No. 08-0857

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY, OHIO
CASE NO. 07-CO-15

ROSE KAMINSKI,
Plaintiff-Appellee,

v.

METAL & WIRE PRODUCTS COMPANY,
Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT METAL & WIRE PRODUCTS COMPANY

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I. THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC OR GREAT GENERAL INTEREST

This appeal is from the Seventh District Court of Appeals' declaration that R.C. 2745.01[1] — Ohio's intentional tort statute — is unconstitutional on its face pursuant to this Court's interpretation of Sections 34 and 35 of Article II of the Ohio Constitution in *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 1999-Ohio-267. (Appellate Opinion ("App. Op."), Appendix ("Appx.") 10-11, at ¶ 34-36.) The decision below forever bars the General Assembly from modifying Ohio's employment intentional tort and presents three substantial constitutional questions:

- What is the correct application of stare decisis to a prior decision interpreting the Constitution of Ohio?
- Do the text, structure, and history of Ohio's Constitution demonstrate that *Johnson*'s abolition of the well-established authority of the legislature to modify the common law is palpably wrong and in stark conflict with this Court's own jurisprudence?
- In addition and in the alternative, does *Johnson*'s constitutional analysis apply only to the intentional tort statute in effect at that time?

The decision also presents a question of great public and general interest insofar as it rules on an issue — whether Plaintiff-Appellee's evidence creates material fact issues on

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[1] R.C. 2745.01 states that an employer shall not be liable for an intentional tort committed during the course of employment "unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that injury was substantially certain to occur." R.C. 2745.01(A). The phrase "'substantially certain' means that 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).

her common law "substantial certainty" workplace tort claim — that was not even before the court of appeals.

First, *Johnson*'s interpretation of Sections 34 and 35, Article II, of the Ohio Constitution *can* be reconsidered and overruled; constitutional interpretations require a more flexible approach to stare decisis than that set forth in *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216 ("*Galatis*"). The *Galatis* test was designed for and applies to prior Ohio Supreme Court interpretations of statutes and the common law, *not* prior interpretations of constitutional provisions. A strict application of the *Galatis* test to prior interpretations of statutes and the common law is viable because Congress or the General Assembly can correct any erroneous judicial interpretation through legislation. But when a supreme court erroneously interprets a constitution, only *that court* can correct its error; "in such cases correction through legislative action is practicably impossible." *Seminole Tribe of Florida v. Florida* (1996), 517 U.S. 44, 63 (citation omitted). Accord *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St.3d 1, 6 ("the doctrine of stare decisis is less important in the constitutional context than in cases of either pure judge-made law or statutory interpretation," because unlike other areas of the law that are subject to revision by the legislature, "it is generally beyond the power of the legislature to change or 'correct' judicial interpretation of the constitution") (emphasis omitted); 1 Tribe, American Constitutional Law (3d Ed.2000) 84, Section 1-16 ("the standard learning has long been that *constitutional* determinations that the Supreme Court believes to be seriously mistaken ought to be much easier to overturn than would be the case with

a mere *statutory* interpretation, in part because amending the Constitution is so much more difficult, and properly so, than amending or repealing a statute") (emphasis in original).

Here, an uncritical application of *Johnson* would forever enshrine a "substantial certainty" standard[2] broader than the standard for intentional torts recognized in the overwhelming majority of jurisdictions. See *Talik v. Federal Marine Terminals, Inc.*, Slip Op. No. 2008-Ohio-937, at ¶ 32 (noting that "Ohio is one of only eight states that have judicially adopted a 'substantial certainty' standard for employer intentional torts.") (internal footnote omitted). Well-established jurisprudence already exists for the proposition that a distinct stare decisis standard is both necessary and appropriate for constitutional jurisprudence. This Court should accept jurisdiction to confirm that while the *Galatis* approach to stare decisis is properly applied to cases construing statutes and the common law, a more flexible approach is required in considering prior court precedent on constitutional interpretations.

Second, *Johnson*'s interpretation of Sections 34 and 35, Article II, of the Constitution of Ohio *should* be reconsidered and overturned. The Seventh District's conclusion that the General Assembly has no power to enact legislation modifying Ohio's intentional tort presents a substantial constitutional question because *Johnson* is demonstrably wrong. *Johnson*'s conclusion that this Court's employment intentional tort claim cannot be rendered "illusory" by statute flows from the flawed premise that

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[2] *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115.

Sections 34 and 35 of Article II imposed limitations on the General Assembly's authority. 85 Ohio St.3d at 306. *Johnson*'s premise finds no support in the structure, language or history of Ohio's Constitution. The General Assembly has always had the authority to modify the common law.

The Ohio Constitution vests the General Assembly with broad authority to modify or abolish the common law in the exercise of its police powers. Ohio's Constitution specifies that "the legislative power * * * shall be vested in a General Assembly[.]" Section 1, Article II, Ohio Constitution. One aspect of this "legislative power" is the police power, under which "anything which is reasonable and necessary to secure the peace, safety, morals, and best interests of the commonwealth may be done * * *." *State ex rel. Yaple v. Creamer* (1912), 85 Ohio St. 349, 389. This Court recently confirmed that the General Assembly "is 'the ultimate arbiter of public policy,' and in fulfilling that role, the legislature continually refines Ohio's tort law to meet the needs of our citizens." *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, at ¶ 102, quoting *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶ 21. Indeed, the General Assembly has always had the right to "modify or entirely abolish common-law actions and defenses." *Thompson v. Ford* (1955), 164 Ohio St. 74, 79.

Nothing in Sections 34 and 35 of Article II purport to limit this long recognized authority. Both Sections were written as permissive *grants* of additional legislative authority, not as limitations of the General Assembly's pre-existing police powers. See Sections 34-35, Article II, Ohio Constitution; see, also, *Johnson*, 85 Ohio St.3d at 310

(Cook, J., dissenting); *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 639-40 (Brown, J., concurring). And history confirms that Sections 34 and 35 were adopted to grant *additional power* to the General Assembly beyond that which it already possessed.

The immediate object of Sections 34 and 35 of Article II was to address constitutional obstacles to enacting a compulsory worker's compensation system raised by this Court's opinion in *Creamer*. *Creamer* upheld the facial constitutionality of a voluntary worker's compensation scheme enacted pursuant to the General Assembly's police powers. Key to this holding were: 1) the voluntariness of the scheme (85 Ohio St. at 398-400); and 2) the Court's recognition that the scheme was unconstitutional as applied to "contracts in existence and unexpired at the time it is put into operation by the employer." Id. at 405. Sections 34 and 35 of Article II of the Ohio Constitution were enacted to *remove* these existing constitutional limitations on the General Assembly's authority — not impose new limitations. See *Johnson*, 85 Ohio St.3d at 310 (Cook, J., dissenting); *Brady*, 61 Ohio St.3d at 639-40 (Brown, J., concurring).

Third, and in the alternative, this Court should limit *Johnson* to the version of Ohio's intentional tort statute construed by that Court. See *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, at ¶ 104-106 (stare decisis does not require statutes to be struck down merely because they are similar to prior statutes); *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶ 23-24 (same). This Court should confirm that R.C. 2745.01 is constitutional on its face, reverse the decision of the court of appeals and reinstate the trial court's grant of summary judgment in favor of Metal & Wire.

Finally, the majority's sua sponte ruling that material fact issues entitle Kaminski to a jury trial on her "substantial certainty" workplace tort (App. Op., Appx. 22, at ¶ 84) is unsupported by any Ohio rule, case or public policy. No order addressing the sufficiency of Kaminski's "*Fyffe*" evidence was entered by the trial court, much less appealed by Kaminski. This Court should accept jurisdiction to ensure the consistent enforcement and uniform application of the Rules of Appellate Procedure throughout Ohio's 12 appellate districts, and "to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 160.

II. STATEMENT OF THE CASE AND FACTS

Appellant Metal & Wire Products Company ("Metal & Wire") is a full service metal fabrication firm with a manufacturing facility in Salem, Ohio. Appellee Rose Kaminski ("Kaminski") worked as a press operator at the Salem facility. On June 30, 2005, Kaminski was injured during an attempt to load new metal coil into her press.

When her press ran out of metal coil, Kaminski was supposed to find her supervisor to have him load another coil. Instead, Kaminski asked co-worker Toby Stivers ("Stivers") to operate a forklift and load new coil into her press. Stivers retrieved a metal coil about four-to-five feet tall, two-to-three inches thick and weighing over 800 lbs. He then told Kaminski he needed to find a supervisor to move the coil from the right fork to the left fork. Kaminski insisted she could help Stivers transfer the coil to the left fork. Stivers relented, Kaminski attempted to balance the coil, one of the forks bumped the coil, and the coil fell onto Kaminski's legs and feet resulting in injury.

Less than two months later, Kaminski filed this lawsuit in the Columbiana County Court of Common Pleas, alleging that: 1) R.C. 2745.01 is unconstitutional in its entirety; and 2) Metal & Wire should be held liable for her injuries under Ohio's common law "substantial certainty" theory of liability. Metal & Wire's Answer denied liability and asserted a counterclaim for a declaratory judgment that R.C. 2745.01 is constitutional.

Metal & Wire promptly filed a motion for summary judgment on its counterclaim, asserting that R.C. 2745.01 was constitutional and governed Kaminski's employment intentional tort claim. Kaminski filed a cross-motion for summary judgment asserting that R.C. 2745.01 was unconstitutional. The Trial Court granted Metal & Wire's motion and denied Kaminski's cross-motion, emphasizing the "presumption of constitutionality" that attaches to laws passed by the General Assembly.

Metal & Wire then moved for summary judgment on the merits of Kaminski's employment intentional tort claim, asserting that there was no evidence that Metal & Wire acted with the requisite intent to cause injury to Kaminski. The trial court granted Metal & Wire's Motion for Summary Judgment, explaining that a "fair reading" of R.C. 2745.01 compelled the conclusion "that the Defendant has not acted with the intent to injure the Plaintiff nor with deliberate intent to cause her injury." (Appx. 27.) The trial court emphasized that "[i]t cannot be overlooked that [Kaminski] was injured when she voluntarily took the task of assisting in loading a coil into her press * * *." (Id.)

In her appeal, Kaminski asserted and argued two assignments of error: 1) R.C. 2745.01 was unconstitutional in its entirety; and 2) even if R.C. 2745.01 were constitutional, genuine issues of material fact precluded summary judgment against Kaminski on her claim under R.C. 2745.01. Kaminski's argument did not address the common law *Fyffe* standard for employment intentional torts. Metal & Wire's opposing brief pointed out the broad police powers possessed by the General Assembly; explained the differences in statutory language between current R.C. 2745.01 and its predecessors; noted that stare decisis does not apply with the same force in constitutional cases; and argued that Kaminski did not possess sufficient evidence to create a genuine issue of material fact regardless of the applicable legal standard.

The court of appeals first concluded that R.C. 2745.01 was unconstitutional in its entirety. Relying on this Court's reasoning in *Johnson* interpreting different statutory language, the court of appeals believed that it was "reasonable to conclude that the General Assembly's latest attempt at codifying [the] employer intentional tort is unconstitutional as well." (App. Op., Appx. 9, at ¶ 28.) The court of appeals then addressed the merits of Kaminski's employment intentional tort claim. Even though the court of appeals acknowledged that "the trial court did not actually consider whether appellee acted with substantial certainty that injury to its employee would occur" (id. at ¶ 84), the court nevertheless declared that it "must analyze appellant's claim under the common-law test for employer intentional tort set out in *Fyffe*" and concluded that the evidence created material fact issues. (Id. at ¶ 50-84).

III. ARGUMENT

Proposition of Law No. 1

> **The *Galatis* stare decisis test must be applied with flexibility in constitutional adjudication. Since it is generally beyond the power of the General Assembly to correct judicial interpretations of the Constitution, an erroneous constitutional determination may be revisited where it is demonstrably wrong. (*City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St.3d 1, followed.)**

Before overturning the holding of *Scott-Pontzer v. Liberty Mut. Fire Ins.* (1999), 85 Ohio St.3d 660, that "you" is ambiguous when used in a UM coverage form issued to a corporate named insured, this Court adopted a three-part test for overruling precedent. Pursuant to that standard, stare decisis does not apply where: 1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision; 2) the decision defies practical workability; and 3) abandoning the precedent will not create an undue hardship for those who have relied upon it. *Galatis*, 100 Ohio St.3d 216, at ¶ 48. Neither *Scott-Pontzer* nor *Galatis*, however, involved constitutional interpretations. Further, the Michigan case from which the *Galatis* elements were drawn — *Pohutski v. Allen Park* (Mich. 2002), 641 N.W.2d 219 — construed a state statute, not a constitutional provision.

While the *Galatis* test is appropriate for cases involving statutory interpretation or the common law, its rigidity is inconsistent with the well-recognized need for flexibility in revisiting erroneous constitutional determinations. While a legislative body can "correct" incorrect supreme court decisions interpreting the common law or statutes, it

has no power (absent constitutional amendment) to correct an erroneous interpretation of the constitution. See *Rocky River*, 43 Ohio St.3d at 6 ("it is generally beyond the power of the legislature to change or 'correct' judicial interpretation of the constitution"); *Seminole Tribe*, 517 U.S. at 63 ("our willingness to reconsider our earlier decisions has been 'particularly true in constitutional cases because in such cases correction through legislative action is practically impossible'").

It is not necessary for this Court to adopt a new or different stare decisis test for constitutional jurisprudence, but only to recognize that the *Galatis* prongs are to be applied with greater flexibility when constitutional interpretation is at issue. Thus, it may be sufficient that only one of the three *Galatis* prongs is present. See *Rocky River*, 43 Ohio St.3d at 6 (overruling a prior decision that is "demonstrably wrong"). See, also, *Planned Parenthood of Southeastern Pa. v. Casey* (1992), 505 U.S. 833, 854-855 (O'Connor, Kennedy and Souter, JJ.) (noting several factors that "may" be relevant in deciding whether to overrule a constitutional decision). The presence or absence of one or more of the factors should not be dispositive.

Proposition of Law No. 2

R.C. 2745.01 does not violate Section 34, Article II of the Ohio Constitution, or Section 35, Article II of the Ohio Constitution, and is therefore constitutional on its face.

R.C. 2745.01 represents the General Assembly's most recent attempt to conform the scope of Ohio's employment intentional tort claim to the reason for its existence. Even though the Ohio Constitution prohibits "all other rights to compensation, or

damages,"[3] *Blankenship* created an intentional tort exception to Ohio's worker's compensation scheme based on the legal fiction that such a tort severs the employment relationship.[4] After *Blankenship,* the General Assembly passed legislation at least three times in an attempt to limit this tort to those deliberate acts so severe that they arguably sever the employment relationship. Twice this Court held those acts unconstitutional. Current R.C. 2745.01 removes those provisions declared unconstitutional in its predecessors and is constitutional on its face.

The Seventh District's conclusion that R.C. 2745.01 violates Sections 34 and 35 of Article II of the Ohio Constitution rests on *Johnson*'s flawed premise that those provisions limit the authority of the General Assembly. That premise is not only inconsistent with the text, structure, and history of the Ohio Constitution for the reasons explained above, it also conflicts with this Court's Section 34 jurisprudence both before and after *Johnson* and renders this Court's Section 35 jurisprudence incoherent.

First, prior to *Johnson,* no majority of this Court had ever interpreted Section 34 as a substantive limitation on the authority of the General Assembly. For instance, Justice Brown's concurring opinion in *Brady* — which supplied the crucial fourth vote necessary to this Court's decision — asserted that Section 34 did not even apply to intentional tort

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[3] See Section 35, Article II, Ohio Constitution.

[4] See, generally, *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St.2d 608.

claims, and explained that "[t]his does not mean * * * that the General Assembly has *no* power to modify intentional tort law by legislation." 61 Ohio St.3d at 640 (Brown, J., concurring; emphasis in original). And after *Johnson* issued, this Court explained that it "has repeatedly interpreted Section 34, Article II as a broad *grant* of authority to the General Assembly, not as a limitation on its power to enact legislation." *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 61 (emphasis in original).

Second, interpreting Section 35 as a limitation on the General Assembly's power to codify this Court's employment intentional tort claim renders its jurisprudence incoherent. As Justice Cook explained in her dissent in *Johnson*, "Section 35, Article II cannot be both inapplicable to employer intentional torts and, at the same time, offended by any legislation regulating such torts." 85 Ohio St.3d at 311-12 (Cook, J., dissenting). Because *Blankenship* rests on the legal fiction that an intentional tort claim severs the employment relationship and renders Section 35 inapplicable, the General Assembly's modification of that claim must likewise be exempt from whatever limitations are imposed by Section 35, Article II of the Ohio Constitution. Alternatively, *Johnson* should be construed narrowly so as to apply only to the statute construed in that case. See, e.g., *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶ 23. Following the *Johnson* decision, the legislature eliminated the "clear and convincing" burden of proof and a certification requirement that put the signer at risk for sanctions. Construing *Johnson* to prohibit all legislative action whatsoever regarding Ohio's

workplace intentional tort — and only that tort — violates the checks and balances of Ohio's constitutional system.

Proposition of Law No. 3

> **An intermediate court of appeals has no authority to issue decisions resolving issues that are not part of any appealed order, and where the issues resolved were not raised in any assignment of error asserted by the appellant or set forth in any argument in the parties' briefs.**

Ohio's Rules of Appellate Procedure determine the source and scope of an intermediate appellate court's review. App.R. 3(D) states that the notice of appeal "shall designate the judgment, order or part thereof appealed from"; App.R. 16(A)(3) provides that the appellant's brief "shall include" a "statement of the assignments of error presented for review"; and App.R. 12(A)(1)(b) provides that a court of appeals "shall" (emphasis added):

> (b) Determine the appeal on its merits ***on the assignments of error set forth in the briefs*** under App.R. 16 ***.

Taken together, these three rules limit an appellate court's jurisdiction to the appealed order and assigned error. See, e.g., *Bank One v. Salser*, 4th Dist. No. 05CA1, 2005-Ohio-3573 (having only appealed the trial court's denial of its 60(B) motion, appellant could not challenge the merits of the underlying dismissal in its brief).

The rules limiting the scope of appellate court review serve several purposes. First, they preclude "sua sponte" appellate reviews of trial court proceedings. See *State v. Perez*, 1st Dist. Nos. C-04-363, 364, 365, 2005-Ohio-1326, ¶ 23 (emphasis added) ("In the absence of an assignment of error, this court *has no authority* to proceed sua sponte to

review" proceedings in the trial court). Second, the rules enable appellate courts to determine their own jurisdiction. See, e.g., *Bank One*, 2005-Ohio-3573 (where notice of appeal designated trial court's denial of 60(B) motion as appealed order, and appeal was timely as to that order, court would not consider underlying judgment as to which no timely appeal was filed). Third, the assignment of error requirements in Appellate Rules 12 and 16 enable trial courts on remand, and appellate courts considering subsequent appeals, to identify the issues resolved in the earlier appeals. See, e.g., *Poulton v. American Economy Ins. Co.*, 5th Dist. Nos. 2004-CA-00226, 228, 2005-Ohio-3123, ¶ 22 (noting that prior decision "was solely limited to the issues raised in the direct appeal").

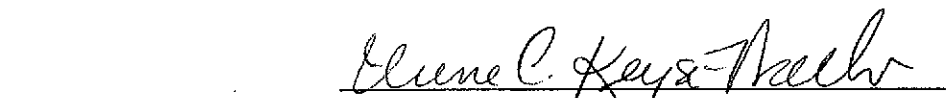
Here, contrary to the fair and efficient scope of appellate review established by the appellate rules of procedure, the majority decided issues relating to Kaminski's motion for partial summary judgment under the *Fyffe* standard that were never part of Kaminski's appeal. This Court should reverse the majority's unauthorized and inequitable deviation from rules governing the proper relationship of inferior and superior courts.

IV. CONCLUSION

The opinion of the court below forever bars the General Assembly from enacting legislation modifying this Court's common law employment intentional tort claim. Nothing in the language of the Ohio Constitution, its history or this Court's precedents

supports that result. This Court should accept jurisdiction, reverse the court of appeals, and reinstate the trial court's grant of summary judgment in favor of Metal & Wire.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Metal & Wire Products Company** has been served this 1st day of May, 2008, by U.S. Mail, postage prepaid, upon the following:

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APPENDIX

STATE OF OHIO)
) IN THE COURT OF APPEALS OF OHIO
COLUMBIANA COUNTY) SS: SEVENTH DISTRICT

ROSE KIMINSKI,)

PLAINTIFF-APPELLANT,)

VS.) CASE NO. 07-CO-15

METAL & WIRE PRODUCTS COMPANY, ET AL.,) JOURNAL ENTRY

DEFENDANTS-APPELLEES.)

For the reasons stated in the opinion rendered herein, appellant's two assignments of error have merit and are sustained. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Columbiana County, Ohio, is reversed and this cause is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion.

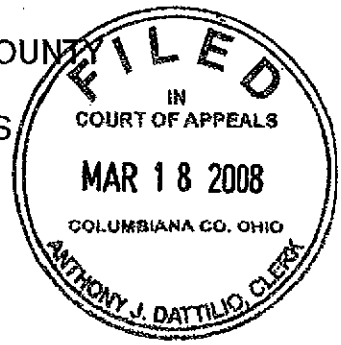
Costs taxed to appellees.

JUDGES.

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT



ROSE KIMINSKI,	)	
	)	
PLAINTIFF-APPELLANT,	)	
	)	
VS.	)	CASE NO. 07-CO-15
	)	
METAL & WIRE PRODUCTS COMPANY, ET AL.,	)	OPINION
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas of Columbiana County, Ohio Case No. 2005CV884

JUDGMENT: Reversed and Remanded

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: March 18, 2008

DONOFRIO, J.

{¶1} Plaintiff-appellant, Rose Kaminski, appeals from a Columbiana County Common Pleas Court judgment granting summary judgment in favor of defendant-appellee, Metal & Wire Products Company.

{¶2} Appellant was employed as a press operator at appellee's Salem manufacturing facility. On June 30, 2005, appellant was working at her press when the press ran out of metal coil. She asked a co-worker, Toby Stivers, to operate the forklift to load a new coil into her press. Using the forklift, Stivers retrieved a metal coil and brought it to appellant's area. The coil was approximately 800-pounds, two-to-three inches thick, and four-to-five-feet tall. In order to load the coil onto the press, Stivers had to switch the coil from the right fork of the forklift to the left fork. Using the forklift, Stivers set the coil upright on the ground to facilitate the transfer. Because the coil needed to be balanced and because the supervisor could not be found, appellant balanced the unstable coil while Stivers attempted to thread the left fork through the coil. The fork bumped the coil. The coil fell onto appellant's legs and feet causing serious injury.

{¶3} Appellant subsequently filed a complaint against appellee. She alleged that appellee acted with the intent to cause injury to its employee by requiring her to participate in the performance of a dangerous activity without proper safety systems in violation of R.C. 2745.01. As part of her complaint, appellant asserted that R.C. 2745.01 is unconstitutional. R.C. 2745.01 provides the requirements for employer intentional tort. Appellant further asserted a claim against appellee for common law employment intentional tort.

{¶4} Appellee filed a counterclaim for a declaratory judgment that R.C. 2745.01 is constitutional. While appellant did not serve the Ohio Attorney General with her complaint alleging that R.C. 2745.01 is unconstitutional, appellee did serve the Attorney General with a copy of its counterclaim.

{¶5} Next, appellee filed a motion for summary judgment on its counterclaim asking the court to find that R.C. 2745.01 is constitutional. Appellant then filed a

cross motion for summary judgment on the counterclaim asking the court to find that R.C. 2745.01 is unconstitutional.

{¶6} The trial court found the statute to be constitutional. It reasoned that it was required to afford the statute a presumption of constitutionality and that it could not find the statute to be clearly unconstitutional.

{¶7} After the trial court's ruling that R.C. 2745.01 is constitutional, appellee moved for summary judgment on appellant's complaint. Appellee alleged that appellant could point to no evidence that it had an intent to injure her nor could she point to any evidence that it acted with the belief that injury was likely to occur. The trial court agreed with appellee and granted summary judgment in its favor.

{¶8} Appellant filed a timely notice of appeal on May 9, 2007.

{¶9} Appellant raises two assignments of error, the first of which states:

{¶10} "THE TRIAL COURT ERRED IN DECLARING R.C. § 2745.01 TO BE CONSTITUTIONAL."

{¶11} The latest version of R.C. 2745.01 became effective on April 7, 2005. It provides in pertinent part:

{¶12} "(A) 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 tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

{¶13} "(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."

{¶14} Thus, R.C. 2745.01 codifies the common law employer intentional tort and makes its remedy an employee's sole recourse for an employer intentional tort.

{¶15} Prior to the current version of R.C. 2745.01, the legislature has previously attempted to codify the common law employer intentional tort. In 1986,

the General Assembly enacted former R.C. 4121.80.[1] Under former R.C. 4121.80 injuries resulting from employer intentional tort fell under the realm of workers' compensation and allowed the injured employee to seek excess damages. It was intended to govern actions alleging intentional torts committed by employers against their employees. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 136, 522 N.E.2d 477. The legislature enacted former R.C. 4121.80 in response to the Ohio Supreme Court's decisions allowing employees to assert actions in common law against employers for intentional torts. See *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572, and *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, 472 N.E.2d 1046. However, the Ohio Supreme Court found former R.C. 4121.80 unconstitutional because it exceeded and conflicted with the legislative authority granted to the General Assembly. *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, at paragraph two of the syllabus.

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[1] **{¶a}** Former R.C. 4121.80 provided in part:

{¶b} "(A) If injury, occupational disease, or death results to any employee from the intentional tort of his employer, the employee or the dependents of a deceased employee have the right to receive workers' compensation benefits under Chapter 4123. of the Revised Code and have a cause of action against the employer for an excess of damages over the amount received or receivable under Chapter 4123. of the Revised Code and Section 35 of Article II, Ohio Constitution, or any benefit or amount, the cost of which has been provided or wholly paid for by the employer.

{¶c} "* * *

{¶d} "(G) As used in this section:

{¶e} "(1) 'Intentional tort' is an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.

{¶f} "Deliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance is evidence, the presumption of which may be rebutted, of an action committed with the intent to injure another if injury or an occupational disease or condition occurs as a direct result.

{¶g} " 'Substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death."

{¶16} Subsequently, the General Assembly enacted R.C. 2745.01.[2] The Ohio Supreme Court then found this statute to be unconstitutional. *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 308, 707 N.E.2d 1107. It reasoned that "[b]ecause R.C. 2745.01 imposes excessive standards (deliberate and intentional act), with a heightened burden of proof (clear and convincing evidence), it is clearly not 'a law that furthers the "* * * comfort, health, safety and general welfare of all employe[e]s."'" Id.

{¶17} Consequently, the General Assembly amended R.C. 2745.01. Appellant now alleges that this current version of R.C. 2745.01 is unconstitutional.

{¶18} All legislative enactments enjoy a presumption of constitutionality. *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224, *Benevolent Assn. v. Parma* (1980), 61 Ohio St.2d 375, 377, 402 N.E.2d 519. Furthermore, courts must apply all presumptions and pertinent rules of construction to uphold, if at all possible, a statute alleged to be unconstitutional. *State v. Sinito* (1975), 43 Ohio St.2d 98, 101, 330 N.E.2d 896. Thus, we must begin our analysis with the presumption that R.C. 2745.01 is constitutional.

{¶19} Appellant specifically takes issue with the phrase "substantially certain" and its application in the statute. The statute defines "substantially certain" as acting with "deliberate intent to cause an employee to suffer an injury, a disease, a

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[2] As stated by the Ohio Supreme Court in *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 306, 707 N.E.2d 1107: "R.C. 2745.01(A) provides that an employer is not generally subject to liability for damages at common law or by statute for an intentional tort that occurs during the course of employment, but that an employer is subject to liability only for an 'employment intentional tort' as defined. 'Employment intentional tort' is defined in R.C. 2745.01(D)(1) as 'an act committed by an employer in which the employer *deliberately and intentionally* injures, causes an occupational disease of, or causes the death of an employee.' (Emphasis added.) Further, R.C. 2745.01(B) states that employees or the dependent survivors of deceased employees who allege an intentional tort must demonstrate 'by *clear and convincing* evidence that the employer deliberately committed all of the elements of an employment intentional tort.' (Emphasis added.) This standard of clear and convincing evidence also applies to a response by the employee or the employee's representative to an employer's motion for summary judgment. R.C. 2745.01(C)(1). In addition, the statute requires that 'every pleading, motion, or other paper' be signed by the attorney of record or, if the party is not represented by an attorney, by the party. R.C. 2745.01(C)(2). And, if the requirements of R.C. 2745.01(C)(2) are not complied with, the court shall impose 'an appropriate sanction.' Id. The sanction may include, but is not limited to, reasonable expenses incurred by the other party, including reasonable attorney fees. Id."

condition, or death." Appellant argues that the Ohio Supreme Court has rejected such a definition.

{¶20} Appellant is correct. The Ohio Supreme Court has rejected a similar definition of "substantially certain." See *Jones*, 15 Ohio St.3d at 95. However, the legislature can change the common law by legislation as long as it acts within constitutional limitations. *Johnson*, 85 Ohio St.3d at 303. Thus, the fact that the Supreme Court has previously rejected a similar definition of substantial certainty is not a reason, in and of itself, to find R.C. 2745. 01 unconstitutional.

{¶21} Appellant next argues that R.C. 2745.01 conflicts with and exceeds the legislative authority granted to the General Assembly pursuant to Sections 34 and 35, Article II of the Ohio Constitution. She asserts that the Ohio Supreme Court has repeatedly held that the General Assembly does not have the power under Sections 34 and 35 to codify the common law employer intentional tort because it necessarily occurs outside of the employment relationship and does not further the comfort, health, safety, and general welfare of employees.

{¶22} Section 34, Article II of the Ohio Constitution provides: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power." Section 35, Article II provides the General Assembly with the power to pass laws establishing a state workers' compensation fund "[f]or the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment."

{¶23} In *Brady*, 61 Ohio St.3d at paragraph two of the syllabus, the Ohio Supreme Court held that R.C. 2745.01's predecessor, former R.C. 4121.80, exceeded and conflicted with the legislative authority granted to the General Assembly pursuant to Sections 34 and 35, Article II of the Ohio Constitution and was unconstitutional. However, the Court's reasoning on the subject was only a plurality decision. In determining that former R.C. 4121.80 violated Section 34, Justice

Sweeney writing for the plurality reasoned that "[a] legislative enactment that attempts to remove a right to a remedy under common law that would otherwise benefit the employee cannot be held to be a law that furthers the ' * * * comfort, health, safety and general welfare of all employe[e]s * * *.'" Id. at 633. (Justices Douglas and Resnick concurring). In finding that the statute violated Section 35, Justice Sweeney wrote that former R.C. 4121.80 attempted to circumvent the purposes of Section 35 and "that the legislature cannot, consistent with Section 35, Article II, enact legislation governing intentional torts that occur within the employment relationship, because such intentional tortious conduct will always take place outside that relationship." Id. at 634.

{¶24} Later when dealing with the constitutionality of the prior version of R.C. 2745.01, the Ohio Supreme Court relied on the plurality's reasoning in *Brady*. The Court stressed that *any* statute the General Assembly enacted that limited employers' liability for their intentional tortious acts would violate the Ohio Constitution:

{¶25} "In *Brady*, the court invalidated former R.C. 4121.80 in its entirety, and, in doing so, we thought that we had made it abundantly clear that *any statute created to provide employers with immunity from liability for their intentional tortious conduct cannot withstand constitutional scrutiny.* See, also, *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 230, 631 N.E.2d 582, 587. Notwithstanding, the General Assembly has enacted R.C. 2745.01, and, again, seeks to cloak employers with immunity. In this regard, we can only assume that the General Assembly has either failed to grasp the import of our holdings in *Brady* or that the General Assembly has simply elected to willfully disregard that decision. In any event, we will state again our holdings in *Brady* and hopefully put to rest any confusion that seems to exist with the General Assembly in this area." (Emphasis added.) *Johnson*, 85 Ohio St.3d at 304.

{¶26} The *Johnson* Court reasoned that "the constitutional impediments at issue in *Brady*, concerning former R.C. 4121.80, also apply with equal force to R.C.

2745.01" because "[b]oth statutes were enacted to serve identical purposes," that being "to provide immunity for employers from civil liability for employee injuries, disease, or death caused by the intentional tortious conduct of employers in the workplace." Id. at 305.

{¶27} The *Johnson* Court further explained that given the standard of proof required by the statute that the employer's conduct was both deliberate and intentional, the employee would have to prove, at a minimum, that the employer was guilty of criminal assault. Id. at 306. The Court found that by setting such a standard, "the General Assembly has created a cause of action that is simply illusory." Id.

{¶28} Given the Court's past holdings regarding R.C. 2745.01's predecessors, it is reasonable to conclude that the General Assembly's latest attempt at codifying employer intentional tort is unconstitutional as well. The Ohio Supreme Court has made it abundantly clear that any statute that codifies the common law employer intentional tort and attempts to limit employers' liability for such intentional torts is unconstitutional under both Section 34 and 35, Article II of the Ohio Constitution.

{¶29} R.C. 2745.01, as currently written, is similar to the earlier version found by the *Johnson* Court to be unconstitutional. R.C. 2745.01(A) provides that in an employer intentional tort action, the employee must prove "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.*" Thus, pursuant to section A, in order to succeed on the claim, the employee must prove one of two things: (1) the employer acted with intent to injure or (2) the employer acted with the belief that injury was substantially certain to occur. This leads one to believe that there are two alternate ways for an employee to succeed on an intentional tort claim against an employer. However, we must consider the rest of the statute.

{¶30} "Intent to injure" is clear and, therefore is not defined in the statute. "Substantially certain," however, is not as clear. Therefore, the legislature provided a

definition. R.C. 2745.01(B) defines substantially certain as, acting "with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death."

{¶31} 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 *Johnson* Court held that this type of action was simply illusory:

{¶32} "Under the definitional requirements contained in the statute, an employer's conduct, in order to create civil liability, must be both *deliberate* and *intentional*. Therefore, in order to prove an intentional tort * * * the employee, or his or her survivors, must prove, at a minimum, that the actions of the employer amount to criminal assault. In fact, given the elements imposed by the statute, it is even conceivable that an employer might actually be guilty of a criminal assault but exempt from civil liability under [former] R.C. 2745.01(D)(1)." *Johnson*, 85 Ohio St. at 306-307.

{¶33} Furthermore, the Ohio Supreme Court has explicitly held that a specific intent to injure is *not* necessary to a finding of intentional misconduct. *Jones*, 15 Ohio St.3d at 95.

{¶34} Pursuant to the Ohio Supreme Court's holdings in *Brady*, supra, and *Johnson*, supra, and consistent with Sections 34 and 35, Article II of the Ohio Constitution, we must conclude R.C. 2745.01 is unconstitutional. Because of its excessive standard of requiring proof that the employer intended to cause injury, "it is clearly not 'a law that furthers the "* * * comfort, health, safety and general welfare of all employe[e]s."'" *Johnson*, 85 Ohio St.3d at 308, quoting *Brady*, 61 Ohio St.3d at 633, quoting Section 34, Article II of the Ohio Constitution. Additionally, "because R.C. 2745.01 is an attempt by the General Assembly to govern intentional torts that occur within the employment relationship, R.C. 2745.01 'cannot logically withstand

constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of constitutional empowerment.'" Id., quoting *Brady*, 61 Ohio St.3d at 634.

{¶35} Appellant next argues that we must apply the principle of stare decisis in this situation. She asserts that the applications of employer intentional tort cannot be in a constant state of flux. Appellant contends that by holding R.C. 2745.01 unconstitutional, we will be applying and upholding the Ohio Supreme Court's past decisions on the matter.

{¶36} As stated above, we began this analysis with the presumption that R.C. 2745.01 is constitutional. However, by interpreting and applying the Ohio Supreme Court's past holdings dealing with similar statutes and the Ohio Constitution, we must reach the conclusion that R.C. 2745.01 is unconstitutional.

{¶37} Finally, appellant argues that R.C. 2745.01 violates the due process clause found in Article I, Section 16 of the Ohio Constitution. She contends that R.C. 2745.01 removes the right of injured employees to seek redress for the intentional torts of their employers. Therefore, appellant asserts, it does not bear a real and substantial relationship to the public health, safety, morals, or general welfare.

{¶38} Because R.C. 2745.01 is unconstitutional based on Sections 34 and 35, Article II of the Ohio Constitution, further analysis here is unnecessary. See *Johnson*, 85 Ohio St.3d at fn. 14 (It is unnecessary to elaborate on other constitutional issues given the Court's holding that R.C. 2745.01 exceeded the limits of legislative power under the Ohio Constitution.)

{¶39} Accordingly, appellant's first assignment of error has merit.

{¶40} Appellant's second assignment of error states:

{¶41} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT UNDER R.C. § 2745.01 AS GENUINE ISSUES OF MATERIAL FACT REMAIN TO BE LITIGATED."

{¶42} Here appellant argues that even if this court upholds R.C. 2745.01, summary judgment was improper because genuine issues of material fact are at issue.

{¶43} Appellant asserts that the evidence demonstrates that appellee was repeatedly warned of the inherent danger to its employees regarding its process of handling of the heavy metal coils. In fact, she states that appellee was fined by the Occupational Safety and Health Administration (OSHA) for a violation in connection with her injury. Despite its alleged knowledge of this known danger, appellant contends that appellee did not make any attempt to formally train its employees in how to properly load the coils onto the presses. She further asserts that appellee considered safer alternatives for loading the coils. However, it decided to use the more dangerous process on the basis of cost. This evidence, appellee argues, satisfies the requirement that appellee had the belief that an injury was substantially certain to occur. Furthermore, she contends that appellee's deliberate decision to subject its employees to a known danger despite its knowledge of a substantial certainty of injury rises to the level of deliberate intent to cause injury to an employee.

{¶44} Additionally, appellant argues that the trial court failed to consider the evidence in the light most favorable to her, the non-moving party, as it was required to do. She contends that the trial court relied on an undocumented and non-binding company policy of using a supervisor to load the coils into the press to characterize her assistance in loading the coil as voluntary and contrary to company policy. However, appellant argues the evidence demonstrated that any employee who passed a written forklift test, not just a supervisor, could operate the forklift in order to load a coil into a press. Thus, appellant contends that the company "policy" that the trial court relied on is "at best, a non-mandatory practice" utilized by appellee, which is often not possible to follow when a supervisor is not present on the plant floor, as was the case here.

{¶45} In response, appellee argues that the record supports summary judgment in its favor even if this court finds that R.C. 2745.01 is unconstitutional and we apply the common law test for employer intentional tort set out in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108.

{¶46} In *Fyffe*, the Ohio Supreme Court set out the controlling test for employer intentional tort as follows:

{¶47} "[I]n order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (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. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)" Id. at paragraph one of the syllabus.

{¶48} Appellee argues that while there was some inherent danger in loading the coils, there was no evidence that it had knowledge that injury was substantially certain to occur or that it required appellant to perform the task of assisting with loading the coils. It points to appellant's deposition testimony where she admitted that she was supposed to find a supervisor to load the coil. (Kaminski depo. 35) Appellee argues that an employee who voluntarily undertakes a risk cannot maintain an employer intentional tort action. Additionally, appellee asserts that the set of circumstances that created the danger as perceived by appellant's expert were unique to this situation. (Girardi dep. 27-29) Finally, appellee contends that while handling coils is generally dangerous, it is simply an inherently dangerous part of the work, which danger can be avoided by paying attention and using reasonable care. (Bellinger dep. 69; Frederick dep. 64)

{¶49} In reviewing an award of summary judgment, appellate courts must apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp.* (1998), 128 Ohio App.3d 546, 552, 715 N.E.2d 1179. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R.

56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377. A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598, 603, 662 N.E.2d 1088, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202.

{¶50} Since R.C. 2745.01 is unconstitutional, we must analyze appellant's claim under the common-law test for employer intentional tort set out in *Fyffe*, supra, and stated above.

{¶51} There seems to be no dispute surrounding the facts preceding appellant's injury. Appellant was working the night shift, operating her press when it ran out of coil. She looked for her supervisor, David Bellinger, so that he could load another coil into her press. However, she was unable to find him. Appellant then asked a co-worker, Toby Stivers, to load the coil for her. She asked Stivers because he was licensed by appellee to operate the forklift, which was required to load the coil. Stivers had changed coils on his press many times. When Stivers brought the coil to appellant's press, he needed to switch the coil from one fork to the other fork to load it into the press. In order to do this, Stivers had to set the coil down. Someone had to balance the coil while Stivers switched it to the other fork. Appellant accepted this job. While appellant was balancing the coil, it fell onto her foot and leg.

{¶52} There also is no dispute that the metal coil appellant was attempting to balance was approximately 800 pounds, four-to-five feet tall, and only two-to-three inches thick. Thus, it was very unstable when stood upright.

{¶53} The issue that arises here is whether appellee required its employees to engage in this method of loading and balancing coils with the knowledge that this method was dangerous and with the knowledge that by requiring employees to use

this method, it was substantially certain that someone would be injured. Thus, we must determine whether appellant presented evidence going to each of the three *Fyffe* elements.

{¶54} First, appellant had to demonstrate that a genuine issue of material fact existed as to whether appellee possessed knowledge of a dangerous process or procedure within its business operations. In order to do so, appellant had to demonstrate that: (1) a dangerous condition existed within appellee's business operations and (2) that appellee had actual or constructive knowledge that the dangerous condition existed. *Moore v. Ohio Valley Coal Co.*, 7th Dist. No. 05-BE-3, 2007-Ohio-1123, at ¶26. Appellant met this element.

{¶55} Bellinger, appellant's supervisor, testified that he had seen coils similar to the one appellant was holding tip over while an employee was holding them. (Bellinger dep. 41). He stated that he witnessed this two or three times. (Bellinger dep. 41). However, on those occasions, the person holding the coil was able to get out of the way. (Bellinger dep. 41). Bellinger said they were lucky to get out of the way. (Bellinger dep. 67). He further stated that the narrow coils, like the one appellant was holding, were at risk of becoming unbalanced and created a dangerous condition when an employee was holding them. (Bellinger dep. 68). He considered the practice of balancing the narrow coils to be unsafe. (Bellinger dep. 43-44).

{¶56} Additionally, Bill Frederick, a former supervisor at appellee's plant, testified that on two or three occasions, coils that he was holding tipped over. (Frederick dep. 43). However, he stated that he was lucky enough to get out of the way. (Frederick dep. 43-44). He also witnessed coils falling while an employee was holding them two to three times a year. (Frederick dep. 44). And Frederick complained to his supervisors that appellee's method of loading coils was unsafe. (Frederick dep. 31, 34-37).

{¶57} In addition, OSHA issued a citation to appellee resulting from appellant's injury. The citation stated, "the load of steel coil being handled by a

forklift, was not properly stable, secured or safely arranged." (Girardi dep. Ex. A).

{¶58} This court has observed:

{¶59} "The mere fact that defendant's process involved the existence of dangers does not automatically classify defendant's acts or omissions as an intentional tort, even if management failed to take corrective actions or institute safety measures. *Shelton v. U.S. Steel. Corp.* (S.D.Ohio, 1989), 710 F.Supp. 206, 210. Some dangers may 'fairly be viewed as a fact of life of industrial employment' and an employer has not committed an intentional tort when an employee is injured by one of those dangers. *Van Fossen v. Babcock & Wilcox Co.* (1989), 36 Ohio St.3d 100, 116, 522 N.E.2d 489. A dangerous condition exists when the danger 'falls outside the "natural hazards of employment," which one assumes have been taken into consideration by employers when promulgating safety regulations and procedures.' *Youngbird v. Whirlpool Corp.* (1994), 99 Ohio App.3d 740, 747, 651 N.E.2d 1314." *Hubert v. Al Hissom Roofing and Constr.*, Inc., 7th Dist. No. 05-CO-21, 2006-Ohio-751, at ¶19.

{¶60} But here two supervisors testified that they had seen the large coils fall over when an employee was balancing them on more than one occasion. They both considered the employees who were balancing the coils at the time "lucky" to get out of the way. Bellinger stated that balancing a coil created a dangerous condition. And Frederick complained to his supervisors that appellee's method of loading the coils was unsafe. This evidence shows that appellee, through its supervisors, knew of the unsafe method used to balance the unsteady coils.

{¶61} This evidence also creates a genuine issue of material fact as to whether the method used to balance the coils was dangerous to the point of falling outside the natural hazards of employment. The Fourth District has noted that operating dangerous machinery may be a necessary incident of an employment situation, thus not permitting for an injured employee to recover in intentional tort for injuries suffered. *Goodin v. Columbia Gas of Ohio, Inc.* (2000), 141 Ohio App.3d 207, 216, 750 N.E.2d 1122. Yet operating the same dangerous machinery without

proper safety mechanisms in place may not constitute a necessary incident of the employment, thus permitting for recovery for intentional tort. Id. In the present case, changing the heavy, unstable coils was a necessary part of appellant's employment. However, whether changing the coils by requiring a single employee to balance the coil was a necessary part of appellant's employment is a question of fact.

{¶62} Second, appellant had to present evidence creating a genuine issue of material fact as to whether appellee possessed knowledge that, if an employee was subjected to the dangerous process or procedure, then harm to the employee was a substantial certainty. The *Fyffe* Court set out the requisite intent for an employer intentional tort. It held that the employer's intent must be more than negligence or recklessness. *Fyffe*, 59 Ohio St.3d at paragraph two of the syllabus. Instead, the requisite intent is present when the employer knows that injuries to employees are certain or substantially certain to occur and the employer nonetheless proceeds with the process, procedure, or condition. Id. "Mere knowledge and appreciation of a risk--something short of substantial certainty--is not intent." Id. This is a difficult standard to meet.

{¶63} Certain facts and circumstances are particularly relevant in attempting to prove that an employer had knowledge of a high probability of harm, including prior accidents of a similar nature, inadequate training, and whether the employer has deliberately removed or deliberately failed to install safety features. *Moore*, 7th Dist. No. 05-BE-3, at ¶37.

{¶64} The evidence as to this second *Fyffe* element is as follows.

{¶65} Bellinger testified that on two or three occasions, he had seen coils similar to the one appellant was holding tip over while an employee was holding them. (Bellinger dep. 41). He further stated that the narrow coils, like the one appellant was holding, were at risk of becoming unbalanced and created a dangerous, unsafe condition when they were being held. (Bellinger dep. 43-44, 68). Yet Bellinger stated that he did not believe that it was certain that someone would be hurt balancing a coil. (Bellinger dep. 66).

{¶66} And Frederick testified that on two or three occasions, coils that he was holding tipped over. (Frederick dep. 43). However, he stated that he was lucky enough to get out of the way. (Frederick dep. 43-44). He also witnessed coils falling while an employee was holding them two to three times a year. (Frederick dep. 44).

{¶67} Frederick even complained to Kevin Ehrenberg, the Salem plant manager, that appellee's method of balancing coils was unsafe. (Frederick dep. 34-37). In fact, Frederick showed Ehrenberg specific safety equipment in a catalog and explained that using this equipment would be safer. (Frederick dep. 37-39). However, Ehrenberg told Frederick that appellee would not pay for that expense. (Frederick dep. 39).

{¶68} Frederick stated that he told no less than three supervisors that the coil-loading method appellee was using was dangerous and that someone was going to get hurt. (Frederick dep. 40). He specifically told them that the coils were unsteady and that they could tip over. (Frederick dep. 40). Frederick stated that the supervisors already knew this. (Frederick dep. 40). However, nothing came of his complaints. (Frederick dep. 37).

{¶69} Additionally, Stivers, Bellinger, and Frederick all testified that appellee never trained employees in the proper way to change or balance a coil. (Stivers dep. 31, 35; Bellinger dep. 17, 31, 36; Frederick dep. 25).

{¶70} Furthermore, appellant's expert in material handling, Walter Girardi, issued a report concerning appellant's injury and appellee's method of loading coils. He opined that appellee's method of loading coils was "very dangerous." (Girardi dep. 23). He also stated that the danger was apparent to anyone who watched the process. (Girardi dep. 25). Girardi stated that harm to employees was substantially certain to occur. (Girardi dep. 26-27).

{¶71} "An expert report stating that the accident was substantially certain to occur may not be sufficient to prevent summary judgment in favor of the employer on the employee's intentional tort claim." *Burgos v. Areway, Inc.* (1996), 114 Ohio App.3d 380, 384, 683 N.E.2d 345. However, here we are faced with more than just

an expert report.

{¶72} In addition to the expert's opinion that harm to employees was substantially certain to occur, we also have testimony that on numerous occasions, heavy, unstable coils like the one appellant was holding, fell over while being balanced by an employee. And two supervisors testified that the employees holding those coils were lucky to escape injury. Furthermore, the evidence demonstrates that appellee never trained its employees in the dangerous task of balancing coils. Significantly, Frederick brought this safety issue to the plant manager's attention and informed him of what equipment to purchase in order to make the coil balancing safer. However, he was told that appellee would not pay to purchase the needed safety equipment. And Frederick told at least three supervisors that someone was going to get hurt using appellee's method of balancing coils. When viewing this evidence in the light most favorable to appellant, as we are required to do, a genuine issue of material fact exists as to whether appellee possessed knowledge that, if an employee was subjected to the process of coil balancing, then harm to the employee would be a substantial certainty.

{¶73} Third, appellant had to present evidence creating a genuine issue of material fact as to whether appellee, despite its knowledge of the dangerous process and the substantial certainty of harm to its employees, continued to require the employee to perform the dangerous task. In order to survive a summary judgment motion, the employee need not demonstrate that the employer ordered the employee to engage in the dangerous task. *Moore*, 7th Dist. No. 05-BE-3, at ¶49. Instead, the employee may satisfy this element by producing, "'evidence that raises an inference that the employer, through its actions and policies, required the employee to engage in the dangerous task.'" Id., quoting *Gibson v. Drainage Prod., Inc.*, 95 Ohio St.3d 171, 766 N.E.2d 982, 2002-Ohio-2008, at ¶24.

{¶74} The evidence as to this element is as follows.

{¶75} Appellant testified that when her machine ran out of coil, she first looked for Bellinger because employees were supposed to have the supervisor load

the new coils. (Kaminski dep. 35). On those occasions when she was able to locate Bellinger, appellant stated that Bellinger would operate the forklift and load the coil for her. (Kaminski dep. 38). However, she was not always able to find him. (Kaminski dep. 37-38). On these occasions, appellant would ask a fellow employee to operate the forklift and load the coil for her. (Kaminski dep. 41). Various people at the plant were licensed by appellee to operate the forklifts. Depending on where the coil was located in the plant, the forklift operator might have to retrieve the coil on one fork and then switch it to the other fork in order to get it into position to be loaded into the press. (Kaminski dep. 38-39). If this was the case, then a second person was required to balance the coil on the floor while the forklift operator put the coil down and switched it to the other fork. (Kaminski dep. 39). Appellant stated that she had previously balanced coils a couple of times before the night she was injured. (Kaminski dep. 39-40).

{¶76} Stivers testified that he was licensed by appellee to operate a forklift. (Stivers dep. 11). He stated that he frequently operated the forklift and changed his own coils as well as other employee's coils. (Stivers dep. 20-21). He had changed appellant's coils in the past. (Stivers dep. 25).

{¶77} Stivers stated that he told appellant that he had to move the coil from the right fork to the left fork and that he was going to look for Bellinger to help him. (Stivers dep. 23-24). The reason Stivers was going to do this was not because he was following a rule that said he had to get the supervisor. (Stivers dep. 33). Instead, it was because appellant is a small woman. (Stivers dep. 34). However, appellant told Stivers that she could hold the coil. (Stivers dep. 24, 32, 58).

{¶78} Stivers stated that Bellinger should have been the one to change the coil because he was the supervisor. However, Stivers testified that he did not look for Bellinger to help because he suspected that Bellinger had been drinking. (Stivers dep. 34-35). Several employees, including appellant and Stivers, testified that Bellinger was sometimes hard to find because he may have been drinking on the job. (Stivers dep. 23; Kaminski dep. 25).

{¶79} Importantly, Stivers also testified that there was no rule that an employee had to get the supervisor to help change a coil. (Stivers dep. 33). In fact, he stated that any employee who was at a press usually held the coil if it needed to be switched from one fork to the other. (Stivers dep. 33). He further stated that supervisors had observed him changing coils in the past and had never told him that he was doing it wrong. (Stivers dep. 43).

{¶80} Bellinger also testified that any employee who was licensed by appellee, not necessarily a supervisor, could operate the forklift and change coils. (Bellinger dep. 23-24). In fact, he stated that he, as a supervisor, was not required to be present to help load all coils. (Bellinger dep. 59). Bellinger further testified that any employee who was free to do it balanced the coils. (Bellinger dep. 42). He stated that the responsibility was not assigned to anyone in particular. (Bellinger dep. 42-43). Instead, whoever was available was required to do the balancing. (Bellinger dep. 43).

{¶81} Additionally, Frederick stated that every day it was necessary for employees to hold coils steady while the forklift operator got the fork through them. (Frederick dep. 28). Frederick stated that all of the employees were required to hold the unstable coils. (Frederick dep. 41).

{¶82} Donald Hardy, a die setter/press operator and assistant supervisor with appellee, testified that there was no policy that a supervisor was required to load the coils. (Hardy dep. 15). In fact, he stated that he frequently loaded coils. (Hardy dep. 15). Hardy further stated that appellant, just like any other employee, could be used to hold a coil. (Hardy dep. 42). It was simply part of the job. (Hardy dep. 39).

{¶83} Given this evidence, a genuine issue of material fact exists as to whether appellee required appellant to balance the coil. There is an indication that appellant and/or Stivers could have decided to wait until they located Bellinger so that he could balance the coil. And Stivers testified that appellant volunteered to balance the coil. But the evidence also demonstrates that all employees, including appellant, were required to balance coils. It was a part of the job of being a press

operator. And appellant had balanced several coils previously. Additionally, while the trial court found that there was a policy requiring a supervisor to be present when loading a coil into a press, the opposite is true. While the various witnesses seemed to suggest that having a supervisor present during coil loading was the ideal situation, this practice was seldom used. Stivers and Hardy, non-supervisors, changed many coils. Given this conflicting evidence, a genuine issue of material fact does exist.

{¶84} Because genuine issues of material fact exist as to all three *Fyffe* elements, summary judgment was not warranted. It should be mentioned, however, that the trial court applied R.C. 2745.01's more stringent test for intentional torts. The trial court concluded that appellee did not act with the intent to injure appellant or with the deliberate intent to cause her injury. Thus, the trial court did not actually consider whether appellee acted with substantial certainty that injury to its employee would occur. Accordingly, appellant's second assignment of error has merit.

{¶85} For the reasons stated above, the trial court's judgment is hereby reversed and the matter is remanded for further proceedings pursuant to law and consistent with this opinion.

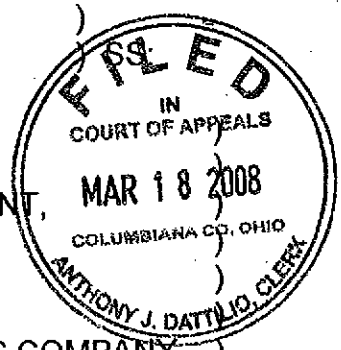
Vukovich, J., concurs.

DeGenaro, P.J., concurs.

APPROVED:

Gene Dohofrio, Judge

STATE OF OHIO)
) IN THE COURT OF APPEALS OF OHIO
COLUMBIANA COUNTY) SS: SEVENTH DISTRICT



ROSE KIMINSKI,)

PLAINTIFF-APPELLANT,)

VS.) CASE NO. 07-CO-15

METAL & WIRE PRODUCTS COMPANY, ET AL.,) JOURNAL ENTRY

DEFENDANTS-APPELLEES.)

For the reasons stated in the opinion rendered herein, appellant's two assignments of error have merit and are sustained. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Columbiana County, Ohio, is reversed and this cause is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion.

Costs taxed to appellees.

JUDGES.

Pursuant to Rule 58(B) of the Ohio Rules of Civil Procedure, the Clerk shall serve upon all parties not in default for the entry hereof notice of the within judgment. By order of the Court.

IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO
CASE NO. 2005-CV-884
JUDGE C. ASHLEY PIKE

FILED
COLUMBIANA COUNTY
COURT OF COMMON PLEAS
APR 20 2007
ANTHONY J. DATTILIO
CLERK (SJC)

ROSE KIMINSKI	)	
	)	
Plaintiff	)	
	)	
-VS-	)	**JUDGMENT ENTRY**
	)	
	)	
METAL & WIRE PRODUCTS COMPANY, et al.	)	
	)	
	)	
Defendants	)	

I. Status of the Case

This matter comes before the Court on the Motion of Defendant Metal & Wire Products Company for Summary Judgment; the Plaintiff's Response; and the Defendants' Reply in Support.

Plaintiff Rose Kiminski filed her Complaint August 29, 2005 alleging in her first claim for relief of cause of action under O.R.C. §2745.01 arising out of an injury she sustained while in the course of her employment at Defendant Metal & Wire Products Company on June 30, 2005. Her second claim alleges a common law employment intentional tort. Defendant Metal & Wire Products Company Answered and set forth a Counterclaim for Declaratory Judgment asking this Court to determine and declare the constitutionality of O.R.C. §2745.01.

The Counterclaim for Declaratory Relief was submitted to the Court on the Motion for Summary Judgment of the Defendant and the Cross-Motion for

Summary Judgment of the Plaintiff. The Court entered its judgment finding O.R.C. 2745.01 to be constitutional. The Plaintiff's statutory cause of action as previously described remains pending and is the subject of the present Motion for Summary Judgment.

II. The Standard of Review

Summary judgment under Civ.R. 56(C) is properly granted where the moving party demonstrates the following:

> "(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 could 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."

[1] In the event the moving party meets this initial burden, the opposing party bears a reciprocal burden in responding to the motion.[2] Under Civ. R. 56(E),"a nonmovant may not rest on the mere allegations or denials of his pleading but must set forth specific facts showing there is a genuine issue for trial."[3] The nonmoving party must produce evidence on any issue for which that party bears the burden at trial.[4]

Because it is a fairly drastic means of terminating litigation, a court must grant summary judgment with caution, resolving all doubts against the moving

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[1] *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327
[2] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112
[3] *Chaney v. Clark Cty. Agricultural Soc., Inc.* (1993), 90 Ohio App.3d 421, 424
[4] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293; and *Celotex v. Catrett* (1986), 477 U.S. 317, 322

party.[5] Nevertheless, summary judgment is appropriate if, after construing the evidence in a light most favorable to the opposing party, there exists no genuine issue of material fact and reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. [6]The evidentiary materials listed in Civ.R. 56(C) include "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any.

III. De Novo Review by Appellate Court

In reviewing a summary judgment, trial and appellate courts use the same standard. Ohio Civil Rule 56. In fact, the appellate court's analysis is conducted under a de novo standard.[7]

IV. Statement of Facts

Plaintiff was employed as a press operator at the Defendants' Salem plant. On June 30, 2005 Plaintiff was working in that position when the press she was running needed re-supplied with a new coil of steel. The type of coil which would need to be loaded into the press was approximately five feet high and weighed 850 pounds. Plaintiff admitted in her deposition that company policy required her to find a supervisor and to have the supervisor load the new coil.

However, when the Plaintiff could not find the supervisor, she insisted that another press operator assist her in loading the new coil. During the loading

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[5] *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 333
[6] *State ex rel. The V. Cos.v. Marshall* (1998), 81 Ohio St.3d 467, 473
[7] *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. *Reali et al. v. Society National Bank* (1999), 133 Ohio App.3d 844, 846 (Seventh District)

process the coil fell causing significant injury to the Plaintiff. To prevail Plaintiff must show pursuant to O.R.C. §2745.01 that her employer committed a tortuous act with intent to injure her or had the belief that the injury was substantially certain to occur under the circumstances presented.

V. Analysis

There is no evidence before this Court that the Defendant/Employer committed a tortuous act with the intent to injure the Plaintiff or with the belief that the injury was substantially certain to occur. As used in the statute, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death. While this statute is relatively new, a fair reading of the same and a consideration of prior cases in this appellate district under a previous similar statute, lead this Court to the conclusion that the Defendant has not acted with the intent to injure the Plaintiff nor with deliberate intent to cause her injury. It cannot be overlooked that this Defendant was injured when she voluntarily took the task of assisting in loading a coil into her press contrary to the policy of the Defendant/Employer which called for her to summon a supervisor to accomplish the task.

V. The Ruling

The Court finds no genuine issues of material fact; regards this case as nearly an abuse of process; dismisses the Complaint; cancels all further proceedings; and directs that the costs be taxed to the Plaintiff with the deposit to be first applied.

C. ASHLEY PIKE, JUDGE

DATED: April 18, 2007/kam

cc: File
David A. Forrest, Esq.
Dennis A. DiMartino, Esq.
William E. Pfau, III, Esq.

IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO
CASE NO. 2005-CV-884
JUDGE C. ASHLEY PIKE

FILED
COLUMBIANA COUNTY
COURT OF COMMON PLEAS
DEC 21 2006
ANTHONY J. DATTILIO
CLERK

ROSE KAMINSKI

Plaintiff

-VS-

METAL & WIRE PRODUCTS COMPANY, et al.

Defendants

JUDGMENT ENTRY (PAG)

I. Status of the Case

This matter comes before the Court on the Defendants' Motion for Summary Judgment on its Counterclaim. The Counterclaim seeks a declaratory judgment that O.R.C. §2745.01 is constitutional. Plaintiff has filed a Brief in Opposition to the Defendants' Motion for Summary Judgment on the Defendants' Counterclaim and further a Cross-Motion for Summary Judgment asking the Court to rule instead that O.R.C. §2745.01 is unconstitutional.

II. The Standard of Review

Summary judgment under Civ.R. 56(C) is properly granted where the moving party demonstrates the following:

> "(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 could 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."

[1] In the event the moving party meets this initial burden, the opposing party bears a reciprocal burden in responding to the motion.[2] Under Civ. R. 56(E),"a nonmovant may not rest on the mere allegations or denials of his pleading but must set forth specific facts showing there is a genuine issue for trial."[3] The nonmoving party must produce evidence on any issue for which that party bears the burden at trial.[4]

Because it is a fairly drastic means of terminating litigation, a court must grant summary judgment with caution, resolving all doubts against the moving party.[5] Nevertheless, summary judgment is appropriate if, after construing the evidence in a light most favorable to the opposing party, there exists no genuine issue of material fact and reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. [6]The evidentiary materials listed in Civ.R. 56(C) include "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any.

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[1] *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327
[2] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112
[3] *Chaney v. Clark Cty. Agricultural Soc., Inc.* (1993), 90 Ohio App.3d 421, 424
[4] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293; and *Celotex v. Catrett* (1986), 477 U.S. 317, 322
[5] *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 333
[6] *State ex rel. The V. Cos.v. Marshall* (1998), 81 Ohio St.3d 467, 473

III. De Novo Review by Appellate Court

In reviewing a summary judgment, trial and appellate courts use the same standard. Ohio Civil Rule 56. In fact, the appellate court's analysis is conducted under a de novo standard.[7]

IV. The Ruling

It is the opinion of the Court that especially a trial court, in the absence of a clearly unconstitutional provision, should afford a presumption of constitutionality to Acts of the General Assembly. The Court cannot find the statute to be clearly unconstitutional. Therefore, the Court finds the statute to be constitutional; grants the Motion of the Defendants in favor of them on the Counterclaim; and overrules the Plaintiff's Cross-Motion for Summary Judgment.

This case shall remain on this Court's docket as previously scheduled.

C. ASHLEY PIKE, JUDGE

DATED: December 19, 2006/kam

cc: File
David A. Forrest, Esq.
Dennis A. DiMartino, Esq.
William E. Pfau III, Esq.

[7] *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. *Reali et al. v. Society National Bank* (1999), 133 Ohio App.3d 844, 846 (Seventh District)