



The Remnants of Intentional Tort

By Joshua P. Grunda, Esq.

Joshua Grunda attended Cleveland State University, Marshall College of Law, from which he graduated in 2007. Joshua is licensed to practice law in the states of Ohio and Illinois, the federal court for the Northern District of Ohio, and the U.S. Supreme Court. He is an associate attorney with Bevan & Associates LPA, Inc. His primary practice areas are asbestos litigation, workers' compensation and appellate practice. For more information, visit www.bevanlaw.com.

The modern era of the employer intentional tort cause of action was ushered in with the Ohio Supreme Court's ruling in *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St.2d 608 (1982). Until this time, employees had been limited to the workers' compensation system for injuries sustained at the workplace. An employee was able to overcome the immunity endowed by R.C. 4123.74 and Article II, Section 35 of the Ohio Constitution if they could show that the employer was "certain or was substantially certain," that injury would occur by subjecting the employee to a particular "process, procedure, instrumentality or condition" in the workplace. *Fyffe v. Jenó's, Inc.*, 59 Ohio St.3d 115 (1991). Subsequent attempts by the Ohio General Assembly to stiffen the standard set forth in *Fyffe* were rejected by the Ohio Supreme Court in *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624 (1991) and *Johnson v. BP Chems., Inc.*, 85 Ohio St.3d 298 (1999).

This all changed with the codification of R.C. 2745.01 in 2005. Unlike previous attempts to modify the holdings in *Blankenship* and *Fyffe*, the Ohio Supreme Court upheld the constitutionality of the statute in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250 (2010) and *Stetter v. R.J. Corman Demolition Servs., L.L.C.*, 125 Ohio St.3d 280 (2010). R.C. 2745.01 requires that an employee show 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." The statute then goes on to define "substantially certain" to mean "that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." This effectively merged the previous standard of "certain or substantially certain" set forth in *Fyffe* into a new, single "deliberate intent" to injure standard. *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491 (2012). As Justice Lanzinger recently stated in a concurring opinion for *Hoyle v. DTJ Ents., Inc.*, 2015-Ohio-843, through enactment of the statute, "the General Assembly has closed off employer intentional torts" to employees in the state of Ohio. For all practical purposes, Justice Lanzinger is *almost* right.

While bringing an intentional tort cause of action under sections (A) or (B) of R.C. 2745.01 can be exceedingly difficult, the General Assembly has left the door slightly open through section (C) of the statute. R.C. 2745.01(C) states that:

Deliberate removal by an employer of an

equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

It is under section (C) of the statute, by either claiming that the employer has deliberately removed a safety guard or deliberately misrepresented the toxic or hazardous nature of a substance, that plaintiffs have found some continued success in bringing intentional torts.

The Ohio Supreme Court has defined the term equipment safety guard to mean "a protective device on an implement or apparatus to make it safe and to prevent injury or loss" *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199 (2012). Further, the court has rejected attempts at a more expansive definition of equipment safety guard, refusing to extend the definition to such items as rubber gloves and face masks. Despite this fact, plaintiffs have found success bringing intentional torts under section (C) of the statute for the deliberate removal of an equipment safety guard in such cases as *Downard v. Rumpke of Ohio, Inc.*, 2013-Ohio-4760. As long as the equipment safety guard meets the Supreme Court's definition, and its removal was not the result of some kind of accident, this remains a viable cause of action.

There have also been a number of positive trial court orders under the "deliberate misrepresentation of a toxic or hazardous substance" section of the statute in asbestos injury cases. The evidence often shows in these cases, along with other toxic and hazardous substances cases, that the employer knows a great deal more about the dangers of the products being used than the employees using them. It is also not unusual for the employer to misrepresent these dangers to the employees when the employees begin to question the health effects of the products they are working with.

While it has undoubtedly become more difficult to overcome the immunity granted by R.C. 4123.74 and Article II, Section 35 of the Ohio Constitution, R.C. 2745.01 has left some continued openings to bring an intentional tort action. While every injured worker should seek a remedy through the workers' compensation system, when egregious acts by an employer are at issue, an intentional tort cause of action is still a viable option.