

ORIGINAL

IN THE SUPREME COURT OF OHIO

Phillip E. Pixley,

Appellee,

v.

Pro-Pak Industries, Inc., *et al.*,

Appellants.

Case No. 13-0797

On appeal from the Court
of Appeals for Lucas County
Sixth Appellate District
Case No. L-12-1177

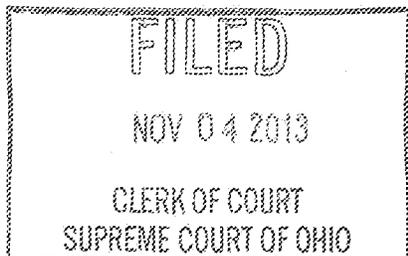
**BRIEF OF AMICI CURIAE
OHIO CHAMBER OF COMMERCE, OHIO CHAPTER OF THE NATIONAL
FEDERATION OF INDEPENDENT BUSINESS AND OHIO SELF-INSURERS
ASSOCIATION IN SUPPORT OF APPELLANT PRO-PAK INDUSTRIES, INC.**

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TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	2
Proposition of Law.....	2
THE EXCEPTIONS TO THE "EMPLOYER INTENTIONAL TORT" LAW, R.C. 2745.01, ARE NARROW AND THE LANGUAGE OF R.C. 2745.01(C) MAY NOT BE EXPANDED BY AN INTERPRETATION THAT RENDERS THE PLAIN AND UNAMBIGUOUS WORDS OF THE STATUTE MEANINGLESS	2
CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

	<u>PAGE</u>
 <u>CASES</u>	
<u>Blankenship v. Cincinnati Milacron Chemicals, Inc.</u> (1982), 69 Ohio St. 2d 608.....	2, 3
<u>Brady v. Safety-Kleen Corp.</u> (1991), 61 Ohio St. 3d 624	3
<u>Fickle v. Conversion Technologies International</u> , 2011 W.L. 2436750 (6 th App. Distr., June 17, 2011).....	8
<u>Fyffe v. Jenos, Inc.</u> (1991), 59 Ohio St. 3d 115.....	3
<u>Hewitt v. L.E. Myers Co.</u> (2012), 134 Ohio St. 3d 199	2, 6, 8
<u>Jones v. VIP Development</u> (1984), 15 Ohio St. 3d 90	2
<u>Kaminski v. Metal & Wire Prods. Co.</u> (2010), 125 Ohio St. 3d 250	passim
<u>Kunkler v. Goodyear Tire & Rubber Co.</u> (1988), 36 Ohio St. 3d 135	3
<u>Pariseau v. Wedge Products, Inc.</u> (1988), 36 Ohio St. 3d 124.....	3
<u>Stetter v. R.J. Corman Derailment Servs.</u> (2010), 25 Ohio St. 3d 280.....	4, 5, 8
<u>Van Fossen v. Babcock & Wilcox Co.</u> (1998), 36 Ohio St. 3d 100.....	3, 5
 <u>STATUTES</u>	
Ohio Rev. Code § 2745.01	2, 4, 5, 7
Ohio Rev. Code § 2745.01(B).....	5
Ohio Rev. Code § 2745.01(C)	5
Ohio Rev. Code § 2745.01(D)	5
Ohio Rev. Code § 4121.80(G)	5
Ohio Rev. Code § 4123.74	3
Ohio Rev. Code Chapter 4112.....	4
Ohio Rev. Code Chapter 4121.....	4
Ohio Rev. Code Chapter 4123.....	4

TREATISES

Section 35, Article II of the Ohio Constitution.....3

STATEMENT OF INTEREST

The Ohio Chapter of the National Federation of Independent Business (NFIB) is an association with more than 24,000 members, making it the state's largest association dedicated exclusively to serving the interests of small and independent business owners. NFIB's members typically employ fewer than ten people and record annual gross sales of less than \$250,000.

The Ohio Chamber of Commerce (OCC) is a trade association of businesses and professional organizations in Ohio with direct business membership in excess of 4,500 business firms and individuals. A non-profit corporation organized and existing under the laws of Ohio, the OCC represents business, trade, and professional organizations doing business within the State and has frequently participated in legislative and administrative proceedings and as amicus curiae in issues involving employer liability.

The Ohio Self-Insurers Association (OSIA) was formed in 1974 to represent Ohio's self-insuring employers in workers' compensation and employer liability issues. It is only the statewide organization that represents self-insured employers exclusively and is devoted to the issue of workers' compensation and employer liability. There are over twelve hundred self-insuring employers in Ohio. Ohio's self-insuring employers represent a significant part of the Ohio workforce and its payroll. OSIA routinely files briefs amicus curiae to present its members interests to the Ohio Supreme Court as well as other courts throughout the state.

Amici's members are vitally concerned about the potential imposition of liability created by the lower court's decision in this case.

STATEMENT OF THE CASE AND FACTS

Amici curiae concur in the overview of the case and facts and in the arguments presented in the Brief of Appellant Pro-Pak Industries, Inc..

ARGUMENT

Proposition of Law

THE EXCEPTIONS TO THE "EMPLOYER INTENTIONAL TORT" LAW, R.C. 2745.01, ARE NARROW AND THE LANGUAGE OF R.C. 2745.01(C) MAY NOT BE EXPANDED BY AN INTERPRETATION THAT RENDERS THE PLAIN AND UNAMBIGUOUS WORDS OF THE STATUTE MEANINGLESS.

The Court of Appeals below construed R.C. 2745.01, the Ohio "employer intentional tort law", in a manner that undermines the intent of the General Assembly and is inconsistent with the decisions of this Court in Kaminski v. Metal & Wire Prods. Co. (2010), 125 Ohio St. 3d 250 and in Hewitt v. L.E. Myers Co. (2012), 134 Ohio St. 3d 199. The case now before the Court involves an interpretation of the law specifying when an Ohio employer might be liable to pay twice for an industrial injury: once through the workers' compensation system; the other in a direct liability action. Virtually every Ohio employer could be affected by this decision.

When this Court decided Blankenship v. Cincinnati Milacron Chemicals, Inc. (1982), 69 Ohio St. 2d 608, the constitutionally and statutorily prescribed exclusivity of the Ohio workers' compensation remedy vanished. Two years later, in Jones v. VIP Development (1984), 15 Ohio St. 3d 90, the Court not only defined the concept of an intentional tort in the employment setting but also held that an injured worker could recover workers' compensation benefits and pursue a direct liability claim: in essence,

recover twice for the same injury. The General Assembly responded on four occasions to address the abrogation of the constitutional immunity for work-related injuries.

The Ohio workers' compensation system was designed to be a comprehensive scheme for the resolution of workplace accidents and injuries. In exchange for the swift and certain compensating of employees who are injured in the course of their employment, Ohio employers are granted an immunity from liability. Section 35, Article II of the Ohio Constitution and Ohio Revised Code Section 4123.74 (hereinafter "R.C. 4123.74") both establish workers' compensation as the exclusive remedy for workplace injuries. This Court has recognized a limited exception to the exclusivity of the workers' compensation remedy: that is the rare case where an injury results from an employment intentional tort committed by the employer against its employee. Blankenship v. Cincinnati Milacron Chemicals, Inc. (1982), 69 Ohio St. 2d 608. Despite multiple attempts¹ by this Court to clarify the definition of an employment intentional tort, there remained uncertainty and inconsistency as to the degree of culpable conduct that could give rise to an employment intentional tort. For example, in his concurring opinion in Brady v. Safety-Kleen Corp. (1991), 61 Ohio St. 3d 624, 642, Justice Herbert Brown noted that immediately after the Court allowed intentional tort claims to proceed against employers, many actions which would otherwise sound in negligence were being filed and litigated as intentional torts:

This trend reached the limit of absurdity in Van Fossen, when we were presented with an employer "intentional" tort based on the simple slip and fall. [citation omitted]

¹ See, e.g., Van Fossen v. Babcock & Wilcox Co. (1998), 36 Ohio St. 3d 100; Pariseau v. Wedge Products, Inc. (1988), 36 Ohio St. 3d 124; Kunkler v. Goodyear Tire & Rubber Co. (1988), 36 Ohio St. 3d 135; Fyffe v. Jenos, Inc. (1991), 59 Ohio St. 3d 115.

Thus, notwithstanding the exclusivity of the workers' compensation remedy, many Ohio employers were forced to defend costly intentional tort cases while at the same time their injured workers were receiving the compensation and benefits provided under the Ohio workers' compensation system for the very same injuries.

In 2005, the General Assembly enacted R.C. 2745.01, which provides in its entirety:

(A) In an action brought against an employer by an employee, or by the defendant survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer should 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 the 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 a condition occurs as a direct result.

(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112 of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121 and 4123 of the Revised Code, a contract, promissory estoppel or defamation.

In two separate opinions issued on March 23, 2010, this Court upheld the constitutionality of R.C. 2745.01. Kaminski, supra; Stetter v. R.J. Corman Derailment Servs. (2010), 25 Ohio St. 3d 280. The history of the Ohio experience with employer

intentional torts was set forth in detail in the majority's opinion in Kaminski. Reading that recitation makes it clear that R.C. 2745.01 was enacted in direct response to Ohio courts' interpreting when an injured worker may pursue a direct liability action against his or her employer based on a claim of intentional tort, despite the constitutional and statutory immunity provided under the workers' compensation laws. In upholding the constitutionality of the Ohio employment intentional tort law, this Court observed in its majority decision that the exception to the exclusivity of the workers' compensation remedy was intended to be a narrow one:

As an initial matter, we agreed with the Court of Appeals that the General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional tort only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D) .

* * *

This view is supported by the history of employer intentional-tort litigation in Ohio and by a comparison of the current statute to previous statutory attempts. See, e.g., Van Fossen, 36 Ohio St. 3d at 108-109, 522 N.E.2d 49, holding that former R.C. 4121.80(G) (which bore a marked resemblance to current R.C. 2745.01(B)) imposed "a new, more difficult statutory restriction upon" an employee's ability to bring an employer intentional-tort action; Johnson, 85 Ohio St. 3d at 310, 707 N.E.2d 1107 (Cook, J., dissenting) ("by enacting [former] R.C. 2745.01, the General Assembly sought to statutorily narrow [the] common-law definition [of employer intentional tort] to 'direct intent' torts only"). Accordingly, our task in this case and in Stetter is to determine whether the statute, insofar as it intends to significantly restrict actions for employer intentional torts, survives scrutiny under certain provisions of the Ohio Constitution.

Kaminski, supra, at page 263. The Court went on to hold that the legislative response to the problems created by the common law employer intentional tort remedy would survive such scrutiny.

In the case now before the Court, however, the court of appeals apparently felt unconstrained by the legislators' efforts or by this Court's majority holdings.

Accordingly, its decision was not faithful to the statute nor was it faithful to this Court's interpretation of the statute in Kaminski and in Hewitt. The case now before the Court was decided under the first phrase of division (C) of the statute:

Deliberate removal by an employer of an equipment safety guard...creates a rebuttal presumption that the removal...was committed with the intent to injure another if an injury...occurs as a direct result.

The court of appeals chose to ignore the plain language of the statute so that it could create liability in accordance with its view of what conduct should be actionable:

The service manual for the transfer car goes on to identify safety features designed to protect employees from those potential dangers, specifically identifying the safety bumper:

2.5.4 Collapsible Bumper

The standard United Pentek transfer car is equipped with a collapsible bumper. The car is stopped if for any reason a bumper is tripped. When a bumper is tripped, the car can only be moved manually in the opposite direction. This bumper uses an inductive proximity switch that is triggered when the bumper begins to collapse. The drive is de-energized immediately upon contact with an obstacle and stops within the collapsible length of the bumper.

Therefore, we conclude the safety bumper is an equipment safety guard, and not a safety device as in *Fickle*, or a piece of personal protective equipment as in Hewitt.

* * *

Upon our review of the evidence and deposition testimony, and when viewing it in the light most favorable to Pixley as we must, we hold that a genuine issue of material fact exists as to whether Pro-Pak deliberately bypassed the safety bumper. Based on the expert testimony, reasonable minds could conclude that the bumper compressed enough to shut off power to the transfer car, the power was not shut off, and the only way the bumper could have compressed as far as it did without shutting off the power was if the proximity switch had been deliberately bypassed.

Such a presumption would not have even been permissible in a case decided under the common law standard. However, this case arose after the effective date of R.C. 2745.01, a statute held by this Court in Kaminski (1) to be the exclusive vehicle for pursuing an employer intentional tort and (2) to be a statute that was to be strictly and narrowly construed. Mr. Pixley was not injured while he was working on the transfer car – rather, he was struck by the transfer car which was being operated by another employee. Mr. Pixley's injury did not arise because a guard was deliberately removed from equipment -- there was no guard removed. To the contrary, even if the safety bumper could be somehow construed as an equipment safety guard,² the transfer car was tested after the incident and was found to be fully functional and operational. The appellate court did not recite any evidence that the proximity switch had been deliberately disabled or by-passed by the employer. Rather, the court speculated as to how there might have been an equipment failure. The appellate court's notion of fairness may have been offended by the facts underlying Mr. Pixley's work related

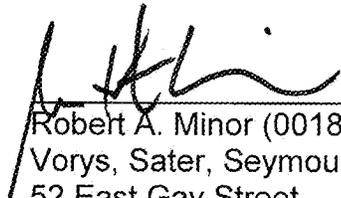
² In Hewitt, this Court described an equipment safety guard as a device to "shield the operator from exposure to or injury from a dangerous aspect of the equipment." Hewitt, supra. Accordingly, amici do not believe that the safety bumper could be so construed. For a discussion of the undefined terms of "equipment safety guard" and "deliberate removal," please see the decision in Fickle v. Conversion Technologies International, 2011 W.L. 2436750 (6th App. Distr., June 17, 2011). In that case, the court adhered to the principle that undefined terms in a statute are to be given their plain and ordinary meaning. Importantly in the case involving Mr. Pixley and Pro-Pak, nothing was ever removed, whether deliberately or inadvertently, from a piece of equipment.

injury. However, this Court has held that R.C. 2745.01 reflected the legitimate exercise of legislative authority and was constitutional. This Court has further noted that the intent of the General Assembly was unmistakable: the intentional tort exception to exclusivity of the workers' compensation remedy was to be narrow. The appellate court's expansion of the exception is directly contrary to both the statute and this Court's decisions in Kaminski, Hewitt and Stetter.

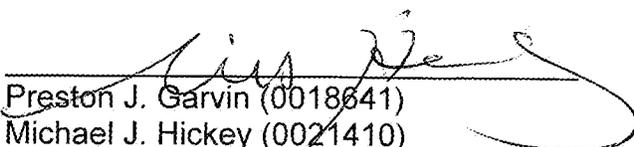
CONCLUSION

For the above reasons, and those set forth in the Brief of Appellant, amici curiae respectfully request that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,



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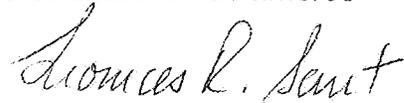
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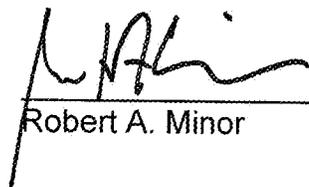
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