

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0941

DONALD YEAPLES, *ET AL.*

RELATORS

v.

On Appeal from the
Court of Appeals,
Eighth Appellate District
Court of Appeals Case No.: 99454

HONORABLE STEVEN E. GALL, *ET AL.*

RESPONDENTS

PRECISION DIRECTIONAL BORING, LLC AND GARY COLE'S MERIT BRIEF

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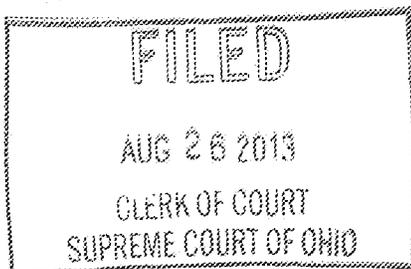


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STATEMENT OF THE FACTS

Relators, Donald Yeaples and Debra Yeaples (collectively, the “Relators”) filed a personal injury Complaint on January 12, 2012 in the Cuyahoga County Common Pleas Court against Respondents, Precision Directional Boring LLC and Gary Cole (collectively, the “Respondents”). (Supplement at 0015). Relator, Donald Yeaples, claimed in that complaint, that while working as a laborer for Respondent, Precision, he was instructed to identify residential connections with storm, sanitary and/or water pipes crossing the roads that could be in the way of a bore path for a planned twelve (12) inch water main. (Supplement at 16, Plaintiff’s Complaint at ¶¶5-6).

While this work was being performed in front of a private, residential driveway, the homeowner notified Mr. Yeaples that they needed to back their vehicle out of the driveway. (Supplement at 0016). At that time, Yeaples fellow employee, Respondent, Gary Cole, was operating a Coyote mini excavator in the same area. (Supplement at 0017, Plaintiff’s Complaint at ¶9). Yeaples proceeded to the rear of the mini excavator in an attempt to guide the homeowner out of their driveway and was hit by the excavator. (Supplement at 0017, Plaintiff’s Complaint ¶9). Yeaples asserts in the personal injury complaint that the excavator was not equipped with a safety device like a back-up alarm and/or mirror. (Supplement at 0017, Plaintiff’s Complaint ¶¶10-12).

The physical location of where the workplace injury occurred was at 206 N. Thomas Road, Tallmadge, Summit County, Ohio. (Supplement at 0016, Plaintiff's Complaint ¶5.) Respondent, Precision, has its corporate office in Medina County, Ohio, while Respondent, Gary Cole resides in Cuyahoga County, Ohio. (Supplement at 1).

Despite the fact that Yeaples was injured in Summit County and his employer, Precision, is located in Medina County, Relators decided to file their personal injury complaint in Cuyahoga County.

On February 8, 2012, Respondents filed a Motion to Dismiss, or in the Alternative, Motion to Transfer for Improper Venue because the alleged injury had occurred in Summit County and the employer, Precision, was located in Medina County. (Supplement at 0023). Respondents further submitted that Relators failed to state any claim against Gary Cole recognized by Ohio law and therefore the fact that Cole resided in Cuyahoga County was insufficient to establish proper venue. On March 28, 2012, the Cuyahoga County Common Pleas Court granted the Motion to Transfer Venue, ordering the Cuyahoga Clerk of Court to transfer the personal injury action to Medina County. (Supplement at 0076).

On May 10, 2012, after the matter was transferred to Medina County, Precision filed its answer and Cole filed a Rule 12 (B)(6) Motion to Dismiss for failure to state a claim on the basis that Ohio did not recognize a “workplace intentional tort” and

further that Cole was immune from suit as a co-employee pursuant to R.C. §4123.741. (Supplement at 0077 and 0082).

On May 30 2012, Relators, without leave of Court, as required by Civ.R. 15(A), filed their First Amended Complaint asserting additional allegations against Cole. (Supplement at 0097). On June 13, 2012, Precision and Cole filed a Motion to Strike the First Amended Complaint because Yeaples did not follow the Ohio Rules of Civil Procedure and consequently, the attempt to amend their Complaint was a nullity. (Supplement at 0106).

At the same time, despite their desire to file a new Complaint in the Medina Court, Relators requested that the Medina Court refuse the transferred case and send it back to Cuyahoga County. (Supplement at 0087).

Following briefing at oral argument, the Medina Court transferred the matter back to Cuyahoga County. (Supplement at 0140, Rel. Apx., Ex. S).

On August 16, 2012, in the Cuyahoga County Common Pleas Court, Precision and Cole filed their Motion to Refuse Venue and Affirm the March 28, 2012 Order. (Supplement at 0087). Precision and Cole argued that Cuyahoga County was not the proper venue because Cole was a nominal party. *Id.*

On January 4, 2013, Cuyahoga County Common Pleas Court, Judge Gall issued his Order transferring this matter to the Medina County Common Pleas Court. (Supplement at 0171). Thereafter, on January 9, 2013, the Cuyahoga County Clerk of

Courts completely complied with Judge Gall's order and transferred the entire matter to the Medina County Common Pleas Court. (Supplement at 0172).

On January 16, 2013, the Medina County Clerk of Courts received the transferred filed. (Supplement at 0175).

On January 24, 2013, Relators commenced this action seeking Writs of Mandamus and *Procedendo* from the Cuyahoga County Court of Appeals. Relators' Writ action sought to require Judge Gall to vacate the Court's March 28, 2012 and January 4, 2013 orders which had held that venue was improper in Cuyahoga County. Despite that filing on January 25, 2013, Relators' counsel recognized and acknowledged that Medina County now had jurisdiction over the matter and filed a Motion to Stay. (Supplement at 0181). Subsequently, on February 13, 2013, the Medina Court issued a judgment which granted Relators' stay request. (Supplement at 0201). The Medina County Court stated that it was neither accepting or rejecting the transfer. *Id.*

In the Mandamus action, on March 20, 2013, Judge Gall moved for summary judgment. Separately, on May 7, 2013, Respondents' Precision and Cole filed their own motion for summary judgment. The Cuyahoga County Court of Appeals reviewed the motions for summary judgment and determined that the entire action turned on whether a cause of action existed for a workplace intentional tort alleged to have been committed by a fellow employee:

[t]he gravamen of this case is whether the Relators stated a claim for intentional workplace tort against Gary Cole. If they did, then venue is proper in Cuyahoga County and it will issue for Judge Gall to proceed with the case; if they do not, then Judge Gall was correct in transferring the underlying case to Medina County, and a writ will not lie.

State ex rel Donald Yeaples v. Hon. Steven E. Gall, 2013-Ohio-2207 (8th Dist.) at ¶2.

On May 24, 2013, the Cuyahoga County Court of Appeals granted Relators' motion for summary judgment and denied Judge Gall's and Respondents' motions. The Appellate Court incorrectly held that Ohio law permits a fellow employee to allege a substantial certainty Workplace Intentional Tort as created in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608 (1982) and modified thereafter by *Fyffe v. Jenco's, Inc.*, 59 Ohio St.3d 115 (1991). The Cuyahoga County Appellate Court issued Writs of Mandamus and *Procedendo* ordering Judge Gall to vacate the orders transferring the underlying case and to accept venue over the underlying case even though Judge Gall no longer had jurisdiction over the personal injury matter since it was still pending in Medina County.

Relators filed a Notice of the Appellate Decision with Medina County and Medina County Court issued an Order transferring the matter to Cuyahoga County. (Supplement at 0177). On June 11, 2013, Respondents Precision and Cole perfected their appeal as of right to this Court. Additionally, Respondents asked the Medina Court to reconsider the transfer order and stay the Medina matter until this appeal was decided. The Medina court granted the stay request. (Supplement at 202).

LAW AND ARGUMENT

- I. PROPOSITION OF LAW NO. I: WHERE A RELATOR HAS NOT PRESENTED A RECOGNIZED, JUSTICIABLE CAUSE OF ACTION, NO CLEAR LEGAL RIGHT TO RELIEF EXISTS AND A REQUEST FOR EITHER A WRIT OF MANDAMUS OR PROCEDENDO MUST BE DENIED.

- II. PROPOSITION OF LAW NO. II: TO BE JUSTICIABLE, A COMPLAINT BY AN INDIVIDUAL ALLEGED TO HAVE BEEN INJURED BY A FELLOW EMPLOYEE IN THE COURSE AND SCOPE OF EMPLOYMENT, MUST SET FORTH COLORABLE FACTS AS TO EACH ELEMENT OF A RECOGNIZED COMMON LAW INTENTIONAL TORT, I.E., ASSAULT, BATTERY, FALSE IMPRISONMENT, OR TRESPASS
 - A. Ohio Law Does Not Recognize a Substantial Certainty Intentional Tort Against a Fellow Employee.

A request for the issuance of either a Writ of Mandamus or Writ of *Procedendo* requires the relator to establish a clear legal right to the relief they are seeking. *See, State ex rel Berger v. McMonagle*, 6 Ohio St.3d 28, 29 (1983); *State ex rel Weiss v. Hoover*, 84 Ohio St.3d 530, 531-532 (1999). As the Cuyahoga County Court of Appeals stated, in order to show a clear legal right to relief in this case, Yeaples must establish that their underlying personal injury complaint presents a colorable claim for an intentional tort against Yeaples' fellow employee, Gary Cole. *State ex rel Donald Yeaples v. Hon. Steven E. Gall*, 2013-Ohio-2207 (8th Dist.) at ¶2. Because the Relators did not set forth a viable or recognized claim for an intentional tort against Cole, Relators Complaint for the issuance of the respective Writs should have been denied and the Cuyahoga Court of Appeals erred in determining otherwise. *Tatman v. Fairfield Cty. Bd. of Elections*, 102 Ohio St.3d 425, 2004-Ohio-3701 at ¶13; *State ex rel Morenz v. Kerr*, 104 Ohio St.3d 148,

154, 2004-Ohio-6208 at ¶13. (The request for the issuance of a Writ must be rejected where it appears beyond doubt, after presuming the truth of all material factual allegations of the complaint and making all reasonable inferences in favor of the relator, that relator is not entitled to the requested relief).

Throughout this country's jurisprudence, including Ohio, courts have recognized the existence of various common law intentional torts, *i.e.*, assault, battery, trespass and false imprisonment. These torts, with their separate *prima facie* elements, are claims asserted against a specific individual requiring particularized action through which the tortfeasor intended to cause another individual a specific, direct injury. "[F]or example, harmful battery protects the interest in bodily integrity, assault protects the interest in freedom from fear of bodily harm, trespass protects the interest in private property, and false imprisonment protects the interest in freedom of movement." *Stanley v. Deluxe Fin. Serv. Inc.*, 2009 U.S. Dist. LEXIS 28124 (N.D. Ohio) at *10-11.

These torts and their elements seem to apply universally regardless of where the tort may have been committed. Stated differently, the elements for these traditional common law torts are virtually identical irrespective of whether the tort occurred in a residence, entertainment establishment, commercial building, in public or on a sidewalk, as these case examples illustrate:

[T]he tort of assault is defined as the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact. The threat or attempt must be coupled

with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching. An essential element of the tort of assault is that the actor knew with substantial certainty that his or her act would bring about harmful or offensive contact.

Smith v. John Deere Co., 83 Ohio App.3d 398, 406, (10th Dist. 1993)(attempted repossession of tractor).

[T]o establish a claim of civil assault, one must demonstrate a willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact. A key element of assault is that the alleged tortfeasor knew with substantial certainty that his or her act would bring about harmful or offensive contact. The threat or attempt must be coupled with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching.

Brooks v. Lady Foot Locker, 2005-Ohio-2394 (9th Dist.), ¶18 (quotation and citation omitted) (interaction related to suspected shoplifting).

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.

Love v. Port Clinton, 37 Ohio St.3d 98 (1988) (battery defined in the context of police subduing and handcuffing).

[A]n individual is liable to another for battery if: (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.

Adkins v. Ferguson, 2003-Ohio-403 (5th Dist.), ¶¶ 24-26 (minor shot another minor while playing with gun).

Besides these traditional common law intentional torts, in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608 (1982), it is commonly recited that this Court created a new and unique common law tort which permitted an employee

to assert an intentional tort claim against their employer when the injury occurred in the workplace. Prior to this decision, an injury in the workplace was solely compensated through Ohio's Worker's Compensation Insurance. This "no fault" compensation was a *quid pro quo* compromise reached with employers in exchange for employer immunity from all workplace injuries. In *Blankenship*, this Court held that an intentional tort asserted against an employer would fall outside the purview of the employer's constitutional immunity. That decision permitted an employee to seek additional damages beyond the worker's compensation benefits. See, *Van Fossen v. Babcock & Wilcox*, 36 Ohio St.3d 100 (1988); *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90; *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135 (1988); *Pariseau v. Wedge Prods., Inc.*, 36 Ohio St.3d 124 (1988).

In order to set forth a colorable claim for an employer intentional tort, distinct and unique elements were subsequently developed by this Court in *Jones v. VIP Dev. Co.* (1984), 15 Ohio St. 3d 90, and then modified by this Court in *Fyffe v. Jenos, Inc.*, 59 Ohio St.3d 115 (1991).

Throughout all of these Supreme Court decisions, it was commonly understood that such specialized tort was a claim by an employee against an employer. In this matter, Relators have asserted that the elements for an employer intentional tort may be utilized to assert an intentional tort claim against a fellow employee. In other words, the injured employee, here Yeaples, believes that the employer's intentional tort and its substantial certainty test created by *Blankenship*, and

its progeny, can form the basis for the employee's claim against the fellow employee. Yeaples desires to use this employer standard instead of asserting a traditional common law cause of action for assault or battery against Cole. The case law does not even remotely support such a proposition. Nonetheless, in this matter, the Cuyahoga County Court of Appeals agreed with Yeaples and has held that he may utilize this substantial certainty test as well as the employer intentional tort *prima facie* elements in a claim against co-employee Cole. See, *State ex rel Donald Yeaples v. Hon. Steven E. Gall*, 2013-Ohio-2207 (8th Dist.) at ¶11 and ¶19. An examination of the respective law in this area establishes that Cuyahoga County Court of Appeals is mistaken and must be reversed.

As previously indicated, in *Blankenship v. Cincinnati Milacron Chem*, 69 Ohio St.2d 608 (1982), this Court for the first time recognized that an employer's commission of an intentional tort against an employee does not arise out of the employment relationship and, therefore, the workers compensation immunity did not apply. Yeaples asserted below that because Blankenship had named fellow employees in his workplace injury complaint, this Court's decision impliedly permits the same action to be utilized against fellow employees.

However, despite Yeaples insistence otherwise, this Court never stated such. In fact, in *Blankenship*, this Court only held that an intentional tort committed in the workplace would be deemed an injury which occurred outside the course and scope of one's employment and, therefore, an intentional tort claim would not be

encompassed by the constitutional immunity. There is nothing in this Court's language to even suggest that the Court was creating a new tort which could be asserted against fellow employees.

Thereafter, in *Jones v. VIP Development Co.*, 15 Ohio St.3d 90 (1984), this Court had occasion to further address the impact of its *Blankenship* decision on employers. Therein, this Court reviewed three appeals involving the question of what would constitute an intentional tort in order to avoid the constitutional immunity. The *Jones*' decision provides that "An intentional tort is an act committed with the intent to injure another, or committed with the belief that injury is substantially certain to occur." *Jones*, *supra*, at paragraph one of the syllabus.

This new standard to be utilized when determining whether an employee had a viable cause of action for an intentional tort against their employer is silent as to its application against a fellow employee. Notably, none of the three appeals presented for review in *Jones*, *supra*, even involved a claim against a fellow employee. Accordingly, neither *Blankenship* nor *Jones* supports Yeaples' position or the Appellate Court's conclusion.

Indeed, the decisions which followed either similarly fail to support the use of the employer intentional tort standard in a claim against a fellow employee or contain language which leads the reader to the conclusion that such substantial certainty standard could only be applied to an employer. See, e.g., *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100 (1988); *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio

St.3d 135 (1988); *Pariseau v. Wedge Prods., Inc.*, 36 Ohio St.3d 124 (1988); *Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115 (1991).

In *Fyffe*, this Court modified *Jones, supra* and established a three-part test an employee must satisfy to present a colorable employer intentional tort claim. This Court held that an employee could maintain an intentional tort cause of action against his employer where the evidence established:

(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 if 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.

Id. at paragraph one of the syllabus

As with *Blankenship* and its progeny, *Fyffe* did not address whether this unique tort and its substantial certainty test could be utilized to support an employee's intentional tort claim against a fellow employee. The language in *Fyffe*, as well as in those cases leading to the creation of the recognized substantial certainty employer intentional tort test, is clearly directed towards an employer. Each of those cases addressed an employer's actions which were believed to "intentionally" cause an employee's injury. The test was designed for the workplace to address an employer's potential liability. The cases do not, in any way, appear to change the traditional

common law torts, like assault and battery, or the elements which apply before liability exists when one individual intentionally injures another.

As stated previously, the traditional intentional tort elements for battery, assault or the like do not seem to limit their application or change the analysis depending on the location of the tort. In other words, did this Court intend that those decisions would permit an employee to file an intentional tort action against another employee and utilize the employer intentional tort *prima facie* elements instead of those elements used in traditional intentional tort claims such as assault and/or battery? Does the fact that the alleged tortious conduct occurred in the workplace, as opposed to in a residence, entertainment establishment or in public, somehow permit the employee advancing an intentional tort against another employee permission to utilize the standards this Court has created for claims by an employee against an employer?

It is illogical for a separate set of elements for an assault or battery type of intentional tort to apply to an injury claim in the workplace as opposed to another venue. Would an assault in a church or bar be treated differently than an assault at work? There does not seem any rationale to permit such a distinction. However, that is exactly the implied result of the Appellate Court's decision here.

In this matter, it is conceded that Relators did not set forth any facts in their personal injury complaint against fellow employee, Gary Cole, which could, presuming true for notice pleading purposes, satisfy any traditional common law tort

of assault or battery. Further, there are no specific causes of action directed against Cole.

Instead, Relators included Cole in the “Parties and Background” portion of their personal injury complaint and all factual references in that complaint describe actions by the employer, Precision, not Cole. Relators assert various allegations that Yeaples employer deliberately intended Yeaples to perform activity which the employer knew was “substantially certain” to harm Yeaples. (Supplement at 0016-0017). However, none of these allegations even include Cole.

Nevertheless, Relators contend throughout their post complaint pleadings that the *Fyffe* “substantial certainty test” can apply to a claim against the employee Cole, despite the lack of any factual assertions directly against Cole or that such standard is directed at an employer as the tripartite test clearly enumerates. *See, Stanley v. Deluxe Fin. Serv. Inc.*, 2009 U.S. Dist. LEXIS 28124 (N.D. Ohio).

Based on case law issued by this Court, it would appear that Yeaples’ attempt to fit a round peg into a square hole cannot be countenanced. As explained, all of this Court’s decisions in this area discuss an employer’s conduct. The “substantial certainty test” focuses on how the employer directed an activity and the employer’s knowledge. Yeaples’ attempt, and the Appellate Court’s implicit permission, to substitute the word “employee” for that of “employer” is nonsensical. The entire common law employer intentional tort, and now the General Assembly’s statutory

standard, is directed to the actions of the employer, not the employee. *See*, R.C. §2745.01.

Yeaples will contend that appellate decisions in *Stockum v. Rumpke Container Serv., Inc.*, 21 Ohio App.3d 236 (1st Dist.1985) and *LaCava v. Walton*, 8th Dist. No. 69190, 1996 Ohio App. LEXIS 2420 (June 13, 1996) support their position that this Court permits fellow employee intentional torts. While the breadth of that statement would be correct—that a fellow employee can be held responsible for an intentional tort which satisfies one of the traditional intentional torts like assault or battery - Yeaples' leap that the employee could also be responsible under a *Fyffe* tripartite employer substantial certainty tort is completely without merit. Neither *LaCava* nor *Stockum* specifically state such.¹

It is beyond peradventure that this Court ever intended for *Fyffe*, or those decisions it modified, to create a separate substantial certainty tort against a fellow employee. Accordingly, this Court should so state and reverse the Cuyahoga County Court of Appeals.

¹ In *LaCava*, *supra*, the court merely stated that the fellow employee immunity did not apply to an intentional tort claim as this Court had held in *Blankenship*, *supra*. In *Stockum*, *supra*, that court similarly held the immunity did not apply for intentional tort claims. However, the court's truncated analysis has been argued by Yeaples to suggest that an employer's intentional tort standard could be utilized for a claim against the co-employee. *Stockum*, *supra*, at 238.

B. Because Relator Did Not Present a Recognized Cause of Action in His Personal Injury Complaint Against His Fellow Employee, Respondent, Gary Cole, Venue Was Proper in Medina County, Not Cuyahoga County.

1. Since Cole Is A Nominal Defendant, Venue Is Not Proper In Cuyahoga County.

When construing the underlying personal injury complaint, proper venue does not lie in Cuyahoga County because the cause of action arose in Summit County and the only party against whom a recognized, valid cause of action has been pled is against the Medina employer, Precision. Civ. R. 3(B) provides:

Any action may be venued, commenced, and decided in any court in any county. When applied to county and municipal courts, "county," as used in this rule, shall be construed, where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:

- (1) The county in which the defendant resides;
- (2) The county in which the defendant has his or her principal place of business;
- (3) A county in which the defendant conducted activity that gave rise to the claim for relief;

- (6) The county in which all or part of the claim for relief arose; or, if the claim for relief arose upon a river, other watercourse, or a road, that is the boundary of the state, or of two or more counties, in any county bordering on the river, watercourse, or road, and opposite to the place where the claim for relief arose...

Here, subsections (1), (2), (3) and (6) of Civ. R. 3(B) are satisfied. Specifically, Precision's principal place of business is in Medina County and the injury occurred in Summit County. The physical location at which Yeaples worked and where the alleged injury occurred was in Summit County, Ohio. (Supplement at 0015.) The proper venue is either Medina or Summit County.

The only tie to Cuyahoga County is Cole's place of residence. Even though Cole resides in Cuyahoga County, venue in Cuyahoga County is improper as he is a nominal party to this lawsuit. Civ.R. 3(E) directs that venue in a multiple party action is proper, "if the venue is proper as to any one party other than a nominal party, or as to any one claim for relief." *Id.* (emphasis added). Relators' filing of this case in Cuyahoga County was based solely on Cole's residence there. As has been established, Yeaples never set forth a legally recognized cause of action against his fellow employee, Cole. Accordingly, Cole, at best, must be considered merely a "nominal party" supporting the Cuyahoga County Common Pleas Court's transfer of venue to Medina. *See, e.g., Smith v. Inland Paperboard and Packaging, Inc.*, 2008 Ohio 6984 (11th Dist.).

In *Smith*, the plaintiff brought an employer intentional tort claim against his employer for injuries he suffered. In addition to the employer, plaintiff named the plant superintendant as a party. *Id.* at ¶32. Even though the employer and the injury occurred outside of Cuyahoga County, the action was brought in Cuyahoga County based on the plant superintendant's residence. *Id.*

The 11th District Court of Appeals agreed with trial court's decision to transfer the matter to Portage County because the plant superintendent was a nominal defendant pursuant to Civ.R. 3(E). In making this determination, the 11th District Court of Appeals analyzed the term "nominal party" contained within Civ.R. 3(E):

The term "nominal party," as used in Civ.R. 3(E), is not defined by the rule, nor do we find any case law defining it. Words used in the rules of procedure are to be given their "plain and ordinary" meaning, if not otherwise defined. *State ex rel Law Office of the Public Defender v. Rosencrans*, 2d Dist. No. CA20416, 2005 Ohio 6681, at P18. Webster's II New College Dictionary (1999) 742 provides, in relevant part: "nominal *** 2. Existing in name only and not in reality. 3. Small; trifling ***." Therefore, for purposes of Civ.R. 3(E), it may be said that a "nominal party" is one whose presence in the action is either: (1) merely formal; or, (2) unnecessary for a just and proper resolution of the claim(s) presented. Particularly in the second situation, a factual inquiry may be necessary to determine whether a party is merely "nominal" for purposes of Civ.R. 3(E).

Id. at ¶41.

The court reached this decision since: (1) the plant superintendant was not at the facility at the time of injury; (2) he had not participated in training the plaintiff; (3) he had never told any employee to bypass a safety procedure; and (4) he was unaware that employees occasionally did so. *Id.* Consequently, the superintendant's "presence as a defendant would not be necessary, factually or legally, for [the plaintiff] to obtain relief against [the employer] on his intentional tort claim. *Id.* at ¶42.

Applying Civ. R. 3(E) and *Smith* to this matter, Cole is a nominal party. In the underlying personal injury complaint, Relators did not set forth any allegations against Cole. It is believed that the only reason Cole was named as a party was based on a

legal strategy because at that time, the Cuyahoga Appellate Court's decisions in *Houdek v. Thyssenkrupp Materials N.A., Inc.*, 2011 Ohio 1694 (8th Dist.) and *Holloway v. Area Temps*, 2010 Ohio 2106 (8th Dist.) were precedent² and Relators evidently viewed the Cuyahoga County as more favorable to their interpretation of R.C. §2745.01, the Ohio Employer Intentional Tort Statute.

Judge Gall saw through Relators' forum shopping and transferred the matter where it belongs, Medina County. The personal injury Complaint fails to set forth any viable intentional tort claim against Cole, i.e., assault, battery, or intentional infliction of emotional distress. Without any specific claims against him, Cole is a nominal defendant. Thus, Judge Gall's decision regarding venue should stand.

III. PROPOSITION OF LAW NO. III: WHEN A JUDGMENT HAS BEEN COMPLETELY PERFORMED, ANY ATTEMPT TO COLLATERALLY ATTACK THAT JUDGMENT IS SUBJECT TO THE MOOTNESS DOCTRINE AND ALL ORDERS ATTEMPTING TO VACATE THAT JUDGMENT ARE VOID.

The Ohio Constitution provides that the jurisdiction of the courts is limited to justiciable cases and controversies:

The Constitution of Ohio sets forth the basic limitation on the jurisdiction of the common pleas courts. *Section 4(B), Article IV of the Ohio Constitution* vests the common pleas courts with "such original jurisdiction over all justiciable matters * * * as may be provided by law."

State ex rel Barclays Bank v. Curt of Common Pleas of Hamilton Cty., 74 Ohio St.3d 536, 542, 1996-Ohio-286 *citing* O. Const. Art. IV, Sec. 4(B).

² This Court subsequently overruled both of those decisions. *See Houdek v. ThyssenKrupp Materials N.A., Inc.*, 2012 Ohio 5685 and *Hewitt v. L.E. Myers*, 134 Ohio St.3d 199, 2012 Ohio 5317.

Encompassed within the Constitution's "justiciability" language is the requirement that any matter present an existing controversy where a judicial resolution would have an immediate impact and such judgment would be able to be carried into effect:

It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and rendered judgments which can be carried into effect. *Fortner v. Thomas*, 220 Ohio St.2d 13, 14 (1970). * * *For a cause to be justiciable, there must exist a real controversy, presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties.

Burger Brewing Co., v. Liquor Control Comm., 34 Ohio St.2d 93, 97-98 (1973).

Mootness is a doctrine which goes hand in hand with the Ohio Constitution's justiciability requirement. *Id.*, *Hirsch v. TRW, Inc.*, 2004-Ohio-1125 (8th Dist. at ¶¶8-11). In *Burger v. Cleveland*, 1997 Ohio App. LEXIS 1351, 8th Dist. No. 67735 (March 30, 1995), the Cuyahoga Appellate Court dismissed a request for the issuance of a Writ because the matter was moot and therefore the Court did not have subject matter jurisdiction. *Id.* at *5. Nine years later, the same Court similarly held a court, in reality, lacks subject matter jurisdiction where the matter has become moot: "If what were once justiciable matters have been resolved to the point where they become moot, the courts of common pleas no longer have subject matter jurisdiction to hear the case." *Id.* at ¶11.

The United States Supreme Court has agreed with such an interpretation of the case and controversy limitation on a court's jurisdiction declaring that a matter which is moot is not justiciable:

In federal cases, mootness has been equated with the case or controversy jurisdictional requirement. *In Liner v. Jafco, Inc.* (1964), 375 U.S. 301, 306, Fn.3d 11 L.Ed. 47, 84 S.Ct. 391, the United States Supreme Court stated, 'our lack of jurisdiction to review moot cases derives from the Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' *See, also, Nebraska Press Ass'n. v. Stewart* (1976), 427 U.S. 539, 546, 49 LEd.2d 683, 96 S.Ct. 2791.

Hirsch, supra at ¶¶8-9.

These salient principles of jurisdiction first recognized in *Burger, supra* and *Hirsch, supra* were reiterated a few years ago by the same Court in reliance on this Court's precedent:

[T]he duty of this court, as with every judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions of abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

State ex rel Coleman v. Keough, 2009-Ohio-4723 (8th Dist.) at ¶6, *citing State ex rel Elijah Jennings, Inc. v. Noble*, 49 Ohio St.3d 71, 74 (1990), *quoting Miner v. Witt*, 82 Ohio St. 237, 238-239 (1910), *quoting Mills v. Green*, 159 U.S. 651, 653 (1895).

While the Cuyahoga County Appellate Court ignored all of these decisions, including its own precedent in the case *sub judice*, these principles are well established that a "case is moot when the issues presented are no longer." *State ex rel Gaylor v. Goodenow*, 125 Ohio St.3d 407, 2010-Ohio-1844 at ¶10 *quoting Los Angeles Cty v. Davis*, 440 U.S. 625, 631 (1979), *quoting Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Moreover, it is well recognized that where judgments have been carried into effect, such fulfillment of the judgment puts an end to the controversy. *See, e.g. Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245 (1990) *quoting Rauch v. Noble*, 169 Ohio St. 314, 316 (1959) *quoting Lynch v. Lakewood City Schools Dist. Bd. of Edn.*, 116 Ohio St. 361 (1927), ¶3 of the syllabus (1927); *see, also Hagood v. Gail*, 105 Ohio App.3d 780, 785 (11th Dist. 1995). Put simply, after compliance with a judgment, “there is nothing to litigate.” *Tereletskey v. Tereletskey*, 2007-Ohio-4132 (9th Dist.) at ¶8, *quoting American Book Co. v. Kansas*, 193 U.S. 49, 52, 24 S.Ct. 394, 48 L.Ed. 613 (1904). More importantly, as this Court has stated and held: “Neither mandamus nor procedendo will issue to compel a vain act.” *State ex rel Morenz v. Kerr*, 104 Ohio St.3d 148, 154, 2004-Ohio-6208 at ¶35, *citing State ex rel Moore v. Malone*, 96 Ohio St.3d 417, 2002-Ohio-4821; *State ex rel Garnett v. Lyons*, 44 Ohio St.2d 125, 127 (1975).³

Here, Judge Gall issued his judgment transferring this matter to the Medina County Common Pleas Court on January 4, 2013. (Supplement at 0171). Thereafter, on January 9, 2013, the Cuyahoga County Clerk of Courts completely complied with Judge Gall’s order and transferred the entire matter to the Medina County Common Pleas Court. (Supplement at 0172).

³ Mootness may be established with evidence not existing in the record. *Id. citing Pewitt v. Lorain Correctional Inst.*, 64 Ohio St.3d 470, 472 (1992); *State ex rel Nelson v. Russo*, 89 Ohio St.3d 227, 228 (2000). Finally, a court is permitted to take judicial notice of the fact that a matter is moot. *State ex rel Rivera v. Callahan*, 2005-Ohio-2182 (8th Dist.) at ¶3.

In Medina County, on January 16, 2013, the Medina County Clerk of Courts received the transferred filed. (Supplement at 0175). On January 25, 2013, Relators' counsel recognized and acknowledged Medina County Common Pleas Court's jurisdiction and filed a Motion to Stay. (Supplement at 0181). Subsequently, on February 12, 2013, the Medina County Common Pleas Court issued a judgment establishing that it, not Cuyahoga county had jurisdiction over the personal injury action. (Supplement at 120).

On February 26, 2013, Respondents filed with the Eighth District Court of Appeals a Motion to Dismiss the Petition for Writs on this mootness basis. On March 8, 2013, the Appellate Court denied same improperly determining that the Medina County Court's action in staying the Medina County action meant that the matter was not moot. However, what the Appellate Court overlooked is that, notwithstanding Medina's stay order, the Medina Court still was the only Court which had jurisdiction over the matter. Significantly, Medina did not transfer or refuse jurisdiction.

While the Medina Court stated that it was neither accepting nor rejecting transfer, such statement does not change the crucial fact that after the Cuyahoga County Clerk complied with Judge Gall's transfer order there was nothing thereafter pending before Judge Gall or in Cuyahoga County. Judge Gall's Order had been fully complied with and the controversy in Cuyahoga County was moot.⁴

⁴ Because the Medina Court never rejected Judge Gall's transfer, this main fact distinguishes application of this Court's decision in *State ex rel Smith Admr v. Bd.*

As the undisputed facts establish, the Cuyahoga County Clerk of Courts completely complied with Judge Gall's order and the Medina County Clerk of Courts and Common Pleas Court has taken jurisdiction. As such, these events rendered the Mandamus Complaint completely moot and consequently the Cuyahoga County Court of Appeals did not have jurisdiction to issue the respective Writs and its judgment and order is void. *Patton v. Diemer*, 35 Ohio St.3d 68, 70 (1988); *State ex rel Beil v. Dotta*, 168 Ohio St. 315, 319-320 (1958); *State Ex rel Elijah Jennings, Inc. v. Noble*, 49 Ohio St.3d 71, 74 (1990); *Minor v. Witt*, 82 Ohio St. 237, 238-239 (1910), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895).

CONCLUSION

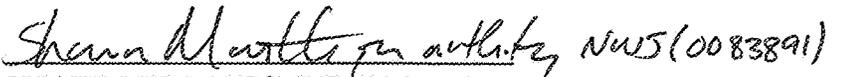
Any claim of intentional tort alleged against another individual, regardless of the location of where the tort occurred, is governed by the *prima facie* element for the respective traditional common law intentional torts, *i.e.* assault, battery, trespass or false imprisonment. Ohio law does not permit an employee who claims to have been injured by a fellow employee, to utilize the legal standard or elements this Court previously recognized for a common law intentional tort. Because Relators' underlying complaint fails to set forth a recognized cause of action, Relators' did not

Cuyahoga County Court of Common Pleas, et al., 106 Ohio St.3d 151, 2005-Ohio-4103. See, *State ex rel Edwards v. Tompkins*, 2011-Ohio-32 at ¶¶11-15 (5th Dist.); see, also, *State ex rel Dannaber v. Crawford*, 78 Ohio St.3d 391, 1997-Ohio-72. Only if Medina County rejected jurisdiction would the proverbial "Gordian Knot" over jurisdiction exist.

establish a clear legal right to relief and their request for respective Writs of Mandamus and *Procedendo* should have been denied.

Moreover, where a judgment has been completely executed and performed, any action attempting to vacate or dissolve that judgment is moot. Where a matter is moot, a Court is without subject matter jurisdiction and any order issued is void. Here, the Cuyahoga County Clerk of Courts had completely and fully complied with Judge Gall's order transferring venue of the underlying personal injury complaint to Medina County. As such, Relators' attempt to vacate that judgment by way of an original action in the Cuyahoga County Court of Appeals was moot, subject matter jurisdiction was lacking and the Cuyahoga County Court of Appeals judgment is void.

Respectfully submitted,


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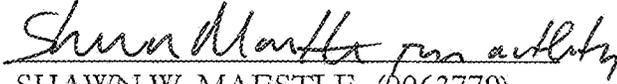
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing true and correct copies thereof, in sealed envelopes, postage fully prepaid and by depositing same in the U.S. mail on this 26th day of August, 2013, to the following:

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SHAWN W. MAESTLE (0063779) *NWS (0083891)*

APPENDIX

IN THE SUPREME COURT OF OHIO

13-0941

DONALD YEAPLES, *ET AL.*

RELATORS

On Appeal from the
Court of Appeals,
Eighth Appellate District
Court of Appeals Case No.: 99454
Cuyahoga County Common Pleas

v.

HONORABLE STEVEN E. GALL, *ET AL.*

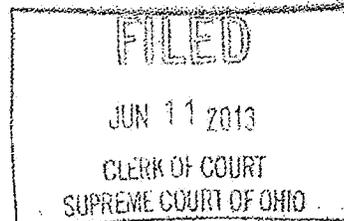
RESPONDENTS

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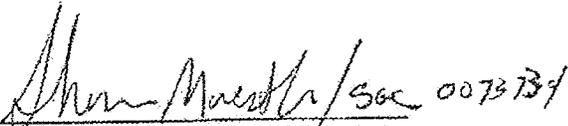
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PRECISION DIRECTIONAL BORING, LLC
AND GARY COLE*



Now comes Respondent, Precision Directional Boring, LLC and Gary Cole, and hereby gives notice of appeal to the Supreme Court of Ohio pursuant to S.Ct. R. II, Section 1(A)(1) in this original action from the summary judgment rulings dated May 24, 2013. The journal entries are attached hereto and incorporated hereon as Exhibit A.

Respectfully submitted,

Handwritten signature of Shawn W. Maestle in black ink, with the initials "SW" and "SM" visible. To the right of the signature, the number "0073737" is handwritten.

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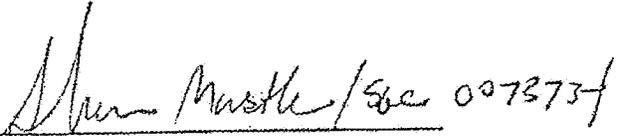
**ATTORNEY FOR RESPONDENT'S PRECISION
DIRECTIONAL BORING, LLC AND GARY COLE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing true and correct copies thereof, in sealed envelopes, postage fully prepaid and by depositing same in the U.S. mail on this 11th day of June, 2013, to the following:

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SHAWN W. MAESTLE (0063779)

MAY 24 2013

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

DONALD YEAPLES & DEBRA YEAPLES

Relator

COA NO.
99454

ORIGINAL ACTION

-vs-

HON. STEVEN E. GALL, ET AL.

Respondent

MOTION NO. 463958

Date 05/24/13

Journal Entry

Cross-motion by Relators for summary judgment is granted. See journal entry and opinion of same date.

COPIES MAILED TO COURSE FOR
ALL PARTIES - COSTS TAKEN

FILED AND JOURNALIZED
PER APP.R. 22(C)

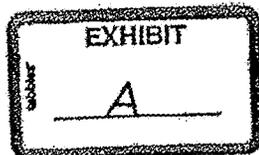
MAY 24 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy

Adm. Judge, MELODY J. STEWART, Concurs _____

Judge EILEEN A. GALLAGHER, Concurs _____

[Signature]
TIM MCCORMACK
Judge



Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

DONALD YEAPLES & DEBRA YEAPLES

Relator

COA NO.
89454

ORIGINAL ACTION

-vs-

HON. STEVEN E. GALL, ET AL.

Respondent

MOTION NO. 464793

Date 05/24/13

Journal Entry

Motion by Respondents, Precision Directional Boring, L.L.C. and Gary Cole, for summary judgment is denied. See journal entry and opinion of same date.

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ALL PARTIES - COSTS TAKEN

FILED AND JOURNALIZED
PER APP.R. 22(C)

MAY 24 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy

Adm. Judge, MELODY J. STEWART, Concur

Judge EILEEN A. GALLAGHER, Concur

[Signature]
TIM MCCORMACK
Judge

MAY 24 2013

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

DONALD YEAPLES & DEBRA YEAPLES

Relator

COA NO.
99454

ORIGINAL ACTION

-vs-

HON. STEVEN E. GALL, ET AL.

Respondent

MOTION NO. 465079

Date 05/24/13

Journal Entry

Writs granted. See journal entry and opinion of same date.

COPIES MAILED TO COURTEL FOR
ALL PARTIES. COSTS TAKEN

FILED AND JOURNALIZED
PER APP.R. 22(C)

MAY 24 2013

CUYAHOGA COUNTY CLERK
OF THE COURTS OF APPEALS
By [Signature] Deputy

Adm. Judge, MELODY J. STEWART, Concur

Judge EILEEN A. GALLAGHER, Concur

[Signature]
TIM MCCORMACK
Judge

MAY 24 2013

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99454

STATE OF OHIO, EX REL.,
DONALD YEAPLES AND DEBRA YEAPLES

RELATORS

vs.

HONORABLE STEVEN E. GALL, ET AL.

RESPONDENTS

JUDGMENT:
WRITS GRANTED

Writs of Mandamus and Procedendo
Motion Nos. 463412, 463958, and 464793
Order No. 465079

RELEASE DATE: May 24, 2013

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By: Charles E. Hannan, Jr.,
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FILED AND JOURNALIZED
PER APP.R. 22(C)

MAY 24 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy

RECEIVED BY THE CLERK OF THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

TIM McCORMACK, J.:

{¶1} On January 24, 2013, the relators, Donald Yeaples and Debra Yeaples, commenced this extraordinary writ action, stating claims in mandamus and procedendo, against the respondents, Cuyahoga County Common Pleas Court Judge Steven E. Gall, Precision Directional Boring L.L.C. (hereinafter "Precision"), and Gary Cole. The relators seek to compel Judge Gall in the underlying case, *Yeaples v. Precision Directional Boring L.L.C.*, Cuyahoga C.P. No. CV-773151, to vacate the court's March 28, 2012 and January 4, 2013 orders finding venue improper in Cuyahoga County and transferring the underlying case to the Medina County Common Pleas Court and to try the underlying case.

{¶2} On March 20, 2013, Judge Gall, through the Cuyahoga County Prosecutor, moved for summary judgment. The relators filed their brief in opposition and a cross-motion for summary judgment on April 9, 2013. Judge Gall filed his opposition to the cross-motion for summary judgment on April 29, 2013. On May 7, 2013, Precision and Cole filed their motion for summary judgment. The gravamen of this case is whether the relators stated a claim for intentional workplace tort against Gary Cole. If they did, then venue is proper in Cuyahoga County and a writ will issue for Judge Gall to proceed with the case; if they do not, then Judge Gall was correct in transferring the underlying case to Medina County, and a writ will not lie. The court has reviewed the materials submitted, and this matter is ripe for resolution. For the following

reasons, this court grants the relators' motion for summary judgment, denies the respondents' motions for summary judgment, and grants the writs of mandamus and procedendo. Judge Gall is directed to vacate the orders transferring the underlying case to the Medina County Common Pleas Court and proceed to judgment on the underlying case.

FACTUAL AND PROCEDURAL BACKGROUND

{¶3} On January 10, 2010, Donald Yeaples, a resident of Lorain County, and Gary Cole, a resident of Cuyahoga County, were working for respondent Precision that has its principal place of business in Medina County. Yeaples and Cole were identifying residential connections with storm, sanitary, and/or water pipes crossing the road at a residence in Summit County to prepare a bore path for a water main. Cole was operating a mini excavator. The homeowners notified Yeaples that they needed to back their vehicle out of the driveway, and Yeaples told this to Cole. Cole nodded his assent, and Yeaples went to the rear of the excavator to guide the homeowners. As Yeaples was doing this, the excavator ran over him.

{¶4} On January 10, 2012, the relators commenced the underlying case against Precision, Cole, and various John Does¹ in Cuyahoga County. In the

¹ Only Precision, Cole, and Count 1 are relevant to the instant action. Count 2 is a claim for negligence against the John Does, and Count 3 is a claim under the Ohio Frequenter Statute against the John Does. In Count 4, Debra Yeaples asserts her claim for loss of consortium against all the defendants.

complaint, the relators stated the basic facts that at the job site, Cole backed up the mini excavator over Donald Yeaples and injured him. They further asserted that the excavator did not have safety equipment, including a rearview mirror or a backup alarm, and was not in compliance with federal and Ohio law.

{¶5} The relators designated Count 1 as "Workplace Intentional Tort."² Eleven times throughout this count, the relators referred to "defendants" plural. Four times they asserted that "[a]s a direct and proximate result of the Defendants' tortious conduct," Donald Yeaples was injured in various ways. Only once in this count did the relators refer to "defendant" in the singular: "Defendant's deliberate removal and/or deliberate refusal to use safety guards and safety devices is a presumption of specific intent as set forth in Section 2745.01(C) of the Ohio Revised Code." At all other times in Count 1, the relators used the plural form of "defendant." At no time did they otherwise specifically mention or distinguish between Precision and Cole.

{¶6} On February 8, 2012, Precision moved to dismiss the complaint or in the alternative to transfer for improper venue. Precision argued that venue could be proper in Cuyahoga County only if Cole was a properly named defendant.³ However, Cole could not be a proper party because R.C. 4123.741

² Count 1 consists of paragraphs 13 through 25 of the complaint.

³ Civ.R. 3(B) provides in pertinent part as follows: "Proper venue lies in any one or more of the following counties: (1) The county in which the defendant resides; (2) The county in which the defendant has his or her principal place of business; (3) A

provides for co-employee immunity; no employee shall be liable in damages for any injury received by any other employee of such employer in the course of the latter employee's employment. Precision further asserted that the complaint did not allege any specific tort against Cole. Precision concluded that the relators named Cole as a nominal defendant solely for the purposes of forum shopping. Cole joined in this motion on February 21, 2012. The relators countered that a co-employee could be liable for an intentional workplace tort and that Cole "appreciated" that Donald Yeaples was behind the excavator, that the excavator lacked necessary safety equipment, and that Cole backed up the excavator anyway in a substantial certainty of injury to Yeaples. On March 28, 2012, the Cuyahoga County Common Pleas Court judge⁴ granted the motion to transfer and transferred the underlying case to the Medina County Common Pleas Court, Case No. 12 CIV 0660.

{¶7} On May 30, 2012, the relators moved the Medina County Common Pleas Court to reconsider and refuse the transfer of venue. On June 28, 2012, the Medina County judge conducted an oral hearing on the venue issue. On

county in which the defendant conducted activity that gave rise to the claim for relief; * * * (6) The county in which all or part of the claim for relief arose * * *."

Civ.R. 3(E) provides in pertinent part as follows: "In any action brought by one or more plaintiffs against one or more defendants involving one or more claims for relief, the forum shall be deemed a proper forum, and venue in the forum shall be proper, if the venue is proper as to any one party other than a nominal party, or as to any one claim for relief."

⁴ At that time, Judge Annette Butler presided over the underlying case.

July 17, 2012, the judge issued a four-page journal entry finding the possibility that co-employee immunity may not exist in this case and ruling that Count 1's use of "Defendants" broadly stated a complaint for workplace intentional tort to encompass a claim against Cole. Therefore, because venue is proper in Cuyahoga County, the court transferred the case back to Cuyahoga County.

{¶8} On August 16, 2012, Precision and Cole moved the Cuyahoga County Common Pleas Court to refuse venue and affirm the March 28, 2012 order. They asserted that the Medina County court erred in concluding the complaint stated a claim against Cole. In reality, they argued Cole is only a nominal party, which is insufficient to vest venue in Cuyahoga County. After further briefing, on January 4, 2013, respondent Judge Gall, who succeeded Judge Butler, summarily granted the motion to refuse venue and transferred the underlying case to Medina County.

{¶9} On January 24, 2013, the relators commenced this writ action, and on January 25, 2013, moved the Medina County judge to stay the underlying case. On February 13, 2013, the Medina County judge granted the stay, and declined to either accept or reject transfer of this case until this court adjudicated this original action.

LEGAL ANALYSIS

{¶10} This court rules that the relators' complaint in the underlying case does state a claim of workplace intentional tort against Cole. Although the

drafting of the complaint could have and should have been better and clearer, the consistent and repeated use of "defendants" in the plural shows that the relators intended to include Cole in Count 1 as a tortfeasor and not as just a nominal party. The sole use of "defendant's" in paragraph 20 does not change this analysis. It would be appropriate to change to singular to aver that Precision removed the safety equipment. Moreover, including Cole in Count 1 would properly apply the liberal pleading standards of Civ.R. 8.

{¶11} The respondents argue that Cole must be a nominal party, because of the principle of co-employee immunity pursuant to R.C. 4123.741. However, this argument is not persuasive. In the seminal case of *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 572 (1982), the Supreme Court of Ohio in the syllabus specifically held that R.C. 4123.741 does not preclude an employee from seeking a common law remedy for intentional tort. This court further notes that Blankenship sued his co-employees in that case. Furthermore, this court in *Lacava v. Walton*, 8th Dist. No. 69190, 1996 Ohio App. LEXIS 2420 (June 13, 1996), ruled that R.C. 4123.741 does not act as a bar to an employee's intentional tort claim against a co-employee. *Stockum v. Rumpke Container Serv., Inc.*, 21 Ohio App.3d 236, 486 N.E.2d 1283 (1st Dist.1985). Thus, it is possible and permissible to state an intentional tort claim against a co-employee, and the relators, however inartfully, have done so in this case.

{¶12} The respondents' reliance on *Sprouse v. Kall*, 8th Dist. No. 82388, 2004-Ohio-353, that the inconsistent use of singular and plural shows that a party was not included in the intentional tort claim is misplaced. In that case, the history of the litigation, especially the motion to amend the complaint, showed that the plaintiff no longer sought to include Sunoco in the intentional tort claim, but would pursue only a negligence claim against Sunoco. Therefore, the inconsistent use of singular and plural in the intentional tort claim would not be controlling. In the present case, the litigation history indicates that the relators intended to include Cole in Count 1. Moreover, *Sprouse* affirms the liberal pleading standards of Civ.R. 8.

{¶13} The respondents further argue that mandamus and procedendo are not proper remedies to contest a venue ruling; appeal after full litigation is the proper remedy. The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief and (3) there must be no adequate remedy at law. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Mandamus is not a substitute for appeal. *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus. Although mandamus should be used with caution, the court has discretion in issuing it. In *Pressley*, paragraph seven of the syllabus, the Supreme Court of Ohio ruled that "in considering the allowance

or denial of the writ of mandamus on the merits, [the court] will exercise sound, legal and judicial discretion based upon all the facts and circumstances in the individual case and the justice to be done." Similarly, the writ of procedendo is merely an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 553 N.E.2d 1354 (1990). Procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Watkins v. Eighth Dist. Court of Appeals*, 82 Ohio St.3d 532, 1998-Ohio-190, 696 N.E.2d 1079. It will not issue when there is an adequate remedy at law. *State ex rel. Hansen v. Reed*, 63 Ohio St.3d 597, 589 N.E.2d 1324 (1992). The court notes that the respondents have cited several cases that hold appeal after a final resolution to address venue issues is an adequate remedy at law precluding an extraordinary writ.

{¶14} However, extraordinary writs have been used to resolve venue disputes. *State ex rel. Smith v. Cuyahoga Cty. Court of Common Pleas*, 106 Ohio St.3d 151, 2005-Ohio-4103, 832 N.E.2d 1206; *State ex rel. Ohio State Racing Comm. v. Walton*, 37 Ohio St.3d 246, 525 N.E.2d 756 (1988); *State ex rel. Starner v. DeHoff*, 18 Ohio St.3d 163, 480 N.E.2d 449 (1985); and *State ex rel. Wood v. McCrystal*, 97 Ohio App.3d 419, 646 N.E.2d 1130 (6th Dist.1994).

{¶15} *Smith* is particularly instructive. In that case, Smith brought a medical malpractice case in Cuyahoga County against the Cleveland Clinic and

various other doctors and hospitals. The Cuyahoga County judge transferred the case to Wayne County, because a substantial portion of treatment occurred in Wayne County. Smith reached a partial settlement and dismissed her remaining claims against the Cleveland Clinic without prejudice. She then recommenced her lawsuit solely against the Cleveland Clinic in Cuyahoga County. The Cuyahoga County judge again transferred venue to Wayne County. However, the Wayne County court refused the transfer and returned the case to Cuyahoga County because the Cleveland Clinic has its principal place of business in Cuyahoga County and the case was properly venued there. Nevertheless, the Cuyahoga County judge transferred venue back to Wayne County. At that time, Smith brought a mandamus action to compel the Cuyahoga County Court of Common Pleas to vacate the orders transferring venue to Wayne County and to adjudicate the case.

{¶16} The Supreme Court of Ohio granted the writ, holding that Smith's medical malpractice case was properly venued in Cuyahoga County because Cleveland Clinic's principal place of business was there. The Supreme Court of Ohio further held that appeal would not be an adequate remedy at law, because with both courts in their most recent decisions refusing to accept jurisdiction, waiting for an appeal, if the case ever proceeded to resolution, would not be a complete, beneficial, and speedy remedy.

{¶17} This court concludes that *Smith* is controlling. The procedural postures of the two cases are indistinguishable. The Cuyahoga County court has twice transferred venue to another court, and the Medina County court, in a written opinion, has concluded that venue was proper in Cuyahoga County. Following the example of the Supreme Court of Ohio, this court will issue the writs to cut the "Gordian knot" of venue in this case.

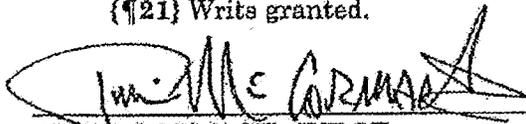
{¶18} The respondents suggest that this matter is moot, because the Medina County court has accepted jurisdiction. However, the Medina County court's pronouncement that it will neither accept nor decline jurisdiction until this court's ruling is inconsistent with the notion that it has accepted the case.

{¶19} In summary, the relators have stated a claim for workplace intentional tort against Cole, as shown by the repeated use of "defendants" in Count 1. Because Cole resides in Cuyahoga County, venue is proper there, and the case should not be transferred to another county on the basis of venue. The issues of whether Cole actually committed an intentional tort or whether statutory authority precludes the claim against Cole have yet to be determined, and this court expresses no opinion on those issues. Given the peculiar procedural posture of this matter, the extraordinary writs of mandamus and procedendo are appropriate remedies.

{¶20} Accordingly, this court denies the respondents' motions for summary judgment and grants the relators' motion for summary judgment. This court

grants the writs of mandamus and procedendo to compel the respondent judge to vacate the orders transferring the underlying case, to accept venue over the underlying case, and to adjudicate the merits of the case. Costs assessed against respondents. This court directs the clerk of court to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶21} Writs granted.


TIM McCORMACK, JUDGE

MELODY J. STEWART, A.J., and
EILEEN A. GALLAGHER, J., CONCUR

KEY WORDS

The relators stated a claim for workplace intentional tort against a co-employee. Because the co-employee resides in Cuyahoga County, venue for the entire suit is proper in Cuyahoga County. Civ.R. 3. Because the Cuyahoga County Court of Common Pleas and the Medina County Court of Common Pleas both rejected venue over the underlying case, the writs of mandamus and procedendo were appropriate remedies to resolve the venue dispute.