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**IN THE SUPREME COURT OF OHIO**

**CASE NO. 2013-0941**

**STATE OF OHIO EX REL. DONALD AND DEBRA YEAPLES**  
**Relator-Appellees**

**-vs-**

**HON. STEVEN E. GALL; PRECISION DIRECTIONAL BORING LLC;**  
**GARY COLE**  
**Respondent-Appellants.**

**ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT**  
**COURT OF APPEALS CASE NO. 99454**

**MERIT BRIEF OF RELATOR-APPELLEES,**  
**DONALD AND DEBRA YEAPLES**

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## INTRODUCTION

Despite all the dramatic rhetoric and unavailing legal analysis, this appeal presents nothing more than a garden variety venue dispute. Pursuant to Civ. R. 3(B)(1), venue has always been proper in any county where any legitimate defendant resides. There has never been any disagreement in this case that Respondent-Appellant, Gary Cole, was named as a Defendant in both the underlying Complaint and the First Amended Complaint and is a resident of Cuyahoga County. *Precision Directional Boring, LLC and Gary Cole's Merit Brief ("Respondents' Brief")*, p. 2. Relator-Appellees, Donald and Debra Yeaples, had retained Cleveland attorneys who opted to exercise the clients' right under the Civil Rules to commence the lawsuit across the street from their offices. The Cuyahoga County Court of Common Pleas is undoubtedly handling substantially more workplace injury lawsuits and workers compensation appeals than any other trial court in Ohio, and is thus adept at adjudicating such actions justly and efficiently. Given that Defendant Cole resides in Cuyahoga County and defense counsel also maintain their offices in Cleveland, one would have thought that this unsurprising selection would have been welcomed by all parties.

But while attempting to mischaracterize Relators as shameless "forum shopp[ers]," Respondents Cole and Precision Directional Boring, LLC ("Precision") have waged an unrelenting campaign to force this personal injury action into Medina County. *Respondents' Brief*, pp. 19. Their motivations are not difficult to discern, as a Medina County jury is likely to view the well-known local employer more favorably than any other. The circumstances that had produced Plaintiffs' devastating losses had all occurred in Summit County, but Respondents never requested a transfer to that jurisdiction.

Unfortunately, Respondents' misguided forum *non conveniens* arguments convinced a newly appointed Cuyahoga County Judge, Hon. Annette G. Butler, to grant

the transfer. Medina County Judge Christopher Collier promptly saw through the charade and rejected the transfer order. Respondent, Hon. Steven E. Gall had replaced Judge Butler by that point in time, and simply reissued her order transferring the action back to Medina County. Neither Cuyahoga County Judge explicitly found that Cole was just a “nominal” party or that the Complaint failed to allege a valid cause of action against him.

The Cuyahoga County Court of Appeals terminated the ping pong match by issuing an unassailable ruling finding that venue is proper in Cuyahoga County under Civ. R. 3(B)(1) and directing Judge Gall to proceed with the personal injury action. *State ex rel. Yeaples v. Gall*, 8<sup>th</sup> Dist. No. 99454, 2013-Ohio-2207, 2013 W.L. 2382824. Without ever denying that they can receive a full and fair trial in Cuyahoga County, Respondents Precision and Cole are now before this Court seeking a transfer to a friendlier forum. For the reasons that follow, this Court should reject this misguided effort and affirm the Eight District.

## STATEMENT OF THE CASE

The underlying personal injury action was commenced in the Cuyahoga County Court of Common Pleas on January 10, 2012. *Case No. 773151*. The original Complaint alleges that Relator, Donald Yeaples, was seriously and permanently injured on January 19, 2010, while he was working as a laborer for Respondent Precision. *Relators' Verified Compl., Apx. 0001*. Relator had been struck and overrun by a Coyote Mini Excavator that was missing a number of important safety guards and features, including a rear view mirror and backup alarm. The machinery was being operated by Respondent Cole, who had been aware that his co-worker was likely to be behind the machinery. Respondent Cole nevertheless made a deliberate decision to back the Excavator towards the unsuspecting employee, who was preoccupied with his own job responsibilities.

On February 8, 2012, Respondent Precision moved for either a dismissal or change of venue. *Relators' Verified Compl., Apx. 0009*. Notably, Respondent Cole did not join this request. On February 21, 2012, Relators filed their Memorandum in Opposition in which they observed that Respondent Cole is a resident of Berea, and therefore venue was proper in Cuyahoga County pursuant to Civ.R. 3(B)(1). *Id., 00020*. They further noted that Cole had been properly served with the Complaint and had neither challenged venue nor sought a dismissal of the action. *Id.*

Later that same day, a Motion for Leave to File Amended Joint Motion to Dismiss, or in the Alternative, Motion to Transfer for Improper Venue, Instantly was filed. *Relators' Verified Compl., Apx. 00029*. Judge Annette G. Butler was advised that "Defendant Cole was inadvertently left out of the originally filed Motion." *Id., p. 00030*. Respondents simultaneously submitted their Amended Joint Motion to Dismiss, or in the Alternative, Motion to Transfer for Improper Venue, Instantly. *Id., 00032*. Three days later, they filed a Motion for Leave to File a Reply Brief in Support of their

Amended Joint Motion to Dismiss, or in the Alternative, Motion to Transfer for Improper Venue. Still not finished, Defendant Gary Cole's Motion to Dismiss, or in the Alternative, to Transfer for Improper Venue was filed on February 27, 2012. *Id.*, 00042. Relators tendered their Memorandum in Opposition on March 5, 2012. *Id.*, 00051.

In an order dated March 28, 2012, Judge Butler summarily granted the defense motions and ordered a transfer to Medina County. *Relators' Verified Compl., Apx. 00062.* No explanation was offered as to how venue could be inappropriate in Cuyahoga County under Civ. R. 3(B)(1) when one of the Defendants was admittedly a resident of Berea. *Id.* Neither was explicitly found to be just "nominal." *Id.*

After the lawsuit was docketed in Medina County (Case No. 12CIV0660), Respondent Cole filed a Motion to Dismiss on May 10, 2012 that differed little from the one that had been submitted earlier to Judge Butler. *Relators' Verified Compl., Apx. 00063.* In their own ensuing Motion, Relators requested the return of this action to the proper venue in Cuyahoga County. *Id.*, 00073. At the same time, a First Amended Complaint was filed, including additional details to the claims for relief that had been raised in the original pleading.<sup>1</sup> *Id.*, 00083. Memoranda in opposition and additional briefing then followed.

Medina County Judge Christopher Collier conducted an oral hearing upon the pending motions on June 28, 2012. The attorneys argued at length over whether the action had been properly filed in Cuyahoga County. At no point was there any dispute that Respondent Cole was still a Cuyahoga County resident.

In a detailed Journal Entry dated July 17, 2012, Judge Collier concluded that venue had been properly established in Cuyahoga County, pursuant to Civ.R. 3(B)(1).

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<sup>1</sup> Relators' counsel had overlooked that one of the Respondents had filed an Answer with the Clerk of Courts on May 10, 2012. Consequently, leave of court had not been requested as required by Civ. R. 15(A). A separate Motion was promptly submitted, seeking leave to file the revised pleading *instanter*. *Relators' Verified Compl., Apx. 000117.*

*Relators' Verified Compl., Apx. 00126.* His ruling explained how he had determined that Respondent Cole was not a "nominal" party, and thus both Respondents had been properly joined in the Cuyahoga County lawsuit, pursuant to Civ.R. 3(E). *Id., 00126-29.*

Once the transfer was completed back to Cuyahoga County, Respondent Precision filed a Motion to Refuse Venue and Affirm the March 28, 2012 Order. *Relators' Compl., Apx. 00130.* Relators submitted a Motion to Reactivate Case and Memorandum in Opposition to Respondents' Motion to Refuse Venue and Affirm on August 27, 2012. *Id., Apx. 00141.* Respondents' Brief in Opposition followed roughly a week later. *Id., Apx. 00147.*

Respondent, Hon. Steven E. Gall ("Judge Gall"), then succeeded Judge Butler, following his election to the Cuyahoga County Bench. In an Order dated January 4, 2013, he summarily denied Relators' Motion to Reactivate and granted the Motion to Refuse Venue and Affirm that had been filed by Respondents Precision and Cole. *Relators' Compl., Apx. 00157.* Significantly for purposes of the instant appeal, Judge Gall did not find that Respondent Cole was merely a nominal party or dismiss him from the action. *Id.*

With the workplace intentional tort action hanging in limbo somewhere between Cleveland and Medina, Relators proceeded to commence the instant original action in the Cuyahoga County Court of Appeals on January 24, 2013. The Verified Complaint alleged that, based upon the authority of *State ex rel. Smith v. Cuyahoga Cty. Court of Common Pleas*, 106 Ohio St.3d 151, 2005-Ohio-4103, 832 N.E.2d 1206, writs of mandamus and procedendo are warranted when a trial court improperly transfers an action for improper venue and violates the plaintiff's right to select the forum from the alternatives available under Civ. R. 3(B).

Respondents Precision and Cole submitted a Motion to Dismiss on February 26, 2013, in which they argued that the Medina County Common Pleas Court had never

actually refused to accept venue. This senseless application was rejected by the Court in a Journal Entry dated March 8, 2013.

Respondent Judge Gall submitted his own Motion for Summary Judgment on March 20, 2013. Without mentioning the appellate court's prior Order of March 8, 2013, the Prosecutor representing Judge Gall re-asserted the same arguments that had already been raised in the unsuccessful Motion to Dismiss. It was also maintained that, notwithstanding *Smith*, 106 Ohio St.3d 151, mandamus and procedendo are unavailable in venue disputes between two counties. Several other justifications for summary judgment were asserted, including a purported pleading deficiency and the supposed unavailability of proper venue in Cuyahoga County.

On May 24, 2013, the Eighth District released an opinion granting the writs of mandamus and procedendo. *Yeaples*, 2013-Ohio-2207. Adhering closely to *State ex rel. Smith*, 106 Ohio St.3d 151, the panel unanimously concluded that Respondent Cole was not a purely nominal party since a potentially viable claim for relief had been alleged against him, and therefore the personal injury action was justifiably commenced in Cuyahoga County under authority of Civ. R. 3(B)(1). *Id.*, ¶10-20.

Respondents Precision and Cole are now seeking further review in the Supreme Court.

## ARGUMENT

In their effort to redirect the underlying personal injury lawsuit to the forum of their choosing, Respondents Precision and Cole have devised three propositions of law. None of them possess merit. They will be separately addressed in the remainder of this Brief.

**PROPOSITION OF LAW 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**

**A. RELATORS' RIGHT TO SELECT THE FORUM**

Respondents' complaints of "forum shopping" are seriously misplaced, as the Civil Rules have long allowed the plaintiff to select the venue for the action whenever multiple options are available. The unavoidable reality is that more than one subsection of Civ. R. 3(B) usually applies to any given lawsuit. *Patterson & Simonelli v. Silver*, 11<sup>th</sup> Dist. 2003-L-055, 2004-Ohio-3028, 2004 W.L. 1309148, p. \*2, (June 11, 2004). The Rule clearly and unequivocally affords the plaintiff the choice of determining where the action will be adjudicated in such instances. *Piqua Pizza Supply Co., Inc. v. Rutherford*, 2<sup>nd</sup> Dist. No. CA1159, 1986 W.L. 9088, (Aug. 19, 1986). It has been explained that:

Venue is proper when the plaintiff chooses a court located in any county described in the first nine provisions of Civ. R. 3(B). These provisions have equal status, and a plaintiff may choose among them with unfettered discretion. *Morrison v. Steiner*, 32 Ohio St.2d 86, 89, 61 O.O.2d 335, 337-338, 290 N.E.2d 841, 843-844 (1972); *Glover v. Glover*, 66 Ohio App.3d 724, 728, 586 N.E.2d 159, 162 (1990). "The first nine provisions of [Civ.R.] 3(B) are alternatives, and each may be a proper basis for venue, but they do not have to be followed in any order. Plaintiff has a choice where the action will be brought if any of the counties specified in [Civ.R.] 3(B)(1) through (9) are a proper forum under the facts of the case." *Varketta v. Gen. Motors Corp.*, 34 Ohio App.2d 1, 6, 63 O.O.2d 8, 11, 295 N.E.2d 219, 223 (1973).

Thus, if the plaintiff has chosen a proper forum from among the options provided for in the rule, it may not be disturbed. [emphasis added; footnote omitted].

*Soloman v. Excel Marketing, Inc.*, 114 Ohio App.3d 20, 25, 682 N.E.2d 724, 727 (2nd Dist.1996); see also *Williams v. Jarvis*, 8th Dist. No. 74580, 1999 WL 652039 (Aug. 26, 1999).

As this Court acknowledged roughly two decades ago, this state does not recognize the doctrine of *forum non conveniens* as a legitimate justification for transferring a lawsuit from one county to another. *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St.3d 123, 130-132, 519 N.E.2d 370, 376-377 (1988); *State ex rel. Lyons v. Zaleski*, 75 Ohio St.3d 623, 624, 665 N.E.2d 212 (1996); see also *Thomas L. Meros Co., L.P.A. v. Grange Mut. Cas. Co.*, 134 Ohio App.3d 299, 301, 730 N.E.2d 1063, 1065 (8th Dist.1999),f fn. 1. This Court established the firm rule in *State ex rel. Starner v. DeHoff*, 18 Ohio St.3d 163, 165, 480 N.E.2d 449 (1985), that:

Under the Ohio Rules of Civil Procedure, the only basis for a transfer of venue from a county where the venue is proper is when the transfer is necessary to obtain a fair trial. *Civ.R. 3(C)(4)*. [emphasis added].

*Id.*, 18 Ohio St.3d at 165. Absent a demonstration that a fair trial cannot be conducted in the county chosen by a plaintiff, an action that is properly venued under Civ.R. 3(B) cannot be transferred. *State ex rel. Smith*, 106 Ohio St.3d 151, 153-154, ¶¶ 14-16.

It has been conceded that Respondent Cole “resides in Cuyahoga County, Ohio.” *Respondents’ Brief*, p. 2. According to the Cuyahoga County Clerk’s docket report, the Summons and Complaint were successfully served upon him on January 27, 2012. This action therefore was properly commenced in Cuyahoga County in accordance with Civ. R. 3(B)(1), which has long provided that venue is authorized in: “The county in which the defendant resides[.]”

Respondent Precision’s connection to Medina County is simply immaterial. “Pursuant to Civ.R. 3(E), if venue is proper as to one defendant, then it is proper as to all.” *State ex rel. Starner*, 18 Ohio St.3d 163, 165; see also *Plumbers & Steamfitters*

*Local Union 83 v. Union Local School Dist. Bd. of Edn.*, 86 Ohio St.3d 318, 321, 715 N.E.2d 127, 129 (1999). Respondent Cole's Cuyahoga County residency was thus sufficient – without more – to justify the filing in that court against both the employer and employee. *Civ.R. 3(B)(1)*.

## **B. THE NOMINAL PARTY EXCEPTION**

In attempting to establish that Respondent Cole is nothing more than a “nominal” party, Respondents have littered their Brief with half-truths and inaccurate assertions. For example, this Court has been assured that: “In the underlying personal injury complaint, Relators did not set forth any allegations against Cole.” *Respondents’ Brief*, p. 18. In reality, the original Complaint had specifically alleged that Respondent Cole was operating the Coyote Mini Excavator on the job site and had spoken with Relator, Donald Yeaples, about moving the machinery out of the resident’s driveway. *Relators’ Verified Complaint.*, Apx. 0002, ¶6-8. Although he was aware that Relator was behind the excavator attempting to guide the homeowner out of the driveway, Cole inexcusably backed into him. *Id.*, 0002-3 ¶9-11. Both “Defendants” knew that the machine was defective and unsafe, most notably as a result of the inoperable back-up alarm and missing rear-view mirror. *Id.*, 0003, ¶ 11-12 & 14-15. The Complaint specifically charged that:

16. At all times mentioned herein, Defendants knew that if [Relator] was subjected to the hazardous and dangerous conditions surrounding use of the equipment, then harm to [Relator] was substantially certain to occur.

*Id.*, p. 0004.

As odd as it seems, Respondents are simply refusing to acknowledge that as used in Relators’ pleadings, the term “Defendants” meant both Precision and Cole. *Respondent’s Brief*, pp. 13-14. Since they were the only two named defendants in the

personal injury action, only one meaning was possible under modern English.<sup>2</sup> Indeed, Respondents Precision and Cole referred to themselves collectively as “Defendants” repeatedly during the underlying proceedings. *Relators’ Verified Compl., Apx. 00029-30, 00032, 0034, 00037-38, 00042, 00043, 00048-50*. Judge Collier thus properly concluded that a workplace intentional tort claim had been sufficiently alleged against both Respondents Precision and Cole under the liberal standards set forth in Civ.R. 8(A). *Relators’ Verified Compl., Apx. 000128*.

The First Amended Complaint that was filed on May 30, 2012 in Medina County furnished additional details with regard to Respondent Cole’s perpetration of the tort. Plaintiff specifically alleged that:

10. As the operator of the Coyote Mini Excavator, Defendant Cole was charged with the responsibility of ensuring that the equipment was properly functional and complied with all federal and state safety regulations. He was also required to operate the machinery in a cautious manner and only after confirming that no nearby co-workers or other individuals were threatened with harm.
11. Defendant Cole knew, or reasonably should have known, that the Coyote Mini Excavator that was in his charge actually failed to comply with federal and state laws and regulations. For example purposes only, there was no functional back-up alarm or acceptable rear-view mirror.

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13. Defendant Cole further knew, or reasonably should have known, that Plaintiff was directly behind the Coyote Mini Excavator attempting to guide the homeowners out of their driveway.
14. Despite his knowledge of the perilous situation and the injury or fatality that was substantially certain to be suffered, Defendant Cole made a deliberate decision to back the Coyote Mini Excavator toward

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<sup>2</sup> While “John Doe” defendants had been included in the caption, claims of negligence had been specifically raised against them in Count Two. *Relators’ Compl., Apx. 0005-6*. They had not been included in Count One (Workplace Intentional Tort). *Id., 0003-4, paragraphs 13-25*.

the unsuspecting Plaintiff.

15. All too predictably, Plaintiff Yeaples was struck by the Coyote Mini Excavator and sustained severe and debilitating injuries which include, but are not limited to, right medial malleolar fracture requiring surgery, RSD of the right lower limb, and posttraumatic stress disorder. These injuries are permanent to a large extent and his losses will be ongoing.

*Id.*, pp. 9-10. Despite Respondents' considerable urging, none of the Cuyahoga and Medina County Judges have stricken the revised pleading. Respondents have failed to offer any plausible explanation in their Brief for why leave to amend should be denied given the liberal standards imposed by Civ. R. 15(A).

Thus far, not one of the trial court and appellate jurists who have examined this venue dispute has openly agreed that Respondent Cole is just a nominal party. In his detailed ruling, Judge Collier had referenced federal authority and concluded that the claim of individual liability could potentially survive co-employee immunity under the standards imposed by Civ. R. 12(B)(6). *Verified Complaint in Mandamus and Procedendo, Apx. 00128-129*. Notably, Respondent Judge Gall did not explicitly disagree in the subsequent order he issued sending the case back to Medina County. *Id.*, 00157. In all likelihood, the Cuyahoga County Judges were swayed by the improper *forum non conveniens* arguments that Respondents have been touting.

Likewise, the Eighth District had no trouble concluding that Respondent Cole was more than just a "nominal" party given his active perpetration of the tort. The unanimous decision reasons that:

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, 1996 WL 325274 (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.

*Yeaples*, 2013-Ohio-2207, ¶11. To be sure, neither Judge Collier nor the Eighth District ever reached the merits of Relators' claim of individual liability against Defendant Cole. Consistent with every authority that Respondents have cited, it was enough that a potentially viable claim for relief existed that would survive dismissal under Civ. R. 12(B)(6).

It bears emphasizing that the term "nominal party" is undefined in the Civ. R. 3(E). As recognized by the court in *Smith v. Inland Paperboard & Packaging, Inc.*, 11<sup>th</sup> Dist. No. 2007-P-0088, 2008-Ohio-6984, 2008 W.L. 5428261, p. \*8 (Dec. 31, 2008), "[w]ords used in the rules of procedure are to be given their "plain and ordinary" meaning, if not otherwise defined." (citation omitted). Citing Webster's II New College Dictionary (1999) 742, the *Smith* court observed that the term "nominal" means: " \* \* \* 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." *Id.* at p. \*8. (citations omitted).

While in *Smith*, 2008-Ohio-6984, the court concluded that a plant superintendent was a "nominal" party, such was a readily apparent conclusion on the facts in that case. There, the individual defendant was not even present at the plant where the plaintiff sustained his injury. In contrast, here, Respondent Cole was the individual purposefully backing the defective machine toward a preoccupied co-worker without making the slightest effort to avoid an accident. Moreover, the *Smith* court did not consider the potential individual liability of the plant supervisor, which Respondent

Cole faces in this action. Rather, in *Smith*, the intentional tort liability was confined to whether the plant supervisor, by his actions, created derivative liability on the part of the employer itself. The *Smith* court therefore concluded that the intentional tort claim against the employer could be resolved without the supervisor remaining in the action as a defendant.

### C. CO-EMPLOYEE IMMUNITY

As properly determined by Judge Collier and the Eighth District, Respondent Cole's inclusion in the personal injury action in his individual capacity was entirely appropriate. The plaintiff's right to sue either the employer or employee (or both) for a single tort has long been recognized in Ohio law:

Where a liability arises against both a master and his servant in favor of a party injured by the sole negligence of the latter while acting for the master, such injured party may sue either the servant, primarily liable, or the master, secondarily liable, or both, in separate actions, as a judgment in his favor against one, until satisfied, is no bar to an action against the other, the injured party being entitled to full satisfaction from either the master or servant or from both. [emphasis added].

*Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940), paragraph two of the syllabus; see also *State ex rel. Flagg v. City of Bedford*, 7 Ohio St.2d 45, 47-48, 218 N.E.2d 601, 604 (1966); *Tisdale v. Toledo Hosp.*, 197 Ohio App.3d 316, 2012-Ohio-1110, 967 N.E.2d 280 (6th Dist.), p. \*6 (Mar. 16, 2012), citing *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939.

Contrary to Respondents' representations, this Court had indeed confirmed that workplace intentional tort actions can be brought against individuals, as well as the employer, in *Blankenship*, 69 Ohio St.2d 608. Eight employees of a chemical manufacturer had sued "their employer (Milacron) and several individual fellow employees" after they had allegedly been exposed to noxious fumes. *Id.*, 69 Ohio St.2d at 608. The trial judge dismissed the lawsuit on the grounds that immunity was

available to the employer through R.C. 4123.74 and to the co-employees under R.C. 4123.741. *Id.* at 609-610. The appellate court affirmed this determination. *Id.* at 610.

But, the Supreme Court reversed. The majority observed that neither R.C. 4123.74 nor R.C. 4123.741 extended the grant of immunity to intentionally tortious misconduct. *Blankenship*, 69 Ohio St.2d at 612. They reasoned that:

The [Workers' Compensation] Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability. But the protection afforded by the Act has always been for negligent acts and not for intentional tortious conduct. Indeed, workers' compensation Acts were designed to improve the plight of the injured worker, and to hold that intentional torts are covered under the Act would be tantamount to encouraging such conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act.

*Id.* at 614. The dismissal entry was overturned in its entirety. *Id.* at 615-616. Since the *Blankenship* Court specifically allowed the workplace intentional tort claim to proceed against both the employer and the individual employees, there is simply no truth to Respondents' protests that such individual liability has never been recognized in Ohio. *Respondents' Brief*, pp. 10-11.

Properly understood, the "workplace intentional tort" theory of recovery is simply a species of the common law causes of action for assault, battery, and trespass. *Kneisley v. Lattimer-Stevens Co.*, 40 Ohio St.3d 354, 357-358, 533 N.E.2d 743 (1988). The Ninth District Court of Appeals has explained that:

The common law recognized the right to a trial by jury for the action known as trespass for battery. The recent expansion of the concept of intentional tort, to include those acts which a person is substantially certain will cause harm, does not negate the common-law origin of the tort. *Palcich v. Mar Bal, Inc.* (Dec. 24, 1987), Geauga App. No. 1394, 1987 WL 31715, unreported. Since the right to a jury trial existed at common law for any action of an intentional nature, Section 5, Article I of the Ohio Constitution applies and the

legislature may not eliminate this right. [emphasis added].

*Bishop v. Hybud Equip. Corp.*, 42 Ohio App.3d 55, 58, 536 N.E.2d 694 (9th Dist.1988). Relators' fundamental right to seek damages against Respondent Cole under an intentional tort theory of recovery is not only recognized under Ohio law, but is actually protected by this state's Constitution.

In accordance with *Blankenship*, 69 Ohio St.2d 608, and its progeny, Ohio courts have indeed recognized that individual co-workers can be held liable, notwithstanding the immunity furnished to co-workers by R.C. 4123.741, whenever they have committed an act despite their appreciation that a plaintiff was substantially certain to be injured. *Stockum*, 21 Ohio App.3d 236, 237; *LaCava v. Walton*, 8<sup>th</sup> Dist. No. 69190, 1996 W.L. 325274, p. \*3 (June 13, 1996). Relators' pleadings sufficiently allege that Respondent Cole fully understood the grave dangers that were posed to anyone working behind the excavator he was backing, particularly given the inoperable safety features, but he nevertheless made a deliberate decision to expose Relator to the substantial certainty of harm. *Relators' Verified Compl., Apx. 00084-85, ¶¶5-9 & 12-16*. At this early stage of litigation, these allegations must be accepted as true. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228, 230-231, 551 N.E.2d 981 (1990); *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144-145, 573 N.E.2d 1063 (1991).

Although Relators have been citing *Stockum*, 21 Ohio App. 3d 236, and *LaCava*, 1996 W.L. 325274, throughout these proceedings as examples of co-workers being sued for individual liability, Respondents have yet to muster an intelligible response. Their latest effort is mystifying, as they appear to be arguing that neither case holds that an employee can "be responsible under a *Fyffe* tripartite employer substantial certainty tort[.]" *Respondents' Brief, p. 15*. That is exactly what they hold. Both appeals involved claims that a co-worker had committed a "substantial certainty" intentional tort, and thus the fellow-servant immunity conferred by R.C. 4123.741 did not apply. The injured

worker's ability to satisfy the *Fyffe* test was the only reason that the claims were allowed to proceed. While the workplace intentional tort theory is almost always brought against the employer, the co-employee can be sued as well as long as he/she was the perpetrator of the tort. *Blankenship*, 69 Ohio St. 2d 608; *Stockum*, 21 Ohio App. 3d 236; *LaCava*, 1996 W.L. 325274. This is such a case.

#### D. THE WORKPLACE INTENTIONAL TORT STATUTE

Respondents have offered only passing references to R.C. 2745.01, and they are no longer seriously disputing that the new workplace intentional tort statute applies only to the "employer." Effective April 7, 2005, R.C. 2745.01 now directs that:

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

(B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death. \*\*\* [emphasis added].

Because the workplace intentional tort statute only concerns actions that have been "brought against an employer[.]" the common law standards that were established in *Blankenship* and *Fyffe* continue to control claims against co-workers. This Court should reject any suggestion that these longstanding remedies have been superseded by legislative implication. *Lynn v. Supple*, 166 Ohio St. 154, 159, 140 N.E.2d 555 (1957). It has explained that:

Not every statute is to be read as an abrogation of the common law. "Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law *unless the language employed by it clearly expresses or imports such intention.*" (Emphasis

added.) *State v. Sullivan* (1909), 81 Ohio St. 79, 90 N.E. 146, paragraph three of the syllabus.

*Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302, 304, 617 N.E.2d 1096, 1098 (1993) (emphasis in original).

Without specifically denying that the express language of R.C. 2745.01(A) limits the statutory deliberate intent requirement to claims that have been brought “against an employer[.]” Respondents have complained that: “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.” *Respondents’ Brief*, p. 13. But it is hardly unusual at all for the General Assembly to establish different standards for different defendants, even when they are alleged to have caused the same injury. For instance, when political subdivision immunity applies under R.C. Chapter 2744, the claims against the employer are governed by a strict three-part test while the employees can be sued so long as a reckless/wanton standard is satisfied. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9; *Pearson v. Warrensville Hts. City Schs.*, 8<sup>th</sup> Dist. No. 88527, 2008-Ohio-1102, 2008 W. L. 660856, p. \*4 (Mar. 13, 2008). Likewise, R.C. 2745.01(A) requires that the injured worker establish a deliberate intent to injure to succeed upon a claim “against an employer” but imposes no such obligation when the co-employee is sued. While the co-workers is still entitled to immunity under R.C. 4123.741, an exception exists when a “substantial certainty” intentional tort can be established. *Blankenship*, 69 Ohio St. 2d 608; *Stockum*, 21 Ohio App. 3d at 237; *LaCava*, 1996 W.L. 325274, \*3.

Of course, Respondents’ musings over the “illogical” implications of R.C. 2745.01(A) are pointless. *Respondents’ Brief*, p. 13. Regardless of the policy implications, unambiguous statutory language may not be ignored. *Bd. of Ed. of Pike-Delta-York Local School Dist. v. Fulton Cty. Budget Commission*, 41 Ohio St.2d 147, 156, 324 N.E.2d 566 (1975); *Guear v. Stechschulte*, 6 Ohio Law Abs. 371, 119 Ohio St. 1,

7, 162 N.E. 46 (1928). Even if the General Assembly intended a different result, a statute must be enforced in accordance with its plain and ordinary meaning. *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543. The question is “not what the General Assembly intended to enact, but what the meaning is of that which it did enact.” *Siegfried v. Everhart*, 23 Ohio Law Abs. 361, 55 Ohio App. 351, 354, 9 N.E.2d 891, 892 (1936). Judge Collier and the Eighth District thus properly concluded that Respondent Cole was far from a nominal party for purposes of Civ. R. 3(E).

**PROPOSITION OF LAW 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**

Although difficult to decipher, the second Proposition of Law appears to advocate a new pleading standard that is contrary to Civ. R. 8(A). This Court is apparently expected to hold, for the first time in Ohio jurisprudence, that the plaintiff must do something more than simply allege a potentially viable claim against a defendant in order to avoid nominal party status. The fact that no authorities have been located supporting of this peculiar new approach does not appear to concern Respondents.

This Court should continue to adhere to the actual terms of Civ. R. 8(A), which have provided for decades that one need only supply a short, plain statement of a valid claim for relief. *Salamon v. Taft Broadcasting Co.*, 16 Ohio App.3d 336, 338, 475 N.E.2d 1292, 1295 (1st Dist.1984). Rejecting the intricacies of the previous rules, Ohio simply demands that adequate notice be provided to allow a sufficient defense. *Iacono v. Anderson Concrete Corp.*, 42 Ohio St.2d 88, 92, 326 N.E.2d 267, 270 (1975); see 74 Ohio Jurisprudence 3d (1987) 283-285, Pleading, Section 42. “[A] pleader is ordinarily not required to allege in the complaint every fact he or she intends to prove; such facts

may not be available until after discovery.” *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 549, 605 N.E.2d 378, 381 (1992). Moreover, it is not necessary that one alleges principles of law or legal theories. *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 526, 639 N.E.2d 771, 782 (1994).

Respondents’ revolutionary heightened-pleading standard is unworkable on several levels, and particularly because venue disputes must be resolved at the outset of the proceedings before discovery is conducted. While the parties’ residency and the situs of the cause of action typically can be identified through the pleadings, that is not possible for the rigorous scrutiny of the merits that Respondents appear to expect. Fundamental principles of due process do not allow such determinations before a full and fair opportunity has been afforded for complete discovery. *Countrywide Home Loans Servs., L.P. v. Stultz*, 161 Ohio App. 3d 829, 836-837, 2005-Ohio-3282, 832 N.E.2d 125, 130-131, ¶17 (10<sup>th</sup> Dist. 2005).

The high degree of specificity that Respondents envision is contrary to *Tulloh v. Goodyear Atomic Corp.*, 62 Ohio St.3d 541, 584 N.E.2d 729 (1992),<sup>3</sup> where the plaintiff had worked for the defendant as a uranium metals handler for approximately ten years. He maintained that he had developed severe ailments as a result of radioactive materials to which he had been exposed. A complaint was filed that included a claim of intentional tort but the action was dismissed for failure to sufficiently state a valid theory of relief. *Id.* The appellate court affirmed on the grounds that “the claim failed because there was no showing that [the defendants] intended for [the plaintiff] to be injured or that the injury was substantially certain to occur.” *Id.* at 542.

Writing for the majority, the late Chief Justice Moyer observed that the Court had to presume “that all factual allegations in the complaint are true and it must appear

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<sup>3</sup> The portion of *Tulloh* dealing with the public policy exception to the employment-at-will doctrine was overruled in *Painter v. Graley*, 70 Ohio St.3d 377, 383-384, 639 N.E.2d 51, 56 (1994). The Supreme Court’s analysis of the pleading requirements for intentional tort claims is still valid law.

beyond doubt that the plaintiff can prove no set of facts warranting recovery” before dismissal was appropriate. *Tulloh*, 62 Ohio St.3d at 544 (citation omitted). The opinion then reasoned that:

Tulloh alleged that [defendants] knew that exposure to radioactive materials at the plant would be hazardous, and that [defendants] intentionally concealed this information from Tulloh with the knowledge that injury was substantially certain to occur. Accepting these allegations as true, as we must, Tulloh’s complaint fulfills the requirements necessary to state a claim of intentional tort.

*Id.* The lower courts’ dismissal of the intentional tort claim was then reversed. *Id.* at 545.

Several years later in *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 707 N.E.2d 1107 (1999),<sup>4</sup> this Court scrutinized the sufficiency of an intentional tort pleading. The plaintiff maintained that he had suffered severe burns while cleaning certain equipment with pressurized steam. *Id.*, 85 Ohio St.3d at 299. In overturning the dismissal of the complaint, the majority explained that:

In his complaint, Johnson alleged that he was exposed to a dangerous situation at the plant and that [defendant] knew that such exposure would be substantially certain to cause injury. Accepting these allegations as true, as we are required to do, we hold that the complaint properly sets forth a claim for intentional tort sufficient to survive a Civ.R. 12(B)(6) motion to dismiss. [citation omitted].

*Id.* at 308.

A similar situation was presented in *Monnin v. Larger Constr. Co.*, 102 Ohio App.3d 228, 656 N.E.2d 1348 (3rd Dist.1995). A roofer had alleged that his employer had committed an intentional tort by failing to provide him with fall protection equipment. The trial court dismissed the action under Civ.R. 12(B)(6) for purportedly failing to allege the claim with sufficient particularity. *Id.*, 102 Ohio App.3d at 229. On

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<sup>4</sup> *Johnson*, 85 Ohio St. 3d 298, was partially reversed in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, but only with regard to certain constitutional challenges that had been raised. *Johnson’s* analysis of the sufficiency of the pleading was left undisturbed.

appeal, the Third District observed that the complaint had alleged that the defendant knew or should have known of the hazards that threatened the workers and provide the necessary equipment. Since such allegations were sufficient to apprise all concerned of the nature of the claim, the trial judge's ruling was reversed. *Id.* at 231-232.

In *Occionero v. Edmundson*, 11th Dist. No. 99-L-188, 2001 WL 314821 (Mar. 30, 2001), the plaintiff's workplace intentional tort claim also had been dismissed by the trial judge. *Id.* at p. \*1. The Eleventh District noted that the complaint had claimed that the employer knew that the plaintiff's co-worker "was unstable, violent, and prepared to cause injury" but had failed to take any precautionary action. *Id.* at p. \*3. It was then held that the plaintiff had sufficiently stated an intentional tort claim with regard to the assault that eventually occurred. *Id.* Given these compelling authorities, this Court should reject the notion that the plaintiff must accomplish something more than satisfying Civ. R. 8(A) in order to avoid a transfer for improper venue.

**PROPOSITION OF LAW 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**

Respondents' final Proposition of Law is predicated upon mystical concepts surrounding jurisdiction and mootness, and is largely incomprehensible. *Respondents' Brief*, pp. 19-24. While far from certain, the argument seems to be 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." *Id.*, p. 23. From this, this Court is being urged to hold that there was nothing that could be done to resolve the venue impasse. *Id.*, pp. 23-24. So long as the Clerks followed the court orders, and the file bounced back and forth between the two courtrooms, Relators' only option was to capitulate if they wanted to proceed with the merits of the lawsuit. *Id.*

Tellingly, no explanation has been furnished for how this twisted, transcendental

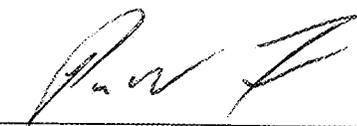
288, 290, 181 N.E.2d 696, 697 (1962). Accordingly, the effort to force an unwarranted change of venue to a friendly forum should be denied and the Eighth District should be affirmed in all respects.

CONCLUSION

Because none of Respondents' Propositions of Law possess merit, this Court should affirm the Eighth District's unassailable venue ruling in all respects. Civ. R. 3(B)(1).

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