No. 2013-0941

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 99454

STATE OF OHIO, ex rel. DONALD YEAPLES, et al.,
Relators-Appellees,

v.

GARY COLE and PRECISION DIRECTIONAL BORING, L.L.C.,
Respondents-Appellants,

and

HONORABLE STEVEN E. GALL,
Respondent.

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I. INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization of 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, efficient, and predictable. To support this effort, OACTA maintains a robust amicus curiae program, participating in those cases addressing legal principles that impact the fair and efficient administration of justice in Ohio. This is such a case.

The decision below undermines the carefully crafted balance of interests embodied in Ohio's workers' compensation system by recognizing a new common law cause of action. Although issued in the context of an extraordinary writ proceeding, the Eighth District's opinion turns on the discrete issue of "whether the relators stated a claim for intentional workplace tort against" a co-worker. *State ex rel. Yeaples v. Gall*, 8th Dist. No. 99454, 2013-Ohio-2207, ¶ 2. Relying on *LaCava v. Walton*, 8th Dist. No. 69190, 1996 Ohio App. LEXIS 2420, 1996 WL 325274 (June 13, 1996), the Eighth District concluded that Appellees can assert a common law *Blankenship/Fyffe*[1] claim against a fellow employee. 2013-Ohio-2207, ¶ 11. But *LaCava* addressed common law claims for assault, battery, and intentional infliction of emotional distress — not a *Fyffe* workplace intentional tort claim. *See* 1996 WL 325274, at *1. Neither this Court's jurisprudence

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[1] *See generally Blankenship v. Cincinnati Milacron Chems.*, 69 Ohio St. 2d 608 (1982); *Fyffe v. Jeno's, Inc.*, 59 Ohio St. 3d 115 (1991).

nor the plain language of R.C. 2745.01 authorize a cause of action for workplace intentional tort against a fellow employee, and this Court should reject the reasoning of the Eighth District purporting to recognize such a claim. Allowing a cause of action for workplace intentional tort against a co-worker would undermine the workers' compensation system by increasing the volume of civil litigation arising out of workplace accidents, undermining workers' compensation exclusivity, and unfairly dragging co-workers into disputes between employers and injured claimants who seek additional compensation beyond their workers' compensation benefits.

II. OHIO'S WORKERS' COMPENSATION SYSTEM AND WORKPLACE INTENTIONAL TORT

The history of workplace intentional torts in Ohio makes clear that this unique cause of action is a direct claim against an employer — not a derivative claim that may be asserted against either an employer or a fellow employee.

At common law, depending on the circumstances, a principal could be subject to direct or derivative liability, or both. *E.g., Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 255-58 (1990). In the context of workplace accidents, derivative liability theories were difficult to establish: "the doctrine of common employment made it extremely difficult for a servant or workman independently of statutory regulation, to recover from a master or employer for a personal injury received in the course of his employment, unless the injury was caused by the negligence of the master himself." *Vayto v. River T. & Ry. Co.*, 18 Ohio N.P. (N.S.) 305, 28 Ohio Dec. 401, 403 (1915). Dissatisfaction with the harsh

results fostered by this doctrine led to the creation of Ohio's workers' compensation system. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 16.

That system supplanted traditional common law remedies against an employer with a carefully crafted compromise that embodied public policy trade-offs. *Kaminski*, 2010-Ohio-1027, ¶ 17. Employees gave up common law claims in exchange for a swift and certain no-fault recovery; employers gave up common law defenses in exchange for limited liability. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 110 (1988). Such trade-offs "benefit[ed] employers, employees, and the public alike." *Id.* A part of these trade-offs was the abolition of an employer's derivative liability — the only common law theories surviving the enactment of Ohio's workers' compensation system were direct liability claims for injuries arising out of an employer's "willful acts," or employer violations of certain "lawful requirements" specified in Ohio's workers' compensation scheme. *Kaminski*, 2010-Ohio-1027, ¶ 18; *Vayto*, 28 Ohio Dec. at 410. But even this limited form of direct liability soon proved incompatible with Ohio's workers' compensation system: 1924 amendments to Section 35, Article II added language to the Ohio Constitution that was "widely believed to grant immunity to complying employers 'from *any* common-law actions for injuries suffered by employees in the workplace.'" *Kaminski*, 2010-Ohio-1027, ¶ 19 (emphasis sic), quoting *Van Fossen*, 36 Ohio St. at 111.

Some sixty years later, *Blankenship* "devised an exception" to the workers' compensation exclusivity created by the 1924 amendments to Section 35, Article II. *Kaminski*, 2010-Ohio-1027, ¶ 21, citing *Blankenship*; *see also Houdek v. Thyssenkrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 14. That exception applied only to claims against *employers*, not fellow employees. *Blankenship*, syllabus ("An employee is not precluded by Section 35, Article II of the Ohio Constitution, or by R.C. 4123.74 and 4123.741 from enforcing his common law remedies *against his employer* for an intentional tort.") (emphasis supplied). Two years later, in *Jones v. VIP Development Co.*, 15 Ohio St.3d 90 (1984), this Court held that the receipt of workers' compensation benefits did not bar a *Blankenship* claim, and that "[a]n employer who has been held liable for an intentional tort is not entitled to a setoff of the award." *Kaminski*, ¶ 26, quoting *Jones*, 15 Ohio St.3d at 90, paragraphs two and three of the syllabus.

When it enacted current R.C. 2745.01, the General Assembly responded to the existing common law jurisprudence by codifying and limiting the *Blankenship* claim. As this Court has recognized, R.C. 2745.01 restricted *Blankenship* and its progeny[2] to acts taken by an employer with a specific intent to injure the employee. *Houdek*, 2012-Ohio-

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[2] This Court defined and refined the elements of a *Blankenship* claim several times. In *Jones*, this Court broadened an employer's direct liability to include acts "committed with the belief that * * * injury is substantially certain to occur." *Jones*, 15 Ohio St.3d at 90, paragraph one of the syllabus. In *Van Fossen*, this Court erected a framework for establishing such a "substantial certainty" claim against an employer. 36 Ohio St.3d at 101, paragraphs five and six of the syllabus. And, in *Fyffe v. Jeno's Inc.*, 59 Ohio St.3d 115 (1991), this Court modified the framework announced in *Van Fossen*. *Id.*, paragraphs one and two of the syllabus.

5685, ¶ 23; *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, ¶ 25. Such a "statutory restriction of intentional-tort liability is supported by the history of employer intentional-tort litigation in Ohio[.]" *Hewitt*, ¶ 25 (internal quotation omitted), quoting *Kaminski*, 2010-Ohio-1027, ¶ 57.

Against this backdrop, this Court is asked to consider Relators-Appellees' contention that they may assert a *Blankenship* claim for workplace intentional tort against a fellow employee.

III. STATEMENT OF FACTS

OACTA adopts the Statement of Facts in Respondents-Appellants' Merit Brief.

IV. ARGUMENT

Proposition of Law No. 1

> **The common law workplace intentional tort claim created in *Blankenship* and limited by R.C. 2745.01 is a direct claim against an employer. No such claim exists against a fellow employee. (*Blankenship v. Cincinnati Milacron Chems.*, 69 Ohio St.2d 608 (1982); R.C. 2745.01, construed.)**

The Eighth District concluded that "it is possible to state an intentional tort claim against a co-employee," citing the "seminal case" of *Blankenship*. *State ex rel. Yeaples*, 2013-Ohio-2207, ¶ 11. But this case does not present the question of whether an employee may assert *any* intentional tort claim against a fellow employee. Rather, it presents the far narrower question of whether an employee may assert a *Blankenship/Fyffe* claim against a fellow employee.

The only claim Relators pled against the co-worker in the underlying civil case is one for "workplace intentional tort" — a claim containing an amalgam of allegations against *all* Defendants, ostensibly supporting the theory that the co-worker knew harm to the plaintiff was "substantially certain" to result from "hazardous and dangerous" workplace conditions. (*See* Pls.' Compl., Cuyahoga County No. CV-12-773151, ¶¶ 13-25, Appellants' Supp. at 17-19.) This Court's jurisprudence has never recognized such a "workplace intentional tort" claim against a fellow employee, and OACTA respectfully submits that this Court should not create such a liability now.

A. A Workplace Intentional Tort Claim is a Direct Claim Against the Employer.

1. This Court has always characterized a workplace intentional tort as a claim against an employer.

When *Blankenship* devised an exception to workers' compensation exclusivity, it did so only with respect to an employee's "common law remedies *against his employer* for an intentional tort." *Blankenship*, 69 Ohio St. 2d at 608, syllabus (emphasis added). That exception was crafted out of a concern that the absence of such a direct liability theory would encourage employer misconduct. *Id.* at 615. This Court reasoned that "[a]ffording an employer immunity for his intentional behavior certainly would not promote [a safe and injury-free work] environment, for *an employer* could commit intentional acts with impunity with the knowledge that, at the very most, his workers' compensation premiums may rise slightly." *Id.* (emphasis added). In other words, whatever the merits of this exception to workers' compensation exclusivity, *Blankenship*

liability is rooted in a concern with deliberate *employer* misconduct and the perceived economic incentives of the *employer* to engage in such misconduct in the absence of a civil remedy.

This Court's subsequent jurisprudence confirms that a *Blankenship* claim is a form of direct employer liability. *See generally Kaminski*, 2010-Ohio-1027, ¶¶ 14-46. Whether defining the scope of *Blankenship* liability or analyzing the constitutionality of a legislative attempt to modify it, this Court has consistently referred to workplace intentional torts as a liability of the *employer*. *See, e.g., Jones*, 15 Ohio St.3d at 94 ("Each of the three causes under consideration" involves allegations of "an intentional wrongful act . . . [by] plaintiffs [who] are suing their *employers* * * *." (emphasis added)); *Van Fossen*, 36 Ohio St.3d at 103 (describing R.C. 4121.80 as "placing various conditions upon all *employer-employee intentional tort actions*" (emphasis added)); *Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115 (1991), paragraphs one and two of the syllabus (explaining what must be demonstrated "to establish 'intent' for the purposes of proving the existence of *an intentional tort committed by an employer against an employee*"; proof beyond negligence or recklessness needed "to establish an *intentional tort of an employer*") (emphasis added)); *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624 (1991), paragraph one of the syllabus ("A cause of action brought by an employee alleging *intentional tort by the employer* in the workplace is not preempted by Section 35, Article II of the Ohio Constitution, or by R.C. 4123.74 and 4123.741" (emphasis added)); *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 56

("[T]he General Assembly's intent in enacting R.C. 2745.01 * * * is to permit recovery for employer intentional torts only when *an employer acts* with specific intent to cause an injury * * *." (emphasis added)); *Stetter v. RJ Corman Derailment Servs., LLC*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶ 26 (same).

Just last year, this Court reviewed these authorities while construing Ohio's workplace intentional tort statute. *Houdek*, 2012-Ohio-5685, ¶¶ 14-23. This Court's opinion in *Houdek* noted that *Blankenship* "recognized a cause of action *for an employer's intentional tort against its employee*" (*id.* at ¶ 14), that former R.C. 4121.80 "attempted to limit the common law *employer intentional tort*" (*id.* at ¶ 16), that *Fyffe* "further clarified the elements of the *employer intentional tort*" (*id.* at ¶ 18), and that former R.C. 2745.01 was enacted to "supersede the common law *employer intentional tort*" (*id.* at ¶ 19). (Emphasis added.) In short, this Court's jurisprudence has consistently described the workplace intentional tort theory created in *Blankenship* as a claim against *employers* — not fellow employees.

2. R.C. 2745.01 likewise applies only to employer conduct.

Moreover, when the General Assembly abrogated the *Jones* and *Fyffe* gloss on *Blankenship* liability by enacting current R.C. 2745.01, it used language that reflected its understanding that the workplace intentional tort cause of action could only be asserted against an employer. The relevant statutory language provides:

> (A) In an action brought ***against an employer by an employee***, or by the dependent survivors of a deceased employee, for damages resulting from ***an intentional tort committed by the employer*** during the course of employment, ***the employer*** shall not be liable unless the plaintiff proves that ***the employer committed the tortious act*** with the intent to injure another or with the belief that the injury was substantially certain to occur.
>
> (B) As used in this section, "substantially certain" means that ***an employer acts*** with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.
>
> (C) Deliberate removal ***by an employer*** of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

(Emphasis added.) Through its repeated references to "an employer," R.C. 2745.01 responded to *Fyffe* by limiting the employer's direct liability for workplace intentional torts. R.C. 2745.01 did not address the liability of fellow employees for workplace intentional torts because nothing in this Court's jurisprudence suggested that such a liability existed.

The court below rested its conclusion that a fellow employee can be sued for a workplace intentional tort in part on the fact that "Blankenship sued his co-employees in that case." *State ex rel. Yeaples*, 2013-Ohio-2207, ¶ 11. That is far too thin a reed on which to rest the creation of a new remedy against a co-worker. The panel's reasoning overlooks the fact that this Court confined *Blankenship*'s holding and reasoning to suits

against employers.[3] 69 Ohio St.2d at 608, syllabus. And the panel simply ignores the 30-year history of *Blankenship* liability recounted above, which demonstrates that this Court has always characterized *Blankenship* claims as a form of direct employer liability, not a derivative claim that may be pursued against either the employer or a fellow employee. Indeed, it would be odd if *Blankenship* were construed to establish a cause of action for workplace intentional torts by co-workers in the absence of any decision of this Court in the intervening thirty years even mentioning such a liability.

B. Even if Fellow Servant Immunity Did Not Bar Intentional Tort Claims Against Co-Workers, Traditional Common Law Intentional Tort Theories Supply a Sufficient Remedy.

In order to create a common law workplace intentional tort claim against a fellow employee, this Court would have to: (1) conclude that the fellow servant immunity statute, R.C. 4123.741, does not bar such a claim; (2) rule that the receipt of workers' compensation benefits does not bar such a claim; and (3) determine that traditional intentional tort theories, such as assault, battery, and intentional infliction of emotional distress, are somehow inadequate to discourage fellow employee misconduct. Even if this Court were willing to take the first two steps, there is no reason to create a new

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[3] For the same reason, this Court's reference in *Blankenship* to the fellow servant immunity statute, R.C. 4123.74, does not show that *Blankenship* liability extends to co-workers. *Blankenship* cited that statute only in the context of rejecting the employer's argument that *the employer* was immune from suit — which is not surprising since an immunity granted to an *employee* cannot extinguish a direct liability of an *employer*. 69 Ohio St.2d at 608, syllabus. This Court's reasoning did not touch on whether the fellow servant immunity statute would bar an intentional tort claim asserted against a fellow employee.

intentional tort theory against co-workers when traditional theories — such as assault and battery, among others — already provide a meaningful remedy for intentional wrongs committed by an individual.

As explained above, *Blankenship* created a new intentional tort claim out of a concern that otherwise "an employer could commit intentional acts with impunity." 69 Ohio St.2d at 615. That concern does not apply to intentional torts committed by fellow employees. *If* fellow servant immunity and receipt of workers' compensation benefits do not bar such a claim, *then* the injured worker already has a meaningful remedy for the intentional wrongs of fellow employees under traditional common law theories such as assault, battery, and intentional infliction of emotional distress. These remedies have long been viewed as sufficient to deter intentional misconduct by strangers. Nothing about the employment relationship suggests that these theories will be insufficient to deter intentional misconduct by co-workers.

Indeed, far from supporting such a new liability, the primary authority relied on by the court below merely applies traditional intentional tort theories to workplace injuries. In *LaCava v. Walton*, 8th Dist. No. 69190, 1996 WL 325274 (June 13, 1996), the plaintiff pled claims against a co-worker for assault, battery, and intentional infliction of emotional distress where the co-worker allegedly "screamed at [plaintiff], grabbed his left arm and eventually pushed him out of the office." 1996 WL 325274, at *1. The panel's opinion cited *Blankenship* solely for the proposition that fellow servant immunity did not shield a co-worker from these traditional common law claims. *Id.* at *2.

The court below also relied on *Stockum v. Rumpke Container Service, Inc.*, 21 Ohio App.3d 236 (1st Dist. 1985). Yet *Stockum* simply underscores the absence of a coherent rationale for extending the workplace intentional tort to encompass claims against co-workers. *Stockum* assumed without discussion that a workplace intentional tort claim could be asserted against a fellow employee. The entirety of the analysis in the per curiam opinion is contained in a footnote that assumes a plaintiff may assert a *Blankenship* claim against a co-worker and addresses only "whether receipt of workers' compensation benefits precludes an employee or his representative from maintaining a common-law action for an intentional tort against a fellow employee." *See id.* at 237 & fn.1. Relying on *Jones*, the court of appeals answered that question "no." *Id.* But even if this answer to that question were correct, it does not support the creation of a new workplace intentional tort liability against co-workers.

Accordingly, *if* intentional tort theories survive R.C. 4123.741, this Court should hold that the theories of recovery available are limited to those available under traditional common law principles.

C. Expanding Workplace Intentional Torts to Encompass Claims Against Co-Workers Would Undermine Important Workers' Compensation Policies.

In the end, Relators-Appellees' "workplace intentional tort" claim is a transparent attempt to resurrect *Fyffe*'s "substantial certainty" theory of liability, which the General Assembly abolished by enacting R.C. 2745.01. This Court affirmed the General Assembly's authority to do so in *Kaminski* and *Stetter*. Allowing a plaintiff to resurrect

this rejected theory of liability would frustrate legislative intent by creating a new wave of litigation against co-workers — who would presumably seek indemnity from their employers, thus undermining the exclusive remedy principle underlying the workers' compensation system. Because employers must act through their employees, it is hard to imagine a circumstance in which an injured employee could not find a co-worker to sue in order to circumvent R.C. 2745.01. The result would be a stream of co-workers unfairly pulled into litigation so a workers' compensation claimant could seek another bite at the apple under the abrogated *Fyffe* standard.

Such an end-run around R.C. 2745.01 would once again impose "the complexities and uncertainties of tort litigation on the compensation process." *Stetter v. R.J. Corman Derailment Servs., L.C.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶ 76, quoting 6 Larson, *Larson's Workers' Compensation Law*, Section 103.03. The same issues litigated in the thirty years between *Blankenship* and this Court's decisions upholding and construing R.C. 2745.01 would be reopened — at the expense of co-workers who did not commit any acts supporting the imposition of intentional tort liability under theories traditionally recognized at common law.

The legislature, as the ultimate arbiter of public policy, concluded that this Court's common law workplace intentional tort jurisprudence swept too broadly and limited such intentional tort claims by enacting R.C. 2745.01. Relators-Appellees' attempts to circumvent this limitation under the guise of a new workplace intentional tort claim against a fellow-employee should be rejected.

V. CONCLUSION

Creating a cause of action for workplace intentional tort against a fellow employee would be an unprecedented and unwarranted step in this Court's jurisprudence. For all of the above reasons, if this Court elects to reach the issue of whether Relators-Appellees have stated a claim for a workplace intentional tort against a co-worker, this Court should reject the conclusion of the Eighth District below and hold that no such claim exists.

Respectfully submitted,

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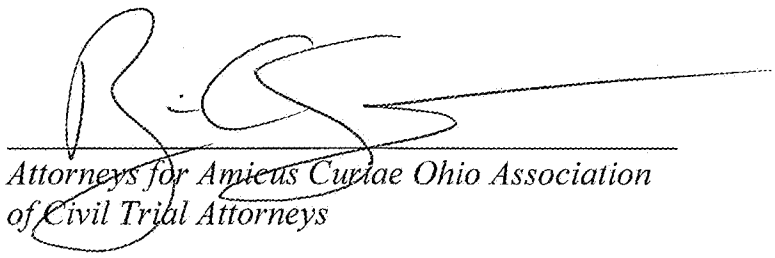

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