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Ohio's Intentional Tort Pendulum Continues To Swing

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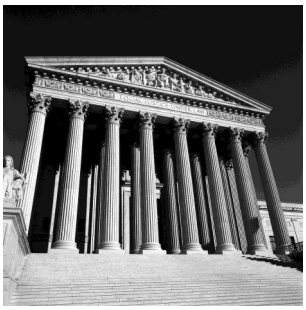

Workplace injuries have always been a minefield for employers, employees and the attorneys who handle them. The United States Bureau of Labor Statistics provide that nonfatal workplace injuries and illnesses among private industry employers have been occurring at a rate of between 3 ½ and 6 percent since 2001.[1] In some years, one in every sixteen workers is involved in a reported workplace injury. In Ohio, like many states, a privately funded insurance fund, "workers compensation", was established to be the exclusive remedy for all workplace injuries. But, that has often not been the case.

This was particularly true before April 7, 2005. Then, a legal test – referred to as the "*Fyffe*" test – focused on the likelihood of an injury occurring.[2] The intention was an equitable one; to punish unsafe employers and compensate injured workers for egregious workplace incidents. Sadly, oftentimes neither occurred. Many safety-minded employers had to pay twice for the same workplace accidents – once through the Bureau of Workers' Compensation and then again to attorneys to defend and/or resolve the employee intentional tort case. Added to the frustration were employer's stop gap insurance policies that frequently led to expensive coverage disputes.

Then, on April 7, 2005, the Ohio General Assembly passed R.C. 2745.01. Its stated goal was to eliminate the "*Fyffe*" test and to limit intentional tort recovery to situations where an employer specifically or deliberately intended to injure its employee. Establishing an employer's "*deliberate intent*" is, inherently, a difficult evidentiary task because a corporate employer is often comprised of hundreds or thousands of individuals whose "intent" often cannot be demonstrated.

Because similar efforts at statutory reform had failed before, few believed that the Ohio Supreme Court would find R.C. 2745.01 constitutional. To the surprise of many, the Ohio Supreme Court upheld its constitutionality since R.C. 2745.01 purportedly "*constrains rather than abolishes an employee's cause of action for an employer intentional tort*."[3] But, in closing a door, the Ohio General Assembly and the Ohio Supreme Court may have opened a window.

Key to the Ohio Supreme Court ruling in the seminal case of *Kaminski v. Metal & Wire Prods. Co.* was the fact that R.C. 2745.01(C) creates a "rebuttable presumption" that an employer intended to injure an employee when it can be established that the employer deliberately removed a safety guard. Instantly, the concept of "deliberately removed a safety guard" became the litmus test for employer liability.

[1] *See* http://www.bls.gov/iif/oshsum.htm#09Summary%20News%20Release.
[2] *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115.
[3] *Kaminski v. Metal & Wire Prods. Co.*, 2010 Ohio 1027, P98 (Ohio Mar. 23, 2010).

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For example, in the matter of *Juhn v. Ford Motor Co.*, an employee fell on some scaffolding where no guardrail or handrail had ever been placed.[4] *Juhn* found that fact dispositive, and held: "Regardless of whether or not Ford violated safety regulation, the plain language of 2745(C) requires the removal of safety equipment guards. There is no evidence that the handrails, toe boards, or safety harnesses were placed around the gap or given to the workers and then deliberately removed or taken away. The court finds the lack of such evidence prevents Plaintiffs from availing themselves of the 2745.01(C) exception."[5]

Compare *Juhn*, however, to the matter of *Berardelli v. Foster Wheeler Zack, Inc.* There, the court concluded that "the failure to use scaffolding in the final phase of the boiler project states a plausible basis for relief under 2745.01 (C)… the key distinction, in the Court's view, is that scaffolding was used initially during the project but was then allegedly removed."[6]

In those two cases, the courts focused on a literal interpretation of an "equipment safety guard," finding different results each time. But, in perhaps the most expansive case yet, *Hewitt v. L.E. Myers*, the Hon. Judge Thomas J. Pokorny allowed the jury to consider violations of various company policies and standards as a basis for relief under R.C. 2745.01(C) even when "plaintiffs ha[d] not made their case with regard to the other sections under the statute." Hewitt - a young linesman who was injured while working near energized lines of more than 500 volts - argued that his accident was caused by a lack of personal protective equipment, and a failure of his employer to properly train and supervise him. The employer argued that these failures amounted to negligence, at best, and, in any event did not involve a literal removal of a safety guard. But, in denying a motion for directed verdict, Judge Pokorny rejected the employer's argument and allowed the jury to decide whether the employer committed a tortious act with the intent to injure based on that evidence alone.[7] The jury returned a verdict for $587,785.00. The employer has appealed that judgment. How the Ohio Eighth Appellate District Court resolves this issue will be instructive.

As these cases indicate, employee intentional torts may still be alive and well in Ohio. The battle over R.C. 2745.01(C) will continue until or unless the Ohio Supreme Court or Ohio General Assembly further address the issue. And, in the meantime, those same "one in every sixteen workers" who are injured in a given year in Ohio, may continue to seek and find relief outside of Workers Compensation.

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[4] *Juhn v. Ford Motor Co.,* No. 1:10-CV-348, at p. 8. (, ND OH Jan. 12, 2011) Doc #21

[5] *Juhn* at p. 8. *(distinguishing Berardelli v. Foster Wheeler Zack, Inc.,* 2010 US Dist. Lexis 102151, (SD Ohio Sept. 17, 2010)).

[6] *See Berardelli* at 13.

[7] *Hewitt v. L.E. Myers*, Case No. CV 711717 (Cuyahoga County Com. Pls., September 23, 2010), at page 44.