

ORIGINAL

No. 13-1405

IN THE
SUPREME COURT OF OHIO

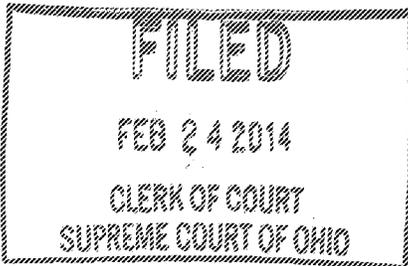
DUANE HOYLE,
Plaintiff-Appellee

-and-

THE CINCINNATI INSURANCE COMPANY
Intervening Plaintiff-Appellant

v.

DTJ ENTERPRISES, INC., et al.,
Defendants-Appellees.



JURISDICTIONAL APPEAL FROM THE
COURT OF APPEALS, NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NOS. CA-26579 & CA-26587

**MERIT BRIEF OF APPELLANT THE
CINCINNATI INSURANCE COMPANY**

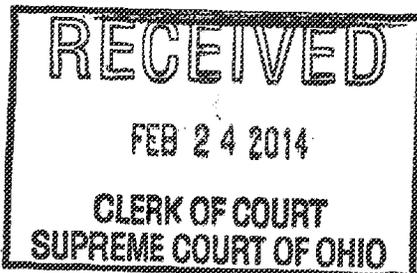
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I. SUMMARY OF THE ARGUMENT

In this case, the legal issues raised by the three propositions of law relate, *first*, to defining and clarifying the legal standard and parameters for determining the civil liability of all Ohio employers for Employer Intentional Torts (“EIT”) pursuant to R.C. §2745.01(C) when there has been a deliberate removal of an equipment safety guard (or the deliberate misrepresentation of a toxic or hazardous substance in the workplace),¹ and, *second*, whether insurers may, or are prohibited from, providing indemnity coverage to employers for such EIT claims now that the current law requires proof that the employer acted with specific intent to injure the employee. The presumption created by R.C. §2745.01(C) does not alter or lessen that degree of proof.

While this Court has decided cases in recent years involving claims brought pursuant to Ohio’s Employer Intentional Tort Statute, it has yet to address a case involving the specific parameters of an employer’s liability under subsection (C) of R.C. §2745.01 involving the rebuttable presumption of the employer’s intent to injure due to the deliberate removal of a safety guard.² The issue of insurance coverage for EIT claims has been addressed by the Court

¹ This Court’s opinion in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795 addressed and gave guidance regarding the definition of the statutory phrases “equipment safety guard” and its “deliberate removal.” *Hewitt* did not touch upon the issues raised by this case.

² This Court does have one pending case involving Revised Code Section 2745.01(C). *See, Pixley v. Pro-Pak Industries, Inc.*, 2013-Ohio-1358, 988 N.E.2d 67 (6th Dist.), appeal allowed, 136 Ohio St.3d 1472, 2013-Ohio-3790, 993 N.E.2d 777. *Pixley*, however, does not involve the issues presented in the case *sub judice*. In *Pixley*, the Court is considering the scope of persons who are intended to be protected by an “equipment safety guard” and how “deliberate removal” is to be determined under the statute.

in previous cases³ but those cases were decided based upon the common law standard for an EIT claim before the tort was redefined by the General Assembly in 2005 to require the employer's specific intent to injure the employee. The Court is presented here with the vehicle for addressing whether such insurance coverage is permissible under current Ohio law and public policy now that liability for EIT claims is premised upon such intent to injure.

This appeal is before this Court from the filing of an EIT case involving an accidental fall from scaffolding during the course and scope of employment. The injured employee, Plaintiff-Appellee Duane Allen Hoyle ("Mr. Hoyle"), filed suit against his employer, Defendants-Appellees DTJ Enterprises, Inc. and Cavanaugh Building Corporation ("DTJ" and "Cavanaugh" respectively), seeking compensation for his injuries. Cavanaugh and DTJ are named insureds under commercial general liability and umbrella policies of insurance issued by Intervening Plaintiff-Appellant The Cincinnati Insurance Company ("CIC"). CIC intervened and filed an intervenor's complaint seeking a declaratory judgment to determine CIC's obligations under these policies to indemnify Cavanaugh and DTJ for the EIT claims made by Mr. Hoyle.

Pursuant to this Court's precedents, intent in employer intentional torts at common law could be proved in one of two ways: by establishing that the harm was directly intended or was substantially certain to occur. *Harasyn*, 49 Ohio St.3d at 175. Those two ways of establishing an employer intentional tort have now been merged in the EIT statute. R.C. §2745.01(A) provides that "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

³ See, e.g., *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, 951 N.E.2d 770, at ¶ 1, fn. 1; *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, 790 N.E.2d 1199, at ¶ 6; *Harasyn v. Normandy Metals, Inc.*, 49 Ohio St.3d 173, 175, 551 N.E.2d 962 (1990).

substantially certain to occur.” The substantial certainty theory has been equated with “deliberate intent.” R.C. §2745.01(B). So, under current Ohio law, the employer’s specific or direct intent to injure the employee is the only way to prove an employer’s liability. See, *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 55. With that being so, the employee can prove no viable claim against an employer for which there would or should be insurance coverage because Ohio public policy prohibits insuring torts where there is a specific intent to injure. Alternatively, even if the direct intent tort claim – which is the only remaining claim in this case – is proven ultimately to be true, coverage is clearly and explicitly excluded under the insurance policy issued by CIC because CIC’s policy does not provide coverage for an employer’s direct intent to injure. CIC’s policy exclusion expressly precludes coverage when an employer’s acts are committed with “deliberate intent to injure.”

Under R.C. §2745.01(C), liability for the deliberate removal of a safety guard also amounts to a direct intent tort against the employer since it creates a rebuttable presumption that the removal was “committed with intent to injure.” The trial court granted summary judgment to CIC on coverage grounds because “[a]ny possible surviving claim under RC. 2745.01(C) would necessarily include the ‘intent to injure’ and would thus be precluded by the insurance policies.” (Summ. Judg. Op. II, Apx. p. 19). The Ninth District’s reversal of that summary judgment and its ruling in favor of coverage pursuant to R.C. §2745.01(C) amounts to an unprecedented expansion of coverage and approval of insurance for an employer’s direct intent to injure an employee. But it has long been against public policy in Ohio to permit indemnity coverage by an insurer for direct intent torts against employers. *Blankenship v. Cincinnati Milacron Chem., Inc.*, 69 Ohio St.2d 608, 615, 433 N.E.2d 572, 577 (1982); *Wedge Products, Inc. v. Hartford Equity*

Sales Co., 31 Ohio St.3d 65, 67, 509 N.E.2d 74 (1987). *Accord, Doe v. Shaffer*, 90 Ohio St.3d 388, 391, 738 N.E.2d 1243 (2000).

II. STATEMENT OF FACTS

On March 19, 2010, Mr. Hoyle filed this action alleging that on March 24, 2008, he fell from a scaffold during the course and scope of his employment resulting in bodily injury. Compl., Supp. p. 1-17. When the fall occurred, Mr. Hoyle was working as a carpenter on a ladder jack scaffold (two extension ladders positioned vertically with a walkway/work platform spanning the space between them) to perform work on a third-floor exterior area approximately thirteen feet off the ground at the Wyoga Place Apartments in Cuyahoga Falls, Ohio. Compl. ¶¶ 11-12, Supp. p. 4. Mr. Hoyle alleges the scaffold collapsed or otherwise failed, causing him to fall the thirteen feet to the ground where he landed on a concrete pad and sustained injuries. Compl. ¶ 14, Supp. p. 5. In his complaint, Mr. Hoyle asserts claims for employer intentional tort against Cavanaugh and DTJ. Compl. ¶¶ 6-44, Supp. p. 3-14.

As a result of these allegations, Cavanaugh and DTJ tendered the defense of Mr. Hoyle's complaint to and made demand upon CIC to indemnify them for any judgment on these claims pursuant to Commercial General Liability ("CGL") and Umbrella Liability policies issued by CIC naming Cavanaugh and DTJ as the named insureds. CIC's MOSJ at 2-4, Supp. p. 19-21. CIC had issued policy No. CPP 081 75 12 covering a policy period of March 31, 2007 to March 31, 2010. Ex. A to CIC's MOSJ, Supp. p. 30-212. The CGL policy provided the following in regard to the coverage issue which is relevant to the propositions of law advanced herein by CIC:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury". . . to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit"

seeking damages for "bodily injury" to which this insurance does not apply.

* * *

This insurance does not apply to:

a. Expected or Intended Injury

"Bodily injury" . . . which may reasonably be expected to result from the intentional . . . acts of the insured . . . , even if the injury or damage is of a different degree or type than actually expected or intended.

CGL Policy, Supp. p. 50, 51.

CIC's policy also included an endorsement, an Employers Liability Coverage Form on Form GA 106 OH 01 96, which provides coverage, in relevant part, as follows:

- a. We will pay those sums that an insured becomes legally obligated to pay as damages because of "bodily injury" sustained by your "employee" in the "workplace" and caused by an "intentional act" to which this insurance applies. . . .

2. Exclusions.

This insurance does not cover:

* * *

- h. liability for acts committed by or at the direction of an insured *with the deliberate intent to injure* . . .

(Emphasis added). Emp. Liab. Cov. Form, Supp. p. 110, 111.

The Employers Liability Coverage Form provided the following definition for "intentional act":

SECTION V -- DEFINITIONS

* * *

3. "Intentional Act" means an act which is substantially certain to cause "bodily injury". For purposes of the coverage afforded by this insurance, an act is substantially certain to cause "bodily injury" when all three of the following conditions are met:
- a. An insured knows of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;

- b. An Insured knows that if an “employee” is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the “employee” will be a substantial certainty; and
- c. An insured under such circumstances and with such knowledge, does act to require the "employee" to continue to perform the dangerous task.

Emp. Liab. Cov. Form, Supp. p. 113.

Because paragraph 2.h of The Employers Liability Coverage endorsement on Form GA 106 OH 01 96 in the insurance policy between Cavanaugh, DTJ, and CIC states, in relevant part, that “[t]his insurance does not cover: . . . liability for acts committed by or at the direction of an insured *with the deliberate intent to injure*,” Emp. Liab. Cov. Form, Supp. p. 111, CIC has maintained that, in accordance with this Court’s *Kaminski* decision, there is no possibility under which CIC might owe a duty to indemnify Cavanaugh or DTJ for any judgment which may be rendered following the trial of this matter. CIC’s MOSJ, Supp. p. 18-27; CIC’s Reply Br., Supp. p. 301-320; CIC’s Sur-Reply Br., Supp. p. 360-366; CIC’s Reply Br., Supp. p. 403-409. In other words, either Mr. Hoyle will have failed to prove that Cavanaugh and DTJ acted with intent to injure Mr. Hoyle and a defense verdict will be rendered (in which case there will be nothing to indemnify) or Mr. Hoyle will have met this burden by proving that Cavanaugh and DTJ acted with the intent to cause his injury, and any obligation by CIC to indemnify Cavanaugh and DTJ will be in direct contravention to paragraph 2.h. of the policy’s endorsement in the Employers Liability Coverage Form on Form GA 106 OH 01 96 and in direct violation of Ohio public policy. And while CIC has provided a defense and fully intends to defend Cavanaugh and DTJ through the trial of this matter, CIC’s MOSJ at 2, Supp. p. 19, CIC seeks this Court’s direction as to its duty to indemnify in light of the 2005 change in Ohio’s EIT statute and this Court’s

interpretation of that statute.

In order to resolve the questions surrounding coverage for Mr. Hoyle's claims, CIC moved the trial court for permission to intervene as an intervening plaintiff in order to secure a declaratory judgment on the issue of coverage. CIC's Mot. Intervene, T.d. 40. Permission to intervene was granted by the trial court in June 2011. J.E. dtd. 6/29/11, T.d. 41. Thereafter, the parties filed summary judgment motions with the trial court addressing Cavanaugh and DTJ's liability to Mr. Hoyle on his EIT claims as well as CIC's duty to indemnify any judgment Mr. Hoyle might obtain in his favor on those tort claims.⁴

The trial court granted summary judgment in favor of CIC declaring that there was no duty to indemnify Cavanaugh and DTJ for Mr. Hoyle's EIT claims.⁵ Summ. Judg. Op. I, Apx. p. 26-27; Summ. Judg. Op. II, Apx. p. 17-19. The trial court held as follows:

The Court finds that the policies exclude coverage for employer liability under R.C. 2745.01. R.C. 2745.01 defines "substantially certain" as meaning "that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." The Ohio Supreme Court has held that "under R.C. 2745.01, the only way an employee can recover is if the employer acted with intent to cause an injury." "[T]he 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)." *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250 (2010).

Summ. Judg. Op. II, Apx. p. 18-19. *See also*, Summ. Judg. Op. I, Apx. p. 27.

⁴ The parties' summary judgment briefing on the issue of CIC coverage obligations to indemnify DTJ and Cavanaugh is contained in the Supplement. The Supplement does not contain the many notices of supplemental authority which were filed by the parties.

⁵ The trial court also granted partial summary judgment in favor of DTJ and Cavanaugh on Mr. Hoyle's EIT claims, except for the claim predicated upon the rebuttable presumption provided for by R.C. §2745.01(C) and whether pins used to hold the ladder jack to the ladder constitute an "equipment safety guard." Summ. Judg. Op. I, Apx. p. 28; Summ. Judg. Op. II, Apx. p. 19-20.

On reconsideration,⁶ the trial court specifically took issue with the argument that the “rebuttable presumption” that may be created under subsection (C) of R.C. §2745.01 is not the equivalent of deliberate intent. According to the trial court, “[a]ny possible surviving claim under R.C. 2745.01(C) would necessarily include the ‘intent to injure’ and would thus be precluded by the insurance policies.” Summ. Judg. Op. II, Apx. p. 19.

In a two-to-one decision, the Ninth District reversed the trial court’s summary judgment. *Hoyle v. DTJ Ents., Inc.*, 2013-Ohio-3223, 994 N.E.2d 492 (9th Dist.) (“App. Op.”), Apx. p. 5-15. The majority held that “[b]ased upon the presumption of deliberate intent under R.C. 2745.01(C), there could exist a circumstance where an employee prevails on his claim of intentional tort without the complained action constituting ‘deliberate intent’ to injure under the terms of the policy.” App. Op., ¶ 21, Apx. p. 14. Judge Hensal, in dissent, citing *Houdek v. ThyssenKrupp Materials N. A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 25, came to the opposite conclusion, stating: “The policy at issue in this case specifically excludes coverage for ‘acts committed * * * with the deliberate intent to injure[.]’ In light of the other provisions of the contract that specifically mirror the state of the law at the time it was created, I would find that the parties intended for the term ‘deliberate intent’ to have the same meaning under the contract as under Section 2745.01.” App. Op., ¶ 23 (Hensal, J., dissent), Apx. p. 15-16.

The 2-1 decision and opinion of the Ninth Appellate District is legally flawed because: (1) it fails to adhere to this Court’s binding precedent interpreting R.C. §2745.01 to require an employee to establish the employer’s direct or deliberate intent to injure the employee in order to

⁶ After the trial court granted summary judgment in favor of CIC on April 20, 2012, DTJ and Cavanaugh moved for reconsideration to allow further briefing on the coverage issue. DTJ’s Mot. Reconsider, T.d. 126. The trial court granted reconsideration and vacated in part the summary judgment opinion entered on April 20, 2012. J.E. dtd. 5/15/12, T.d. 130.

prevail ultimately on a claim for employer intentional tort; (2) it disregards the public policy of Ohio which prohibits an insurer from indemnifying conduct and actions by employers which involve direct intent to injure as the culpable basis giving rise to liability; and, alternatively, (3) it erroneously imposes upon insurers the duty to indemnify an insured-employer when an employee invokes R.C. §2745.01(C) in an effort to create a presumption of intent to injure due to the employer's deliberate removal of an equipment safety guard notwithstanding an endorsement in the insurer's policy – like the one found in CIC's policy here – excluding coverage for “liability for acts committed by or at the direction of an insured with deliberate intent to injure.”

CIC timely appealed to this Court. Not. of App., Apx. p. 1-4. The case has been accepted as a jurisdictional appeal to address CIC's three propositions of law. See, 137 Ohio St.3d 1421, 2013-Ohio-5285, 998 N.E.2d 1177.

III. ARGUMENT REGARDING APPELLANT'S PROPOSITIONS OF LAW

A. Proposition of Law No. I:

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.

With respect to Proposition of Law No. I, the Court must determine whether the presumption which may be created by R.C. §2745.01(C) is sufficient to establish liability against an employer for EIT liability now that this Court has made it clear such liability only exists upon establishing the employer's deliberate intent to injure. *Houdek v. ThyssenKrupp Materials N. A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, at ¶ 25. By failing to follow this

Court's decisions in cases like *Houdek* and *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, the Ninth District's decision in the case at bar, if left to stand, signals a seismic shift in the current EIT law as adopted and enacted by Ohio's General Assembly. Without correction by this Court, it will serve as legal authority leading other trial and appellate courts to stray from the General Assembly's purpose in enacting R.C. §2745.01 to limit recovery for employer intentional torts to only those most egregious cases when an employer has acted with specific intent to cause an injury.

1. The history and development of EIT liability in Ohio has been settled and clarified by the General Assembly and upheld by this Court as requiring specific intent to injure.⁷

Generally, an employee is precluded from suing the employer as a result of a work-related injury that is covered by the Ohio Workers' Compensation Act. *See*, Ohio Constitution Article II, Section 35; R.C. Chapter 4123. That changed thirty-two years ago when this Court decided *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608, 614, 433 N.E.2d 572 (1982). Creating an exception to the general rule, *Blankenship* held that an employee could sue an employer for work-related injuries, but only if the employer intentionally inflicted the injuries. Under *Blankenship*, this Court specifically ruled that neither Article II, Section 35 of the Ohio Constitution nor R.C. §4123.74 preclude an employee from seeking damages against an employer for an intentional tort. *Blankenship, supra*, syllabus. This exception was intended to apply to only the most egregious cases of employer wrongdoing. The

⁷ For a thorough and more expansive discussion of the legal history and development of tort liability of employers for injuries inflicted upon employees leading to the enactment of the current version of R.C. §2745.01, *see Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶¶ 14-46, 78-87.

Court reasoned that “[a]ffording an employer immunity for his intentional behavior would not promote [a safe and injury-free work environment], for an employer could commit intentional acts with impunity with the knowledge that, at the very most, his workers’ compensation premiums may slightly rise.” *Id.* at 615.

Two years later, this Court decided *Jones v. VIP Development Co.*, 15 Ohio St.3d 90, 472 N.E.2d 1046 (1984). The *Jones* Court clarified the *Blankenship* holding by providing a working definition of the tort: “An intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.” *Id.*, at 95. But the *Jones* definition resulted in further confusion surrounding what was meant by “substantial certainty.”

In 1986, the Ohio General Assembly enacted R.C. §4121.80 in an effort to define an employer intentional tort as “an act committed with the intent to injure another or committed with the belief that an injury is substantially certain to occur.” However, this Court declared the legislation unconstitutional in *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624, 576 N.E.2d 722 (1991). The *Brady* Court concluded that the legislature exceeded its constitutional authority by promulgating a law that addresses a situation which takes place outside the context of an employment relationship.

While the constitutionality of R.C. §4121.80 was being litigated in Ohio’s courts, the case of *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (1988) was decided in 1988. In *Van Fossen*, the Court sought to limit the inference of employer intent by establishing knowledge as an important element. *Id.*, paragraphs five and six of the syllabus.

Three years after *Van Fossen* was announced, this Court handed down *Fyffe v. Jenos, Inc.*, 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991) in an effort to clarify the previous holding in

Van Fossen and establish the standard for employer intentional tort liability. The *Fyffe* Court set forth a test for establishing “intent” with respect to the “substantial certainty” aspect of employer intentional torts. Under *Fyffe*, a plaintiff was required to satisfy three-prongs to successfully maintain a cause of action against an employer for intentional tort:

- (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
- (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and
- (3) That the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

Id., at 118.

In 1993, the General Assembly passed R.C. §2745.01 which attempted to exact a stricter standard of proving intent by the employer. But this Court struck this legislative provision down in *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 631 N.E.2d 582 (1994). In doing so, this Court relied upon the previous holding in *Brady* as evidence that the section on intentional torts was not related to the “common purpose of the bill.”

In 1995, the legislature passed a revised version of R.C. §2745.01 which replaced the common law cause of action with a new statutory provision that required the plaintiff to establish by clear and convincing evidence that the employer caused the injury. But that statute suffered a similar fate as previous legislation when this Court declared R.C. §2745.01 unconstitutional in *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 707 N.E.2d 1107 (1999). The *Johnson* Court held that this standard is “so unreasonable and excessive that the chance of recovery of damages by employees for intentional torts committed by employers in the workplace is virtually zero.” *Id.*, at 307.

In 2004, the Ohio General Assembly enacted the current version of R.C. §2745.01 to repeal the 1995 version of R.C. §§2745.01 and 2305.112. The current statute took effect on April 7, 2005. The current version of the EIT statute limits the “substantially certain to occur” element to only conduct where “an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition or death.” R.C. §2745.01(B). Further, the current statute “creates a rebuttable presumption that the [deliberate] removal [of an equipment safety guard] or [deliberate] misrepresentation [of a toxic or hazardous substance] was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.” R.C. §2745.01(C).

The full text of the current R.C. §2745.01 is as follows:

- (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.
- (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.
- (D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

In 2010, this Court upheld the constitutionality of the current version of R.C. §2745.01.

See, Kaminski, supra, syllabus, and its companion case, *Stetter, supra*, paragraphs one and two

of the syllabus. “The net result of these two decisions is to confirm the constitutional validity of R.C. 2745.01.” *Kaminski*, at ¶ 2. In upholding the constitutionality of the current EIT statute, this Court observed that R.C. §2745.01 “intends to significantly restrict actions for employer intentional torts * * * .” *Id.*, at ¶ 57. That public policy determination has been made by the General Assembly and it is not the province of the courts to second guess such policy choices of the legislature. *Id.*, at ¶¶ 74-75 (citations omitted).

2. The burden of proof (i.e., persuasion) remains with the plaintiff in an EIT case under R.C. §2745.01 to establish that the employer acted with intent to injure.

The burden of proof is a “‘substantive’ aspect of a claim.” *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20–21, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000); *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 271, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) (“[T]he assignment of the burden of proof is a rule of substantive law ...”); *Garrett v. Moore–McCormack Co.*, 317 U.S. 239, 249, 63 S.Ct. 246, 87 L.Ed. 239 (1942) (“[T]he burden of proof ... [is] part of the very substance of [the plaintiff’s] claim and cannot be considered a mere incident of a form of procedure”). Under the law of Ohio, it is the plaintiff’s obligation, in order to recover against a defendant, to produce evidence which furnishes a reasonable basis for sustaining his claim. *Landon v. Lee Motors, Inc.*, 161 Ohio St. 82, 99, 118 N.E.2d 147 (1954). *See also, Zafires v. Peters*, 160 Ohio St. 267, 115 N.E.2d 838 (1953), paragraph one of the syllabus (“One who seeks relief by judicial process must present proof of the basic facts essential to establish his right to such relief, or fail in his action.”)

The term “burden of proof” is a composite burden that “encompasses two different aspects of proof: the burden of going forward with evidence (or burden of production) and the

burden of persuasion.” *Chari v. Vore*, 91 Ohio St.3d 323, 326, 744 N.E.2d 763 (2001), citing *Xenia v. Wallace*, 37 Ohio St.3d 216, 219, 524 N.E.2d 889 (1988); *State v. Robinson*, 47 Ohio St.2d 103, 107, 351 N.E.2d 88 (1976). “The term ‘burden of production’ tells a court which party must come forward with evidence to support a particular proposition, whereas ‘burden of persuasion’ determines which party must produce sufficient evidence to convince a judge that a fact has been established.” 29 American Jurisprudence 2d, Evidence, Section 171 (2012). “The burden of persuasion never leaves the party on whom it is originally cast.” *Id.* Thus, what can shift is “the burden of going forward with the evidence, rather than the actual burden of proof. The burden which rests upon the plaintiff, to establish the material averments of his or her cause of action * * *, never shifts.” 42 Ohio Jurisprudence 3d, Evidence and Witnesses, Section 84 (2012).

This Court’s recent precedents in the area of EIT cases have held that, under Revised Code Section 2745.01, “absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee’s exclusive remedy is within the workers’ compensation system.” *Houdek, supra*, at ¶ 25; *see also, id.*, at ¶ 29 (“R.C. 2745.01 limits claims against employers for intentional torts to circumstances demonstrating a deliberate intent to cause injury to an employee.”) As was stated in both *Kaminski* and its companion case, *Stetter*, the General Assembly intended to limit claims for employer intentional torts to situations in which an employer acts with the “specific intent” to cause an injury to another. *Kaminski*, at ¶ 56; *Stetter*, at ¶ 26. In *Stetter*, this Court stated that by enacting R.C. §2745.01, the Ohio General Assembly meant to “significantly curtail an employee’s access to common-law damages” and “permit recovery for employer intentional torts only when an employer acts with specific intent to cause injury.” *Id.*, at ¶ 24.

Applying the foregoing to the case at bar, the party who files a complaint alleging an EIT claim under R.C. §2745.01 has the ultimate burden to prove that the employer acted with intent to injure the employee. That is, the employee asserting a violation of the EIT statute has the burden of persuasion by a preponderance of the evidence. That burden of persuasion never leaves the party who is alleging a violation of the EIT statute.⁸

3. The rebuttable presumption provided for in R.C. §2745.01(C) only shifts the burden of production to the employer.

A presumption only shifts the burden of going forward (not the burden of persuasion) and, if unrebutted, entitles the beneficiary of the presumption to judgment on the point at issue. *Carson v. Metropolitan Life Ins. Co.*, 165 Ohio St. 238, 243-244, 135 N.E.2d 259 (1956). The burden on a party to establish the material averments of his or her cause of action by a preponderance of all the evidence never shifts at any time during the course of the trial by reason of presumptions in favor of one party or by a *prima facie* case made in his or her favor even though he or she may be aided by a rebuttable presumption. *Brunny v. Prudential Ins. Co. of America*, 151 Ohio St. 86, 93, 84 N.E.2d 504 (1949). In short, in civil actions, a presumption is not evidence and does not switch the burden of proof; it affects only the burden of going forward with evidence. *See, Horsley v. Essman*, 145 Ohio App.3d 438, 443, 763 N.E.2d 245 (4th Dist. 2001); Evid.R. 301. “The effect of rebutting a presumption has been characterized as ‘bursting

⁸ Cavanaugh is simply wrong when it has argued that “[a] rebuttable presumption shifts the burden of proof to the employer.” Cavanaugh Juris. Memo at p. 6. Further, as established herein, Cavanaugh is legally incorrect when it asserts that the effect of an unrebutted presumption under subsection (C) of the EIT statute means that “it will be found liable *without any definitive determination* of its ‘deliberate intent to injure’ Mr. Hoyle, but simply based solely on the statutory presumption.” (Emphasis added.) Cavanaugh Juris. Memo at p. 6. Any finding by a jury of liability against Cavanaugh will most certainly be a “definitive determination” that Cavanaugh acted with such intent.

the bubble,' with the case then proceeding as if the presumption had never arisen." *Timberlake v. Sayre*, 4th Dist. Scioto No. 09CA3269, 2009-Ohio-6005, at ¶ 24.

In order for an employee, like Mr. Hoyle, to prevail in this or any other EIT case, he or she will always have the burden to establish the intent to injure the employee. *See, Kaminski, supra*, at ¶ 55; *Houdek, supra*, ¶ 25. Any presumption which might be created by virtue of R.C. §2745.01(C) due to the deliberate removal of an equipment safety guard does not satisfy the employee's ultimate burden to prove that the employer's actions were done with specific intent to injure.

When the federal courts sitting in Ohio have applied this Court's holdings from *Kaminski* and its progeny to R.C. §2745.01(C) cases, they have arrived at the same conclusion supporting this Court's adoption of Proposition of Law No. I – *i.e.*, that the only "intent" standard that applies to EIT cases is specific, deliberate intent to injure. *Rudisill v. Ford Motor Company*, 709 F.3d 595, 603 (6th Cir. 2013). *See also, Irondale Industrial Contractors, Inc. v. Virginia Surety Company, Inc.*, 754 F.Supp.2d 927 (N.D. Ohio 2010).

Rudisill is a case which directly involves the application of subsection (C) of the employer intentional tort statute, R.C. §2745.01. After discussing what is necessary in order for an employer to rebut the presumption under subsection (C), the Sixth Circuit states the following which is directly on point with the analysis of whether the employee must prove a "deliberate intent to injure" even when the employee has benefit of the presumption:

In sum, the evidence taken from all four factors together would not enable a reasonable jury to conclude that Ford acted with the deliberate intent to injure Rudisill. Because *such intent is an essential element of an intentional-tort claim under Ohio Revised Code Section 2745.01*, summary judgment for Ford was properly granted.

* * *

Although this result might seem harsh to an injured employee like Rudisill, it is the result of reasoned public policy. The 'social bargain' of workers' compensation is a two-way street: true, employees give up the ability to bring tort claims on anything less

than a demanding showing of intent to injure. But in turn they obtain compensation for a variety of injuries, regardless of fault, for which the common law provided no remedy.

(Emphasis added.) *Rudisill, supra*, 709 F.3d at 612. *See also, Irondale Industrial Contractors* at 933 (“Subsection (C) [of R.C. §2745.01] is not a separate tort, it merely provides a legally cognizable example of ‘intent to injure.’”)

4. Where an employer fails to adequately rebut the presumption created by R.C. §2745.01(C), the plaintiff's burden of proof is satisfied establishing that the employer acted with specific intent to injure the employee thereby giving rise to a *prima facie* case of liability under the EIT statute.

This Court has said that legal presumptions, if left unrebutted, are *prima facie* evidence of the fact presumed. *Behrens v. Behrens*, 47 Ohio St. 323, 331, 25 N.E. 209 (1890). When a rebuttable presumption is left unrebutted, “it settles the question involved [and] serves to establish a *prima facie* case.” *Shepherd v. Midland Mut. Life Ins. Co.*, 152 Ohio St. 6, 15, 87 N.E.2d 156 (1949).

Consequently, should an employer like Cavanaugh fail to come forward with evidence that adequately rebuts the presumption of intent to injure created by R.C. §2745.01(C),⁹ the plaintiff's burden of proof will be satisfied and it will be established conclusively that the employer acted with the specific deliberate intent to injure the employee which will result in liability being imposed under the EIT statute. Thus, the employer's failure to rebut the presumption will have potentially catastrophic consequences for the employer because it would result in either a directed verdict or an affirmative instruction to the jury that the employer's

⁹ This case does not require the Court to address or decide the quantum of evidence necessary for the employer to rebut the presumption under R.C. §2745.01(C) nor is the Court being called upon to decide whether the presumption is rebutted as a matter of law or is to be presented to the jury as a factual determination. *See, Downard v. Rumpke of Ohio, Inc.*, 12th Dist. Butler No. CA2012-11-218, 2013-Ohio-4760, appeal pending.

intent to injure the employee is to be presumed by the jury in accordance with Ohio law.¹⁰

5. When the presumption created by R.C. §2745.01(C) has been successfully rebutted, the only way the employee can prevail is by meeting the burden to prove that the employer acted with the specific intent to injure the employee in order to establish liability under the EIT statute.

In *Myocare Nursing Home, Inc. v. Fifth Third Bank*, 98 Ohio St.3d 545, 2003-Ohio-2287, 787 N.E.2d 1217, this Court stated that “where a rebuttable presumption exists, a party challenging the presumed fact must produce evidence of a nature that counterbalances the presumption or leaves the case in equipoise. Only upon the production of sufficient rebutting evidence does the presumption disappear.” *Id.*, at ¶ 35 (citing *Carson v. Metro. Life Ins. Co.*, 156 Ohio St. 104, 108, 100 N.E.2d 197 (1951).) Where a presumption is rebuttable, such as the case here under R.C. §2745.01(C), the production of evidence disputing or contrary to the presumption causes the presumption to disappear as if it had never arisen. *See, Ayers v. Woodard*, 166 Ohio St. 138, 144, 140 N.E.2d 401 (1957); *In re Guardianship of Breece*, 173 Ohio St. 542, 555, 184 N.E.2d 386 (1962); *see also*, 1980 Staff Note, Evid.R. 301 (“once a presumption is met with sufficient countervailing evidence, it falls and the presumption serves no further function. If rebutted, the jury is not instructed that a presumption existed”).

This issue was discussed by the Sixth Circuit in *Rudisill* where the court stated:

The district court’s ruling that Ford had successfully rebutted the intent-to-injure presumption by adducing evidence of a lack of intent to injure does *not* mean that

¹⁰ Cavanaugh and DTJ take issue with the fact that, while the trial court denied their summary judgment motion due to issues of fact remaining on Mr. Hoyle’s EIT claim under R.C. §2745.01(C), it granted summary judgment to CIC on all claims. Cavanaugh’s Juris. Memo at pp. 4, 6. There is nothing inconsistent or irreconcilable with the trial court’s rulings. Cavanaugh may have liability to Mr. Hoyle. Cavanaugh may not. Whichever way the jury resolves that issue, if liability is found ultimately against Cavanaugh, there will be no coverage available under the CIC policy.

Rudisill was required to present evidence of an intent to injure in order to invoke the presumption in the first place. There is a significant difference between giving the defendant an opportunity to rebut a presumption and a finding that no presumption arose to begin with. Once the rebuttable presumption has been successfully invoked, the burden is on the *defendant* to rebut it by introducing evidence of the lack of an intent to injure; by contrast, in the absence of a presumption, the burden would be on *the plaintiff* in the first instance to introduce evidence of the intent to injure.

(Emphasis sic.)

709 F.3d at 608.

The Ninth District actually was correct on this point when it stated:

A presumption shifts the evidentiary burden of producing evidence, i.e., the burden of going forward, to the party against whom the presumption is directed. However, a rebuttable presumption does not carry forward as evidence once the opposing party has rebutted the presumed fact. Thus, once the presumption is met with sufficient countervailing evidence, it fails and serves no further evidentiary purpose. *The case then proceeds as if the presumption had never arisen.* (Internal citations omitted.) (Emphasis added.)

App. Op. at ¶ 18, Apx. p. 13, quoting *Hall v. Kemper Ins. Cos.*, 4th Dist. Pickaway No. 02CA17, 2003-Ohio-5457, ¶ 92. It was in the application of this principle upon the coverage issue that the Ninth District went astray.

When the presumption created by R.C. §2745.01(C) has been successfully rebutted with evidence offered by the employer, the presumption that the employer intended to injure the employee will “disappear as if it had never arisen” and “[t]he case then proceeds as if the presumption had never arisen.” Once the employer introduces sufficient competent evidence to rebut the presumption that it did not intend to injure, the case will be submitted to the jury to perform its function of weighing and assessing the credibility of the employee’s evidence (and perhaps the employer’s rebuttal evidence), and, in doing so, can find in favor of or against the employer. *Downard, supra*, 2013-Ohio-4760, at ¶ 78. The burden of persuasion, however, will remain with the employee and the only way for the employee to prevail under the EIT statute at

that point is by meeting the burden to prove ultimately that the employer acted with the specific intent to injure the employee.

6. The presumption of “intent to injure another” under R.C. §2745.01(C) is not a watered-down EIT cause of action.

The trial court rejected the argument that “the ‘rebuttable presumption’ that may be created under R.C. 2745.01(C) is not the equivalent of deliberate intent.” Summ. Judg. Op. II, Apx. p. 19. The trial court concluded “[a]ny possible surviving claim under R.C. 2745.01(C) would necessarily include the ‘intent to injure’ and would thus be precluded by the insurance policies.” Summ. Judg. Op. II, Apx. p. 19. The Ninth District reversed and construed the “intent to injure another” requirement of R.C. §2745.01(C) as being a degree of culpability less than and distinct from the deliberate intent required under subsections (A) and (B) of the EIT statute for purposes of insurance coverage. App. Op. at ¶ 19, Apx. p. 13. Cavanaugh embraces the concept of two different standards of intent. See, Cavanaugh’s Juris. Memo at pp. 6, 7-8 (“[B]ecause the trial court found that liability might remain under subsection (C) [of R.C. §2745.01], while at the same time finding there was no evidence of deliberate intent to harm, whatever remains under that subsection must be separate from the deliberate intent standard of the remainder of the statute.”)

Under Ohio law, proof of liability by inference or circumstantially does not alter or change the nature of a plaintiff’s claim or a defendant’s liability. For example, application of the doctrine of *res ipsa loquitur* in a negligence or malpractice case does not change the plaintiff’s claim, but merely allows the plaintiff to prove his or her case through circumstantial evidence. *Jennings Buick, Inc. v. Cincinnati*, 63 Ohio St.2d 167, 170, 406 N.E.2d 1385 (1980). “[The] doctrine of *res ipsa loquitur* represents an exception to the general rule that negligence will not

be inferred from the mere happening of an event which causes injury.” *Soltz v. Colony Recreation Ctr.*, 151 Ohio St. 503, 510, 87 N.E.2d 167 (1949). When a plaintiff prevails by resorting to *res ipsa loquitur*, the defendant’s resulting liability for having acted negligently is no less, in either degree or culpability, than if the plaintiff had proven such liability with direct evidence. *See, Wiley v. Gibson*, 70 Ohio App.3d 463, 465-466, 591 N.E.2d 382 (1st Dist. 1990) (doctrine applied to malpractice action), *Gayheart v. Dayton Power & Light Co.*, 98 Ohio App.3d 220, 229-233, 648 N.E.2d 72 (2d Dist. 1994) (doctrine applied in negligence action). Whether an employee in an EIT case establishes intent to injure with direct evidence under R.C. §2745.01(A) or (B) or by way of the inference of intent created by the rebuttable presumption under R.C. §2745.01(C) makes no difference -- the employer’s liability and culpability for violating Ohio’s EIT statute is the same.

The EIT statute’s methods of proof – direct verses inferential/burden shifting – is not unique in Ohio’s employment law. For years, it has been utilized in statutory discrimination actions. *See, McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, ¶¶ 34-35 (sex discrimination); *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St. 3d 175, 2004-Ohio-723, 803 N.E.2d 781, ¶ 9 (age discrimination); *Hood v. Diamond Products, Inc.*, 74 Ohio St.3d 298, 302, 658 N.E.2d 738 (1996) (handicap discrimination); *Kiraly v. Office Max, Inc.*, 8th Dist. Cuyahoga No. 91311, 2009-Ohio-863, ¶¶ 12-13 (national origin discrimination); *Courie v. ALCOA*, 162 Ohio App. 3d 133, 2005-Ohio-3483, 832 N.E.2d 1230, ¶ 20 (8th Dist.) (race discrimination).

In order to prevail in a statutory employment discrimination action, a plaintiff must show that an employer more likely than not was motivated by discriminatory intent. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 583, 664 N.E.2d 1272 (1996). There are two methods by

which such intent can be proven. Discriminatory intent may be established by “direct evidence” of age discrimination. *Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125, 128, 672 N.E.2d 145 (1996), citing *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501, 575 N.E.2d 439 (1991). Absent “direct evidence,” intent to discriminate may be established inferentially by way of the burden shifting analysis this Court has adopted under the Ohio employment discrimination statutes. To prove discriminatory intent indirectly, the employee must meet the four-part *prima facie* analysis set forth in *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146, 451 N.E.2d 807 (1983), adopted from the standards established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The *Barker* analysis requires that the plaintiff-employee demonstrate that he or she: (1) was a member of a statutorily protected class; (2) was subject to an adverse employment decision; (3) was qualified for the position; and (4) was replaced by, or the discharge permitted retention of, a person of comparable qualifications outside the protected class. *Coryell, supra*, paragraph one of syllabus. “To say that a plaintiff has established a *prima facie* case is simply to say that he has produced sufficient evidence to present his case to the jury, i.e., he has avoided a directed verdict.” *Coryell, supra*, ¶ 17, quoting *Kohmescher, supra*, 61 Ohio St.3d at 505, quoting *Rose v. Natl. Cash Register Corp.*, 703 F.2d 225, 227 (6th Cir. 1983).

Once the employee establishes a *prima facie* case, the employer must proffer a reason for the adverse employment action. If the employer rebuts the employee’s *prima facie* case of age discrimination by coming forward with a legitimate, nondiscriminatory reason for the discharge, the employee is then permitted to show that the stated reason is merely a pretext for unlawful discrimination. *Mendlovic v. Life Line Screening of Am., Ltd.*, 173 Ohio App.3d 46, 2007–Ohio–4674, 877 N.E.2d 377 (8th Dist.), ¶ 32 (“The employee’s burden is to prove that the employer’s reason was false and that discrimination was the real reason for the discharge.”)

But, irrespective of whether the direct or indirect method is utilized to establish discriminatory intent, the employee must prove that he or she was discharged on account of the prohibited statutory classification in order to carry his or her burden of proof.¹¹ *Allen v. totes/Isotoner Corp.*, 123 Ohio St.3d 216, 2009-Ohio-4231, 915 N.E.2d 622, ¶4 (“The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the plaintiff based upon an impermissible category remains on the plaintiff.”); *Coryell, supra*, ¶ 18. Whether the employee establishes intent with “direct evidence” or by way of the inference of intent created by way of the indirect/*prima facie* method, the employer’s liability and culpability for violating Ohio’s employment discrimination statutes is the same. No court has ever held or suggested otherwise.

Likewise, in the area of EIT, an employer’s wrongdoing and culpability for intent to cause the employee’s injury pursuant to the EIT statute is the same, irrespective of whether that intent is proven with direct evidence under subsections (A) and (B) of R.C. §2745.01 – which Hoyle is not able to do here – or the rebuttable presumption and inferential analysis method under subsection (C) where the employer has deliberately removed a safety guard or misrepresented a toxic or hazardous substance. To do otherwise would mean that R.C. §2745.01 is not in harmony and would not be construed or interpreted consistently and uniformly.

“It is the duty of any court, when construing a statute, to give effect to all of the pronouncements of the statute and to render the statute compatible (to harmonize) with other and

¹¹ The employee retains the ultimate burden in other employment litigation cases. *See, e.g., Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 180, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009) (“[A] plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”)

related enactments whenever and wherever possible.” *State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections*, 67 Ohio St.3d 597, 599, 622 N.E.2d 329 (1993). To determine the legislative intent behind a statute, courts must read the language in context and must construe related sections together. *Spencer v. Freight Handlers, Inc.*, 131 Ohio St.3d 316, 2012-Ohio-880, 964 N.E.2d 1030, ¶ 16. In reviewing a statute like R.C. §2745.01, the Court cannot pick out one provision and disassociate it from the context, but must look to the entirety of the enactment to determine the intent of the General Assembly. *Horvath v. Ish*, 134 Ohio St.3d 48, 2012-Ohio-5333, 979 N.E.2d 1246, ¶ 10, quoting *State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1347 (1997). *See also*, R.C. §1.42.

Here, as already recognized by this Court, the General Assembly’s intent and purpose for enacting the EIT statute was “to significantly restrict actions for employer intentional torts.” *Kaminski, supra*, ¶ 57. By enacting R.C. §2745.01, the Ohio General Assembly meant to “significantly curtail an employee’s access to common-law damages” and “permit recovery for employer intentional torts *only* when an employer acts with specific intent to cause injury.” (Emphasis sic.) *Stetter, supra*, at ¶ 26 and 27. To establish an employer’s EIT liability, therefore, the intent to injure under R.C. §2745.01(C) should have no different meaning and should have no lesser degree of culpability than necessary to satisfy the intent to injure found in subsections (A) and (B) of R.C. §2745.01. Thus, “absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee’s exclusive remedy is within the workers’ compensation system.” *Houdek, supra*, ¶ 25.

7. Proposition of Law No. I is ripe for consideration by this Court as it is intrinsically tied to resolution of the two coverage questions presented which address CIC’s duty to indemnify.

Mr. Hoyle has argued that Proposition of Law No. I is not ripe for review and that CIC is merely asking this Court for an advisory opinion. Hoyle Juris. Memo at pp. 6, 8. Cavanaugh makes similar arguments that “CIC’s appeal is premature” and it opposes consideration by this Court because “there has been no final determination” of Cavanaugh’s liability to Mr. Hoyle. Cavanaugh’s Juris. Memo at p. 4. Neither of these arguments has any merit.

“The duty to defend is separate and distinct from the duty to indemnify.” *W. Lyman Case & Co. v. Natl. City Corp.*, 76 Ohio St.3d 345, 347, 667 N.E.2d 978 (1996); *see also, Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, 951 N.E.2d 770, ¶ 19 (“[T]he duty to defend is broader than and distinct from the duty to indemnify.”)(Citing *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶ 19). While a duty to defend arises if the allegations in the pleadings state a claim “potentially and arguably” within the policy’s coverage, the duty to indemnify arises *only if liability in fact exists under the policy*. *Wedge Prod., Inc.*, *supra*, 31 Ohio St.3d at 67; *Chemstress Consultant Co. v. Cincinnati Ins. Co.*, 128 Ohio App.3d 396, 402, 715 N.E.2d 208 (9th Dist. 1998).

The two coverage issues raised in Propositions of Law No. II and III, therefore, are intrinsically tied to and require a resolution of what is the legal import and result if Mr. Hoyle can meet the burden imposed on him to prove Cavanaugh’s EIT liability for the sole remaining claim under R.C. §2745.01(C). As established herein, Mr. Hoyle can’t meet that burden on that remaining claim without establishing and proving ultimately that the employer’s conduct amounted to a deliberate intent to injure him. Mr. Hoyle cannot prevail under any scenario without establishing that Cavanaugh specifically intended to injure him, irrespective of whether he utilizes the statutory presumption or not.

The argument made by Mr. Hoyle that the issue of coverage is not ripe because “[t]here

has been no determination that Cavanaugh is liable under the statute,” Cavanaugh’s Juris. Memo at p. 5, creates no impediment to this Court addressing CIC’s propositions of law raised in this appeal. The very same argument has already been rejected by this Court in *Ward v. United Foundries, Inc.*, *supra*, at ¶¶ 21-22, with the express recognition that a determination by a fact-finder was not required before an exclusion for EIT insurance coverage can be determined and enforced. *Id.*, ¶ 21. A declaratory judgment action to resolve the issue of insurance coverage does not need to await a final determination of the insured’s underlying liability. *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108, 507 N.E.2d 1118 (1987).

In any event, as established above, if Cavanaugh can’t or doesn’t come forward with evidence to rebut the presumption created by the removal of the ladder jack pins – assuming they are found ultimately to be safety guards which were deliberately removed by the employer – the legal import and consequence will be that Cavanaugh acted with specific intent to injure Mr. Hoyle. On the other hand, if Cavanaugh does present evidence sufficient to rebut the statutory presumption,¹² the only way for Mr. Hoyle to prevail will be through presentation of direct evidence that Cavanaugh intended to injure him.¹³ Either way, there will be no insurance coverage giving rise to a duty to indemnify because public policy prohibits the coverage (Proposition of Law No. II), or, alternatively, the terms of the CIC policy endorsement precludes such coverage (Proposition of Law No. III). Whatever happens between Mr. Hoyle and Cavanaugh in the trial court at the conclusion of this appeal will have no impact upon whether

¹² Cavanaugh claims to have the evidence needed to rebut the presumption. *See*, Cavanaugh Juris. Memo at p. 11.

¹³ The trial court has already found that Mr. Hoyle has no such evidence and has granted partial summary judgment to Cavanaugh and DTJ on the EIT claims made pursuant to R.C. §2745.01(A) and (B). Summ. Judg. Op. I, Apx. at 22-23; Summ. Judg. Op. II, Apx. at 19.

the indemnity coverage sought herein is against public policy or whether such coverage is owed by CIC pursuant to the terms of the CGL or umbrella policies.

8. The Ninth District's opinion is out of touch with the law in other jurisdictions.

In *Kaminski*, this Court stated that one of the purposes of the General Assembly's enactment of the current version of R.C. §2745.01 is "to harmonize the law of this state with the law that governs a clear majority of jurisdictions." *Kaminski*, at ¶ 99. With that being so, the Ninth District's decision should be reversed since it is directly contrary to the way workplace torts are handled in other jurisdictions.

For example, in our sister state of Kentucky, the Kentucky Supreme Court recently outlined the standard to be used in order to recover outside of the Kentucky Workers Compensation scheme when it stated as follows: "As provided in *Fryman v. Electric Steam Radiator Corp.*, 'deliberate intention' [has been interpreted to mean] that the employer must have determined to injure an employee and used some means appropriate to that end, and there must be specific intent. . . . The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.'" *Moore v. Environmental Construction Corp.*, 147 S.W.3d 13, 16-17 (Ky. 2004).

B. Proposition of Law No. II:

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 Ohio Supreme Court first dealt with the issue of the insurability of intentional torts seventy-six years ago in *Rothman v. Metropolitan Cas. Ins.*, 134 Ohio St. 241, 16 N.E.2d 417 (1938). In *Rothman*, the plaintiff was a passenger in a truck that went off the road and overturned. Rothman sued the company for “wanton misconduct,” and was awarded \$500. Rothman then filed a supplemental petition against Metropolitan Casualty, the trucking company’s insurer. Metropolitan refused to pay the judgment because its policy only covered “bodily injuries...accidentally suffered.” This Court found coverage, drawing an early distinction between the insurability for a willful/intentional *act* versus a willful/intentional *injury*:

* * * It is well settled from the standpoint of public policy that the act of intentionally inflicting an injury cannot be covered by insurance in anywise protecting the person who inflicts such injury. * * * In our opinion, only those acts which are not motivated by an intent and purpose to injure are to be regarded as covered by the terms of this policy.

Id., at 246.

With respect to CIC’s Proposition of Law No. II, it has long been against public policy in the State of Ohio to permit insurance coverage for direct intent torts. As this Court noted thirty years ago in its seminal decision in *Blankenship*, “[a]n insurance policy does not protect the policy holder from the consequences of his intentional tortious act. Indeed, it would be against public policy to permit insurance against the intentional tort.” *Blankenship, supra*, 69 Ohio St.2d at 615. *See also, Wedge Products, Inc., supra*, 31 Ohio St.3d at 67 (“[P]ublic policy is contrary to insurance against intentional torts.” (Citations omitted)). *Accord, Doe v. Shaffer, supra*, 90 Ohio St.3d at 391 (“As early as 1938, this court found that it was ‘well settled from the standpoint of public policy that the act of intentionally inflicting an injury cannot be covered by insurance in anywise protecting the person who inflicts such injury.’” (Quoting *Rothman, supra*, 134 Ohio St. at 246 (other citations omitted))); 58 Ohio Jurisprudence 3d, Insurance, Section

1014. Therefore, in Ohio, “an intent to injure, not merely an intentional act, is a necessary element to uninsurability.” *Buckeye Union Ins. Co. v. New England Ins. Co.*, 87 Ohio St.3d 280, 283, 720 N.E.2d 495 (1999) (Per Pfeifer, J., with one justice concurring and five justices concurring in the judgment.)

The current EIT law limits claims for employer intentional torts to situations in which an employer acts with the “specific intent” to cause an injury to another. *Kaminski*, at ¶ 56; *Stetter*, at ¶ 26. With that being so, Ohio public policy prohibits an insurer from providing indemnity coverage to an insured/employer for any claim made pursuant to R.C. §2745.01, including subsection (C).

In *Harasyn v. Normandy Metals, Inc.*, 49 Ohio St.3d 173, 551 N.E.2d 962 (1990), an employee suffered the loss of four fingers on his left hand in an industrial accident. He filed suit alleging that his injuries were the result of an intentional tort by his employer within the meaning of *Blankenship*. The employer was insured by Fireman’s Fund Insurance Company of Ohio under a “General Liability Policy” and an “Employers’ Liability Stop-Gap Coverage Endorsement.” After the employee and the employer entered into a consent judgment for \$200,000, the employee filed a supplemental complaint pursuant to R.C. §3929.06 against Fireman’s Fund Insurance Company of Ohio praying that the employer’s insurance policy satisfy the judgment. The trial court granted summary judgment against Fireman’s Fund on the indemnity claim and ordered Fireman's Fund to pay the judgment. The court of appeals held that the “Employers’ Liability Stop-Gap Coverage Endorsement” did cover employer intentional torts, but such coverage was void as against public policy. This Court accepted jurisdiction over the appeal to address the issue of whether public policy prohibits an employer from insuring against tort claims by employees *in cases where the employer did not intend to injure the*

employee but knew that injury was substantially certain to occur under the *Van Fossen v. Babcock & Wilcox Co.* standard.

This Court discussed the different levels of intent involved with intentional acts. “The first level, * * * ‘direct intent,’ is where the actor does something which brings about the exact result desired. In the second, the actor does something which he believes is substantially certain to cause a particular result, even if the actor does not desire that result.” *Harasyn*, 49 Ohio St.3d at 175. As the *Harasyn* Court noted, “[i]n the case of a ‘direct intent’ tort, the presence of insurance would encourage those who deliberately harm another.” *Id.*, at 176. The Court in *Harasyn* concluded that, while public policy would prohibit insurance coverage for direct-intent torts, insurance coverage could be available “where the employer’s tortious act was one performed with the knowledge that injury was substantially certain to occur.” *Id.*, at 177. In contrast, now “‘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.) R.C. §2745.01(B). So the distinction drawn in *Harasyn* no longer applies.

In addition to the definitional difference in the meaning of “substantial certainty,” the allowance in *Harasyn* of insurance coverage was premised on the legislative enactment of R.C. §4121.80, which created a statewide fund to pay claims arising out of employer intentional torts. This Court noted that this enactment was an expression by the public’s elected officials that such insurance for EIT claims was not against public policy. *Id.*, at 177. Revised Code Section 4121.80, however, was repealed by the General Assembly in 1992.¹⁴ *Royal Paper Stock Co. v. Meridian Ins.*, 94 Ohio App.3d 327, 333, 640 N.E.2d 886 (10th Dist. 1994). Therefore, insurance coverage of employer intentional torts is truly contrary to public policy under the

¹⁴ R.C. §4121.80 was also found to be unconstitutional in *Brady, supra*.

current law.

There can be little doubt that, in accordance with this Court's holding in *Harasyn* in regard to "direct intent" torts, indemnity insurance coverage is void and prohibited by public policy for any claims made against an employer pursuant to R.C. §2745.01. Under the present EIT law, such claims against employers are clearly and expressly based exclusively upon the employer's deliberate intent to injure. *See, Houdek, supra*, at ¶ 25 (Under Revised Code Section 2745.01, "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system.") *See also, id.*, at ¶ 29 ("R.C. 2745.01 limits claims against employers for intentional torts to circumstances demonstrating a deliberate intent to cause injury to an employee.")

Now that EIT liability is based solely upon an employer's direct and deliberate intent to cause injury to the employee, public policy should prohibit an insurer from providing insurance coverage that indemnifies an employer for EIT liability pursuant to R.C. §2745.01. As one leading treatise on Ohio insurance coverage law has aptly noted, "in accordance with *Harasyn*, it would be against public policy to provide coverage for the [intentional] torts described in R.C. 2745.01(A) and (C)." Young, Bekeney, & Mesko, *Ohio Insurance Coverage*, Section 4.15 (2013). Ever since *Blankenship* -- as reaffirmed in *Harasyn* -- the law has been and it should remain against public policy in Ohio for an insurer to indemnify its insured/employer for an EIT claim when the employer acts with direct intent to cause injury to an employee. Because that is the standard which applies today under R.C. §2745.01, Ohio's public policy should prohibit an insurer from indemnifying an insured/employer for claims made pursuant to the EIT statute.

C. Proposition of Law No. III:

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."

"It is axiomatic that an insurance company is under no obligation to its insured, or to others harmed by the actions of an insured, unless the conduct alleged of the insured falls within the coverage of the policy." *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 36, 665 N.E.2d 1115 (1996). "Coverage is provided if the conduct falls within the scope of coverage defined in the policy, and not within an exception thereto." *Id.* Where an exclusionary clause has a reasonable interpretation barring coverage, a court is bound to enforce the provision accordingly. *Watkins v. Brown*, 97 Ohio App.3d 160, 164, 646 N.E.2d 485 (2d Dist. 1994).

The Commercial General Liability and Umbrella policies issued by CIC provide coverage only for "bodily injury" "to which [the] insurance applies." The CGL policy at issue here specifically excludes coverage for "bodily injury" which "may reasonably be expected to result from the intentional or criminal acts of the insured or which is in fact expected or intended by the insured, even if the injury or damage is of a different degree or type than actually expected or intended." CGL Policy, Supp. p. 51. The Employers Liability Coverage endorsement on Form GA 106 OH 01 96 provides coverage for "bodily injury" caused by an "intentional act." Emp. Liab. Cov. Form, Supp. p. 110. However, the same endorsement excludes coverage for "acts committed by or at the direction of an insured *with the deliberate intent to injure.*" (Emphasis added.) Emp. Liab. Cov. Form, Supp. p. 111.

With respect to Proposition of Law No. III, both the trial court's summary judgment

ruling and Judge Hensal's dissenting opinion correctly conclude that, because any EIT claim under R.C. §2745.01(C) requires the employee to sustain the burden to prove the employer's intent to injure, there can be no indemnity coverage owed under CIC's CGL and Umbrella policies. App. Op., ¶ 23 (Hensal, J., dissent), Apx. p. 15-16; Summ. Judg. Op. II, Apx. 19. The trial court and Judge Hensal's views of R.C. §2745.01(C) comport with well-reasoned case law rejecting coverage for EIT claims predicated upon the statutory presumption of intent to injure on the grounds that "there are no circumstances in this case where [the insured-employer] is entitled to coverage under the Policy." See, *Irondale Industrial Contractors, supra*, 754 F.Supp.2d at 933.

In *Irondale Industrial Contractors*, an employee fell and suffered fatal injuries while working for the employer at its steel mill. The employer brought a declaratory judgment action against its liability insurer asserting that the insurer was required to defend and potentially indemnify the employer with respect to wrongful death claims brought by the deceased employee's spouse. In declaring that the insurer owed no duty to defend or indemnify the employer, the district court stated:

Irondale argues the scope of R.C. 2745.01(C) changes this outcome because Irondale assumes it could be held liable for the wrongful death of Cantu without *intending* to cause injury to him. However, Subsection (C) creates a rebuttable presumption that an employer's removal of certain safety equipment *is* evidence of intent to injure. Subsection (A) defines an intentional tort, and later Subsections (B) and (C) refine that definition. Subsection (C) is not a separate tort, it merely provides a legally cognizable example of "intent to injure."

No matter how Yolanda Cantu spins her claim, the essence is that Irondale is liable under the Ohio intentional tort statute. The Policy excludes such a claim, stating it does not cover injuries "intentionally caused or aggravated by you [Irondale]," or those "committed by you [Irondale] with the belief that an injury is substantially certain to occur." This Policy language parrots R.C. 2745.01, including Subsection (C). Irondale is not entitled to coverage simply because the Policy does not incorporate the exact language of Subsection (C). See *Arch Specialty Ins. Co. v. J.G. Martin*, 2007 WL 4013351, at *7, 2007 U.S. Dist.

LEXIS 84627, *19 (N.D. Ohio 2007) (“there is no requirement that the exclusion in the policy must be framed in the language of the legal standard”). Accordingly, there are no circumstances in this case where Irondale is entitled to coverage under the Policy.

(Emphasis sic.) 754 F.Supp.2d at 933.

Likewise, here, there are no circumstances in this case where Cavanaugh is entitled to indemnity coverage under CIC’s Policy.

1. While insurance policies are contracts, the statutory law in effect at the time of contracting is incorporated into the policy to define the scope of coverage available.

To find a basis for coverage, the Ninth District’s opinion draws a distinction between the statutory intent to injure as found in R.C. §2745.01 and that same concept in the exclusion to coverage found in the endorsement to CIC’s CGL policy. In its opinion, the appellate court declared, without citation to any legal authority, that “[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.*” (Emphasis sic.) App. Op. at ¶19, Apx. p. 13. In opposing jurisdiction, Mr. Hoyle and Cavanaugh both have embraced and advocated for adherence to this flawed distinction. Hoyle Juris. Memo, at p. 6-7; Cavanaugh Juris. Memo, at p. 7. Not only is the distinction illogical but it is at odds with and contrary to “a long line of decisions by this court.” *Ross v. Farmers Ins. Group of Companies*, 82 Ohio St.3d 281, 287, 695 N.E.2d 732 (1998). The appellate court’s reasoning is flawed because “it is well settled that insurance contracts incorporate existing law.” *Reinbolt v. Gloor*, 146 Ohio App.3d 661, 667, 767 N.E.2d 1197 (3rd Dist. 2001). Yet, Mr. Hoyle criticizes CIC for suggesting that the statutory presumption of intent

to injure found in R.C. §2745.01(C) can be “borrowed” into its insurance policy, calling it “a nonsensical principle.” Hoyle Juris. Memo, at p. 7.

What the Ninth District, Mr. Hoyle and Cavanaugh all ignore is that “[c]ontracts of insurance must be deemed to have been entered into by the parties in view of the state of the law generally, at the time, as it related to the subjects of validity and coverage.” *Home Indem. Co. of N.Y. v. Village of Plymouth*, 146 Ohio St. 96, 102, 64 N.E.2d 248 (1945). The distinction made in the Ninth District’s opinion at paragraph 19 between the statutory intent to injure and the policy’s use of that term is legally flawed because it fails to observe the principle that “statutes relating to matters pertinent to the risk covered by a contract of insurance become a term or part of the contract itself.” (Citations omitted.) *Id.* This “borrow[ing]” of legal principles into a contract of insurance has been well-established as the law in Ohio for more than a century. *See, Ross, supra*, at 287:

* * * The court stated in *Goodale v. Fennell* (1875), 27 Ohio St. 426, 432, that “[w]hen a contract is once made, the law then in force defines the duties and rights of the parties under it.” In *Weil v. State* (1889), 46 Ohio St. 450, 453, 21 N.E. 643, 644, quoting *Smith v. Parsons* (1823), 1 Ohio 236, 242, the court stated that “[c]ontracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in a law, as if that provision had been inserted in, and formed part of the contract.”

See also, Wolfe v. Wolfe, 88 Ohio St.3d 246, 265-266, 725 N.E.2d 261 (2000); *Knepper v. Travelers Ins. Co.*, 54 Ohio App.2d 9, 13, 374 N.E.2d 423 (6th Dist. 1977) (“Existing and valid statutory provisions enter into and form a part of all contracts of insurance to which they are pertinent and applicable as fully as if such provisions were written into them.”)

The policy period for the CIC policy at issue here started on March 31, 2007 and expired on March 31, 2010. CIC Policy Dec. Page, Supp. at 32. Accordingly, R.C. §2745.01, which became effective on April 7, 2005 (two years before the effective date of CIC’s Policy), applies

to and governs the interpretation and application of the CIC policy's terms and coverage. *Turek v. Vaughn*, 154 Ohio App.3d 612, 798 N.E.2d 632, ¶40 (3rd Dist. 2003). The trial court correctly adhered to this principle when it stated:

The Court notes that the policy's "intentional act" coverage, as would-be coverage for an act which is substantially certain to cause "bodily injury," is directly affected by the legislature's definition of "substantially certain" in R.C. 2745.01(B) as meaning "that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." Employer torts under R.C. 2745.01(A) now fall within the exception that excludes coverage for "liability for acts committed by or at the direction of an insured with the deliberate intent to injure."

Summ. Judg. Op. II, Apx. p. 19.

CIC has been criticized for not mentioning the policy's definition of "intentional act" found in the Employer Liability Coverage endorsement on Form GA 106 OH 01 96, which is based upon the "substantial certainty" standard. Hoyle Juris. Memo at p. 1, 11. But, as the trial court aptly noted, coverage under the CIC policy for an act which is substantially certain to cause injury to the employee is directly affected by the General Assembly's definition of "substantially certain" in R.C. §2745.01(B) as meaning "that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." Therefore, the policy's definition of "intentional act" has no impact on the arguments regarding coverage being made here. The partial summary judgment awarded to DTJ determined that no such specific intent theory remains in this case under either subsection (A) or (B) of R.C. §2745.01. Summ. Judg. Op. I, Apx. p. 23; Summ. Judg. Op. II, Apx. p. 19. Even if such a claim remained in the case, there would be no indemnity coverage owed by CIC based upon the exclusion in paragraph 2.h of Form GA 106 OH 01 96 "for acts committed by or at the direction of an insured *with the deliberate intent to injure . . .*" (Emphasis added). Emp. Liab. Cov. Form, Supp. p. 111. An exclusion in an insurance policy operates to deny coverage that would otherwise be afforded.

Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd., 64 Ohio St.3d 657, 666, 597 N.E.2d 1096 (1992) (pollution exclusion barred coverage even though claim qualified as an occurrence.)

2. The doctrine of inferred intent does not result in indemnity coverage when the intent to injure arises from R.C. §2745.01(C)'s presumption.

Mr. Hoyle or Cavanaugh may argue that indemnity coverage should be afforded for an employer's EIT liability under R.C. §2745.01(C) because such liability is based upon a presumption which leads to there being only an inference of intent to injure. Such an argument can't overcome this Court's precedent addressing the doctrine of inferred intent. See, *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, 942 N.E.2d 1090. The inferred intent doctrine does not lead to indemnity coverage here.¹⁵

In *Campbell*, this Court "[r]ecogniz[ed] the need for clarity in this area of the law." *Id.*, ¶ 35. After extensively reviewing and explaining the Court's case law addressing the development of the inferred intent doctrine, the *Campbell* Court noted that "[a]n insurer's motion for summary judgment may be properly granted when intent may be inferred as a matter of law." *Id.*, ¶ 59. The Court went on to hold that "the doctrine of inferred intent applies only in cases in which the insured's intentional act and the harm caused by that act are intrinsically tied so that the harm necessarily results from the act." *Id.*, ¶62. In providing additional guidance, this Court stated as follows:

[*Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108, 507 N.E. 2d 1118 (1987)] and *Gearing [v. Nationwide Ins. Co.]*, 76 Ohio St.3d 34, 36, 665 N.E.2d 1115 (1996)] provide clear examples of cases in which the doctrine applies. In *Gill*, harm was inherent in the defendant's act of murder. Harm was similarly inherent in the acts of sexual molestation in *Gearing*. In each of these cases, the

¹⁵ It is unclear whether the doctrine of inferred intent should have any application to the issue of indemnity coverage for EIT claims brought pursuant to R.C. §2745.01, which is "an entirely separate area of the law." *Campbell, supra*, ¶55, fn. 5.

insured could not claim that he was unaware that harm would result from his actions. The doctrine of inferred intent thus applied in those cases, and the insureds' actions were excluded from coverage.

Id., ¶ 49.

Pursuant to R.C. §2745.01(C), the employer's intent to injure an employee is conclusively inferred as a matter of law from the act of deliberately removing an equipment safety guard or deliberately misrepresenting a toxic or hazardous substance in the workplace. In other words, due to the presumption of intent to injure, an employer "could not claim that he was unaware that harm would result from his actions" of deliberately removing an equipment safety guard or deliberately misrepresenting a toxic or hazardous substance in the workplace. Should the doctrine of inferred intent apply to the indemnity coverage at issue here, *Campbell* mandates that an employer's deliberate removal of an equipment safety guard or the deliberate misrepresentation of a toxic or hazardous substance pursuant to R.C. §2745.01(C) are, as a matter of law, "inextricably tied" with the harm which necessarily results to the employee who is injured as a result of such an act. Here, there is no other conclusion at which to arrive. *See, e.g., Lachman v. Farmers Ins. of Columbus*, 8th Dist. Cuyahoga No. 96904, 2012-Ohio-85, ¶ 23; *State Farm Mut. Auto. Ins. Co. v. Gourley*, 10th Dist. Franklin No. 12AP-200, 2012-Ohio-4909, ¶ 29.

3. The coverage that is afforded by CIC's insurance policy is not illusory.

Any argument that the coverage afforded by CIC in the CGL or Umbrella policies are illusory should be rejected. CIC's policies issued to employers like Cavanaugh provided other coverage, such as negligence-only coverage when employers are sued both as employers and in some other capacity, and in other situations not involving the strict employment relationship (i.e. "dual capacity" and "third-party over" cases). This Court has recognized that insurance policies

which offer this other type of coverage are not “illusory” since they do afford some protection, although perhaps not as extensive as would be afforded under the traditional “substantial certainty” coverage. *Ward*, *supra*, ¶¶ 24-25.

As the *Ward* Court noted, “[w]hen there is some benefit to the insured from the face of the endorsement, it is not an illusory contract.” *Id.*, ¶ 24, citing *State Auto Ins. Co. v. Golden*, 125 Ohio App.3d 674, 678, 709 N.E.2d 529 (8th Dist. 1998). *See also, Irondale Industrial Contractors, supra*, 754 F.Supp.2d at 933:

The Ohio Endorsement may limit coverage to Irondale, but “[w]hen some benefit to the insured is evident from the face of the endorsement, the endorsement is not an illusory contract.” *State Auto. Ins. Co. v. Golden*, 125 Ohio App.3d 674, 678, 709 N.E.2d 529 (Ohio Ct.App.1998). The Policy here provides some coverage to Irondale. For example, paragraph B1 of Part Two states that Virginia Surety must provide coverage if Irondale is found liable to a third party for damages resulting from injury to one of Irondale’s employees (Doc. No. 34–1, p. 3). Also, coverage is provided when an employee’s relative sues for the relative’s damages resulting from the employee’s injury (Doc. No. 34–1, p. 4).

Furthermore, Virginia Surety must provide coverage if Irondale is sued by an employee for negligently causing the employee’s injuries. Such a suit would be covered by workers’ compensation, and therefore subject to summary dismissal, requiring Virginia Surety to defend Irondale until such a dismissal. Virginia Surety concedes as much (Tr. p. 27).

The CIC policy and the coverage it affords is not illusory and is enforceable.

4. The law from other jurisdictions supports a finding of no coverage for EIT claims.

As far as insurance coverage for employer intentional torts in other jurisdictions is concerned, the trial court and Judge Hensal’s dissent are in accord. Under California law, for example, an insurance company owes no duty to defend or indemnify an employer against a California Labor Code Section 4558 claim that the plaintiff/employee’s injury was proximately caused by the employer’s “knowing removal of or knowing failure to install the point of

operation guard” to a baler machine on which the employee was injured. *Everest National Ins. Co. v. Valley Flooring Specialties*, E.D. Cal. No. CV F 08–1695, 2009 WL 997143 (Apr. 14, 2009) at *1.

Like Ohio’s R.C. §2745.01(C), Section 4458(b) of the California Labor Code allows an employee to bring an action for damages against an employer where the employee’s injury or death is “proximately caused by the employer’s knowing removal of, or knowing failure to install, the point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.” *Id.*, at *1.

The California court found that there was no duty to defend or indemnify under the liability coverage in the employer’s insurance policy because the employee’s claims were subject to California’s Workers Compensation law and the policy’s workers compensation exclusion applied. The court explained that an employer’s liability insurance policy “is not a general liability policy providing coverage for injuries to members of the general public; instead it provides coverage to employers for those injuries to their employees not covered by workers’ compensation.” *Id.*, at *9 (citing *Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 41 Cal.3d 903, 917, 226 Cal.Rptr. 558, 718 P.2d 920 (1986).)

Paragraph 2.h of the Employer Liability Coverage endorsement on Form GA 106 OH 01 96 setting forth the exclusion from coverage for “deliberate intent” in the CIC policy generally tracks the language of R.C. §2745.01 and coverage is not owed “simply because the Policy does not incorporate the exact language of Subsection (C).” *Irondale Industrial Contractors*, 754 F.Supp.2d at 933. The court of appeals’ decision reversing the trial court’s summary judgment in favor of CIC as to indemnity coverage owed should be reversed. Coverage for EIT liability

committed with “deliberate intent” is expressly excluded from coverage under the CIC CGL policy just as it is in the majority of other jurisdictions which have determined to compensate most employment torts through the state’s worker’s compensation scheme rather than by way of the tort system.

5. Recovery under CIC’s Umbrella policy can only be had when there is coverage under the underlying policy and isn’t otherwise excluded from coverage.

Because there is (and can be) no coverage under CIC’s underlying policy, there can also be no coverage under CIC’s Umbrella policy since Exclusion B.9. (“Employer’s Liability Limitation”) excludes coverage under the Umbrella policy for “Any liability arising from any injury to . . . an ‘employee’ of the insured sustained in the ‘workplace’ [or] ‘employee’ of the insured arising out of the performance of duties related to the conduct of the insured’s business.” Umbrella Policy, Supp. at p. 124. The exclusion does not, however, apply “when such insurance is provided by valid and collectible ‘underlying insurance’ listed in the Schedule of Underlying Insurance. . . .” Umbrella Policy, Supp. at p. 124.

Further, the Umbrella policy contains an “Expected or Intended Injury” exclusion which provides, in relevant part, as follows:

This insurance does not apply to . . . “bodily injury” or “property damage” which may reasonably be expected to result from the intentional or criminal acts of the insured or which is in fact expected or intended by the insured, even if the injury or damage is of a different degree or type and actually intended or expected.

Umbrella Policy, Supp. at p. 124.

Therefore, while coverage under the Umbrella policy may apply where there is coverage under the underlying CGL policy, coverage is clearly precluded under CIC’s Umbrella policy where, as here, there is no coverage for an EIT claim under the underlying policy.

IV. CONCLUSION

For all of these reasons, Intervening Plaintiff-Appellant, The Cincinnati Insurance Company respectfully submits that this Court should reverse the Ninth District Court of Appeals opinion for the following reasons: (1) The appellate court misconstrued R.C. §2745.01(C) and erroneously relied upon the rebuttable presumption of intent to injure to trump this Court's precedent requiring an employee to establish an employer's specific intent to injure in order to prevail on a claim against the employer for intentional tort; and (2) The appellate court improperly imposed upon insurers, like The Cincinnati Insurance Company, a duty to indemnify insured-employers who intentionally injure their employees when an employee invokes R.C. §2745.01(C). Such insurance coverage is against public policy. Alternatively, the imposition of a duty to indemnify in this case ignored the insurance policy endorsement excluding coverage for "liability for acts committed by or at the direction of an insured *with deliberate intent to injure.*"

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APPENDIX

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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.

FILED
AUG 30 2013
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SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NOS. CA-26579 & CA-26587

NOTICE OF APPEAL

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NOTICE OF APPEAL

Intervening Plaintiff/Appellant, The Cincinnati Insurance Company, hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment and opinion of the Summit County Court of Appeals, Ninth Appellate District, in the case captioned *Duane Hoyle v. DTJ Enterprises, Inc., et al.*, Ninth District Court of Appeals Nos. CA-26579 and CA-26587, entered on July 24, 2013.

This jurisdictional appeal raises questions of public or great general interest.

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STATE OF OHIO)
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2013 JUL 24 10:19 AM

DUANE ALLEN HOYLE

CLEAR OF COURT

C.A. No. 26579
26587

Appellant

v.

DTJ ENTERPRISES, INC.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2010-03-1984

Cross-Appellants

and

THE CINCINNATI INSURANCE
COMPANIES

Appellee/Cross-Appellee

DECISION AND JOURNAL ENTRY

Dated: July 24, 2013

MOORE, Presiding Judge.

{¶1} Plaintiff, Duane Hoyle, appeals from the ruling of the Summit County Court of Common Pleas, which granted summary judgment to The Cincinnati Insurance Companies ("Cincinnati Insurance"). Defendants DTJ Enterprises, Inc. ("DTJ") and Cavanaugh Building Corporation ("Cavanaugh"), cross-appeal. For the reasons set forth below, we reverse.

I.

{¶2} In 2008, Mr. Hoyle was injured when he fell approximately thirteen feet from a scaffold while employed by DTJ and Cavanaugh. Mr. Hoyle brought a complaint against DTJ and Cavanaugh, alleging a workplace intentional tort. DTJ and Cavanaugh were insured by

Cincinnati Insurance. Cincinnati Insurance intervened in the action, seeking a declaratory judgment that it was not required to provide coverage to DTJ and Cavanaugh based upon certain exclusions contained in the insurance contract.

{¶3} DTJ and Cavanaugh filed a motion for summary judgment. Thereafter, Cincinnati Insurance filed motion for summary judgment, wherein it maintained that, although it had agreed to defend DTJ and Cavanaugh, the insurance contract excluded coverage for Mr. Hoyle's claims, and it had no duty to indemnify DTJ and Cavanaugh. 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 later 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 determined that 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 resulting judgment against them. The trial court set forth in its entry that there was no just reason for delay. *See* Civ.R. 54(B). Mr. Hoyle timely appealed from the judgment of the trial court, and now presents one assignment of error for our review. DTJ and Cavanaugh cross-appealed, and they also present one assignment of error for our review. We have consolidated the assignments of error to facilitate our discussion.

II.

MR. HOYLE'S ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT GRANTED CINCINNATI INSURANCE[S] MOTION FOR SUMMARY JUDGMENT.

DTJ'S AND CAVANAUGH'S ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT GRANTED CINCINNATI INSURANCE[S] MOTION FOR SUMMARY JUDGMENT.

{¶4} In their assignments of error, Mr. Hoyle, DTJ and Cavanaugh argue that the trial court erred in granting Cincinnati Insurance's motion for summary judgment. We agree.

{¶5} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Pursuant to Civ.R. 56(C), summary judgment is proper if:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶6} Here, Mr. Hoyle, DTJ, and Cavanaugh argue that Cincinnati Insurance was not entitled to judgment as a matter of law, because the trial court erred in its interpretation of the law concerning workplace intentional torts and in its application of the law to the insurance contract.

{¶7} In the insurance contract at issue, Cincinnati Insurance provided general commercial liability coverage to DTJ and Cavanaugh for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' * * * to which this insurance applies." The general commercial liability policy expressly excluded from coverage bodily injury "which may reasonably be expected to result from the intentional * * * acts of the insured or which is in fact expected or intended by the insured, even if the injury or damage is of a different degree or type than actually expected or intended."

{¶8} However, the insurance contract also contained an endorsement for "Employers Liability Coverage." Therein, Cincinnati Insurance provided coverage for certain "intentional act[s]," as follows:

[Cincinnati Insurance] will pay those sums that an insured becomes legally obligated to pay as damages because of "bodily injury" sustained by your "employee" in the "workplace" and caused by an "intentional act" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages.

The policy defined an "intentional act" as "an act which is substantially certain to cause 'bodily injury,'" and required the following conditions be met for purposes of coverage:

- a. An insured knows of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
- b. An insured knows that if an "employee" is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the "employee" will be a substantial certainty; and
- c. An insured under such circumstances and with such knowledge, does act to require the "employee" to continue to perform the dangerous task.

However, the policy excluded from coverage "liability for acts committed by or at the direction of an insured with the *deliberate intent to injure*[" (Emphasis added.)

{¶9} Based upon the exclusion for acts committed with the deliberate intent to injure, Cincinnati Insurance argued that any potentially successful claim by Mr. Hoyle would necessarily be excluded from the insurance coverage, because Mr. Hoyle would have to establish deliberate intent in order to recover for a workplace intentional tort pursuant to R.C. 2745.01.¹

{¶10} R.C. 2745.01 provides, in relevant part:

¹ Cincinnati Insurance further urged the trial court to grant it, at minimum, partial summary judgment as to its policy exclusion for punitive damages. As the trial court granted summary judgment on the basis that Cincinnati Insurance had no duty to provide coverage, the trial court did not address the argument as to coverage for punitive damages.

(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.

(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 added.)

{¶11} Here, Mr. Hoyle's only remaining claim is based upon his allegation that DTJ and Cavanaugh deliberately removed a safety guard, and, pursuant to R.C. 2745.01(C) their "intent to injure" is presumed. Through this method of proving the claim, Mr. Hoyle, DTJ, and Cavanaugh argue that DTJ and Cavanaugh could be held liable for Mr. Hoyle's injury without proof of deliberate intent to cause injury. Cincinnati Insurance responds that "intent to injure" and "substantially certain" to cause injury, as those phrases are used in R.C. 2745.01, both require the plaintiff to establish deliberate intent. Cincinnati Insurance maintains that the rebuttable presumption in subsection (C) of intent to injure demonstrates "deliberate intent," and, thus, if Mr. Hoyle were successful in his claim through use of the presumption, his claim would be excluded under the policy.

{¶12} Prior to the enactment of current R.C. 2745.01, to prove "intent" for purposes of an employer intentional tort, the employee was required to establish:

- (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
- (2) knowledge by the employer that if the employee is subjected by his employment

to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

Fyffe v. Jenos, Inc., 59 Ohio St.3d 115 (1991), paragraph one of the syllabus. The Ohio Supreme Court further explained in *Jones v. VIP Dev. Co.* 15 Ohio St.3d 90 (1984), paragraph one of the syllabus, that “[a]n intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.” Thereafter, the General Assembly enacted several statutes to govern employer-intentional torts, and these statutes were held unconstitutional by the Ohio Supreme Court prior to the enactment of the current R.C. 2745.01. *Kaminiski v. Metal & Wire Prods. Co. (Kaminski II)*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 28-33. At first glance, R.C. 2745.01(A) appears to retain the *Jones* standard for proving intent, as the statute provides that “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.” However, in R.C. 2745.01(B), “substantially certain” is defined as requiring that “an employer acts with *deliberate intent* to cause an employee to suffer an injury, a disease, a condition, or death.” (Emphasis added.) In *Kaminski v. Metal & Wire Prods. Co. (Kaminski I)*, 175 Ohio App.3d 227, 2008-Ohio-1521, ¶ 31, (7th Dist.), the Seventh District reviewed subsections (A) and (B):

When we consider the definition of “substantial certainty,” it becomes apparent that an employee *does not have two ways to prove an intentional tort claim as R.C. 2745.01(A) suggests*. The employee’s two options of proof become: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure. Thus, under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury.

(Emphasis added.)

{¶13} *Kaminski I* was appealed to the Ohio Supreme Court, which agreed with the Seventh District's interpretation of R.C. 2745.01(A) and (B) in this respect:

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). *See Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, ¶ 17 (the General Assembly in R.C. 2745.01 "modified the common-law definition of an employer intentional tort" by rejecting "the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct"). *See also Stetter [v. R.J. Corman Derailment Servs., L.L.C.]*, 125 Ohio St.3d 280, 2010-Ohio-1029, at paragraph three of the syllabus, in which we hold that R.C. 2745.01 does not eliminate the common-law cause of action for an employer intentional tort.

Kaminski II at ¶ 56; *see also Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 3.

{¶14} Recently, in *Houdek*, the Ohio Supreme Court again reviewed the issue of intent in the context of workplace intentional torts. In *Houdek*, an employee was injured when a co-worker, who was operating a sideloader, struck him. *Id.* at ¶ 1, 8. The employee brought suit, and the trial court granted summary judgment to the employer. *Id.* at ¶ 9. The employee appealed, and the Eighth District reversed, determining that the employer could be held liable for the employee's injuries if it "objectively believed the injury to Houdek was substantially certain to occur." *Id.* at ¶ 3. The employer appealed this decision to the Supreme Court, which reversed the holding of the Eighth District. *Id.* at ¶ 29. Because there was no evidence that the employer "deliberately intended to injure" the employee, the Supreme Court concluded that it could not be liable for a workplace intentional tort. *Id.* at ¶ 4. The Court noted that R.C. 2745.01(C) was not applicable to the facts of that case. *Id.* at ¶ 27. It held that "R.C. 2745.01 limits claims against employers for intentional torts to circumstances demonstrating a *deliberate intent* to cause injury to an employee[.]" (Emphasis added.) *Id.* at ¶ 29.

{¶15} In a dissenting opinion, Justice Pfeifer concluded that “[t]he majority [overstate[d] the ruthlessness of R.C. 2745.01” because subsection (C), provides a presumption of an intent to injure in certain circumstances. *Id.* at ¶ 30 (Pfeifer, J. dissenting). Therefore, in such a case:

Only the removal of the safety equipment needs to be deliberate under the statute; if the injury flows from the removal of safety equipment, an injured worker needs to prove nothing further as to the employer’s intent to successfully prosecute an intentional-tort claim against the employer. The worker need not prove that the employer was trying to hurt him—intent is presumed by the removal of safety equipment. That is, the safety equipment must be deliberately removed but the injury need not be deliberately caused for an injured worker to recover pursuant to R.C. 2745.01(C).

Id. (Pfeifer, J. dissenting).

{¶16} Pursuant to the Ohio Supreme Court’s decisions above, R.C. 2945.01 requires specific or deliberate intent to cause injury to recover on an employer intentional tort. *Houdek* at ¶ 29. However, “[t]he specific-intent requirement is moderated * * * by subsection C of Ohio Revised Code § 2745.01, which sets up a rebuttable presumption of intent to injure when the employer deliberately removes an equipment safety guard or deliberately misrepresents a toxic or hazardous substance.” *Rudisill v. Ford Motor Co.*, 709 F.3d 595, 603 (6th Cir.2013); *Houdek* at ¶ 30 (Pfeifer, J. dissenting).

{¶17} Here, Mr. Hoyle’s only remaining claim rests upon operation of the presumption located in R.C. 2745.01(C). Therefore, unlike *Houdek*, our inquiry pertains to whether, if deliberate intent *were to be presumed* by operation of subsection (C), the claim would be excluded from coverage under the Employer Liability policy for actions taken with the “deliberate intent” intent to injure.

{¶18} The Fourth District has explained the effect of presumptions as follows:

A presumption shifts the evidentiary burden of producing evidence, i.e., the burden of going forward, to the party against whom the presumption is directed. See *Weissenberger*, Ohio Evidence (2001) 44. However, a rebuttable presumption does not carry forward as evidence once the opposing party has rebutted the presumed fact. *Forbes v. Midwest Air Charter, Inc.*, 86 Ohio St.3d 83, 86, 1999-Ohio-85. Thus, once the presumption is met with sufficient countervailing evidence, it fails and serves no further evidentiary purpose. The case then proceeds as if the presumption had never arisen. See *Horsley v. Essman*, 145 Ohio App.3d 438, 444 (4th Dist. 2001); *Ellis v. Miller*, Fourth Dist. Gallia No. 00CA17, 2001 WL 978868 (Aug. 16, 2001).

Hall v. Kemper Ins. Cos., 4th Dist. Pickaway No. 02CA17, 2003-Ohio-5457, ¶ 92, quoting *Minor v. Nichols*, Fourth Dist. Jackson No. 01CA14, 2002-Ohio-3310, ¶ 14.

{¶19} Here, the trial court concluded that a question of fact existed as to whether Mr. Hoyle could prevail on his claim through the presumption of intent to injure contained in R.C. 2745.01(C). To do so, Mr. Hoyle would need to only prove the deliberate removal of a safety guard. The burden of proof would then shift to DTJ and Cavanaugh to rebut the presumption. *Hall* at ¶ 92. If DTJ and Cavanaugh failed to do so, Mr. Hoyle could prevail on his claim without actual proof of deliberate intent to injure. Although 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*.

{¶20} In *Cincinnati Equitable Ins. Co. v. Sorrell*, 9th Dist. Lorain No. 05CA008703, 2006-Ohio-1906, ¶ 14, this Court explained:

The interpretation of an insurance contract is a matter of law. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995). When this Court interprets an insurance contract, we “look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11. A contract for insurance “must be given a fair and reasonable interpretation to cover the risks anticipated by the parties.” *Boxler v. Allstate Ins. Co.*, 9th Dist. Summit No. 14752, 1991 WL 24960, *7 (Feb. 27, 1991). Furthermore, “[w]hen the intent of the parties is evident from the clear and

unambiguous language in the provision, the plain language of the provision must be applied." *Rybacki v. Allstate Ins. Co.*, 9th Dist. Medina No. 03CA0079-M, 2004-Ohio-2116, at ¶ 9, citing *Karabin v. State Auto. Mut. Ins. Co.*, 10 Ohio St.3d 163 (1984).

{¶21} The Employer Liability policy at issue here provides coverage for "bodily injury" caused by an "intentional act," which it defines as one where the insured (1) knows of the existence of a dangerous condition within its business operation, (2) knows that if an employee is subjected to the dangerous condition, then harm to the employee will be a "substantial certainty," and (3) requires "the 'employee' to continue to perform the dangerous task." The policy excluded from coverage "liability for acts committed by or at the direction of an insured with the deliberate intent to injure[.]" Therefore, we cannot conclude that an "intentional act" under the policy, which is specifically covered as set forth above, includes an act committed with a "deliberate intent" to injure, which is specifically excluded. Based upon the presumption of deliberate intent under R.C. 2745.01(C), there could exist a circumstance where an employee prevails on his claim of intentional tort without the complained action constituting "deliberate intent" to injure under the terms of the policy. As the trial court determined that questions of fact existed as to the viability of claim under subsection (C), we conclude that there likewise exists a question of fact as to whether such a claim falls within the policy exclusion, precluding summary judgment on the issue of coverage.

III.

{¶22} Mr. Hoyle's, DTJ's and Cavanaugh's assignments of error are sustained. The judgment of the Summit County Court of Common Pleas is reversed, and this cause is remanded for further proceedings consistent with this opinion.

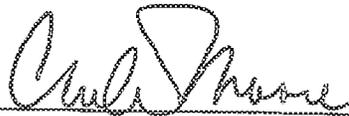
Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee/Cross-Appellee.



CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS.

HENSAL, J.
DISSENTING.

{¶23} I respectfully dissent. The Ohio Supreme Court has held that, under Revised Code Section 2745.01, “absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee’s exclusive remedy is within the workers’ compensation system.” *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 25. The policy at issue in this case specifically excludes

coverage for "acts committed * * * with the deliberate intent to injure[.]" In light of the other provisions of the contract that specifically mirror the state of the law at the time it was created, I would find that the parties intended for the term "deliberate intent" to have the same meaning under the contract as under Section 2745.01. Accordingly, I do not agree that "there could exist a circumstance where an employee prevails on his claim of intentional tort without the complained action constituting 'deliberate intent' to injure under the terms of the policy." As such, I would find that the trial court correctly granted summary judgment to Cincinnati Insurance.

APPEARANCES:

DAVID R. GRANT and STEPHEN S. VANECK, Attorneys at Law, for Appellant.

STEPHEN J. CHUPARKOFF, Attorney at Law, for Appellee/Cross-Appellee.

MARK W. BERNLOHR and ALAN M. MEDVICK, Attorneys at Law, for Cross-Appellants.

DAVID G. UTLEY, Attorney at Law, for Cross-Appellants.

DANIEL M. HARRIGAN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

2012 JUL 18 PM 2: 28

DUANE ADAMS SUMMIT COUNTY)
CLERK OF COURTS)
Plaintiff,)

-vs-)

DTJ ENTERPRISES, INC., et al.,)
Defendants.)

CASE NO. CV 2010-03-1984

JUDGE THOMAS A. TEODOSIO

ORDER
Partial Summary Judgment

This matter is before the Court upon Defendants' Motion for Summary Judgment and Intervening Plaintiff's Motion for Summary Judgment, and the responses and reply briefs submitted to this Court. On April 20, 2012, this Court entered an Order for partial summary judgment. On May 15, 2012, and on motion of the Defendants, this Court vacated its judgment as to the issue of coverage to allow for additional briefing. The Court has reviewed the additional briefing provided by the parties, including the briefs filed June 1, 2012, and June 15, 2012, for which leave to file is hereby granted. Furthermore, the Court hereby incorporates its Order of partial judgment entered on April 20, 2012, as to all issues previously decided by that Order and not vacated by the Order of May 15, 2012.

Pursuant to Civ. R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 327 (1977). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record

demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St. 3d 280, 293 (1996). The movant must point to some evidence in the record of the type listed in Civ. R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ. R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.*

The Cincinnati Insurance Companies, as Intervening Plaintiff, seek summary judgment on their complaint for Declaratory Judgment. The Cincinnati Insurance Companies argue that the insurance policies in question do not provide coverage for the actions alleged by the underlying Plaintiff against the defendants.

The Commercial General Liability and Umbrella policies issued by the Cincinnati Insurance Companies provide coverage for "bodily injury" to which the insurance applies. The policy specifically excludes coverage for "bodily injury" which "may reasonably be expected to result from the intentional or criminal acts of the insured or which is in fact expected or intended by the insured, even if the injury or damage is of a different degree or type than actually expected or intended."

The Employers Liability Coverage policy (GA 106 OH 01 96) provides coverage for "bodily injury" caused by an "intentional act." The policy excludes "liability for acts committed by or at the direction of an insured with the deliberate intent to injure."

The Court finds that the policies exclude coverage for employer liability under R.C. 2745.01. R.C. 2745.01 defines "substantially certain" as meaning "that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." The Ohio Supreme Court has held that "under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury." "[T]he 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).” *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St. 3d 250 (2010).

The Court notes that the policy’s “intentional act” coverage, as would-be coverage for an act which is substantially certain to cause “bodily injury,” is directly affected by the legislature’s definition of “substantially certain” in R.C. 2745.01(B) as meaning “that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” Employer torts under R.C. 2745.01(A) now fall within the exception that excludes coverage for “liability for acts committed by or at the direction of an insured with the deliberate intent to injure.”

Defendants have provided additional briefing that argues the “rebuttable presumption” that may be created under R.C. 2745.01(C) is not the equivalent of deliberate intent. This Court disagrees. Any possible surviving claim under R.C. 2745.01(C) would necessarily include the “intent to injure” and would thus be precluded by the insurance policies.

No genuine issues of material fact remain and the Cincinnati Insurance Companies are entitled to Summary Judgment as a matter of law.

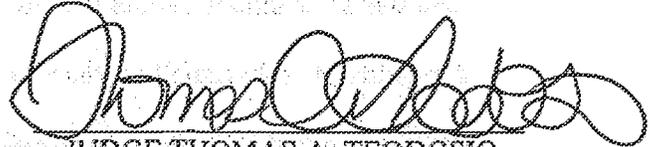
With regard to Intervening Plaintiff Cincinnati Insurance Companies’ Complaint for Declaratory Judgment, Summary Judgment is GRANTED. The Intervening Plaintiff owes no indemnity to Defendants DTJ Enterprises, Inc. and Cavanaugh Building Corporation as a result of the allegations set forth in the underlying Complaint.

For the purpose of clarity, the Court reiterates its ruling of April 20, 2012. The Court finds that Plaintiff is unable to prove a claim under R.C. 2745.01(A), except as modified by the rebuttable presumption provided for under R.C. 2745.01(C). To the extent that Plaintiff’s claims rely on R.C. 2745.01(A) & (B) alone, summary judgment is GRANTED in favor of Defendants. To the extent

that Plaintiff's claims rely on the rebuttable presumption provided for by R.C. 2745.01(C), genuine issues of material fact remain and Summary Judgment is DENIED.

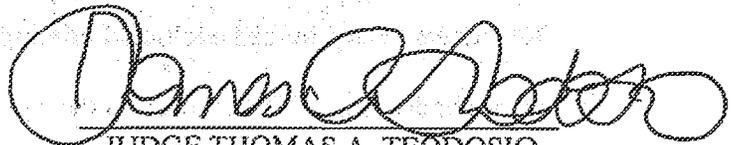
This is a final judgment as to all claims and parties hereby resolved and there is no just reason for delay.

IT IS SO ORDERED.



JUDGE THOMAS A. TEODOSIO

Pursuant to Civ.R. 58(B), the Clerk of Courts shall serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



JUDGE THOMAS A. TEODOSIO

cc: Attorney David R. Grant
Attorney David G. Utley
Attorney Mark W. Bernlohr
Attorney Stephen J. Chuparkoff

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

2012 APR 20 PM 2:13

DUANE ALLEN HOYLE)
SUMMIT COUNTY)
CLERK OF COURTS)
Plaintiff,)
-vs-)
DTJ ENTERPRISES, INC., et al.,)
Defendants.)

CASE NO. CV 2010-03-1984

JUDGE THOMAS A. TEODOSIO

ORDER

Partial Summary Judgment

This matter is before the Court upon Defendants' Motion for Summary Judgment and Intervening Plaintiff's Motion for Summary Judgment. Upon consideration of said motions, and the responses and reply briefs submitted to this Court, the Court finds as follows.

Pursuant to Civ. R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 327 (1977). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St. 3d 280, 293 (1996). The movant must point to some evidence in the record of the type listed in Civ. R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ. R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.*

This case arises out of an accident that occurred on March 24, 2008, during renovations of the Wyoga Lake Apartments in Akron, Ohio. Plaintiff Duane Alan Hoyle was an employee working as a carpenter for Defendants DTJ Enterprises, Inc, and Cavanaugh Building Corporation, who were the general contractors for the project. Plaintiff sustained injuries after falling from a ladder jack scaffold, and filed a Complaint alleging an intentional employer tort. Intervening Plaintiff Cincinnati Insurance Companies insured Defendants and filed a Complaint seeking Declaratory Judgment on the issue of coverage and indemnity. Defendants and Intervening Plaintiff filed their motions for Summary Judgment, responses and replies were filed, and the issues before this Court have been fully briefed.

I. R.C. 2745.01(A)

Defendants argue they are entitled to summary judgment because Plaintiff cannot meet the requirements for employer liability under R.C. 2745.01. R.C. 2745.01(A) provides: "In an action brought against an employer by an 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 tortuous act with the intent to injure another or with the belief that the injury was substantially certain to occur." R.C. 2745.01(B) goes on to define "substantially certain" as meaning "that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death."

In *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St. 3d 250 (2010), the Court quotes the Seventh District's decision in the underlying case, *Kaminski*, 175 Ohio App. 3d 227: "When we consider the definition of 'substantial certainty,' it becomes apparent that an employee does not have two ways to prove an intentional tort claim as R.C. 2745.01(A) suggests. The employee's

two options of proof become: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure. Thus, under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury.” The Supreme Court goes on to state: “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).” *Id.*

Plaintiff’s deposition testimony provides evidence that Plaintiff did not believe that Defendants intended to cause him injury. (Hoyle depo. at 160 & 168). Plaintiff provides no evidence that the Defendants acted with a specific intent to injure the Plaintiff. The Court finds that Plaintiff is unable to prove a claim under R.C. 2745.01(A) and (B) because the evidence shows there was no specific intent to cause an injury. No genuine issue of material fact remains, and therefore summary judgment is granted in favor of the Defendants. This decision, however, does not apply to the cause of action to the extent that it relies upon R.C. 2745.01(C), as examined below.

II. R.C. 2745.01(C)

Defendants further argue that Plaintiff cannot sustain a claim under R.C. 2745.01(C) because there has not been a “deliberate removal by an employer of an equipment safety guard.” Under R.C. 2745.01(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.”

"It is well-established that the interpretation of undefined statutory terms is not a question of fact, but a question of law for the court." *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). "[T]he meaning of the terms 'equipment safety guard' and 'deliberate removal' in R.C. 2745.01(C) is to be ascertained as a matter of law by the court." *Id.*

In *Forwerck v. Principle Business Enterprises*, 2011 Ohio 489 (6th Dist. 2011), the Sixth District Court of Appeals defined "deliberate" as it applies to R.C. 2745.01(C) as "characterized by or resulting from careful and thorough consideration" "[T]he term 'removal' in the statute should be construed in accordance with the relevant dictionary definition of 'remove.'" *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). "As relevant here, 'remove' is defined . . . as 'to move by lifting, pushing aside, or taking away or off; also 'to get rid of; eliminate.'" *Id.* "Removal of a safety guard does not require proof of physical separation from the machine, but may include the act of bypassing, disabling, or rendering inoperable." *Id.* "'Deliberate removal' for purposes of R.C. 2745.01(C) means a considered decision to take away or off, disable, bypass, or eliminate, or to render inoperable or unavailable for use." *Id.* In the present case, genuine issues of material fact remain as to whether there was a deliberate removal of the pins used to hold the ladder jack to the ladder. Specifically, a question of fact remains as to whether the pins were rendered unavailable for use.

"[A]s used in R.C. 2745.01(C), an 'equipment safety guard' would be commonly understood to mean a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." *Barton v. G.E. Baker Construction*, 2011 Ohio 5704 (9th Dist. 2011); *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). "The General Assembly did not make the presumption applicable upon the deliberate removal of any safety-related device, but only of an equipment safety guard, and we may not add words to an

unambiguous statute under the guise of interpretation.” *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). In coming to its definition of “equipment safety guard,” the Sixth District references a definition provided by the Third District in *Wehri v. Countrymark*, 1990 Ohio App. LEXIS 1957 (3rd Dist. 1990): “An equipment safety guard is a device placed on equipment to prevent an employee from being drawn into or injured by that equipment.” *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). The Sixth District noted that “equipment safety guards,” while “perhaps not constituting physical covers or barriers per se, are nevertheless designed to prevent exposure of the worker’s hands within the point of operation.” *Id.* “[I]t [is] apparent that not all workplace safety devices are ‘equipment safety guards’ as that term is used in Section 2745.01(C).” *Barton v. G.E. Baker Construction*, 2011 Ohio 5704 (9th Dist. 2011). The Court noted that “equipment safety guard” encompasses “more than the concept of a barrier guard,” but does not encompass “any device designed to prevent injury or to reduce the seriousness of injury.” *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). The Sixth District relied on Merriam-Webster’s Collegiate Dictionary’s definition of “guard” as “a protective or safety device; specif: a device for protecting a machine part or the operator of a machine.” *Id.*

The Sixth District goes on to explain its analysis and application of the definition of “equipment safety guard” to the case in front of it: “The jog control and emergency stop cable in this case were not designed to prevent an operator from encountering the pinch point on the rewind roller and, therefore, are not equipment safety guards for the purposes of the presumption in R.C. 2745.01(C). In reaching this conclusion, we recognize that those devices are designed or may operate to reduce the seriousness of injury to an operator whose hands or fingers are inadvertently drawn into the in-running rewind roller. We appreciate that these devices could

very well mean the difference between a relatively minor and catastrophic injury. The scope of our review, however, does not permit us to inquire as to whether the General Assembly should have provided for a presumption of intent to injure where these types of safety devices or features are deliberately removed by the employer. We are not empowered to override or second-guess the public policy determinations of the General Assembly, but must follow the plain language of the statute.” *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). Thus, the Sixth District distinguished between “safety devices/features” and “safety guards.”

The issues before this Court is whether the pins used to hold the ladder jack to the ladder constitute an “equipment safety guard.” This Court hereby adopts the definition of “equipment safety guard” as “a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.” *Barton v. G.E. Baker Construction*, 2011 Ohio 5704 (9th Dist. 2011); *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). However, genuine issues of material fact remain as to whether the pins at issue meet the definition of “equipment safety guards.” Therefore, Summary Judgment is not proper on this issue.

III. Insurance Policy Coverage

The Cincinnati Insurance Companies, as Intervening Plaintiff, seek summary judgment on their complaint for Declaratory Judgment. The Cincinnati Insurance Companies argue that the insurance policies in question do not provide coverage for the actions alleged by the underlying Plaintiff against the defendants.

The Commercial General Liability and Umbrella policies issued by the Cincinnati Insurance Companies provide coverage for “bodily injury” to which the insurance applies. The policy specifically excludes coverage for “bodily injury” which “may reasonably be expected to result from the intentional or criminal acts of the insured or which is in fact expected or intended by the

inured, even if the injury or damage is of a different degree or type than actually expected or intended.”

The Employers Liability Coverage policy (GA 106 OH 01 96) provides coverage for “bodily injury” caused by an “intentional act.” The policy excludes “liability for acts committed by or at the direction of an insured with the deliberate intent to injure.”

The Court finds that the policies exclude coverage for employer liability under R.C. 2745.01. As discussed above, the present version of R.C. 2745.01 defines “substantially certain” as meaning “that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” The Ohio Supreme Court has held that “under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury.” “[T]he 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).” *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St. 3d 250 (2010).

The Court notes that the policy’s “intentional act” coverage, as would-be coverage for an act which is substantially certain to cause “bodily injury,” is directly affected by the legislature’s definition of “substantially certain” in R.C. 2745.01(B) as meaning “that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” Employer torts under R.C. 2745.01(A) now fall within the exception that excludes coverage for “liability for acts committed by or at the direction of an insured with the deliberate intent to injure.”

No genuine issues of material fact remain and the Cincinnati Insurance Companies are entitled to Summary Judgment as a matter of law.

IV. Punitive Damages

The Court further notes that pursuant to the Employers Liability Coverage (Policy GA 106 OH 10 96), "punitive, exemplary, or other non-compensatory damages" are not covered under said policy.

Conclusion

The Court finds that Plaintiff is unable to prove a claim under R.C. 2745.01(A), except as modified by the rebuttable presumption provided for under R.C. 2745.01(C). To the extent that Plaintiff's claims rely on R.C. 2745.01(A) & (B) alone, summary judgment is GRANTED in favor of Defendants. To the extent that Plaintiff's claims rely on the rebuttable presumption provided for by R.C. 2745.01(C), genuine issues of material fact remain and Summary Judgment is DENIED. With regard to Intervening Plaintiff The Cincinnati Insurance Companies' Complaint for Declaratory Judgment, Summary Judgment is GRANTED. The Intervening Plaintiff owes no indemnity to Defendants DTJ Enterprises, Inc. and Cavanaugh Building Corporation as a result of the allegations set forth in the underlying Complaint.

IT IS SO ORDERED.



JUDGE THOMAS A. TEODOSIO

cc: Attorney David R. Grant
Attorney David G. Utley
Attorney Mark W. Bernlohr
Attorney Stephen J. Chuparkoff

Ohio Rev. Code Section 2745.01 Liability of employer for intentional tort - intent to injure required - exceptions.

(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.

(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.

(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

Effective Date: 04-07-2005

Ohio Evidence Rule 301. Presumptions in General in Civil Actions and Proceedings

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 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 upon the party on whom it was originally cast.

Effective Date: 07-01-1980