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R.I.P. EMPLOYER INTENTIONAL TORTS: THE DEBILITATING APPLICATION OF OHIO REVISED CODE SECTION 2745.01

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I. INTRODUCTION

Ohio's workers' compensation fund emerged as a compromise that guaranteed compensation for employees' workplace injuries while employers escaped unlimited liability.[1] However, this left open the question of whether employees could still sue for actions that went beyond mere negligence.[2] For three decades, the Ohio General Assembly and Supreme Court of Ohio warred over what constituted an employer intentional tort. The General Assembly attempted several times to restrict the cause of action and shield employers from liability.[3] The Supreme Court of Ohio firmly stood by its principle that workers' compensation would not be the sole remedy for intentional torts committed by an employer. Rather, an injured employee could recover both workers' compensation and damages.[4]

In 2010, however, the court suddenly shifted from its position when determining the constitutionality of section 2745.01 of the Ohio Revised Code, which severely restricts employees' potential causes of action.[5] Section 2745.01 provided the typical two prongs for an intentional tort as stated in the Restatement (Second) of Torts:[6] An employee can recover if the employer acts with the intent to injure or if the employer is substantially certain that an injury will result from their conduct.[7] Unfortunately, though, the General Assembly defined substantial certainty as "acting with the deliberate intent" to injure.[8] Therefore, what was once two avenues for recovery became only one.[9]

When the Supreme Court of Ohio upheld the constitutionality of section 2745.01, some felt that this completely eliminated the possibility

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1. *See* 1 PHILIP J. FULTON, OHIO WORKERS' COMPENSATION LAW § 1.2 (Matthew Bender rev. ed. 2014).

2. *See* BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 15:17 (2014). Previously, employees could only sue for negligent acts committed by their employer. *Id*.

3. *See id*.

4. *See generally* Brady v. Safety-Kleen Corp., 576 N.E.2d 722 (Ohio 1991).

5. *See* Kaminski v. Metal & Wire Prod. Co., 927 N.E.2d 1066 (Ohio 2010).

6. RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965).

7. *Id.*

8. OHIO REV. CODE ANN. § 2745.01 (LexisNexis 2016).

9. *Id*.

of an employee recovering for an intentional tort.[10] When looking at the case law that has developed since the Supreme Court of Ohio's decision, those initial forecasts of extinction were indeed correct.[11] The court has interpreted and applied section 2745.01 so strictly that one would be foolish to even think that the employer intentional tort is on life support—it is dead.

This casenote outlines the history of the employer intentional tort in Ohio and concludes that section 2745.01 effectively destroys the tort. Part II of this article provides the background of the Ohio's workers' compensation fund and the long battle between the General Assembly and Supreme Court of Ohio over whether workers' compensation should be an exclusive remedy. Parts III and IV discuss the Supreme Court of Ohio's strict interpretation and application of Section 2745.01 (B) and (C). Finally, Part V concludes that the enactment and the Supreme Court of Ohio's interpretation of Section 2745.01 have effectively eliminated the possibility of employees recovering for an employer intentional tort.

II. BACKGROUND OF OHIO WORKERS' COMPENSATION AND EMPLOYER INTENTIONAL TORTS

The Workers' Compensation Act left questions as to whether workers' compensation would be the exclusive remedy for workplace injuries. Initially, courts held that workers' compensation was the sole remedy, but this interpretation slowly eroded and eventually the Supreme Court of Ohio held that intentional torts fell outside the realm of workers' compensation.[12] A three-decade war emerged as the General Assembly attempted to restrict recovery for employer intentional torts. The Supreme Court of Ohio stood by its decision that workers' compensation was not the sole remedy until the *Kaminski v. Metal & Wire Products Co.* decision in 2010, which held that section 2745.01 was constitutional.[13]

A. Ohio Workers' Compensation

Ohio established a voluntary workers' compensation fund in 1911 by

10. *See generally* Aamir Mahboob, Comment, *The Judicial-Legislative War: Employer Intentional Torts in Ohio*, 42 U. TOL. L. REV. 525 (2004).

11. *See generally* Bran D. Kerns & Marc A. Glumac, *Finding Some Certainty in the Substantially Uncertain Realm of Employer Intentional Tort: The History of Compensation Workers in Ohio*, OHIO ASS'N OF CIV. TRIAL ATT'YS, Summer 2013, at 3, 4.

12. *See* SIEGEL & STEPHEN, *supra* note 2.

13. *See* Kaminski v. Metal & Wire Prod. Co., 927 N.E.2d 1066 (Ohio 2010).

enacting section 4123.35 of the Ohio Revised Code, with the 1912 General Assembly mandating payments from employers.[14] Prior to this enactment, employees relied on the common law to recover for their workplace injuries.[15] However, the common law system proved to be incapable of providing adequate protection for injuries that were inevitable because of the dangers prevalent in modern industrialism.[16] In the previous system, the employee had the burden of proving that the employer was actually at fault, but this was virtually impossible with all of the defenses employers had in their arsenal.[17] Typically, the workplace injury resulted from the inherent risk of employment in which no one was at fault, so employers effortlessly escaped liability.[18]

The Ohio workers' compensation fund established an enduring compromise between employees and employers.[19] Employers now bear the burden of workplace injuries, not society as a whole.[20] In order to recover damages, employees no longer have to prove the employer was at fault, which gives employees broad coverage for any injury that occurs in the workplace.[21] With this broad coverage also comes sacrifice: employees relinquish their common law right to bring a civil suit against their employer.[22] Employers also make sacrifices by giving up all of their common law defenses in exchange for protection against open-ended liability.[23]

Article II, section 35 of the Ohio Constitution established the "insurance fund," which provides benefits for those workers who are injured during the course of employment.[24] Employers pay annual premiums at a basic rate into the state fund; depending on their experience rating, additional payments may be required.[25] The experience rating system is an incentive designed to promote safety practices.[26] If the employer has a bad loss experience, they are penalized and have to pay in excess of the basic premium rate.[27]

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14. *See* FULTON, *supra* note 1, § 2.11.

15. *Id.* § 1.1.

16. *Id.*

17. *Id.* § 1.2. Assumption of the risk and contributory negligence were the most effective defenses for employers. *Id.*

18. *Id.*

19. *Id.*

20. *See* 1 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION § 1.01 (Matthew Bender rev. ed. 2016).

21. *See* FULTON, *supra* note 1.

22. *Id.*

23. *Id.*

24. FULTON, *supra* note 1, § 14.1.

25. *Id.*

26. *Id.* § 14.7.

27. *Id.* A bad loss experience is when the employer has suffered multiple workplace injuries in

Even though making the person whole again is the primary goal of a tort claim, workers' compensation often fails to make the employee whole.[28] Within this tradeoff, employees effectively relinquish the ability to seek full redress in exchange for the certainty that they will always be compensated.[29]

B. The Erosion of Workers' Compensation as the Exclusive Remedy for Workplace Injuries

For nearly a half-century, Ohio courts viewed the workers' compensation fund as the exclusive remedy for all workplace injuries. In *Bevis v. Armco Steel Corp.*, an employee brought an intentional tort suit against the employer for concealing an X-ray that revealed an occupational injury.[30] However, the court held that the Workers' Compensation Act effectively eliminated unlimited liability for employers, and therefore, the employee's only recourse was workers' compensation, regardless of intent.[31]

This exclusivity interpretation began to erode slowly in 1959 when the General Assembly enacted section 4123.74 of the Ohio Revised Code which states, "Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or *arising out of his employment*."[32] Following the enactment of section 4123.74, a 1978 Sixth District case, *Delamotte v. Unitcast Division of Midland Ross Corp.*, demonstrated the erosion of the exclusivity interpretation.[33] Despite almost identical facts to *Bevis*, the court held that the 1959 amendment allows employees to sue employers for intentional torts, because an intentional tort does not "arise out of employment" under the amendment.[34]

The issue of whether section 4123.35 of the Ohio Revised Code was intended to cover intentional torts committed by employers was

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the past. *Id.*

28. *Id.*

29. *Id.* Overall, the Workers' Compensation Act benefitted both employers and employees because employees were compensated for any injuries sustained while at work and employers no longer faced unlimited liability. *Id.*

30. *See* Bevis v. Armco Steel Corp., 93 N.E.2d 33, 34 (Ohio Ct. App. 1949).

31. *See id.* at 35.

32. OHIO REV. CODE ANN. § 4123.74 (LexisNexis 2016) (emphasis added).

33. *See* Delamotte v. Unitcast Div. of Midland Ross Corp., 411 N.E.2d 814, 815 (Ohio Ct. App. 1978).

34. *Id.* at 816. This decision planted the seed for the Supreme Court of Ohio to attack the exclusivity of the workers' compensation system.

discussed in a 1982 case, *Blankenship v. Cincinnati Milacron Chemicals, Inc.*[35] In this landmark decision, the Supreme Court of Ohio followed in the Sixth District's footsteps and held that intentional torts committed by an employer fall outside the realm of employment for purposes of workers' compensation.[36] The plaintiffs in *Blankenship* were employees of a chemical company who were exposed to fumes and other "noxious characteristics of certain chemicals."[37] The employer knew of these conditions and did nothing to prevent employees from exposure.[38] The employer's defense relied on the longstanding commitment to workers' compensation being the exclusive remedy for all workplace injuries.[39] The court ruled to the contrary; stating that workers' compensation does not provide immunity from civil liability for intentional torts.[40] The court noted that the purpose of the Workers' Compensation Act was to promote a safe and injury-free work environment.[41] However, allowing blanket liability for injuries sustained at work, including intentional torts, would not promote the goal of the act.[42] The court further held that granting immunity for intentional torts actually encouraged employers to engage in such egregious conduct; therefore, the Workers' Compensation Act did not preclude the employee from filing an intentional tort suit.[43]

Two years after the *Blankenship* decision, the court addressed the standard for proving an intentional tort against an employer in *Jones v. VIP Development Co.*[44] The court held that intent is much broader than a desire to bring about physical results, rather, intent also extends to those results that the employer believes are substantially certain to occur.[45] This decision established that acts lacking a specific intent to injure could still constitute an intentional tort and, as a result, were beyond the scope of workers' compensation coverage.[46] Relying on Prosser and Keaton, specialists in the area of torts, the court determined that the standard for an intentional tort is "an act committed with the

35. Blankenship v. Cincinnati Milacron Chems. Inc., 433 N.E.2d 572 (Ohio 1982).

36. *See id.*

37. *Id.* at syllabus.

38. *Id.*

39. *See id.* at 614.

40. *See id.*

41. *Blankenship*, 433 N.E.2d at 614.

42. *See id.*

43. *See id.* For the first time since the Workers' Compensation Act was enacted the Supreme Court of Ohio allowed an employee to bring a civil suit against an employer who committed an egregious act such as an intentional tort.

44. *See* Jones v. VIP Dev. Co., 472 N.E.2d 1046 (Ohio 1984).

45. *See id.* at 94–95.

46. *See id.*

intent to injure another, or committed with the belief that such injury is substantially certain to occur."[47] The court then further analyzed the "substantial certainty" standard, distinguishing acts with a substantially certain outcome from negligent acts.[48] To recover for an employer intentional tort, the employee must prove that the employer intended to harm or that the employer was substantially certain that an injury would occur; anything less will be mere negligence and workers' compensation will be the exclusive remedy.[49]

C. The General Assembly Limits Employer Intentional Torts: Section 4121.80 of the Ohio Revised Code

In response to the rulings in *Blankenship* and *Jones*, in 1988 the General Assembly attempted to soften the blow on employers by enacting section 4121.80.[50] The Supreme Court of Ohio ruled on the constitutionality of this statute in *Brady v. Safety-Kleen Corp*.[51] The court criticized the statute in regard to subsection (G) of section 4121.80, which states:

> As used in this section: Intentional tort is an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur. Deliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance is evidence, the presumption of which may be rebutted, of an action committed with the intent to injure another if the injury or an occupational disease or condition occurs as a direct result. Substantially certain means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.[52]

The court struck down section 4121.80 as unconstitutional because the General Assembly attempted to remove a right to a remedy.[53] According to the court, this was contrary to article II, section 34 of the Ohio Constitution which states, "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and

47. *Id.* at 95.
48. *Id.*
49. *See id.*
50. *See* SIEGEL & STEPHEN, *supra* note 2.
51. Brady v. Safety-Kleen Corp., 576 N.E.2d 722 (Ohio 1991).
52. *Brady*, 576 N.E.2d at 724 n.1.
53. *See Brady*, 576 N.E.2d at 728.

providing for the comfort, health, safety and general welfare of all employees."[54] Therefore, one could not interpret a statute that removes a right to a remedy to further the comfort, health, safety, and general welfare of all employees.[55] Additionally, the court followed the *Blankenship* line of reasoning by holding that the legislature cannot enact legislation governing employer intentional torts because this intentional conduct will always take place outside of the employer–employee relationship.[56] The court stood by its established principle: when an employer commits an intentional tort, the employer–employee relationship is abolished and replaced by the intentional-tortfeasor–victim relationship.[57]

D. The General Assembly Limits Employer Intentional Torts Take Two: Section 2745.01 of the Ohio Revised Code

Not to be discouraged by the *Brady* decision, in 1995 the General Assembly enacted section 2745.01 of the Ohio Revised Code.[58] Once again, this was an attempt to restrict employees' ability to recover for intentional torts committed by an employer.[59] In *Johnson v. BP Chemicals, Inc.*, the Supreme Court of Ohio did not hold back its disapproval of the General Assembly's second attempt to cloak employers with blanket immunity for injuries sustained by employees.[60] The court noted, in the very beginning of the opinion, "We can only assume that the General Assembly has either failed to grasp the import of our holdings in *Brady* or that the General Assembly has simply elected to willfully disregard that decision."[61] The relevant provisions of the statute that the court addressed provided:

> (c)(1) If the defendant employer moves for summary judgment, the court shall enter judgment for the defendant unless the plaintiff employee or dependent survivors set forth specific facts supported by clear and convincing evidence to establish that the employer committed an employment intentional tort against the employee.

54. OHIO CONST. art. I, § 34 (1851).

55. *Brady*, 576 N.E.2d at 728.

56. *See id.* at 729.

57. *Id.* Section 4121.80(G) also presented issues concerning the constitutionality of the statute because it granted the Industrial Commission original jurisdiction to determine the amount of damages. *Id.* The court held that the Industrial Commission does not have original jurisdiction because an intentional tort does not arise out of the employment relationship. *Id.*

58. SIEGEL & STEPHEN, *supra* note 2.

59. Johnson v. BP Chem. Inc., 707 N.E.2d 1107 (Ohio 1999).

60. *See Johnson*, 707 N.E.2d 1107.

61. *Id.*

> . . . .
> (d)(1) 'Employment intentional tort' means an act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee.[62]

The court held that, much like section 4121.80, this latest attempt by the General Assembly to restrict employer intentional torts did not withstand constitutional muster.[63] Requiring that the employee demonstrate by "clear and convincing" evidence that the employer acted with the deliberate intent to injure would be almost impossible to prove.[64] Moreover, the court discussed how the General Assembly actually created an illusory cause of action because section 2745.01 did not provide any protections to employees.[65] In order to recover under section 2745.01, the injured employee essentially had to prove that the employer committed criminal assault.[66]

In short, the court vigorously defended the position it had firmly maintained for nearly two decades: employers cannot be cloaked from liability for intentional torts.[67] The requirements imposed by the General Assembly under section 2745.01 were so unreasonable that employees faced an insurmountable hurdle, and their likelihood of recovering was virtually nonexistent.[68] As in *Brady*, the court held that these excessive standards for recovery in no way furthered the comfort, health, safety, and general welfare of all employees as required by article II, section 34 of the Ohio Constitution.[69]

E. The General Assembly Limits Employer Intentional Torts Take Three: Current Section 2745.01

After the tongue lashing from the *Johnson* court, the General Assembly waited until 2005 to make its third attempt at limiting employees' ability to recover for an employer intentional tort. Section 2745.01 currently states:

> (A) In an action brought against an employer by an employee,

62. Johnson v. BP Chem. Inc., 707 N.E.2d 1107, 1109 n.2 (Ohio 1999).

63. *Johnson*, 707 N.E.2d at 1112.

64. *Id.* at 1113.

65. *Id.*

66. *Id.*

67. *See* Brady v. Safety-Kleen Corp., 576 N.E.2d 722 (Ohio 1991); Blankenship v. Cincinnati Milacron Chems. Inc., 433 N.E.2d 572 (Ohio 1982).

68. *Johnson*, 707 N.E.2d at 1114.

69. *Id.*

> 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.[70]

The newest attempt to limit employers' liability was examined in *Kaminski v. Metal & Wire Products Co.* and its companion case *Stetter v. RJ Corman Derailment Services.*[71] Based on the court's unwillingness to accede to the General Assembly's previous efforts to restrict employer intentional torts, it seemed it would be a clear-cut decision. However, with the new additions of Justices Cupp, O'Donnell, O'Connor, and Lanzinger, the court upheld the constitutionality of section 2745.01.[72]

The court in *Kaminski* held that sections 34 and 35 of article II actually affirmatively grant the General Assembly authority enact legislation.[73] The court reasoned that to read these sections as a limitation on the General Assembly's authority would result in a prohibition of all legislation that imposed any burden on employees, regardless of how beneficial it may be to the public.[74] The court criticized the *Brady* and *Johnson* decisions for striking down statutes because those courts read into article II, section 34 that "no law shall be passed unless" it furthers the comfort, health, safety, and general welfare. However, the court found that this language was not included in that section of the Ohio Constitution, and thus, should be read as a grant of authority as opposed to a limitation.[75] The court also held that

70. OHIO REV. CODE ANN. § 2745.01 (LexisNexis 2016).

71. *See* 1 MAYNARD G. SAUTTER, EMPLOYMENT IN OHIO, § 1-5 (Matthew Bender 2016).

72. *See generally* Richard M. Garner, *Flexible Predictability: Stare Decisis in Ohio*, 48 AKRON L. REV. 15 (2015).

73. *See* Kaminski v. Metal & Wire Prod. Co., 927 N.E.2d 1066, 1081 (Ohio 2010).

74. *Id.*

75. *Id.* This shift in interpretation of article II, section 34 was critical to upholding the statute because it was the backbone of the holdings in *Brady* and *Johnson*. *See also* SAUTTER, *supra* note 71.

section 2745.01 was substantially different from the older versions.[76] This distinction was imperative to holding the statute constitutional because it eliminated the blanket application of the *Johnson* and *Brady* decisions.[77] Since the General Assembly did not merely reenact the same statute, the precedential value of previous cases could be avoided.[78]

In his dissent, Justice Pfeifer noted several times that this case was merely "déjà vu" because this was the third time that the General Assembly attempted to restrict employer intentional torts.[79] In *Johnson*, the court held that even though the older version of section 2745.01 was different from section 4121.80, the purposes of those statutes were the same.[80] For Justice Pfeifer, the fact that section 2745.01 was different from the former version was irrelevant because the substance of the statute should be examined and both statutes attempted to cloak employers from liability for intentional torts.[81] The *Johnson* court held that since the employee had to show the employer's conduct was deliberate and intentional, the cause of action was illusory and this is exactly what the current section 2745.01 requires.[82] Justice Pfeifer ended his dissent with a recap of the battle between the court and General Assembly when he stated, "But today, the cycle ends, as the General Assembly has found a court that agrees with it: workers have no constitutionally protected right to seek redress for injuries suffered from their employer's intentional torts."[83]

The *Stetter* decision mirrored *Kaminski* in the legal analysis and the court held that section 2745.01 is constitutional.[84] Notably, the court analyzed the General Assembly's reasoning for enacting section 2745.01.[85] The General Assembly's intent was to curtail the substantial certainty provision of employer intentional torts.[86] Now, recovery is

76. *Kaminski*, 927 N.E.2d at 1087. The court focused on the 1995 version of section 2745.01 and section 4120.80. *Id.* Specifically, the court noted how the older provision's burdens were too onerous. *Id.* The statute made recovery for an intentional tort too difficult, rendering the cause of action "illusory" and not constitutionally valid. *Id.*

77. *Id.* at 1087–88.

78. *See id.* Additionally, the court noted that this statute does not abolish the cause of action for intentional torts but merely constrains employees' ability to recover to only intentional acts and that such a constraint is within the General Assembly's authority.

79. *Kaminsk*i, 927 N.E.2d at 1091 (Pfeifer, J., dissenting).

80. *See id.*

81. *See id.*

82. *Id.*

83. *Id.* The majority opinion ignored years of precedent in order to finally give in to the General Assembly's wish to extinguish workplace intentional torts.

84. Stetter v. R.J. Corman Derailment Servs., 927 N.E.2d 1092, 1097 (Ohio 2010).

85. *See id.* at 1099–1100.

86. *Id.* at 1100.

only permissible when the employer acted with the specific intent to cause an injury.[87] The court went even further than it did in *Kaminski* to distinguish section 2745.01 from its predecessors in order to avoid applying stare decisis.[88] The court commended the General Assembly for tailoring the legislation to cure the constitutional defects of the past statutes.[89] This tailoring of the current section 2745.01 made it sufficiently different in the eyes of the majority to avoid stare decisis.[90] Specifically, the General Assembly eliminated the "clear and convincing" standard of proof that *Johnson* previously invalidated.[91] The court held that the General Assembly eliminated many of the unreasonable, onerous, and excessive provisions of the statute, thereby making it distinguishable from the statutes that the court previously held as unconstitutional.[92]

Once again, Justice Pfeifer dissented for many of the same reasons he did in *Kaminski*. In this dissent, he noted that section 2745.01 restricts employees' right to a remedy.[93] The General Assembly did not merely restrict employer intentional torts, instead the General Assembly effectively eliminated them.[94] Similar to the *Johnson* and *Brady* courts, Pfeifer noted that the requirement of deliberate intent is such a high burden that the act would have to constitute a criminal act to prevail.[95] Despite the changes the General Assembly made to current section 2745.01, Pfeifer argued that the statute is the same as the previous versions and simply includes cosmetic differences.[96] Pfeifer concluded that the statute still eliminates a remedy for employees injured by the egregious acts of employers, which is precisely what the court found to be unconstitutional in *Brady* and *Johnson*.[97]

III. ANALYSIS OF SECTION 2745.01(B)

This part will discuss section 2745.01(B) and the Supreme Court of

87. *Id.*

88. Stare decisis is the legal principle of determining cases based on precedent. *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

89. *See Stetter*, 927 N.E.2d at 1102.

90. *See id.*

91. *See* SAUTTER, *supra* note 71. Additionally, the new legislation is distinguishable from section 4121.80 because it does not restrict recovery to an amount in excess of workers' compensation benefits and a court determines the amount of damages as opposed to the Industrial Commission. *Id.*

92. *Stetter*, 927 N.E.2d at 1103.

93. *Id.* at 1111 (Pfeifer, J., dissenting).

94. *Id.*

95. *Id.*

96. *Id.* at 1112.

97. *See id.*

Ohio's strict interpretation. Section 2745.01(B) has been the provision used most often by employees to file suit against their employer for an intentional tort. Subsection (B) eliminates recovery for the "substantial certainty" prong of the Restatement Second intentional tort by defining substantial certainty as an act by the employer with the deliberate intent to cause an employee to suffer injury.[98] The workers' compensation fund established a compromise between employees and employers, but, as the cases show, eliminating the possibility of recovering when an employer is substantially certain that its conduct will cause an injury loads the dice too heavily in favor of the employer. Employees attempted to circumvent subsection (B) by using Occupational Safety and Health Administration (OSHA) violations to infer that under all of the circumstances of the injury, the employer acted with the intent to harm.[99] However, courts rejected this because it only established that the employer was aware that an injury was likely to occur, but not that the employer actually intended to injure the employee.[100] Two options exist to overcome this problem. First, and most preferable, the General Assembly should reenact the substantial certainty prong because it requires employers to facilitate a safe workplace. Second, if the substantial certainty prong is eliminated, then employees should be able to present evidence like OSHA violations, which will allow courts to use a "totality of the circumstances" approach to infer that the employer acted with intent to injure.

A. Houdek v. ThyssenKrupp Materials N.A.[101]

Bruce Houdek injured his back while working for ThyssenKrupp and returned to work shortly thereafter.[102] Upon Houdek's return, his supervisor, Joseph Matras, assigned him to relabeling inventory on the warehouse storage racks.[103] Other employees in the warehouse drove sideloaders, machines similar to forklifts, to remove goods from the racks that Houdek relabeled.[104] At an employee meeting concerning the relabeling process, George Krajacic, a sideloader operator, asked Matras if he should rearrange his schedule to avoid pulling goods from aisles in which employees like Houdek would be relabeling.[105] Matras said that

98. OHIO REV. CODE ANN. § 2745.01 (LexisNexis 2016).

99. *See generally* Harris v. Benjamin Steel Co., 2015-Ohio-1499 (Ct. App. 2015); Vermett v. Fred Christen and Sons Co., 741 N.E.2d 954 (Ohio App. 2000).

100. *See generally* Harris v. Benjamin Steel Co., 2015-Ohio-1499 (Ct. App. 2015).

101. Houdek v. Thyssenkrupp Materials N.A., 983 N.E.2d 1253 (Ohio 2012).

102. *Id.* at 1254.

103. *Id.*

104. *Id.*

105. *Id.*

this would not be necessary.[106] On the day of the injury, Houdek informed Krajacic that he would be working in a specific aisle.[107] However, after several hours, Krajacic forgot about Houdek and drove the sideloader down the dead-end aisle that Houdek occupied.[108] Houdek shattered his leg and ankle when the sideloader pinned him against a scissor lift he had been using.[109] Houdek sued, alleging that Matras directed him to work in the aisle with knowledge that injury would be substantially certain to occur.[110]

1. Eighth District Decision

The trial court granted ThyssenKrupp's motion for summary judgment and Houdek appealed to the Eighth District.[111] The Eighth District discussed how section 2745.01(A) and (B) could not be harmonized because they conflicted.[112] The court held that subsection (B) was a scrivener's error because intent to injure and deliberate intent to injure are essentially the same concept so to include this twice does not make sense.[113] Furthermore, instead of applying a subjective standard when analyzing subsection (B), the Eighth District held that courts should interpret the employer's belief objectively.[114] Under subsection (B), the employer's belief must be viewed in light of what a reasonably prudent employer would believe.[115] To read subsection (B) any other way permits willful ignorance or deceit on the part of the employer.[116] The Eight District held that genuine issues of material fact existed as to whether a reasonable prudent employer would believe that an injury was substantially certain to occur when directing Houdek to

106. *Id.*

107. *Houdek*, 983 N.E.2d at 1255.

108. *Id*.

109. *Id.*

110. *Id.*

111. *See generally* CHRISTOPHER M. ERNST, OHIO TORT LAW § 42:110 (2015).

112. Houdek v. ThyssenKrupp Materials N.A., 2011-Ohio-1694, ¶ 42 (Ct. App. 2011); OHIO REV. CODE ANN. § 2745.01 (LexisNexis 2016) ("(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.").

113. *Houdek*, 2011-Ohio-1694, ¶ 42. A scrivener's error is a drafting or typographical error that was not fixed after the initial drafting. S*crivener's Error*, BLACK'S LAW DICTIONARY (10th ed. 2014).

114. *Id*. ¶ 45.

115. *Id*. ¶ 45.

116. *Id.* ¶ 45.

relabel in the same aisle as sideloaders.[117]

2. Supreme Court of Ohio Decision

The Supreme Court of Ohio, referencing *Kaminski* and *Stetter*, noted that the General Assembly's purpose for enacting section 2745.01was to significantly curtail the "substantial certainty" employer intentional tort.[118] Therefore, subsection (B) was not a scrivener's error; instead, it was the General Assembly's careful drafting to limit recovery to only those cases in which the employer acted with the specific intent to injure.[119] Without the deliberate intent to injure, which subsection (B) explicitly requires, the employer will not be liable for an intentional tort and the exclusive remedy is workers' compensation.[120] The court held that Houdek presented no evidence showing ThyssenKrupp acted with the deliberate intent to injure.[121] Instead, Houdek's injuries were the result of a "tragic accident" that may have been avoided had certain precautions been taken, but the statute requires more than a showing that an employer knowingly placed an employee at risk.[122]

3. Justice Pfeifer's Dissent

Justice Pfeifer, in his dissent, argued that courts can infer intent to injure from the facts and circumstances of the case.[123] Justice Pfeifer held that if courts cannot infer intent to injure, workers must rely solely on employers confessing that the they acted with the deliberate intent to injure.[124] In this case, Justice Pfeifer found that the intent to injure could be inferred from the facts.[125] Houdek was already injured when Matras directed him to work in a dimly lit, narrow, and dead-end aisle where an encounter with a sideloader was likely.[126] According to Justice Pfeifer, a reasonable jury could infer that ThyssenKrupp intended to injure Houdek based on these facts.[127] Under the standard

117. *Id.* ¶ 46. This decision mirrored the *Jones* standard that an employee can recover by showing that either the employer acted with intent to injure or the employer was substantially certain that an injury would occur.

118. Houdek v. Thyssenkrupp Materials N.A., 983 N.E.2d 1253, 1258 (Ohio 2012).

119. *See* ERNST, *supra* note 111.

120. *See Houdek*, 983 N.E.2d at 1258.

121. *Id.* at 1259.

122. *Id.*

123. *See id.* at 1260 (Pfeifer, J., dissenting).

124. *Id*.

125. *See Houdek*, 983 N.E.2d at 1260.

126. *Id*.

127. *Id.*

adopted by the court, workers' compensation will be the sole remedy when the employer knowingly places an employee in a dangerous situation.[128] Justice Pfeifer argued that this is unsound policy because it places the burden of this inappropriate conduct on all of Ohio's employers whether or not they emphasize a safe work environment.[129] All employers are required to pay into the workers' compensation fund, therefore all employers, whether or not they are responsible for the injury, pay the compensation allotted when a single employer's intentional actions injure an employee.[130]

B. Lower Court's Unwillingness to Apply the Supreme Court's Decision

As the Eighth District opinion indicates, lower courts often have a hard time applying section 2745.01. Even more alarming, however, is that lower courts have regrettably applied the Supreme Court of Ohio's standard as seen in *Cain v. Field Local School District*.[131] Cain was employed at a school as a non-teaching assistant where she worked with learning-disabled children.[132] She had an excellent employment record, but in her role as a union representative, Cain filed a grievance against a teacher.[133] Because of this action, Cain alleged that her employer eliminated her position and subsequently required her to work with children who had multiple handicaps and disabilities, despite having no experience working with students with multiple handicaps or disabilities.[134] The children she was forced to work with were violent and aggressive, and two students assaulted Cain.[135] Cain suffered severe injuries from the attack and sued the school district.[136]

The court noted that the case was a "difficult one," because, as Justice Pfeiffer observed in *Houdek*, the employer must confess that they acted with the intent to injure.[137] The court held that despite the difficulty in prevailing on an employer intentional tort claim, the Supreme Court of Ohio had made clear that section 2745.01 is a strict standard that courts must observe.[138] This case displays the hesitancy of lower courts in applying section 2745.01(B), but ultimately their hands are tied.

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128. *See id*. at 1261.
129. *See id.*
130. *See Houdek*, 983 N.E.2d at 1261.
131. *See* Cain v. Field Local Sch. Dist., 2013-Ohio-1492 (Ct. App. 2013).
132. *Id.* ¶ 2.
133. *Id.*
134. *Id.*
135. *Id*
136. Cain v. Field Local Sch. Dist., 2013-Ohio-1492, ¶ 2 (Ct. App. 2013).
137. *Id.* ¶ 21.
138. *Id.*

C. Using OSHA Violations to Show Deliberate Intent to Injure

While the *Houdek* court effectively eliminated any hope of resurrecting the substantial certainty standard, employees attempted to circumvent section 2745.01(B) by using OSHA violations to display deliberate intent to injure.[139] In *Head v. Reilly Painting & Contracting*, William Head died from injuries sustained while working for Reilly Painting.[140] Head was preparing to install new shingles on a flattop roof of a residential building.[141] The roof was eleven feet off the ground and Head attempted to hand a broom to a coworker standing on the ground.[142] Head lost his balance and fell to the ground, leaving him paralyzed.[143] Head later died from complications resulting from his injuries.[144] Safety harnesses were available for employees to use at the scene but Head's supervisor did not believe they were necessary because the roof was flat.[145] OSHA required that employees wear harnesses for all work performed more than six feet off the ground.[146] Subsequently, OSHA cited Reilly Painting for violating this regulation.[147] Head's estate brought an intentional tort action against Reilly Painting on the ground that the supervisor failed to provide Head with a safety harness in violation of OSHA regulations.[148] The estate argued that since the supervisor did not require Head to use a safety harness, reasonable minds could find that the supervisor acted with the deliberate intent to injure.[149]

Head's estate asserted that the court should follow a Ninth District case, decided after the enactment of section 2745.01, in which the court held that an employer who disregarded OSHA safety regulations was substantially certain that an injury would occur.[150] However, the Eighth District rejected this proposal on the grounds that the Ninth District holding created a fallacy that equated deliberate denial of safety equipment with deliberate intent to injure.[151] The Eighth District drew a bright line rule that OSHA violations alone are insufficient to satisfy

139. *See* MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 21:5 (2016).
140. Head v. Reilly Painting & Contracting Inc., 28 N.E.3d 126, 127 (Ohio Ct. App. 2015).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Head*, 28 N.E.3d at 129.
147. *Id.*
148. *Id*. at 127.
149. *Id*.
150. *Id*. at 129; *see also* Smith v. Ray Esser & Sons Inc., 2013-Ohio-1095 (Ct. App. 2013).
151. *Head*, 28 N.E.3d at 129.

section 2745.01(B).[152] Reilly Painting knew that injuries were substantially certain to occur if Head fell from the roof without wearing a safety harness, however, this knowledge did not demonstrate that Reilly Painting deliberately intended to harm Head.[153] In other words, the deliberate decision not to use safety equipment does not demonstrate the requisite specific intent to injure.[154] The Eighth District concluded that ruling the other way would revert the system back to the old employer-intentional-tort standard, completely disregarding both the legislature's intent to constrict the cause of action and the *Kaminski* decision.[155]

The concurrence held that, while the judgment was correct, the court's reasoning contained flaws.[156] The concurrence noted that circumstances exist in which a conscious decision to violate OSHA regulations would be enough to withstand summary judgment because reasonable minds could differ as to whether the employer acted with the deliberate intent to injure.[157] OSHA requires safety equipment for certain situations because injuries commonly occur and to completely disregard the violations would be unwise.[158] The concurrence rejected the majority's decision to avoid using the Ninth District case.[159] That case involved a dangerous excavation project in which an employer was injured because a trench was not properly sloped.[160] However, due to previous OSHA citations concerning similar excavations, the court denied summary judgment because reasonable minds could conclude that the employer was substantially certain that the employee would be injured.[161] The *Head* concurrence suggested that facts similar to the Ninth District case showing an employer's blatant disregard for safety with the knowledge that injuries were substantially certain to occur

152. *See id.*; *see also* Harris v. Benjamin Steel Co., No. 2012-Ohio-1499 (Ct. App. 2015) (holding that OSHA violations alone do not demonstrate intent to injure); Vermett v. Fred Christen and Sons Co., 741 N.E.2d 954 (Ohio Ct. App. 2000) (refusing to use an OSHA violation when considering if the employer was substantially certain that an injury would occur).

153. *Head*, 28 N.E.3d at 130.

154. *See id.*

155. *See id*. The *Kaminski* court held that sections 34 and 35 of article II affirmatively grant the General Assembly authority to enact legislation. *Kaminsk*i, 927 N.E.2d at 1088. The General Assembly did not simply reenact the same statute that had been struck down in the past. *Id.* Therefore, section 2745.01 was constitutional. *Id.*

156. *See id.* at 132 (Gallagher, P.J., concurring).

157. *See id.*

158. *Id*.

159. *See id.* at 132–33.

160. *Head*, 28 N.E.3d at 132–33; *see* Smith v. Ray Esser & Sons Inc., 2013-Ohio-1095 (Ct. App. 2013).

161. *Head*, 28 N.E.3d at 132–33.

meets the requirement of section 2745.01(B).[162] This is important because it supports the conclusion that section 2745.01(B) can, and should be, read as providing employees with the option of using substantial certainty to prove an employer intentional tort. When a set of facts shows complete disregard for employee safety, the employer should not be able to escape liability just because there is no evidence that the employer acted with deliberate intent.

D. Eliminating the Substantial Certainty Prong Incentivizes Employers to Cut Corners in Regards to Employer Safety

In *Houdek*, the Eighth District came to a logical conclusion that section 2745.01(B) was a scrivener's error. The provision is redundant because "intent to injure" and "deliberate intent to injure" are essentially the same requirement. While the General Assembly's intent was to restrict the cause of action for employees by eliminating the substantial certainty prong, this language makes section 2745.01 confusing and circular. Additionally, using an objective standard to determine if the employer committed an intentional tort promotes a safe work environment[163] and holds employers accountable for their conduct.[164] Requiring an employer to live up to a reasonable, prudent-employer standard will force the employer to eradicate those practices that are substantially certain to injure an employee.[165] Applying a subjective standard, as the Supreme Court of Ohio did before Kaminski [*whatever case changed the standard]*, is equivalent to bestowing upon employers the old common law defenses they enjoyed before the Workers' Compensation Act. Employers can effortlessly escape liability because proving they acted with the intent or deliberate intent to injure is nearly impossible.[166] Justice Pfeifer correctly noted that, after *Houdek*, the employee must helplessly rely on the employer confessing that it intended to injure.[167] Anything less than such an admission will be insufficient to establish a case for intentional tort as the court effectively eliminated drawing inferences in order to presume that the employer acted with the requisite intent.

Additionally, the *Houdek* opinion directly conflicts with the purpose

162. *Id.* at 133. The circumstances surrounding the injury are imperative to showing deliberate intent and should not be overlooked.

163. *See* Woodson v. Rowland, 407 S.E.2d 222 (N.C. 1991) ("The substantial certainty standard satisfies the Act's purposes of providing trade-offs to competing interests and balancing these interests, while serving as a deterrent to intentional wrongdoing and promoting safety in the workplace.").

164. *See* Houdek v. ThyssenKrupp Materials N.A., 2011-Ohio-1694, ¶ 45 (Ct. App. 2011).

165. *Id.*

166. *See* SAUTTER, *supra* note 71.

167. Houdek v. Thyssenkrupp Materials N.A., 983 N.E.2d 1253, 1260 (Pfeifer, dissenting).

of enacting the workers' compensation fund. The goal of the workers' compensation fund was to promote a safe and injury-free work environment, but abolishing the substantial certainty prong of an intentional tort undermines this goal.[168] This actually incentivizes cutting corners with regards to employee safety in order to maximize profits. Connecticut provides an illustration of this problem because it uses the substantial certainty analysis when determining an employer intentional tort.[169] The Supreme Court of Connecticut held that eliminating the substantial certainty prong would allow employers to cost out an investment decision to kill workers and merely suffer a premium increase.[170] Think of an automobile factory in which the employer is trying to maximize profits any way possible. The employer speeds up the production line, has fewer employees per shift, fails to provide any safety gear, and refuses to repair any of the machines in the factory. The employer knows that an injury is substantially certain to occur by cutting all of these corners. However, under *Houdek*, an injured employee's sole remedy would be workers' compensation because the employer did not act with the deliberate intent to injure.[171] Unless the employer acts with the deliberate intent to injure, Ohio courts will view scenarios such as this as a "tragic accident" despite all of the circumstances surrounding the injury.[172] The only threat to the employer is the possibility of an increased experience rating, resulting in a minimal increase in their premium.[173] One would be hard-pressed to view this as "promoting employer safety." Rather, the General Assembly enacted section 2745.01 to permit employers to chase after the almighty dollar even if that means eliminating employer safety.

Ohio enacted the workers' compensation fund as a compromise between the employee and employer, but eliminating recovery for substantially certain intentional torts makes this "compromise" far too one-sided.[174] Reverting back to the *Jones* standard would even out the playing field and provide a safer environment for employees. Additionally, Justice Pfeifer's recognition that all of Ohio's employers

168. Blankenship v. Cincinnati Milacron Chems., 433 N.E.2d 572 (Ohio 1982).

169. *See* Suarez v. Dickmont Plastics Corp., 698 A.2d 838 (Conn. 1997); Woodson v. Rowland, 407 S.E.2d 222 (N.C. 1991).

170. *See Suarez*, 698 A.2d 838.

171. *See Houdek*, 983 N.E.2d at 1258.

172. *See id.* at 1259.

173. *See* FULTON, *supra* note 1, § 14.1.

174. *See id.* § 1.2.; *see also* SAUTTER, *supra* note 71. The *Kaminski* and *Stetter* decisions are significant because they strengthen the exclusivity feature of the workers' compensation system since proving that an employer acted with deliberate intent to injure the employee is an extremely high burden to meet.

bear the consequences of *Houdek* should not go unnoticed.[175] Undoubtedly, the majority of employers in Ohio conduct their business in a manner that puts employee safety as a top priority. Despite these employers' commitment to safety, they will still have to pay for the egregious conduct of the outliers who cut corners with safety because compensation is paid out from the mandatory state fund.[176] Abolishing the substantial certainty standard incentivizes employers who vow to maintain a safe work environment to divorce themselves from those practices because spending money on safety precautions—while their competitors cut corners and maximize profits—is economically unfeasible.

E. Courts Should Be Permitted to Infer from the Circumstances that an Employer Committed an Intentional Tort

The majority opinion in *Head* demonstrates how far the courts have distanced themselves from the old substantial certainty standard. OSHA compiles rules and regulations that employers must comply with because evidence suggests that injuries will occur without these precautions.[177] However, if an employer disregards these rules the courts still refuse to infer intent to injure regardless of the surrounding circumstances.[178] The concurring opinion in *Head* mirrors Justice Pfeifer's dissent in *Houdek* and is a much better standard for courts to follow. If OSHA cites an employer for past OSHA violations in which employees were injured and still deliberately disregards safety measures, the employer should not be immune from civil liability.[179] Deliberately ignoring past safety violations allows a reasonable person to infer that the employer acted with the intent to injure.[180] Furthermore, a bright line rule that OSHA violations will never be probative of intent to injure loads the dice even further in the favor of the employer.[181] When an OSHA violation results in an injured employee, courts should refrain from dismissing the case completely and instead evaluate the facts and circumstances surrounding the injury.[182] If the substantial certainty standard were to be completely

175. *See Houdek*, 983 N.E.2d at 1261 (Pfeifer, J., dissenting).

176. *See* FULTON, *supra* note 1, § 14.1.

177. *See* Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970).

178. Head v. Reilly Painting & Contracting, Inc., 28 N.E.3d 126, 130 (Ohio Ct. App. 2015); *see also* Harris v. Benjamin Steel Co., No. 2012-Ohio-1499 (Ct. App. 2015).

179. *See Head*, 28 N.E.3d at 133 (Gallagher, P.J., concurring).

180. *Id.*

181. *See id.*

182. *See* Medina v. Harold J. Becker Co., 840 N.E.2d 1112 (Ohio App. 1st 2005). OSHA violations can bolster the assertion of an intentional tort. *Id.*

abolished from employer intentional torts, then the employee would at least receive a "totality of the circumstances" analysis. In this analysis, OSHA violations should be a significant factor in order to force employers to maintain a safe work environment.

IV. THE REBUTTABLE PRESUMPTION: SECTION 2745.01(C)

This part discusses employees' last hope at recovery for an employer intentional tort: section 2745.01(C).[183] Subsection (C) provides a rebuttable presumption that the employer acted with intent to injure if the employer removed an equipment safety guard.[184] However, this presumption is not helpful because of how narrowly the courts have interpreted it.[185] The Supreme Court of Ohio has had opportunities to provide employees some protection in the workplace, but instead squandered the opportunities by strictly interpreting this provision. What is even more surprising than the Supreme Court of Ohio's decision is how lower courts have allowed employers to escape liability when they are substantially certain that an injury will not occur. Moreover, like subsection (B), subsection (C) provides little to no help to employees and actually incentivizes employers to put employee safety on the back burner.

A. The Stringent Interpretation of Section 2745.01(C): Hewitt v. L.E. Myers Co.

In *Hewitt v. L.E. Myers Co.*, Larry Hewitt worked as an apprentice lineman for L.E. Myers Company.[186] Hewitt was assigned to replace an old electrical power line, which required tying in a new power line that was de-energized.[187] L.E. Myers mandated that all linemen wear rubber gloves when working regardless of whether the line was energized.[188] However, Hewitt's supervisor said that Hewitt did not need the protective rubber gloves because the power line was de-energized.[189] Hewitt was suspended in a bucket working on the line when someone

183. OHIO REV. CODE ANN. § 2745.01(C) (LexisNexis 2016).

184. *Id.* 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.

185. *See* Jamie LaPlante, *Ohio Supreme Court Limits Scope of Employer Intentional Tort Statute*, HR LAWS: OHIO EMPLOYMENT LAW LETTER (Jan. 1, 2013), http://fmla.hrlaws.com/node/1218457.

186. Hewitt v. L.E. Myers Co., 981 N.E.2d 795, 800 (Ohio 2012).

187. *Id.* at 797.

188. *Id.*

189. *Id.* at 797–98.

yelled at him from the ground.[190] As he turned to respond, the wire he was working on came in contact with an energized line, resulting in severe burns.[191] Subsequently, Hewitt filed suit alleging an intentional tort because L.E. Myers knew with substantial certainty that injury would occur when working near an energized high voltage line without wearing protective gloves.[192]

The trial court held that rubber gloves were an equipment safety guard under subsection (C) and L.E. Myers failed to rebut the presumption.[193] However, the Supreme Court of Ohio held that the rubber gloves were not an equipment safety guard.[194] The court interpreted the phrase "deliberate removal by an employer of an equipment safety guard," by reading the words according to the rules of grammar and looking at the legislative intent.[195] Since the adjectives "equipment" and "safety" modify the word "guard," the court held that an equipment safety guard means a protective device on an implement or apparatus to make it safe and to prevent injury.[196] Essentially, an equipment safety guard is a device designed to shield the operator from exposure to a dangerous aspect of the equipment.[197]

The lower court determined that a safety guard did not have to be attached to machinery and Hewitt argued for a broad interpretation to include any safety related item that may act as a barrier to an injury.[198] However, the Supreme Court of Ohio rejected this interpretation and reasoned that "equipment safety guard" does not include any generic safety-related item.[199] The General Assembly intended to restrict intentional tort liability, so to read subsection (C) as applying to any safety equipment would be inconsistent.[200] Therefore, the rubber gloves that Hewitt's employer deemed unnecessary failed to meet the requirements of equipment safety guard.[201] Rather, the rubber gloves were merely freestanding items that served as a barrier between the employee and a potential injury.[202] Freestanding items are personal protective items that the employee controls, as opposed to an equipment

190. *Id.* at 798.
191. *Id.*
192. *Hewitt*, 981 N.E.2d at 798.
193. *See* LAPLANTE, *supra* note 185.
194. *See Hewitt*, 981 N.E2d at 802.
195. *Id.* at 799.
196. *Id.*
197. *See* LaPlante, *supra* note 185.
198. *See Hewitt*, 981 N.E2d at 800.
199. *Id.* at 800–801.
200. *Id*. at 801.
201. *See id.*
202. *Id*.

safety guard.[203]

Justice Pfeifer dissented and held that the majority read into the statute, "deliberate removal by an employer of *a* safety guard *attached* to equipment."[204] The General Assembly did not enact the statute with those words, but that is how the majority interpreted it.[205] Rather than adding words or trying to decipher the General Assembly's intent, the better method of interpretation is to read the statute as enacted.[206] When reading the phrase "equipment safety guard" as a unitary term, there is a simple meaning—equipment that is used as a safety guard.[207] Consequently, helmets, facemasks, visors and other similar items are equipment used as a safety guard, but their removal will no longer give rise to the presumption.[208] The majority opinion is "staggering" and "dangerous" for employees because subsection (C) was interpreted so narrowly.[209] This restrictive interpretation will be devastating because employers have less incentive to maintain a safe work environment.[210]

B. Substantial Certainty: The Double Standard

As previously discussed, knowledge with substantial certainty that an injury will occur because of OSHA violations is not enough to recover for an employer intentional tort; however, substantial certainty that an injury will not occur is enough to rebut the presumption of subsection (C), as seen in *Rudisill v. Ford Motor Co.*[211] In that case, Norman Rudisill began working at Ford in 1994 and worked his way up to a team leader.[212] He was in charge of a mold line where engines were cast in molten metal.[213] In the mold line process, the engine is placed in a mold and molten iron is poured into the mold, which hardens into the engine.[214] Sometimes molten metal runs over and down the side of the mold requiring an employee to rake off the molten metal into a pit

203. *Id.* at 801.

204. *Hewitt*, 981 N.E2d at 802 (Pfeifer, J., dissenting).

205. *Id.*

206. *Id.* at 803.

207. *Id.*

208. *Id.*

209. *Id.* Affirming the lower court would have no seriously negative impact on employers. *Id.* They need only pay some money to the injured employee but employers are more readily equipped to suffer this burden. *Id.* However, reversing the lower court will have disastrous long term consequences for employees. *Id.*

210. *Hewitt*, 981 N.E2d at 803.

211. *See* Rudisill v. Ford Motor Co., 709 F.3d 595, 607 (6th Cir. 2013).

212. *Id*. at 598.

213. *Id.*

214. *Id.*

below.[215] A crane and hoist must clamp the mold and suspend it over the open pit.[216] In order to do this, guardrails must be removed, leaving the pit exposed.[217] Rudisill completed this process hundreds of times.[218] On the day of the injury, Rudisill was in the process of raking the molten metal off the mold.[219] As he raked the mold, it became unbalanced, causing a clamp to slip off and hit Rudisill in the face.[220] As a result, Rudisill stumbled back and fell down into the pit leaving him with a head injury and severe burns.[221] Rudisill filed suit for employer intentional tort under 2745.01(C).[222]

The district court held that the presumption of intent to injure under subsection (C) was successfully established, but determined that Ford had rebutted the presumption.[223] On appeal, the Sixth Circuit affirmed and further discussed how Ford rebutted the presumption of intent to injure.[224] First, in the hundreds of thousands of hours worked at the plant, no substantially similar accident occurred.[225] Additionally, Ford had no previous citations or complaints about the mold line process.[226] Rudisill engaged in the process hundreds of times and claimed that he would have said something to management had he believed it was a dangerous process.[227]

By presenting all of this information, Ford did not merely rely on an affidavit stating, "We love safety" to rebut the presumption.[228] Rather, Ford presented hard, uncontroverted evidence that enabled the court to determine that Ford adequately rebutted the presumption.[229] Rudisill attempted to present evidence that OSAH had cited Ford for violations for having exposed floor openings covered and guarded.[230] However, the court rejected this argument, holding that OSHA violations cannot permit a reasonable jury to find that Ford acted with the intent to injure

215. *Id.* at 599.

216. *Id.*

217. *Rudisill*, 709 F.3d at 599.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 600.

223. *Rudisill*, 709 F.3d at 604.

224. *Id.* at 608.

225. *Id.*

226. *Id.* at 599.

227. *See id.*

228. *Id.* at 608.

229. *Rudisill*, 709 F.3d at 608; *see also* Downard v. Rumpke of Ohio, Inc., 3 N.E.3d 1270 (Ohio Ct. App. 2013) (stating that the holding in *Rudisill* comports with the case law from the Supreme Court of Ohio).

230. *See Rudisill*, 709 F.3d at 611.

Rudisill.[231]

C. The Final Nail in the Employer Intentional Tort Coffin: Cincinnati Insurance Co. v. DTJ Enterprises (In re Hoyle)

In the most recent decision concerning section 2745.01, the Supreme Court of Ohio officially ended the possibility for recovery under the substantial certainty standard.[232] In *Cincinnati Insurance Co. v. DTJ Enterprises (In re Hoyle)*, Duane Allen Hoyle suffered serious injuries when he fell fourteen feet from an unstable ladder jack while working for his employers DTJ Enterprises and Cavanaugh.[233] Hoyle alleged that his supervisor refused to use bolts that would keep the ladder jack stable because they took too long to use.[234] Cincinnati Insurance Company (CIC) intervened in the case, claiming it had no obligation to indemnify DTJ or Cavanaugh should Hoyle prevail.[235]

The CIC insurance policy offered extended coverage for an additional premium for an act that is substantially certain to cause bodily injury.[236] This additional policy covered substantially certain intentional torts, but excluded acts with the deliberate intent to injure.[237] Importantly, the coverage acknowledged section 2745.01 and noted that the substantial certainty policy will be offered only until the Supreme Court of Ohio decided the constitutionality.[238] Upon the *Kaminski* decision, CIC no longer offered the substantial certainty coverage.[239]

Hoyle argued that subsection (C) does not involve the deliberate intent to injure and, therefore, the insurance coverage should not be excluded.[240] The Ninth District held, "[D]eliberate intent to injure may be presumed for the purposes of the statute where there is a deliberate removal of a safety guard, this does not in itself amount to deliberate intent for the purposes of the insurance exclusion."[241] This means that an employee may prevail on an intentional tort claim without actually

231. *See id.*; *see also* Schiemann v. Foti Contracting, 2013-Ohio-269 (Ohio Ct. App. 2013); Hernandez v. Martin Chevrolet, Inc., 649 N.E.2d 1215 (Ohio 1995).

232. *See* Cincinnati Ins. Co. v. DTJ Enters. (*In re* Hoyle), 36 N.E.3d 122 (Ohio 2014).

233. *Id.* at 125.

234. *Id.*

235. *See* David J. Oberly, *Ohio Precludes Insurance Coverage for Employer Intentional Torts*, CINCINNATI BAR ASSOCIATION REPORT, July 2015, at 6.

236. *Id.*

237. *Id.*

238. *Hoyle*, 36 N.E.3d at 129.

239. *See id.*

240. *Id.*

241. *Id.*

proving deliberate intent to injure.[242] However, the Supreme Court of Ohio reversed because the whole point of the presumption is to presume the intent required under subsections (A) and (B).[243] Therefore, CIC does not have to indemnify, regardless of the outcome of the case. Ultimately, this holding solidifies that the employee may not recover unless the employee proves deliberate intent to injure.

D. Missed Opportunity to Reestablish Employee Protection

The opportunity to give some protection to Ohio employees presented itself to the court in *Hewitt*, but the court failed to take advantage as it once again ruled in favor of employers.[244] The General Assembly did not define what equipment safety guard meant, leaving the court with the responsibility to decide.[245] Unfortunately, the court interpreted this provision so narrowly that it is essentially useless because it is so difficult to prove.[246] The only conceivable situation in which subsection (C) would come into play would be in a factory job where machines are prevalent, leaving many of Ohio's employees at risk.[247] The appellate court even noted that a stringent interpretation would severely limit recovery to only those employees who use machines.[248] However, the Supreme Court of Ohio interpreted the provision narrowly solely because the General Assembly's intent was to restrict liability for intentional torts.[249] Ruling that rubber gloves that protect linemen from potentially deadly power lines are not an equipment safety guard created a precedent that is staggering and dangerous for employees. Now employers are free to disregard this and similar equipment without fearing liability.

E. Incongruent Standards for Proving and Rebutting an Employer Intentional Tort

The *Rudisill* court deemed that OSHA violations are insufficient in order to prove an intentional tort under 2745.01(C).[250] OSHA violations offer evidence that an injury is substantially certain to occur if

242. *See* Oberly, *supra* note 235.

243. *See Hoyle*, 36 N.E.3d at 130–31.

244. *See* Kerns & Glumac, *supra* note 11.

245. Hewitt v. L.E. Myers Co., 981 N.E.2d 795, 800 (Ohio 2012).

246. *See* JAMES T. O'REILLY & THERESA NELSON RUCK , OHIO PERSONAL INJURY PRACTICE § 7:28 (2015).

247. *See* Kerns & Glumac, *supra* note 11.

248. *See Hewitt*, 981 N.E.2d at 800.

249. *See id.* at 800–801.

250. *See* Rudisill v. Ford Motor Co., 709 F.3d 595, 607 (6th Cir. 2013).

employers do not take certain precautions, yet this will not suffice to prove intent to injure on behalf of the employer. Astonishingly, the court then affirmed that Ford had rebutted its presumption because no similar accidents had occurred in the hundreds of thousands of hours worked in the factory.[251] Moreover, the court allowed evidence to show that the employer was substantially certain that injury would not occur to rebut the presumption under subsection (C). However, the court did not allow OSHA violations showing that injuries were substantially certain to occur to establish that Ford acted with the intent to injure. This is inherently contradictory and demonstrates just how far courts are willing to go in order to protect employers. This standard is untenable and the court even noted, "One might argue as a matter of policy that his bargain is too one-sided; that the employees got the short end of the stick."[252] However, this is a matter to take up with the General Assembly, not the courts.[253] As in *Cain*, this once again acknowledges lower courts' unwillingness to apply the harsh standard of section 2745.01.

F. The Final Nail in the Employer Intentional Tort Coffin

Hoyle is not a surprising decision, and the court correctly decided this based on the precedent of current section 2745.01. However, this decision completely closes off any potential of substantial certainty squeaking into the section 2745.01 analysis.[254] Justice O'Neill's dissent hit the nail squarely on the head when he stated, "The case before us demonstrates the money-driven efforts to return once again to the pre-*Blankenship* days, when profits were never placed in peril by the egregious acts of management."[255] This gradual extinction of employees' cause of action for an employer intentional tort serves no one.[256] As Justice Lanzinger noted, the outcome of this decision is that nothing less than deliberate intent will prevail.[257] Furthermore, the effect of this decision is that employees will be limited to only workers' compensation for any injury sustained at work whether or not it is from intentional conduct of the employer.[258]

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251. *Id.*

252. *Id.* at 612.

253. *Id.*

254. *See* Oberly, *supra* note 235; *see also* KEVIN M. YOUNG, KARL A. BEKENY & JENNIFER L. MESKO, OHIO INSURANCE COVERAGE § 4:12 (2016).

255. Cincinnati Ins. Co. v. DTJ Enters. (*In re* Hoyle), 36 N.E.3d 122, 133 (Ohio 2014) (O'Neill, J., dissenting).

256. *Id.* at 134.

257. *Id.* at 133 (Lanzinger, J., concurring).

258. *Id.*

V. CONCLUSION

Spectators forecasted that the employer intentional tort was in peril when the Supreme Court of Ohio held that section 2745.01 is constitutional.[259] However, after seeing just how strictly the court has applied the statute since *Kaminski*, no question remains as to whether or not it is extinct. Once the court decided *Kaminski*, a reasonable observer would certainly question the longevity of subsection (B). However, it was unthinkable that subsection (C), the only employee friendly portion of the statute, would also be interpreted so narrowly. As Justice Pfeifer noted, at this point in the history of section 2745.01, it is impossible to think of a situation in which an employee would prevail unless the employer confesses that they acted with intent to injure.[260] This permits the employer to cut corners and take unnecessary risks, jeopardizing employee safety while facing only minimal consequences of a premium increase. Employers receive a mere slap on the wrist for their egregious conduct while employees bear the burden of not being fully compensated. The so-called "compromise" of workers' compensation is far too one-sided if employers are cloaked from liability for intentional torts.

Ideally, the best approach would be reverting back to the *Jones* and Restatement Second standard. Allowing the employee to recover when the employer was substantially certain that their conduct would result in an injury incentivizes employers to maintain a safe and accident free work environment. The purpose of establishing workers' compensation was to promote safety, so it is unimaginable to eliminate substantial certainty from the intentional tort analysis. A secondary, but still effective, approach would be to implement a "totality of the circumstances" analysis. If deliberate intent is required then courts should at least be able to make inferences, since deliberate intent is such a high threshold. While this is not a perfect solution, it makes recovery actually possible.

In sum, the only thing substantially certain about the current state of section 2745.01 is that plaintiff's attorneys will go nowhere near one of these cases despite the validity of the claim.

259. *See generally* Mahboob, *supra* note 10.

260. Houdek v. Thyssenkrupp Materials N.A., 983 N.E.2d 1253, 1260 (Pfeifer, J., dissenting).