No. 2008-0857

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.

APPELLANT METAL & WIRE PRODUCTS COMPANY'S REPLY BRIEF

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I. INTRODUCTION

Far from an "ever-shifting" and "result-oriented"[1] constitutional jurisprudence, Appellant Metal & Wire Products Company ("Metal & Wire), Amicus Curiae Attorney General Rogers, and other amici offer a framework for analyzing the constitutionality of legislation that confirms the General Assembly's plenary police power under Section 1, Article II of the Ohio Constitution, follows this Court's past and most recent interpretations of Sections 34 and 35, Article II, and is consistent with the theoretical underpinnings of the common law intentional workplace tort as set forth in *Blankenship*[2] and its progeny.

First, Appellee Rose Kaminski and her amici agree that Section 1, Article II — not Section 34 or 35 — is the source of the General Assembly's authority to enact R.C. 2745.01. Absent a specific constitutional prohibition, the General Assembly is vested with broad authority to exercise its general police power under that section, including the codification and limitation of the common law workplace intentional tort.

Second, Kaminski's argument that Sections 34 and 35, Article II immunize the common law workplace intentional tort from legislative modification is premised on overbroad dicta and flawed reasoning in a decision striking down a different statute. Neither the language nor the history of either section supports such an anomalous rule.

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[1] Kaminski Opposing Brief ("Opp. Br.") at 11, 12.

[2] *Blankenship v. Cincinnati Milicron Chem., Inc.* (1982), 69 Ohio St.2d 608.

To the contrary, Section 34 expands the General Assembly's legislative powers, while Section 35 has no application to the common law tort recognized in *Blankenship* et seq.

Third, any purported immunization of a specific common law tort from legislative action runs counter to the constitutional separation of powers. This Court recently reiterated that "the legislative branch is 'the ultimate arbiter of public policy.'" *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468, at ¶21. It is that long-established principle of constitutional jurisprudence — not overbroad statements in *Johnson*[3] — that merits stare decisis deference.

Applying these three principles to the strong presumption of constitutionality that accompanies all legislation demonstrates that R.C. 2745.01 easily falls within the category of a permissible exercise of the General Assembly's police power.

II. ARGUMENT

The first and most fundamental flaw of the decision below (and the *Johnson* analysis upon which it is based) is the manner in which the constitutional issue is framed. The question is not whether the General Assembly "exceed[ed] the legislative authority" to regulate the workplace extended in Sections 34 and 35, Article II of the Ohio Constitution. See App. Op. at 5 (Appx. to Opening Br. at 10, ¶21.) All parties agree that R.C. 2745.01 modifies a common law tort that occurs *outside* employment; it does not fix hours of labor, establish a minimum wage or govern workers' compensation benefits for injuries incurred in the scope of employment. The correct inquiry is whether the General

[3] See *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298.

Assembly exceeded the legislative authority granted to it under the broad police power in Section 1 of Article II to codify, alter or abolish the common law.

It has long been recognized that the *Blankenship* common law tort "impacts" the seemingly clear "exclusive remedy" provisions of Section 35, Article II of the Ohio Constitution. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 109, 111. But that "impact" does not change the common law roots of a *Blankenship* tort or the plenary powers of the General Assembly to modify the common law. Moreover, the "impact" of R.C. 2745.01 is wholly consistent with Sections 34 and 35, Article II because it restores the balance of rights and obligations struck with the 1923 repeal of employer "open liability."

By simply parroting language from *Brady*,[4] Kaminski and her amici repeat the very errors that require the reversal of *Johnson*. *Brady's* holdings are based on a statute that regulated workplace intentional torts within the Industrial Commission — an administrative body created pursuant to the specific authority granted in Section 35, Article II. It is for that reason that the *Brady* court was required to determine whether the General Assembly exceeded the authority extended in Section 35 and whether the constitutional grant of absolute authority over workplace hours, wages and benefits in Section 34, Article II authorized the potential violation of Section 35. The statute at issue in *Johnson*, however, like the statute at issue in this case, modified a common law cause of action within the confines of the civil tort system. *Brady* does not govern the analysis

[4] *Brady v. Safety Kleen Corp.* (1991), 61 Ohio St.3d 624.

of the General Assembly's police power to modify the common law; this Court should reject Kaminski's invitation to legitimize the fundamentally unsound reasoning of *Johnson*.

A. ***Johnson*'s "Collision Course" with the Separation of Powers Doctrine Merits Reversal.**

This Court should confirm the constitutionality of R.C. 2745.01 whether or not it overrules *Johnson* — it need not give effect to the overbroad dicta of that case when considering a statute substantially different from the statute construed in *Johnson*. See *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468, at ¶52. But errors and omissions in *Johnson*'s analysis counsel in favor of Supreme Court clarification and correction.

Only the dissent in the deeply divided *Johnson* decision discusses the scope of the General Assembly's plenary police power that was the source of authority for the statute analyzed therein. See 85 Ohio St.3d at 319-20 (Lundberg Stratton, J., dissenting, emphasis in original):

> The General Assembly had authority to enact R.C. 2745.01 under its general grant of legislative power [in Section 1, Article II] and did not need to rely on the specific grant of authority in Section 35, Article II of the Ohio Constitution. And, in fact, the General Assembly specifically stated that R.C. 2745.01 was to control actions *not* governed by Section 35, Article II of the Ohio Constitution.
>
> * * *
>
> * * * R.C. 2745.01 is a valid exercise of the General Assembly's police power because R.C. 2745.01 is a codification and modification of employer intentional tort law.

In lieu of a reasoned discussion of the plenary police power, the majority opinion in *Johnson* assumes (incorrectly) that the General Assembly "failed to grasp the import of our holdings in *Brady*" (id. at 304). It is the majority opinion that failed to appreciate the revisions undertaken by the General Assembly to correct the flaws found in the statute construed in *Brady*, or to analyze the distinction between a statute regulating workplace intentional torts through the Industrial Commission and a statute that modifies tort law.

Perhaps most troubling is *Johnson*'s message that "any statute" narrowing the scope of the common law open liability created in *Blankenship* et seq. "cannot withstand constitutional scrutiny." Id. at 304. Such broad declarations of legislative impotency do not merit stare decisis deference. Court decisions that place a state's highest court "on a collision course with separation of powers principles" is precisely the type of precedent that is not worthy of stare decisis treatment. *People v. Sharpe* (Ill. 2005), 839 N.E.2d 492, 520-21. See, also, *Jackson v. City of Florence* (Ala. 1975), 320 So.2d 68, 72 ("no one believes in the validity of the rule of stare decisis and the necessity for stability in the law more than we do. We are equally, if not more so, adamant in our belief in the profound wisdom in the doctrine of separation of powers"); *Hancock v. Commr. of Educ.* (Mass. 2005), 822 N.E.3d 1134, 1163 (Cowin, J., concurring):

> [W]hen we are called on to revisit a decision * * * that is plainly wrong in an area of such constitutional significance as our separation of powers doctrine, we must not let our desire for consistency overpower our commitment to the intellectual honesty of our jurisprudence. Stare decisis, while an unquestionably important pillar of our judicial system, does not require slavish adherence to unconstitutional precedent.

B. The General Assembly's Plenary Police Power Under Section 1, Article II of the Ohio Constitution Provides Ample Authority for R.C. 2745.01.

The parties are in agreement that the source of the General Assembly's authority to enact R.C. 2745.01 is its plenary police power under Section 1, Article II of the Ohio Constitution. (See Opp. Br. at 19.) It is equally undisputed that the police power includes the power to codify, modify, or abolish common-law causes of action. *Thompson v. Ford* (1955), 164 Ohio St. 74, 79; see, also, *Strock v. Presnell* (1988), 38 Ohio St.3d 207, 212-14. As a result, the police power permits the General Assembly to modify Ohio's workplace intentional tort claim, provided it does not violate "specific and clear" limitations on legislative power contained in other constitutional provisions. *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.3d 159, 162; *Bd. of Commrs. of Champaign Cty. v. Church* (1900), 62 Ohio St. 318, 344.

The only question, then, is whether the General Assembly's codification and modification of the common law workplace intentional tort violates any "specific and clear" limitations on legislative power. No such prohibition appears in either Section 34 or 35 of Article II.

1. Section 34, Article II does not prohibit R.C. 2745.01.

Contrary to Kaminski's assertion at pages 19-20 of her Opposing Brief, Section 34, Article II is not a "specific and clear" limitation on legislative authority to define workplace intentional torts. As this Court held in *American Assn. of Univ. Professors v. Central State Univ.* (1999), 87 Ohio St.3d 55, 61, Section 34 is properly characterized "as a broad *grant* of authority to the General Assembly, not as a limitation on its power to

enact legislation." *American Assn.* specifically rejected the argument that Section 34 prohibits legislation burdening employees, explaining that "the public's interest in the regulation of the employment sector often requires legislation that burdens rather than benefits employees." Id. at 61-62. Here, the public interest is furthered by the adoption of a statutory workplace intentional tort standard that is consistent with the prevailing rule of law across the United States. See 6 Larson, Workers' Compensation Law (2008) 103-8, Section 103.03.

Kaminski's argument further misreads this Court's earlier decision in *City of Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1. *City of Rocky River* actually held that when the General Assembly passes legislation pursuant to Section 34, this Court cannot declare that legislation unconstitutional based on alleged violations of other constitutional amendments. Id. at 15-18. *City of Rocky River* is consistent with this Court's observation in *American Assn.* that Section 34, Article II is a broad grant of legislative authority. Section 34 cannot render R.C. 2745.01 unconstitutional.

2. Section 35, Article II does not prohibit R.C. 2745.01.

The logic of *Brady* compels the conclusion that Section 35, Article II is not a "specific and clear" limitation on legislative authority to define workplace intentional torts. Since *Brady* concluded that workplace intentional torts arise outside the scope of Section 35, Article II, it necessarily follows that Section 35 cannot limit the General Assembly's authority to define such liability. As Justice Cook observed 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." See *Johnson*,

85 Ohio St.3d at 311-12 (Cook, J., dissenting). Far from imposing a "specific and clear" limitation on the General Assembly's authority to legislate workplace intentional torts, *Brady* dictates that Section 35, Article II imposes no limitation at all.

Moreover, R.C. 2745.01 furthers the language, purpose, and history of Section 35. The first sentence of Section 35 authorizes the General Assembly to pass laws "establishing a state fund to be created by compulsory contribution thereto by employers" for 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 * * *." (See Appx. to Opening Br. at 37.) Because it "does not disrupt any of the rights or obligations of the claimant and the employer with regard to the payment of statutory workers' compensation benefits," the intentional tort statute does not violate the first sentence of Section 35. *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, 121-22.

The natural congruence between the General Assembly's modification of the common law workplace intentional tort and the history of the 1923 amendments to the second sentence of Section 35 further supports the constitutionality of R.C. 2745.01. As explained more fully in Metal & Wire's Opening Brief, the 1923 amendment deleted the provision that preserved an employer's "open liability," and instead specified that a workers' compensation award "*shall be in lieu of all other rights to compensation, or damages* * * * and any employer who pays the premium or compensation provided by law * * * *shall not be liable to respond in damages at common law or by statute for such*

death, injuries, or occupational disease." (See Appx. to Opening Br. at 79-80, emphasis added.) The original public meaning of this amendment was to abolish the "open liability." Ohio citizens were told the amendment would "abolish[] open liability of employers," id. at 632 (Appx. 80), and soon afterwards this Court confirmed the amendment abolished tort claims arising out of compensable injuries. *State ex rel. Engle v. Indus. Comm.* (1944), 142 Ohio St. 425, 430-31.

In *Blankenship*, this Court did not analyze the 1923 amendments, because it concluded that the constitutional employer immunity did not apply to intentional torts: "Clearly, neither the relevant constitutional language nor the pertinent statutory language expressly extend the grant of immunity to actions alleging intentional tortious conduct by employers against their employees." 69 Ohio St.2d at 612. The *Van Fossen*[5] majority did discuss the history of the 1923 amendments, but not in the context of a statute modifying the common law tort resurrected in *Blankenship*. To the contrary, *Van Fossen* concluded that *notwithstanding* the abrogation of open liability in the 1923 amendments, and the seemingly "clear" exclusive liability provisions of amended Section 35, *Blankenship* recognized a common law workplace intentional tort. 36 Ohio St.3d at 111. The majority acknowledged other jurisdictions' recognition of "deliberate" intent torts (id. at 112) and proceeded to interpret the "nebulous" common law tort (id. at 114). Whether or not "in lieu of all other rights to compensation, or damages at common law or by statute" leaves room for the *Blankenship* exception, there is certainly nothing in that

[5] *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100.

constitutional provision that prohibits legislative limitation of the common law tort this Court recognized.

Finally, *Brady* simply analyzed the phrase "occasioned in the course of such workmen's employment" in Section 35 to conclude that a common law intentional tort action, because it is "totally unrelated to the fact of employment," could not be adjudicated within the compensation system established in Section 35. 61 Ohio St.3d at 633-34. Here, the General Assembly has made no attempt to do so. Rather, it has codified and limited the common law intentional tort under its broad police power.

3. R.C. 2745.01 does not violate substantive due process.

At pages 20-23 of her Opposing Brief, Kaminski repeats her argument before the Seventh District Court of Appeals that R.C. 2745.01 violates her substantive due process rights.[6] The Seventh District declined to address this argument. (Appx. 14, at ¶¶37-38.) Should this Court elect to do so, it should conclude that R.C. 2745.01 does not violate Kaminski's substantive due process rights because it is reasonably related to legitimate legislative goals that are consistent with the purposes of workers' compensation law — including maintaining the balance of sacrifices between employer and employee, and minimizing litigation.

[6] See *Arbino*, 116 Ohio St.3d 468, at ¶48 (the "due course of law" provision in Section 16, Article I is equivalent to the due process clauses of the United States Constitution).

(a) The rational basis test applies to Kaminski's due process challenge.

Contrary to Kaminski's assertions at pages 20-22 of her Opposing Brief, she does not possess a fundamental "right to seek a civil remedy for injury caused by an intentional tort." Kaminski's argument is based primarily on *Blankenship* and its progeny. This Court's modern workplace intentional tort jurisprudence standing alone, however, cannot create fundamental rights. Indeed, this Court recently reaffirmed the "long-standing principle that no person has a vested right to the law remaining unchanged." *Pack v. Osborn* (2008), 117 Ohio St.3d 14, at ¶12.

Equally flawed is Kaminski's argument that R.C. 2745.01 implicates the right to trial by jury protected in Section 5, Article I of the Ohio Constitution. (Opp. Br. at 20.) While a plaintiff may have the right to a trial by jury of all issues of fact in her case (see *Arbino*, 116 Ohio St.3d 468, at ¶34), the right to trial by jury is not "a limit on the ability of the legislature to act within its constitutional boundaries." Id. at ¶126 (Cupp., J., concurring). Thus, "[i]t is long-settled constitutional law that it is within the power of the legislature to alter, revise, modify, or abolish the common law as it may determine necessary or advisable for the common good." Id. at ¶131. In short, "the right to trial by jury does not prevent the legislature from altering or abolishing a cause of action." Id. at ¶132.

Because R.C. 2745.01 does not implicate fundamental rights, the rational-basis test applies. *Arbino* at ¶49. A statute will be upheld under the rational-basis test if it: 1) bears a real and substantial relationship to the public health, safety, morals or general

welfare; and 2) is not unreasonable or arbitrary. Id. R.C. 2745.01 easily clears both hurdles.

(b) R.C. 2745.01 satisfies the rational basis test.

Because the constitutionality of R.C. 2745.01 is evaluated under the rational basis test, the absence of specific legislative findings in H.B. 498 (see Opp. Br. at 21-22) is irrelevant to this Court's constitutional analysis. A legislative goal, and the means employed to achieve it, need not be supported by empirical evidence; if rational speculation supports the General Assembly's codification of the workplace intentional tort in R.C. 2745.01, it will be upheld under the rational basis test. *United States v. Carolene Products Co.* (1938), 304 U.S. 144, 152 ("the existence of facts supporting the legislative judgment is to be presumed"). Cf. *State v. Thompson* (2002), 95 Ohio St.3d 264, at ¶26 (explaining in the context of an equal protection challenge that a legislative classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification") (internal quotation omitted).[7]

[7] *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, did not impose an empirical evidence requirement on legislation subject to rational basis review. *Sorrell* simply noted in dicta that the question of whether the statute at issue in that case bore a rational relationship to its goal was "debatable" in the absence of "credible empirical evidence." *Id.* at 423. It established no constitutional requirements relating to legislative fact-finding. Here, far from being "debatable," the rational relationship between the goals of maintaining the balances of sacrifices between employer and employee — and minimizing litigation — and R.C. 2745.01 is supported by treatises and the majority rule of law followed across the country.

Confining an employer's workplace intentional tort liability to deliberate intent torts bears a real and substantial relationship to the general welfare because it furthers legitimate legislative goals that complement the objectives of workers' compensation law. A leading treatise explains that the exclusivity of the workers' compensation remedy furthers two main purposes: 1) maintaining the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability; and 2) minimizing litigation, even litigation of undoubted merit. 6 Larson, Workers' Compensation Law (2008) 103-10, Section 103.03. By limiting the "open liability" to deliberate intent torts, R.C. 2745.01 furthers both purposes. It restores the balance of sacrifices between employer and employee by adopting the "almost unanimous rule" followed by other jurisdictions that "open liability" does not extend to any "misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting injury." Id. at 103-8, §103.03. And R.C. 2745.01 minimizes litigation by eliminating Ohio's broad, "substantial certainty" *Fyffe* intentional tort standard. See *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115.

Kaminski argues that R.C. 2745.01 jeopardizes the general welfare because it "effectively removes the right of injured employees to seek redress for the intentional torts of their employers." (Opp. Br. at 23.) Even assuming it would jeopardize the general welfare to implement the 1923 repeal of an employer's "open liability" (and it

would not),[8] R.C. 2745.01 does not abolish the workplace intentional tort claim. In addition to preserving liability for deliberate intent workplace torts (R.C. 2745.01(B)), R.C. 2745.01(C) creates a presumption of intent when an employer deliberately removes an equipment safety guard or misrepresents the toxicity or hazardous nature of a substance. (See Appx. 81.) It also preserves statutory workplace discrimination and harassment claims, as well as common law tort claims for intentional infliction of emotional distress that is not compensable under the workers' compensation statutes, and defamation (id., R.C. 2745.01(D)).

These provisions strike a balance between employer and employee, preserving a tort remedy for injuries that truly cannot be characterized as workplace accidents, while eliminating the expansive *Fyffe* standard that superimposed "the complexities and uncertainties of tort litigation on the compensation process." 6 Larson, Workers' Compensation Law (2008) 103-10, Section 103.03. They also demonstrate that the codified tort is not, as Kaminski alleges, "illusory." See Opp. Br. at 18, 21.

Indeed, Kaminski's own amici dispute her "illusory" claim. See, e.g., OAJ Amicus Br. at 8, predicting that employers will be inundated with employee suits for a "deliberate" workplace tort that would not be insured under a "stop gap" policy. The insurability of workplace intentional torts is not at issue in this appeal, involves distinct

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[8] The Larson treatise notes several other jurisdictions (including Maine, Indiana and Virginia) that reject an exception to exclusivity even for intentional torts where (as is true of Section 35, Article II of the Ohio Constitution) the authorizing law does not include language focusing on the accidental character of the alleged injury. 6 Larson, Workers' Compensation Law (2008) 103-4, Section 103.01.

contract principles not at issue in this appeal, and should not be considered by this Court as part of this case. See, e.g., *Penn Traffic Co. v. AIU Ins. Co.* (2003), 99 Ohio St.3d 227, at ¶40 (analyses of workplace intentional tort claims do not control analyses of insurance contracts). But it is notable that the OAJ's prediction that employers will "routinely" be exposed to liability under R.C. 2745.01 severely undermines Kaminski's assertion that the statutory liability created by R.C. 2745.01 is somehow illusory.

In short, the General Assembly's decision to restore the balance of sacrifices between employer and employee by adopting the nearly unanimous rule that "open liability" only extends to deliberate intent workplace torts is both reasonable and rational. It makes eminent sense to limit tort recovery to only those workplace mishaps that cannot be considered accidents, and the decision to adopt the prevailing workplace intentional tort standard used across the United States cannot be considered arbitrary.

C. In the Alternative, the Court of Appeals Erred in Addressing the Merits of Plaintiff's "*Fyffe*" Claim.

Even if this Court were to conclude that R.C. 2745.01 is unconstitutional on its face, the judgment of the court of appeals should still be reversed because it improperly preempted the Trial Court's resolution of issues relating to Kaminski's "*Fyffe*" substantial-certainty tort claim. Kaminski's suggestion that a party who raises a legal issue as a "shield" for affirming the judgment below provides an appellate court with authority to convert that shield into a "sword" to preempt further litigation of the issue is not supported by any precedent.

Far from supporting her position, the sole case on which Kaminski relies confirms that a court of appeals is *without jurisdiction* to adjudicate issues that have not been resolved below. See *Hungler v. City of Cincinnati* (1986), 25 Ohio St.3d 338. *Hungler* held that the court of appeals in that case "exceeded the permissible exercise of its review" when it "raised an issue * * * which was outside the record before it and therefore could not be determined as error." Id. at 342. *Hungler* explained that "a reviewing court can only reverse the judgment of a trial court *if it finds error in the proceedings of such court*[.]" Id., quoting *State v. Ishmail* (1978), 54 Ohio St.2d 402, 405-06.

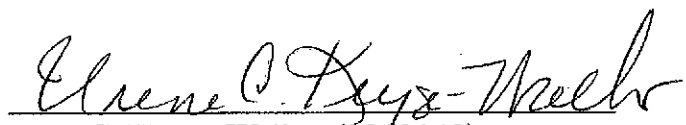
Here, the Trial Court could not have committed an error in its handling of Kaminski's "*Fyffe*" substantial-certainty tort claim because it never addressed the merits of that claim. It is this absence of error that distinguishes the use of alternative arguments as a "shield" for affirming the trial court's judgment (which are advanced on the theory that the trial court did not really err if its judgment can be supported by other grounds) from using those arguments as a "sword" to preempt further litigation of issues the trial court never decided. Because the Trial Court did not (and could not have) commit an error in its handling of Kaminski's "*Fyffe*" substantial-certainty tort claim, at a minimum the judgment of the court of appeals should be reversed to the extent it addresses that claim.

III. CONCLUSION

R.C. 2745.01 brings Ohio's workplace intentional tort into the mainstream and is fully authorized by the General Assembly's police power. To the extent *Johnson* holds

otherwise, it should be overruled. For all the above reasons, Metal & Wire Products Company respectfully requests that this Court reverse the judgment of the court of appeals and reinstate the Trial Court's order declaring R.C. 2745.01 constitutional and granting summary judgment in favor of Appellant Metal & Wire Products Company.

Respectfully submitted,



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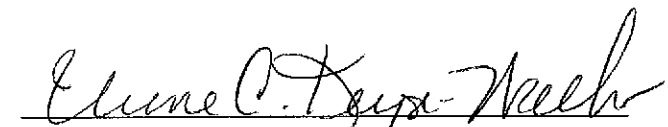

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