECONSIDERATION

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FILED
 JUN 28 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

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RECEIVED
 JUN 28 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

Now comes Appellant, Irondale Industrial Contractors, Inc., by and through counsel, and pursuant to S.Ct. Prac. R. 11.2, respectfully requests that this Court reconsider its June 19, 2013 denial (Justices O'Donnell, Kennedy and O'Neill dissenting) of its discretionary review of this case. The decision sought to be presented for this Court's review changes the nature and scope of a "substantially certain" employer intentional tort under R.C. 2745.01(A) and (B) by: (1) reading the statutory definition of "substantially certain" and the definition of "substantially certain" set forth in this Court's jurisprudence to eliminate the requirement of specific or deliberate intent; and (2) reinstating the test for "substantially certain" intentional torts that existed prior to the enactment of R.C. 2745 and prior to this Court's decisions in *Houdek v. ThyssenKrupp Materials*, 134 Ohio St. 3d 491, 2012-Ohio-5685; *Kaminski v. Metal Meyer Products, Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027; *Stetter v. R.J. Corman Derailment Servs. LLC*, 125 Ohio St.3d 280, 2010-Ohio-1029.

Through this series of cases this Court has carefully laid out the requirements of the new intentional tort law. The Court resolved the questions of the constitutionality of the intentional tort law in *Kaminski* and *Stetter*, and addressed the definition of "equipment safety guard" under R.C. 2745.01(C) in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317. It then determined in *Houdek* that the "deliberate intent" requirement of R.C. 2745.01(B) was not a scrivener's error and that "specific intent" was required to prove a "substantially certain" intentional tort. What is left to determine is what the term "specific intent" means in the context of an intentional tort. Is it, as the *Cantu* court has held, simply the old common law standard by a different name or does it require something more? The impact of the answer to this question cannot be overstated. Under *Cantu*, a plaintiff can now seek to establish a "substantially certain" intentional tort by defining "specific intent" in the same manner as "substantially certain" was

defined in the superseded cases of *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90, 95, 472 N.E.2d 1046 (1984) and *Fyffe v. Jenos, Inc.*, 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991).

I. THE CANTU DECISION EFFECTIVELY REINSTATES THE COMMON LAW STANDARD FOR INTENTIONAL TORT.

This Court in *Houdek* interpreted the “substantially certain” intentional tort under R.C. § 2745.01(A) & (B) to mean that “absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee’s exclusive remedy is within the workers’ compensation system.” *Houdek*, at ¶ 25. This Court further held that to establish “deliberate intent” requires proof of “specific intent.” *Houdek*, at ¶ 23, citing *Kaminski*, at ¶ 56.

The *Cantu* court attempts to define the intent required to make out a claim of intentional tort as having the same meaning ascribed to the term “substantial certainty” under the intentional tort jurisprudence prior to the enactment of R.C. 2745.01. Prior to the enactment of R.C. 2745.01, this Court in *Jones* and *Fyffe* cited to Prosser & Keeton, Law of Torts, Section 8 at 35-36 (5th Ed. 1984) and 1 Restatement of the Law 2d, Torts, Section 8A, at 15 (1965) to reject the proposition that an employer’s ‘specific intent to injure is necessary to a finding of intentional misconduct.’” *Houdek*, at ¶ 15, citing *Jones*, at 94-95. Instead, the *Jones* court “defined ‘intent’ to include not only the specific consequences that an actor desires, but also those consequences that an actor believes are substantially certain to result from the conduct.” *Houdek*, Id., citing *Jones*, Id. The General Assembly’s intent to supersede prior Ohio common law regarding the scope and definition of a “substantially certain” intentional tort is expressly set forth in the enacting provision of the legislation.¹

¹ “The General Assembly hereby declares its intent in enacting Sections 2305.112 and 2745.01 of the Revised Code to supersede the effect of the Ohio Supreme Court decisions in *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 60 Ohio St. 2d 581 (decided March 3, 1982); *Jones v. VIP Development Co.* (1982), 15 Ohio St.3d 90

Nevertheless, the *Cantu* court, while avoiding direct citation to *Jones* and *Fyffe*, cites to the same underlying authority that supported those decisions - Prosser and the Restatement of Torts. A comparison of the *Jones* decision to the Sixth District's *Cantu* decision makes transparent the intentions of the *Cantu* court to return to the common-law standard. In *Jones*, this Court wrote:

"The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way the law forbids. * * * " Prosser & Keeton, Law of Torts (5 Ed.1984) 36, Section 8. However, "intent is broader than a desire or purpose to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does. * * * " *Id.* at 35. See, also, *Payne v. Vance* (1921), 103 Ohio St. 59, 69, 133 N.E. 85.

Thus, a specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is *substantially certain*, not merely likely, to occur. It is this element of substantial certainty which distinguishes a merely negligent act from intentionally tortious conduct. . . . The existence of this knowledge or intent on the part of the actor may be inferred from his conduct and surrounding circumstances. *Davis v. Tunison* (1959), 168 Ohio St. 471, 155 N.E.2d 904 [7 O.O.2d 296], paragraph two of the syllabus.

Thus, an intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur. See 1 Restatement of the Law 2d, Torts (1965) 15, Section 8A. We hereby reject the proposition that a specific intent to injure is necessary to a finding of intentional misconduct.

Jones, at 94-95.

In *Cantu*, the Sixth District wrote, in interpreting R.C. 2745.01 and this Court's cases on the new statute:

"As used in intentional torts, 'intent' is [the] desire to bring about [a] result that will invade the interests of another. * * * Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." (Citations omitted.)

(decided Dec. 31, 1981); . . . and *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115 (decided May 1, 1991)." Section III, Am. H.B. 498, 125th General Assembly.

Black's Law Dictionary 810 (6th Ed.1990). The word "intent" is used to "denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." 1 Restatement of the Law 2d, Torts, Section 8(A) (1965):

All consequences which the actor desires to bring about are intended * * *. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than a substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness * * *. *Id.*, Comment b.

"The actor who fires a bullet into a dense crowd may fervently pray that the bullet will hit no one, but if the actor knows that it is unavoidable that the bullet will hit someone, the actor intends that consequence." Keeton, *Prosser and Keeton on Torts*, Section 8, 35 (5th Ed.1984).

Substantial certainty is a part of intent and vice versa. When the legislature redefined "substantially certain" to mean "deliberate intent," the only thing added to this equivalency was the adjective "deliberate," meaning "to carefully consider * * * characterized by awareness of the consequences." *Merriam Webster's Collegiate Dictionary* 305 (10th Ed.1996).

Cantu, at ¶ 22-24. As is evident from these passages, the *Cantu* court has adopted the discarded common law standard to redefine the intent required for an intentional tort.

II. "SPECIFIC INTENT" IS NOT THE SAME AS "SUBSTANTIAL CERTAINTY" UNDER THE OLD COMMON LAW INTENTIONAL TORT.

This case presents the opportunity to clarify the "deliberate intent" standard required by R.C. 2745.01(A) and (B). Is it, as *Cantu* suggests, essentially the same as the common law standard described in Prosser and the Restatement, or does this Court's requirement of deliberate or specific intent require a greater evidentiary showing than was required under the common law?

There can be no dispute that the interpretation of "deliberate intent" in *Cantu* changes the scope of an employer intentional tort, away from a standard that "embodies the General

Assembly's intent to significantly curtail an employee's access to common-law damages" for an intentional tort and back to the pre-*Kaminski* common law analysis. See *Houdek*, at ¶ 23. After citing at length to Prosser and the Restatement of Torts, the *Cantu* court explicitly minimizes the importance of this Court's direction that "specific intent" is required, stating:

The [*Houdek*] court defined "deliberate intent" as "specific intent," *id.*, a term ordinarily used in criminal law meaning a "subjective desire or knowledge that the prohibited result will occur." *Black's Law Dictionary* 1399 (6th Ed. 1990), quoting *People v. Owens*, 131 Mich. App. 76, 85, 345 N.W.2d 904 (1983). We do not believe that the substitution of this phrase for the statutory language materially varies our analysis.

Cantu, at ¶ 26.

By disregarding this Court's instruction in *Houdek*, the *Cantu* court also undermines the principle teaching of *Kaminski*. There, this Court explicitly detailed the circumstances under which an intentional tort would not be cognizable:

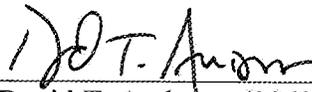
The common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of **a conscious and deliberate intent directed to the purpose of inflicting an injury.**

Kaminski, at ¶ 56 (emphasis added). The bolded language above makes clear that there must be some evidence that the employer consciously intended to cause an injury. The *Cantu* court's description of this Court's jurisprudence renders this language meaningless. As under the common law standard, the knowledge of a dangerous process by Appellant's supervisor and an instruction by that supervisor to perform work in that dangerous situation are enough, under *Cantu*, to constitute an intentional tort. The requirement of "conscious and deliberate intent directed to the purpose of inflicting an injury" is eliminated. There is simply no evidence in the record of this case, even when construed most favorably to Plaintiff, that tends to establish that the supervisor had any deliberate intent "directed to the purpose of inflicting an injury" on *Cantu*.

III. CONCLUSION

Appellant Irondale Industrial Contractors respectfully requests that this Court reconsider its Order declining jurisdiction in this case to address this question of great general public interest to provide clarity to the courts of Ohio and an understanding of the scope of this remedy under Ohio law. Alternatively, Appellants respectfully request that this Court accept jurisdiction to reverse the Sixth District Court of Appeals' decision on the authority of *Houdek*.

Respectfully submitted,



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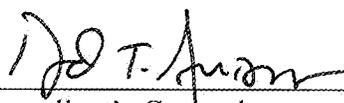
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellant Irondale Industrial Contractors, Inc.'s Motion for Reconsideration has been served via regular U.S. Mail upon the following:

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this 27th day of June, 2013.



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