ORIGINAL

No. 13-1405

IN THE

SUPREME COURT OF OHIO

DUANE HOYLE,
Plaintiff-Appellee
-and-
THE CINCINNATI INSURANCE COMPANY
Intervening Plaintiff-Appellant
v.
DTJ ENTERPRISES, INC., et al.,
Defendants-Appellees.

APPEAL FROM THE COURT OF APPEALS

NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO

CASE NOS. CA-26579 & CA-26587

THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS' AMICUS CURIAE MEMORANDUM IN SUPPORT OF JURISDICTION

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FILED
SEP 09 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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I. STATEMENT OF FACTS

The Appellee Duane Hoyle was injured when he fell thirteen feet from a ladder jack scaffolding while working on a remodeling project at Wyoga Lake Apartments. Mr. Hoyle and his co-workers sometimes used ladder jacks instead of lifts because of problems with mud. Just before he was injured, Mr. Hoyle was working with several co-workers to erect the ladder jack scaffold. The workers secured the ladders with straps, but had not completed the construction of the corner of the scaffold when Mr. Hoyle walked onto it and fell.

Mr. Hoyle filed suit against DTJ and Cavanaugh alleging a workplace intentional tort. More specifically, Mr. Hoyle alleged his employer: 1) removed that the ladder jack bracket safety pins; 2) failed to secure the ladders used to construct the ladder jack scaffold at either their tops or at their bases; 3) used a pick/platform that was too long for this application; 4) failed to provide and require the use of fall protection; 5) failed to supervise the assembly of the ladder jack; and 6) permitted and intended for two ladder jack scaffold assemblies to be impermissibly bridged.

At the time of the incident, Cincinnati Insurance Company insured DTJ and Cavanaugh. Cincinnati Insurance intervened in the underlying case and asked for a declaratory judgment that it was not required to cover DTJ and Cavanaugh because the insurance contract does not cover deliberately intentional conduct and R.C. §2745.01 requires an employee to show the conduct of his employer was deliberately intentional to prove a workplace intentional tort.

R.C. §2745.01 limits an employer's liability to those circumstances in which an employee proves the employer specifically intended an injury or acted deliberately with intent to harm:

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

> dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the **intent to injure** another or with the belief that the injury was substantially certain to occur. (emphasis in bold)
>
> (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. (emphasis in bold).
>
> (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. (emphasis in bold).

DTJ and Cavanaugh moved for summary judgment on Mr. Hoyle's intentional tort claims under R.C. §2745.01 arguing that there was no proof of deliberate intent to harm or deliberate removal of a safety guard. Cincinnati Insurance moved for summary judgment on the declaratory judgment claim. The trial court granted DTJ and Cavanaugh's motion for summary judgment in part, concluding that a material question of fact remained only as to Mr. Hoyle's claim that his injuries were caused by DTJ and Cavanaugh removing a safety guard. The trial court found a question of fact existed on whether the employer "deliberately" removed a guard.

The trial court granted summary judgment to Cincinnati Insurance, concluding that Mr. Hoyle would have to demonstrate "deliberate intent" of DTJ or Cavanaugh to cause him injury in order to prevail on his claim. The trial court also determined the insurance contract excluded from coverage damages caused by "deliberate intent" of the insured to injure, and thus, Cincinnati Insurance was not required to indemnify DTJ or Cavanaugh for any potential judgment.

DTJ and Cavanaugh appealed this judgment and the Ninth District Court of Appeals reversed summary judgment. The court of appeals held, "[a]lthough the deliberate intent to

injure may be presumed for purposes of the statute where there is a deliberate removal of a safety guard, we conclude that this does not in itself amount to 'deliberate intent' for the purposes of the insurance exclusion."

This decision opens the door for liability under the statute—created by the rebuttable presumption-- without an employer acting with deliberate intent to harm. That is an incorrect application of the statute and a dangerous precedent that could unravel years of legal precedent defining workplace intentional tort as a tort requiring deliberate intent.

II. OACTA'S INTERESTS IN THIS APPEAL

The Ohio Association of Civil Trial Attorneys ("OACTA") is an organization of civil defense attorneys and corporate executives engaged in the defense of civil lawsuits and the management of insurance claims. It has a significant interest in rectifying the erroneous conclusion of the Ninth District Court of Appeals misinterpreting R.C. §2745.01 to require proof of something less than deliberate intent.

The appellate court's decision constitutes a dangerous precedent which is inconsistent with Ohio's public policy as stated in R.C. §2745.01 requiring proof of deliberate intent to harm. If this Court does not address the resulting injustice, the precedent will cause significant harm to the businesses and the insurers whom the OACTA members represent. If this decision stands, businesses and possibly insurers will find themselves liable for employer intentional torts under R.C. §2745.01 when the employee argues the employer deliberately removed a safety guard (thus creating a statutory presumption of intent to harm under R.C. §2745.01 subsection (C)), even when the employer rebuts the statutory presumption of deliberate intent. Based on Ohio's public policy, the legislature never intended to create liability for anything less than an employer's specific or deliberate intent to cause harm.

III. WHY THIS IS A CASE OF GREAT IMPORTANCE

This case is of great importance because the court of appeal's decision seeks to create a class of employer intentional tort claims that is exempt from the deliberate intent standard. In *Hoyle v. DTJ Enterprises, Inc.*, the Ninth District Court of Appeals ignored the plain language of R.C. §2745.01 requiring proof of deliberate conduct. The court below ruled the statutory presumption of deliberate intent created by R.C. §2745.01(C) creates a circumstance "where an employee prevails on his claim of intentional tort without the complained action constituting 'deliberate intent' to injure." (*Hoyle* decision p.10). The *Hoyle* court's analysis is flawed because it ignores the law of presumptions, and its result is inconsistent with the clear statutory language requiring proof of an employer's deliberate intent to harm.

In R.C. §2745.01(C), the General Assembly created a rebuttable presumption—akin to those found in other statutory enactments. See e.g. *Vargo v. Travelers Ins. Co.* (1987), 34 Ohio St.3d 27, 30, 516 N.E.2d 226 (holding that under R.C. §313.19, a coroner's report creates a rebuttable presumption of the manner, mode and cause of a decedent's death). Evid. R. 301 states a presumption does not shift the ultimate burden of proof:

> In all civil actions and proceedings not otherwise provided for by statute enacted by the General Assembly or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial on whom it was originally cast. (Emphasis added).

In Ohio, a rebuttable presumption simply shifts the burden of producing evidence, and does not alter the ultimate burden of proof:

> Thus, proof of the basic fact (e.g., letter mailed) automatically establishes the presumed fact (e.g., letter received) and shifts the burden of producing evidence rebutting the presumed fact to the other party. If the opposing party fails to offer

> sufficient evidence to rebut the presumed fact, that party has failed to satisfy its burden of production and suffers a directed verdict on that issue.
>
> * * *
>
> If, however, the opposing party offers sufficient evidence to rebut the presumed fact, the presumption disappears. It has performed its function of shifting the burden of production, and since that burden has been satisfied by the introduction of rebuttal evidence, no further function remains to be served. The burden of persuasion remains with the party to whom it was originally allocated. (Emphasis added).

SEE GIANNELLI & SNYDER, EVIDENCE, p. 154 (1996); see also *Evans v. Nat'l. Life & Acc. Ins. Co.* (1986), 22 Ohio St.3d 87, 90, 488 N.E.2d 1247; *Ayers v. Woodard* (1957), 166 Ohio St. 138, 140 N.E.2d 401, at syllabus paragraph three.

If the employer removes a safety guard, the presumption establishes deliberate intent to injure unless the employer rebuts the presumption. If the employer rebuts the presumption, the plaintiff must then present evidence of the employer's actual deliberate intent to injure. The Legislature never intended for an injured worker to prevail under R.C. §2745.01 absent a finding of deliberate intent to injure—whether established by an unrebutted presumption or by actual evidence of deliberate intent to injure. *Rudisill v. Ford Motor Co.*, 709 F.3d 595 (6th Cir. 2013).

Ohio has a strong public interest in extending immunity to employers through Ohio's Worker's Compensation statutes, but this decision allows for claims against employers without proof of deliberate intent. This is in direct conflict with the legislative intent behind R.C. §2745.01.

Although this court recently accepted jurisdiction over the case of *Pixley v. Pro Pac Industries, Inc*, (Supreme Court Case No. 13-0797), the issues presented herein are significantly different. The *Pixley* case involves a dispute over the interpretation of the terms "deliberate" and "safety guard" as used in R.C. §2745.01; whereas our case focuses on whether R.C. §2745.01's

statutory presumption creates a class of workplace intentional torts that do not require the employer to act with deliberate intent.

The Legislature never intended for an employee to recover under R.C. §2745.01 when the proof falls short of deliberate intent to harm, and therefore, this Court should accept jurisdiction to address the error in the Ninth District Court of Appeal's decision. The lower court's decision creates a new standard of proof that falls short of proof of deliberate intent. Therefore, although *Pixley* and this case involve questions about R.C. §2745.01, this case is distinct from *Pixely* which does not involve the specific question of what proof is required after the employer rebuts the presumption. Thus, this Court's decision in *Pixley* will not resolve the problem created by the court of appeal's decision in this case, which erodes R.C. §2745.01's standard of proof and allows for employer liability without proof of deliberate or specific intent to harm.

IV. APPELLANTS' PROPOSITIONS OF LAW

Appellant Cincinnati Insurance Company's First Proposition of Law:

> Where an employee is relying upon R.C. §2745.01(C) to create a rebuttable presumption of intent to injure arising from the employer's deliberate removal of an equipment safety guard, the ultimate burden remains with the employee to prove that the employer acted with "deliberate intent" in order to establish liability against the employer for an Employer Intentional Tort.

In order to put this proposition of law into its proper context, it is important to examine the history behind Ohio's workplace intentional tort laws and the development of Ohio's public policy against employer liability outside of the worker's compensation system.

Common Law Standard Workplace Intentional Tort

Generally speaking, Ohio's Worker's Compensation system provides immunity to an employer from liability for injuries sustained by an employee while performing duties in course

of employment. See R.C. §4123.74. But, in *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, the court created an exception to this immunity for a workplace "intentional tort," which the court defined as an act committed with intent to injure another or with the belief that such an injury is "substantially certain to occur." For purposes of a common law intentional tort claim, "intent" existed where the employer: (1) knew of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knew that exposure of the employee to this dangerous process, procedure, instrumentality or condition will be substantially certain to harm the employee and will not simply create a high risk of harm; and (3) under the circumstances, and with knowledge of the circumstances, acted to require the employee to continue to perform the dangerous task. *VanFossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100.

In *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, the Court stated the employer did not need to possess a subjective intent to harm the employee, or foresee the specific type of harm that would befall the employee, in order to be liable for an intentional tort. The *Fyffe* Court further elaborated that for purposes of this type of claim, "intent" meant something more than mere negligence or recklessness. *Id.* at paragraph 2 of the syllabus. The essence of these decisions was to erode the employer's immunity for workplace injuries under Ohio's Worker's Compensation system under R.C. §4123.74. The Ohio Legislature decided that Ohio's public policy required a higher level of employer immunity and thus passed legislation to strengthen employer immunity for workplace injuries except for certain specific instances.

Legislation Governing Workplace Intentional Tort

In response to the court decisions creating a cause of action for common law workplace intentional tort, the Ohio Legislature passed legislation to regulate this area of the law. In 1986,

the Ohio Intentional Tort Claim Statute, R.C. §4121.80, went into effect, establishing a statutory framework for the administration and compensation of workplace intentional torts. This statutory provision contained its own definition of "substantially certain" which was more stringent than that previously formulated by the courts. On August 27, 1991, the Court ruled the statute was unconstitutional, in *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722. The *Brady* court determined that R.C. §4121.80 was "totally repugnant to" Section 34, Article II[9] in that " [a] legislative enactment that attempts to remove a right to a remedy under common law that would otherwise benefit the employee cannot be held to be a law that furthers the ' * * * comfort, health, safety and general welfare of all employees * * *.' " *Brady*, 61 Ohio St.3d at 633, 576 N.E.2d 722.

In another effort to limit an employer's liability for intentional tort, the Ohio legislature passed House Bill 107, effective October 20, 1993, again redefining an "intentional tort" and eliminating reference to the term "substantially certain to occur." But, in *State ex rel Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, the Court declared the new statute, R.C. §2745.01, unconstitutional for violating the one subject rule of the Ohio Constitution. The Ohio legislature then re-enacted §2745.01 in almost the identical format to be effective November 1, 1995. That version of §2745.01 defined an employer intentional tort as "an act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee." Then, on April 14, 1999, this Court decided the case of *Johnson v. B.P. Chemicals, Inc.* (1999), 85 Ohio St.3d 298, in which the Court ruled that R.C. §2745.01, effective November 1, 1995, violated Section 34, Article II of the Ohio Constitution. In striking down this statute, the Supreme Court re-opened the door for an employee to sue an employer for intentional tort under Ohio's common law.

Roughly 10 years later in 2005, the current version of R.C. § 2745.01 became effective. This most recent attempt at regulating an employer intentional tort requires proof the employer deliberately intended to injure the employee. Despite the passing of R.C. §2745.01, the law governing employer intentional torts remained unsettled in the minds of lawyers and lower court judges until this Court's decision in *Kaminiski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027. In *Kaminski*, the Court ruled R.C. §2745.01 passed constitutional and judicial scrutiny. In *Kaminski*, despite overruling the court of appeals, this Court agreed with the court of appeal's interpretation of the legislative intent behind R.C. §2745.01: "As an initial matter, we agree with the court of appeals that the General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts **only when an employer acts with specific intent** to cause an injury, subject to subsections (C) and (D)."[1] *Kaminski* at ¶ 56 (citations omitted).

This history helps explain why the Ninth District Court of Appeal's decision interpreting R.C. §2745.01(C) creates a legal precedent that is inconsistent with the legislature's intent to limit recovery to a specific and narrow circumstance. The General Assembly has made clear through R.C §2745.01 that employers will only be liable for torts committed with specific or deliberate intent to harm. *Kaminski*, supra.

The Plain Meaning of "Deliberate" and "Removal"

The lower court's decision is based in part on its finding that the term "deliberate" means one thing in the statute and another in the insurance contract. The Oxford English Dictionary 413 (2nd Ed.) offers the following definitions:

an adjective: Well weighted or considered; carefully thought out; formed, carried out, etc. with careful consideration and full intention; done with set purpose; studied; not hasty or rash.

[1]Kaminski at ¶ 56 (citations omitted).

of persons: Characterized by deliberation; considering carefully; careful and slow in deciding; not hasty or rash.

a verb: To weight in the mind; to consider carefully with a view to decision; to think over.

Webster's New Universal Unabridged Dictionary 480 (2nd Ed. 1983) also states:

an adjective: to consider, weight well; carefully thought out or formed, premeditated, done with purpose; formed with deliberation; careful in considering; not sudden or rash; lacking rapidity; slow, unhurried; as, a deliberate move.

a transitive verb: to weigh in the mind; to consider the reasons for and against; to consider carefully; to ponder on.

synonyms: careful, cautious, intentional, purposed, thoughtful.

Webster's Ninth New Collegiate Dictionary 336 (1985) also states:

an intransitive verb: to think about or discuss issues and decisions carefully

a transitive verb: to think about deliberately and often with formal discussion before reaching a decision

an adjective: characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; slow, unhurried, and steady as though allowing time for decision on each individual action involved.

Since the term "deliberate removal" creates a statutory presumption, an examination of the word "removal is likewise relevant to this analysis. Oxford English Dictionary 601 (2ed.) defines "removal" as:

the act of taking away entirely.

the act of 'removing' a person by murder.

dismissal from an office or post; also, transference to another office, etc.

Webster's New Universal Unabridged Dictionary 480 (2nd Ed. 1983) also states:

a noun: a removing or being removed, specially a taking away or being taken away, dismissal from an office or position or a change of place, residence, etc.

transitive verb: to move from where it is; to lift, push, or carry away, or from one place to another, to take off, to take away by death, to wipe out, to get rid of, to eliminate as, remove the causes of war, to take, extract, separate or withdraw from.

synonyms: displace, separate, abstract, transport, carry, transfer, eject, oust, dislodge, suppress.

intransitive verb: to move or move away; to change place in any manner; to go from one place to another

synonyms: move, migrate, depart.

To qualify for the rebuttable statutory presumption of deliberate intent to harm under R.C. 2741.01(C), the employee must show the employer "deliberately removed" a safety guard. Applying the above definitions, the employee must establish the employer "considered" and "weighed" the actual "taking away" of a safety guard. This proof creates a presumption the employer deliberately intended harm to the employee. The employer can rebut this statutory presumption, and if rebutted, the burden should then fall on the plaintiff to establish the employer acted with deliberate intent to harm.

The Rebuttable Presumption of Deliberate Intent

The rebuttable presumption found in R.C. § 2745.01 (C) is an evidentiary tool to get past summary judgment when an employer deliberate removes a safety guard. If the employer rebuts the presumption, the plaintiff still carries the burden of proof, because in order to establish liability under R.C. § 2745.01 (C), a jury would still have to find an employer acted with deliberate intent to harm.

Evid. R. 401 states relevant evidence means evidence that has a tendency to make the existence of a fact that is of consequence to the determination of the action more or less probably that it would be without the evidence. The evidence of deliberate removal of a safety guard tends to prove the employer deliberately intended harm. Under R.C. §2745.01(C), evidence of

deliberate removal creates a rebuttable presumption in favor of deliberate intent to harm, and thus, even if the employer rebuts the presumption of deliberate intent to harm, a question of fact remains on the employer's liability which must be resolved by a jury.

The words "of consequence to the determination" as used in Evid. R. 401 refer to the materiality of the evidence.[2] Evidence can be direct or circumstantial. Direct evidence comes from testimony of witnesses who have seen or heard of the facts and it includes admissible exhibits. Circumstantial evidence is proof of a fact based on a drawing a reasonable inference from facts proven by direct evidence. [3] The inference must be reasonable and must come from facts establishing the greater weight of the evidence and not from a speculative or remote basis.[4]

R.C. § 2745.01 (C) requires proof of the deliberate removal of a safety equipment guard in order to create a rebuttable presumption that the employer deliberately intended harm to the employee. Evidence Rule 301 requires that the ultimate burden of proof remain with the plaintiff/employee. Thus, regardless whether the employer deliberately caused harm or deliberately removed a safety device, the employee must prove "deliberate" conduct to establish liability. The statute presumes proof of deliberate intent when the employer deliberately removed a safety guard. If the employer fails to rebut the presumption, the presumption stands. If the employer rebuts the presumption, the plaintiff/employee must offer proof on the employer's deliberate intent to harm.

The word "deliberate" must have a consistent meaning, regardless of whether the context is the words of a statute or an insurance contract. "Deliberate" is an adjective that describes action. "Removal" is a noun that refers to the act of taking away. Both terms are active terms,

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[2]Staff Notes 1980, Evid. R. 401 (citations omitted).
[3]1 O.J.I. § 5.10.2.3. and 4.
[4]1 O.J.I § 5.01.6.

and from the Legislature's use of these terms, Ohio's courts must assume the Legislature's intent to limit an employer's liability to a narrow and specific circumstance in which the employer specifically or deliberately intended harm. Nothing less should create liability under R.C. §2745.01. The Ninth District Court of Appeals, however, has written a new standard of proof under §2745.01 (C), that falls somewhere short deliberate intent to harm. This new standard is not at all what the General Assembly had in mind when it passed R.C. §2745.01.

Appellant Cincinnati Insurance Company's Second Proposition of Law:

> Ohio public policy prohibits an insurer from indemnifying its insured/employer for Employer Intentional Tort claims filed under R.C. §2745.01 because an injured employee must prove that the employer committed the tortious act with direct or deliberate intent to injure in order to establish liability.

The Ninth District Court of Appeal's decision creates confusion and uncertainty on whether commercial insurance contracts cover workplace intentional torts. OACTA urges the court to accept jurisdiction to resolve the issue of coverage for intentional tort for both employer and insurer alike.

Appellant Cincinnati Insurance Company's Proposition of Law No. 3:

> An insurer has no duty to indemnify an employer-insured for Employer Intentional Tort liability when an employee invokes R.C. §2745.01(C) for the deliberate removal of an equipment safety guard where an endorsement to the insurer's policy excludes coverage for "liability for acts committed by or at the direction of an insured with deliberate intent to injure."

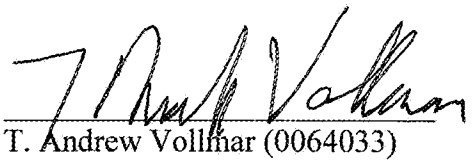
The Ninth District Court of Appeal's decision creates confusion and uncertainty on whether commercial insurance contracts cover workplace intentional torts. OACTA urges the court to accept jurisdiction to resolve the issue of coverage for intentional tort for both employer and insurer alike.

Conclusion

R.C. §2745.01 does not have multiple burdens of proof for employer intentional torts. The legislature created one standard of proof: an employer's specific or deliberate intent to harm. This standard of proof applies to all claims for employer intentional tort. R.C. §2745.01 (C) creates a rebuttable presumption of deliberate intent to harm in cases where the employer removes an equipment safety guard. Deliberate intent is presumed because the removal of the safety guard is a deliberate act that is normally intrinsically tied to an injury, such that deliberate intent can be inferred. *Allstate v. Campbell* 128 Ohio St.3d 186 (Ohio 2010) at ¶62. Because there can be legitimate reasons for the removal of a safety guard, the employer has the opportunity to rebut the statutory presumption of deliberate intent to harm, and the presumption is not a conclusive inference or presumption. It is rebuttable-- meaning the employer can offer evidence showing a valid, non-malicisous reason, short of deliberate intent. Once that occurs, the presumption is rebutted, and the employee has the burden of proving deliberate intent through other means. *Rudisill,* supra, ("When a presumption is rebutted, the case proceeds as if the presumption had never arose). See, e.g., *In re Guardianship of Breece*, 173 Ohio St. 542, 184 N.E.2d 386, 394 (1962) ("Where the presumption is a rebuttable one, as in this case, the production of evidence disputing or contrary to the presumption causes the presumption to disappear where such evidence to the contrary either counterbalances the presumption or even when it is only sufficient to leave the case in equipoise."); *Horsley v. Essman*, 145 Ohio App.3d 438, 763 N.E.2d 245, 249 (2001) ("We have previously characterized the effect of rebutting the presumption as ' bursting the bubble,' with the case then proceeding as if the presumption had never arisen.") In either scenario, the employee can only recover if direct intent is proven.

The Ninth District Court of Appeal's decision is inconsistent with Ohio's public policy creating immunity to employers for workplace injuries except in narrow circumstances of proof of deliberate conduct. The court ignored the plain meaning of the word "deliberate" in the context of R.C. § 2745.01 (C), the legislative history of employer intentional tort law and the plain language of Evidence Rule 301. Ohio has a strong interest against any statutory interpretation that both ignores the plain meaning of words and results in liability for employers beyond the limited scope of R.C. §2745.01. Therefore, OACTA respectfully urges this Court to accept jurisdiction of this case to overturn the Ninth District Court of Appeal's decision and render a ruling consistent with Ohio's public policy prohibiting liability absent proof of specific or deliberate intent to harm.

Respectfully Submitted,



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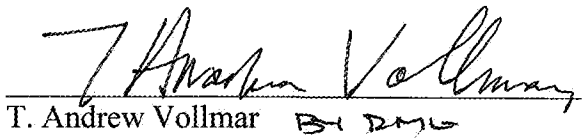

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