No. 2011-1076

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 95399

BRUCE R. HOUDEK,
Plaintiff-Appellee,

v.

THYSSENKRUPP MATERIALS N.A., INC., et al.,
Defendant-Appellant.

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I. INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization of over 500 attorneys, corporate executives, and managers who devote a substantial portion of time to the defense of civil lawsuits. OACTA has long been a voice in the ongoing effort to ensure that the civil justice system is fair and efficient.

One key feature of Ohio's workers' compensation system is the constitutionally based exclusivity-of-remedy principle that underlies it. R.C. 2745.01 is the General Assembly's latest effort to protect that exclusivity by limiting *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St.2d 608 (1982), and its progeny. In dismissing R.C. 2745.01(B) as a "scrivener's error," and adopting an amorphous "substantial certainty" standard focusing on the "objective beliefs" of a "reasonably prudent" employer, the decision below undermines two central purposes of workers' compensation exclusivity — to maintain the balance of sacrifices between employer and employee, and to minimize litigation.[1] It is unfair and inefficient to require employers to pay workers' compensation premiums and (where applicable) separate penalties for violations of specific safety requirements ("VSSR") while simultaneously defending against civil lawsuits based on conduct falling far short of a specific intent to injure. The decision below conflicts with R.C. 2745.01, this Court's decision in *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, and the policies supporting exclusivity and should be reversed.

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[1] 6 Larson, *Larson's Workers' Compensation Law*, Section 103.03, at 103-8 (2011).

II. OHIO'S WORKPLACE INTENTIONAL TORT AND THE LEGISLATIVE RESPONSE

As this Court recognized in *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, any analysis of R.C. 2745.01 must reflect the dynamic between this Court's workplace intentional tort jurisprudence and the General Assembly's responses to that jurisprudence. 125 Ohio St.3d 280, 2010-Ohio-1029, at ¶27. Because *Kaminski* analyzes this history in detail, OACTA will only highlight a few key points.

First, the Ohio Constitution places the compensation of injured workers and the punishment of employers for unsafe workplace practices within the exclusive jurisdiction of the Industrial Commission. The workers' compensation system "'operates as a balance of mutual compromises' between the interests of the employer and the employee whereby employees *relinquish their common law remedy* and accept lower benefits coupled with the greater assurance of recovery and *employers give up their common law defenses and are protected from unlimited liability*." *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, at ¶34 (emphasis added), quoting *Bickers v. W&S Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, at ¶19. Thus, in exchange for seemingly abolishing civil liability, Section 35, Article II established VSSR proceedings to punish employers who engage in unsafe practices.[2]

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[2] *See* Joint Resolution No. 40, 1923 Ohio Laws 681; *State ex rel. Rudd v. Indus. Comm.*, 116 Ohio St. 67, 69 (1927) (explaining that the amendments to Section 35 gave "the Industrial Commission full power to determine whether the death of an employee resulted from the failure of the employer to comply with a specific requirement enacted by the General Assembly or promulgated in the form of an order adopted by the commission or board").

Therefore, *Blankenship* did not (and could not) rest on the division of powers specified in the Ohio Constitution. Rather, *Blankenship* rested on the theory that "[a]n intentional tort * * * is clearly not an 'injury' arising out of the course of employment," 69 Ohio St.2d at 613 fn. 8, which is "[t]he most fictitious theory of all" for creating intentional tort liability. *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, at ¶15, fn. 4, quoting 6 Larson, *Larson's Workers' Compensation Law*, Section 103.01, at 103-4 (2007). As at least one commentator has recognized, "if it is a work-connected assault, it is no less so because the assailant happens to be the employer." *Id.*

Second, this Court's *Blankenship* jurisprudence adopted a two-pronged definition of intent that did not require proof of a specific intent to harm the employee. This Court held in *Jones v. VIP Dev. Co.* that "[a]n intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur." 15 Ohio St.3d 90, 95 (1984). As *Harasyn v. Normandy Metals, Inc.* explains:

> This definition encompasses two different levels of intent. The first level, which we will refer to as "direct intent," is where the actor does something which brings about the exact result desired. In the second, the actor does something which he believes is substantially certain to cause a particular result, even if the actor does not desire that result.

49 Ohio St.3d 173, 175 (1990). "[M]ost employer intentional torts * * * [fell] into the latter category" and did not involve an actual desire to harm the employee. *Id.*

Third, this Court developed its *Blankenship* jurisprudence primarily in response to two distinct fact patterns. The first arose out of deliberate misrepresentations concerning the toxicity of chemicals in the workplace. *See Blankenship, supra* (misrepresentations relating to toxicity of certain chemicals in a chemical manufacturing plant); *Jones*, 15 Ohio St.3d at 91-92, 97-98 (employer allegedly aware that employees had been exposed to toxic chemicals, but misrepresented that the exposure was not dangerous). The second arose out of the deliberate removal of a safety guard from machinery operated by employees. *Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115 (1991) (Plexiglas safety guard removed from conveyor machine).

The General Assembly passed H.B. No. 498, which enacted current R.C. 2745.01, against this backdrop. Echoing the policies supporting workers' compensation exclusivity, sponsor testimony explained that "the workers' compensation system was designed to eliminate lawsuits against employers and allow for the payment of benefits to injured employees regardless of fault." *See* Ohio Capitol Connection, Minutes of House Labor and Commerce Committee, p. 1 (Aug. 25, 2004). A primary motivating factor behind R.C. 2745.01 was the "substantial certainty" prong of *Blankenship* liability, which dropped "the standard for proving an intentional tort * * * to a negligence-based standard that is far below any reasonable definition of an intentional tort." *Id.* Accordingly, the purpose of R.C. 2745.01 was to "clarify the definition of an intentional tort." *Id.*

R.C. 2745.01 accomplished this clarification through yet another compromise between the rights of employers and employees. On the one hand, R.C. 2745.01 limits employer intentional tort liability to acts taken by an employer with a specific intent to harm. It accomplishes this task in two steps: 1) subsection (A) restates the common law intent test, including the "direct intent" prong requiring proof that the actor desired the result of his actions (*Harasyn*, 49 Ohio St.3d at 175); and 2) subsection (B) limits the "substantial certainty" prong to those acts involving a "deliberate intent to cause an employee to suffer an injury[.]" R.C. 2745.01(A)-(B). On the other hand, R.C. 2745.01 creates a rebuttable presumption of intent to injure another where the employer engages in the type of conduct alleged in *Blankenship* and *Fyffe*. Specifically, R.C. 2745.01(C) provides that the "[d]eliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result."

III. ARGUMENT

Proposition of Law No. 1

R.C. 2745.01 permits recovery for employer intentional torts only when an employer acts with a specific intent to injure the employee, subject to subsections (C) and (D). *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, at ¶¶52-57 (followed).

This case does not involve the rebuttable presumption of intent created by R.C. 2745.01(C). Thus, the sole question presented is whether an employee must show that

the employer specifically intended to harm him to establish liability under R.C. 2745.01 (A) and (B). Less than two years ago, this Court answered that question "yes," explaining that the General Assembly's intent, "as expressed particularly in 2745.01(B), [is] to permit recovery for employer intentional torts *only when an employer acts with specific intent to cause an injury*[.]" *Kaminski*, 2010-Ohio-1027, at ¶56 (emphasis added); *Stetter*, 2010-Ohio-1029, at ¶26 (same).

The decision below fails to heed *Kaminski*, expanding employer liability for "substantial certainty" torts to include claims that a reasonably prudent employer "objectively believed the injury to [the employee] was substantially certain to occur." 2011-Ohio-1694, at ¶¶45-46. In failing to follow *Kaminski*, the panel abdicated its responsibility to apply this Court's precedents, and apply R.C. 2745.01(B) as written. Moreover, adopting a "substantial certainty" standard that turns on the "objective beliefs" of a reasonably prudent employer removes Ohio law from the mainstream.

A. R.C. 2745.01(A) and (B) Require Proof of a Specific Intent to Harm the Employee.

The plain language of R.C. 2745.01(B) bars the panel's new "substantial certainty" standard. The panel acknowledged that R.C. 2745.01(B) defines "substantially certain" to mean "deliberate intent." 2011-Ohio-1694, at ¶42. As this Court noted in *Kaminski*, R.C. 2745.01(B) thus requires proof of a specific intent by the employer to injure the employee. 2010-Ohio-1027, at ¶56. Since "[a]ll * * * intermediate courts of appeal are charged with accepting and enforcing the law as promulgated by the Supreme

Court and are bound by and must follow the Supreme Court's decisions,"[3] the panel should have followed *Kaminski*.

There is no basis for reconsidering *Kaminski* under the standards of *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. None of the reasons offered by the panel for ignoring R.C. 2745.01(B) establishes that *Kaminski* was wrongly decided, much less that the decision defies practical workability.

First, the panel described R.C. 2745.01(B) as a "scrivener's error" based on its conclusion that "substantially certain" and "deliberate intent" cannot be harmonized. 2011-Ohio-1694, at ¶42. Yet there is no need to reconcile those terms, because R.C. 2745.01(B) *defines* "substantially certain" *as* "deliberate intent."

More importantly, the panel's cursory dismissal of R.C. 2745.01(B) overlooks the statute's historical context, which shows a good reason for defining "substantially certain" as "deliberate intent." Because "direct intent" *Blankenship* liability already required proof of a specific intent to harm, *Harasyn*, 49 Ohio St.3d at 175, the only obstacle to a uniform specific intent standard was the broader "substantial certainty" prong. *Id.* In that context, it made eminent sense for the General Assembly to confine liability to specific intent torts by redefining "substantially certain" as "deliberate intent."

Second, the panel assumes that enforcing a specific intent standard will "abolish" intentional tort liability. 2011-Ohio-1694, at ¶38. It will not. Since R.C. 2745.01(C)

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[3] *Jackson v. Glidden Co.*, 8th Dist. No. 87779, 2007-Ohio-277, at ¶14 (internal quotation omitted).

creates a rebuttable presumption of intent that applies to factual allegations mirroring *Blankenship* or *Fyffe*, enforcing a specific intent standard in *other* intentional tort cases will not "abolish" intentional tort liability.

In any event, the underlying sentiment — that abolishing such liability impairs an employee's "right" to damages for dangerous workplace conditions (2011-Ohio-1694, at ¶¶3-4, 11) — gets matters precisely backwards. The very existence of an employment intentional tort is inconsistent with the *employer's* constitutional immunity from suit under Section 35, Article II. *See Kaminski,* 2010-Ohio-1027, ¶19 (Section 35, Article II "continues in force today and provides that * * * employers who comply with workers' compensation laws '*shall not be liable to respond in damages at common law or by statute*'") (emphasis added). This longstanding constitutional immunity is a powerful reason to abolish the *Blankenship* intentional tort in its entirety. By adopting a specific intent standard that significantly narrows that tort, the General Assembly reasonably limited an unconstitutional liability it did not create.

Third, the panel's "cautionary note" that a specific intent standard will "spread the risk of such employer conduct to all of Ohio's employers" does not justify its dismissal of R.C. 2745.01(B) as a "scrivener's error." Policy considerations cannot trump plain language. *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, at ¶27 (where "the meaning of the statute is evident from the plain language," "it is unnecessary to resort to * * * public policy"). Even if public policy considerations were relevant, however, the panel's concerns are misplaced — "risk spreading" is what

the Ohio Constitution commands. Under Section 35, Article II, all employers pay workers' compensation premiums, and those who violate specific safety requirements pay an additional VSSR award. The Ohio Constitution thus anticipates that *compensation* for workplace injuries will always be a shared — or "spread" — risk, while *punishment* in the form of VSSR awards will always be paid solely by employers who commit violations, not the state fund.

In the end, *if* intentional tort liability is constitutional, the scope of that liability is a policy choice. Workers' compensation exclusivity is "a compensation law question, not a tort law question." 6 Larson, *Larson's Workers' Compensation Law*, Section 103.03, at 103-8 (2011). Moreover, this Court has acknowledged the "fundamental principle" that "the legislative branch is 'the ultimate arbiter of public policy.'" *Stetter*, 2010-Ohio-1029, at ¶34; *Kaminski*, 2010-Ohio-1027, at ¶59. By enacting R.C. 2745.01(B), the General Assembly made a policy decision to enhance exclusivity by limiting liability to specific intent torts. As explained below, this decision is supported by sound reasoning and consistent with the approach adopted by most other jurisdictions.

B. Most Jurisdictions Apply A Specific Intent Standard.

Any exception to workers' compensation exclusivity runs headlong into the "two central purposes to exclusiveness: first, to maintain the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability and, second, to minimize litigation, even litigation of undoubted merit." 6 Larson, *Larson's Workers' Compensation Law*, Section 103.03, at 103-8 (2011). Most jurisdictions

reconcile the tension between these purposes and an "intentional tort" exception to workers' compensation exclusivity by limiting that exception to acts taken with a specific intent to harm the employee. Thus, as this Court recently observed, "R.C. 2745.01 appears to harmonize the law of this state with the law that governs a clear majority of jurisdictions." *Stetter*, 2010-Ohio-1029, at ¶73, quoting *Kaminski*, 2010-Ohio-1027, at ¶99. *See also*:

- Ky.Rev.St. 342.610(4) (exception to workers' compensation exclusivity where "injury or death results to an employee through the deliberate intention of his or her employer to produce such injury or death");
- Md.Code 9-509(d) (exception to workers' compensation exclusivity where "a covered employee is injured or killed as the result of the deliberate intent of the employer to injure or kill the covered employee");
- Mich.Comp.Laws 418.131(1) ("The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury.");
- Idaho Code 72-209(3) (exception to workers' compensation exclusivity for "the willful or unprovoked physical aggression of the employer, its officers, agents, servants or employees, the loss of such exemption applying only to the aggressor and shall not be imputable to the employer unless provoked or authorized by the employer, or the employer was a party thereto");
- N.D.Cent.Code 65-01-01.1 ("The sole exception to an employer's immunity from civil liability under this title * * * is an action for an injury to an employee caused by an employer's intentional act done with the conscious purpose of inflicting the injury.");

- Wash.Rev.Code 51.24.020 (exception to workers' compensation exclusivity where "injury results to a worker from the deliberate intention of his or her employer to produce such injury");

- *Van Biene v. ERA Helicopters, Inc.*, 779 P.2d 315, 318-19 (Alaska 1989) (exception to workers' compensation exclusivity applies only to "the kind of actual intention to injure that robs the injury of accidental character") (internal quotation omitted);

- *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195, 196 (9th Cir.1989) (Oregon exception to workers' compensation exclusivity applies where employee shows that the employer "had a deliberate intention to injure [the employee] or someone else and that [the employee was] in fact injured as a result of that deliberate intention");

- *Grillo v. Natl. Bank of Washington*, 540 A.2d 743, 751-54 (D.C.App.1988) (adhering to "majority rule" that "the intentional tort exception does not apply unless the employer had formed the 'specific intent' to injure the employee");

- *Griffin v. George's, Inc.*, 589 S.W.2d 24, 27 (Ark.1979) (exception to workers' compensation exclusivity applies only to "acts committed with an actual, specific and deliberate intent on the part of the employer to injure the employee");

- *Cooper v. Queen*, 586 S.W.2d 830, 833 (Tenn.App.1979) (gross or criminal negligence is insufficient to establish requisite intent; employer cannot rely on workers' compensation exclusivity only when it "has deliberately produced" the harm).

This specific intent standard and its underlying rationale — that the injury is not accidental/does not arise out of employment — do not apply to "accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed for the purpose of inflicting an injury." 6 Larson, *Larson's Workers' Compensation Law*, Section 103.03, at 103-6 to 103-7 (2011). In short, "what is being tested * * * is not the degree of gravity or depravity of the

employer's conduct, but rather the narrow issue of the intentional versus accidental quality of the precise event producing the injury." *Id.* at 103-8.

Therefore, even allegations that an employer knowingly ordered employees to perform an extremely hazardous job do not justify a civil action against an employer:

> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering employees to perform an extremely dangerous job, willfully failing to furnish a safe place to work, willfully violating a safety statute, failing to protect employees from crime, refusing to respond to an employee's medical needs and restrictions, or withholding information about work site hazards, the conduct still falls short of the kind of actual intention to injure that robs the injury of the accidental character.

6 Larson, *Larson's Workers' Compensation Law*, Section 103.03, at 103-7 to 103-8 (2011).

C. Houdek Cannot Show That ThyssenKrupp Specifically Intended to Harm Him.

Application of the specific intent standard in this case requires entry of judgment in Defendant-Appellant Thyssenkrupp Materials NA, Inc.'s favor as a matter of law. There is no evidence that ThyssenKrupp acted with a specific intent to harm Plaintiff-Appellee Bruce Houdek ("Houdek").

The panel's decision reversing the summary judgment in favor of ThyssenKrupp focused on alleged "directives" communicated by Houdek's supervisors. These alleged "directives" included ordering Houdek to tag inventory in Aisle A of the warehouse, ordering an operator of a forklift to travel at "maximum speed" when retrieving materials

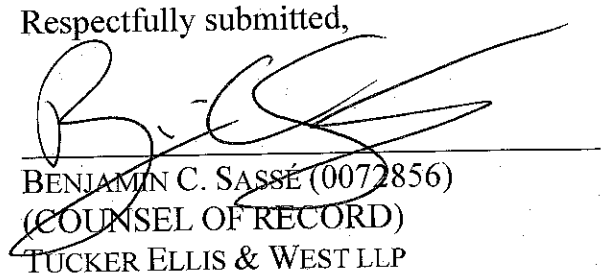
from warehouse aisles, and ordering the forklift operator to retrieve materials from Aisle A. 2011-Ohio-1694, at ¶¶18-20. But supervisory "directives" that require an employee to work in an extremely dangerous situation fall short of demonstrating a specific intent to harm that employee. *E.g., Griffin v. Futorian Corp.*, 533 So.2d 461, 463 (Miss.1988) (employer's order that employee continue working in extremely dangerous conditions that had already resulted in the loss of most of his right hand did not establish an actual intent to injure the employee); *Stalnaker v. Boeing Co.*, 231 Cal.Rptr. 323 (Cal.App.1986) (allegations that employer ordered employee to help clear unexploded ordnance from firing range with knowledge that such ordnance lay beneath the range's surface and without any special training or protective equipment insufficient to establish specific intent to injure). Therefore, when examined under the proper specific intent standard, Houdek's allegations fail to raise a genuine issue of material fact and Thyssenkrupp is entitled to judgment as a matter of law.

IV. CONCLUSION

Under Ohio's workers' compensation scheme, Houdek is entitled to his swift and certain remedy in the form of workers' compensation benefits. If the employer's actions were egregious, Houdek also could have pursued a VSSR award to punish his employer. But Thyssenkrupp is entitled to immunity from civil suit for this accidental workplace injury under the plain language of R.C. 2745.01 and the Ohio Constitution. For all of the above reasons, OACTA respectfully requests that this Court hold that R.C. 2745.01(A)

and (B) only permit recovery for specific intent workplace intentional torts and reverse the judgment of the court of appeals.

Respectfully submitted,



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I hereby certify that a copy of the foregoing **Merit Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Appellant** has been served this 28th day of February, 2012, by U.S. Mail, postage prepaid, upon the following:

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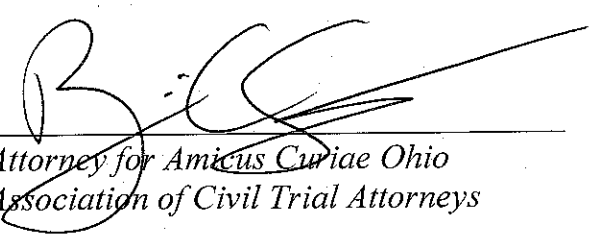

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