

ORIGINAL

IN THE SUPREME COURT OF OHIO
13-0941

DONALD YEAPLES, *ET AL*

RELATORS

v.

HONORABLE STEVEN E. GALL, *ET AL*

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

RESPONDENTS

REPLY BRIEF

PAUL W. FLOWERS (0046625)
PAUL W. FLOWERS, CO., L.P.A.
TERMINAL TOWER, 35TH FLOOR
50 PUBLIC SQUARE
CLEVELAND, OH 44113
(216) 344-9393
FAX: (216) 344-9395

W. CRAIG BASHEIN (0034591)
BASHEIN & BASHEIN CO., L.P.A.
TERMINAL TOWER, 35TH FLOOR
50 PUBLIC SQUARE
CLEVELAND, OH 44113
(216) 771-3239
FAX: (216) 781-5876
ATTORNEYS FOR RELATORS

SHAWN W. MAESTLE (0063779)
(COUNSEL OF RECORD)
SMAESTLE@WESTONHURD.COM
CAROLYN M. CAPPEL (0017469)
CCAPPEL@WESTONHURD.COM
WESTON HURD LLP
THE TOWER AT ERIEVIEW
1301 EAST 9TH STREET, SUITE 1900
CLEVELAND, OH 44114-1862
(216) 241-6602, (216) 621-8369 (FAX)
ATTORNEY FOR RESPONDENTS
PRECISION DIRECTIONAL BORING, LLC
AND GARY COLE

CHARLES E. HANNAN
Assistant Cuyahoga County Prosecutor
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
ATTORNEY FOR RESPONDENT HON.
STEVEN E. GALL

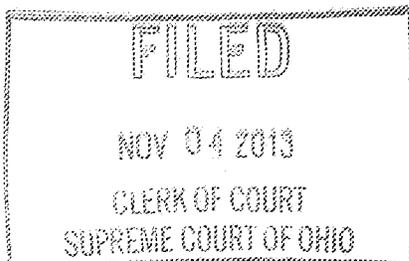


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LAW AND ARGUMENT

Relators, Donald and Deborah Yeaples, did not squarely address Respondent's three suggested Propositions of Law or their interrelated issues. Instead, Relators' responsive brief does nothing more than create various "straw men" arguments which Relators then knock down in the apparent hope that such illusion, particularly when accomplished with "over the top" sarcasm, will divert this Court's attention from the true legal issues presented. Indeed, Yeaples' merit brief is much like a skilled magician whose deceptive tactics divert one's attention away from the true issues. Relators avoid discussing whether Ohio law permits a co-employee intentional tort to be asserted utilizing the *Jones/ Error! Bookmark not defined.*^{Fyffe} substantial certainty tripartite standard thus far reserved for intentional torts alleged against an employer. As to this penultimate question, as well as the related issues this matter presents, Respondents will briefly discuss why the legal principles set forth in their initial merit brief are correct and Yeaples' anemic response is unavailing.

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

Relators, the Yeaples, were required to prove that they had set forth a viable cause of action against Donald Yeaples' co-employee, Gary Cole, in order to show that Relators had a clear legal right to the requested Writs. *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).

Yeaples' underlying tort complaint clearly alleges a *prima facie* cause of action for an employer intentional tort against Yeaples' employer, Precision Directional Boring, LLC. As for the co-employee defendant, Cole, Yeaples attempt to lump Cole into this employer intentional tort cause of action but do not set forth any allegations, (beyond utilizing the *Jones/Fyffe* substantial certainty standard), which current Ohio Law recognizes as a viable cause of action against a co-employee.¹

In response to this deficiency, Yeaples contend that requiring them to plead an independent viable cause of action against the co-employee, as Respondents submit the law requires, would infringe upon "a plaintiff's right to sue either the employer or employee (or both) for a single tort * * *". (Yeaples Merit Brief, page 13 emphasis in original). Yeaples attempt to bolster this statement with various citations from court

¹ In their responsive brief, the Yeaples make continuous reference to their improperly filed amended complaint in **Medina County**. As Yeaples admits, they filed their amended complaint after defendant, Precision, had filed its answer. Accordingly, pursuant to Civ. R. 15(A) leave of court was necessary to amend their complaint which has never been sought nor granted. Consequently, the amended complaint is not properly before this Court. *Grenga v. Youngstown State University*, 2011-Ohio-5621 ¶13 ("When YSU filed its answer on October 27, 2010, it cut off Grenga's right to file an amended complaint as a matter of course").

decisions which involve the concept of *respondeat superior* which permits an employer to be held legally responsible for its employee's actions. Generally negligence based concepts of vicarious liability are wholly inapplicable to an action involving a workplace intentional tort as Yeaples attempt to plead.

Respondeat superior permits an employer to be held responsible for an employee's conduct where the activity causing harm occurs within the course and scope of employment. *Osborne v. Lyles*, 63 Ohio St.3d 326, 329 (1992). Workplace intentional torts, which do not otherwise meet the statutory requirements set forth in R.C. §2745.01 *et seq.*, simply cannot qualify for such flow-through liability. Indeed, to permit vicarious liability to apply where an intentional tort is committed within the employment's scope controverts the workplace tort's limited exception to the employer's constitutional immunity because the statutory or former *Jones/Fyffe* substantial certainty intentional torts are said to actually arise outside the scope of the employee's employment:

The plain import of this constitutional language indicates that the purpose of workers' compensation is to create a source of compensation for workers injured or killed *in the course of employment*. Section 35, Article II then defines, *inter alia*, the scope and limits of the General Assembly's power in the creation and development of the workers' compensation system. * * * But the protection afforded by the Act has always been for negligent acts and not for intentional conduct." (Footnotes omitted). *Id.*, 69 Ohio St.2d at 614, 23 O.O.3d at 508, 433 N.E.2d at 577. See, also, *State, ex rel. Crawford v. Indus. Comm.* (1924), 110 Ohio St. 271, 274-276, 143 N.E. 574, 575.

* * *

As cogently reasoned by one distinguished member of this court:

* * * *Injuries resulting from an employer's intentional torts, even though committed at the workplace, are utterly outside the scope of the purposes intended to be achieved by Section 35 and by the Act. *Such injuries are totally unrelated to the fact of employment.* When an employer intentionally harms his employee, that act effects a complete breach of the employment relationship, and for purposes of the legal remedy for such an injury, the two parties are not employer and employee, but intentional tortfeasor and victim. If the victim brings an intentional tort suit against the tortfeasor, it is a tort action like any other. The employer has forfeited his status as such and all the attendant protections fall away.

Brady v. Safety-Kleen Corp., 61 Ohio St.3d 624, 633-634 (1991). (emphasis added).

It follows that *respondeat superior* could never be used to justify the existence of a workplace intentional tort since, by definition, these specialized workplace torts must arise outside of the scope of the employment relationship which consequently prohibits the use of vicarious liability.

Conversely, the right to sue an individual for an intentional tort is generally governed by common law concepts, like assault, battery or similar causes of action. Respondents do agree that a plaintiff, through a single complaint, could assert claims against both an employer and an employee where each cause of action asserted against the respective party meets Ohio law standards and the pleading contains the requisite

factual and legal allegations to support a *prima facie* claim against each party. However, Yeaples' underlying tort complaint in this matter fails in this regard.

In fact, Yeaples does not even contend that his complaint presents a *prima facie* claim against his co-employee, Gary Cole, for any of the traditional causes of action for which Cole could be held liable to Yeaples for his alleged injuries. Rather, Yeaples has asserted and specifically labeled his claim as a "Workplace Intentional Tort" against both Precision and Cole. (Supplement at 0015-0019). In response to Cole's Motion to Dismiss, Yeaples argued, and continues here, that the old common law substantial certainty intentional tort standard established by this court in *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90 (1984) and modified in *Fyffe v. Jenos, Inc.*, 59 Ohio St.3d 115 (1991), permits such a workplace intentional tort against the co-employee, Cole. Whether Yeaples can assert a cause of action under the *Jones/Fyffe* substantial certainty intentional tort standards is at the heart of this appeal.

Indeed, only if Yeaples can maintain such a cause of action could the Cuyahoga County Court of Appeal's issuance of the Writ of Mandamus and/or *Procedendo* have been considered appropriate. It is this issue which Yeaples has completely failed to address.

As Respondent set forth in its initial brief, the employer substantial certainty intentional tort standard has never been applied by this Court or any other Ohio court to support, even at the pleading level, a claim against an employee solely based on the *Jones/Fyffe* tripartite substantial certainty test. The "substantial certainty test" focuses

on how the employer directed an activity and the employer's knowledge of a dangerous situation. *Fyffe, supra* at ¶1 of the syllabus. This tripartite analysis focuses entirely on what actions the employer undertakes or engaged in to deliberately injure its employee.

In this matter, Yeaples has asserted that his employer deliberately intended for him to perform activity which the employer knew was "substantially certain" to harm him. (Supplement at 0016-0017). While this allegation may be arguably sufficient to present a cause of action against the employer, Precision, these allegations are insufficient to maintain an intentional tort claim against an individual co-employee and this Court should so state.

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

Respondent's straight forward proposition of law does not seek or even request that this Court change the current pleading standard as Yeaples sarcastically asserts. Instead, Respondents believe, and Ohio law supports, that an intentional tort claim asserted against an individual which occurs in the workplace, must meet the same pleading standards as an intentional tort alleged to have occurred outside the workplace. Accordingly, Yeaples was required to have shown in his complaint that his fellow employee, Gary Cole, engaged in specific acts which would, if true, establish

that Cole intentionally injured Yeaples. Nowhere in Yeaples' responsive brief does he even suggest that his pleading meets such minimal pleading standards.

Rather, Yeaples, consistent with his sleight of hand, discusses how his complaint presents facts which this Court and others have approved to permit an intentional tort claim to proceed against an employer. *See*, Appellee's brief, pages 20-21. As Yeaples well knows, but disregards, the only question before this Court is whether Yeaples' complaint presents a viable claim against the co-employee, Gary Cole. In the complaint, Yeaples' "Workplace Intentional Tort" count does not set forth any specific allegations that Cole intentionally assaulted or otherwise intentionally caused him harm. Rather, all of the allegations involve conduct in which the employer, Precision, allegedly engaged, and for which it could be responsible. (Supplement 0015-0019).

Yeaples also argues that these allegations are sufficient in that they establish that Cole should be held responsible for Yeaples injuries under the *Jones/Eyffe* "substantial certainty" intentional tort standard. Put simply, Yeaples wants this Court to extend the employer intentional tort substantial certainty standard and replace the basic common law tests which are designed for those intentional torts committed by individuals. As explained, such is illogical as was recently illustrated by the Federal District Court in *Stanley v. Deluxe Fin. Serv. Inc.*, 2009 U.S. Dist. LEXIS 28124 (N.D. Ohio), where the Federal Court highlighted how the employer intentional tort

substantial certainty test could not be expanded to cover those torts committed by a co-employee:

Through a progression of cases, employer liability for intentional torts expanded beyond the traditional intentional torts. *See, e.g. Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (Ohio 1988); *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 3 135, 522 N.E.2d 477 (Ohio 1988); [*12] *Pariseau v. Wedge Prods., Inc.*, 36 Ohio St.3d 124, 522 N.E.2d 511 (Ohio 1988). Ultimately, in *Fyffe*, the Ohio Supreme Court set out the precise contours of an intentional tort committed by an employer against its employee:

(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, than 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.

59 Ohio St.3d at 118.

The explicit language of the *Fyffe* standard makes the new cause of action applicable to intentional torts committed by the *employer*. Nothing in *Fyffe* or its progeny ever states that this new cause of action is applicable as against a *fellow employee*. To impose this standard on fellow employees requires substituting the word 'employee' for the word 'employer.' Moreover, the required elements relate to knowledge and power of that the average employee would lack *visa-vis* a fellow employee.

Stanley v. Deluxe Fin. Serv. Inc., 2009 U.S. Dist. LEXIS 28124 (N.D. Ohio) at *11-13.

As the Federal Court properly recognized, 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.

Consequently, because the employer substantial certainty test cannot be utilized to support a “Workplace Intentional Tort” as Yeaples has pled against a co-employee and because Yeaples’ Complaint does not otherwise plead a viable intentional tort claim against Cole, such results in the only possible conclusion that Cole is a nominal party and venue is proper in Medina County where the underlying tort claim is currently pending.

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

Yeaples protests as a “mystical concept” and “far fetched” the jurisdictional principle that only one court may have jurisdiction over a matter at any given time. Appellee’s brief pages 21-22. Respondents believe that it is a basic concept of all jurisprudence that only one court may proceed on any given cause of action against the same parties at one time in order to avoid chaos. Consequently, once a court transfers a matter to another court, the transferor court loses jurisdiction in favor of the transferee court. *Atwood Resources, Inc. v. LeHigh*, 98 Ohio App.3d 293, 298 (5th Dist. 1994) (Once transferor court signs the venue transfer order, the transfer or court no longer has jurisdiction); *see, also, Moses v. Business Card Exp. Inc.*, 929 F.2d 1131,

1135 (6th Cir. 1991) (noting with approval, District Court's statement that "once the files are physically transferred to the transferee court, the transferor court loses jurisdiction over the case."); *Jones v. Infocure Corp.*, 310 F.3d 529, 533 (7th Cir. 2002) ("[A] District Court relinquishes all jurisdiction over a case when it is transferred to another district court").

In this matter, when Yeaples filed their complaint with the Cuyahoga County Court of Appeals seeking the issuance of Writs of Mandamus and *Procedendo*, against the Cuyahoga County Common Pleas Court, there was no current controversy pending in the Cuyahoga County Court's system. The record is unequivocal that Judge Gall issued his judgment transferring the 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). On January 16, 2013, the Medina County Clerk of Courts received the transferred filed. (Supplement at 0175).

Approximately six weeks later, on February 26, 2013, the Yeaples filed their petition for the respective writs with the Cuyahoga County Court of Appeals. However, as the record reflects, compliance with Judge Gall's order had been fully completed and the matter was now transferred out of the county and outside the jurisdiction of the Cuyahoga County Court of Appeals. *Atwood Resources, Inc.*, *supra*; *Moses*, *supra*; *Infocure Corp.*, *supra*.

Therefore, the Appellate Court could not have jurisdiction and the matter was moot. *See, e.g. 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).

It is for these reasons, that Respondents contend that this Court's decision in *State ex rel Smith Admr. v. Cuyahoga County Court of Common Pleas*, 106 Ohio St.3d 151, 2005-Ohio-4103, is inapplicable.

The Cuyahoga County Court of Appeals decision in this matter orders Judge Gall to proceed to judgment on a matter which is not currently before him. The Appellate Court's ruling can only be enforced and carried into effect if the Medina County Court voluntarily acts to relinquish its present jurisdiction over the underlying case. Stated differently, if Medina County were to refuse to transfer its current jurisdiction, what is the effect of the Cuyahoga County Appellate Court ruling? Indeed, what was the point of the entire mandamus proceeding? The undisputed facts establish that the matter before the Cuyahoga County Court of Appeals was moot.

CONCLUSION

The "substantial certainty" employer intentional tort standard which this Court created was a legal standard to be applied by an employee in a cause of action against ones employer. This standard focuses on the actions of the employer. Relator in this matter has filed a complaint which seeks to apply this employer-based standard to a

cause of action asserted by one employee against another employee. Ohio law does not permit such a cause of action. Because the Relators did not set forth a viable or recognized claim for an intentional tort against the employee, Relators' complaint for the issuance of the respective Writs should have been denied since Relators must show a clear legal right to relief and where Relators cannot, the writ must be denied. Relators' complaint does not set forth any other cause of action against Yeaples' co-employee, Gary Cole, a mere nominal party. Relators have not established a basis for the respective Writs to have been granted.

Respectfully submitted,

Shawn W. Maestle per authority of [Signature] (0083891)
SHAWN W. MAESTLE (0063779)

(COUNSEL OF RECORD)

SMAESILE@WESTONHURD.COM

CAROLYN M. CAPPEL (0017469)

CCAPPEL@WESTONHURD.COM

WESTON HURD LLP

THE TOWER AT ERIEVIEW

1301 EAST 9TH STREET, SUITE 1900

CLEVELAND, OH 44114-1862

(216) 241-6602, (216) 621-8369 (FAX)

ATTORNEY FOR RESPONDENTS 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 4th day of November, 2013, to the following:

PAUL W. FLOWERS
PAUL W. FLOWERS, CO., L.P.A.
TERMINAL TOWER, 35TH FLOOR
50 PUBLIC SQUARE
CLEVELAND, OH 44113

W. CRAIG BASHEIN
BASHEIN & BASHEIN CO., L.P.A.
TERMINAL TOWER, 35TH FLOOR
50 PUBLIC SQUARE
CLEVELAND, OH 44113

CHARLES E. HANNAN
Assistant Cuyahoga County Prosecutor
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

Shawn W. Maestle
Shawn W. Maestle (0063779) *WJM*
(0083891)