

ORIGINAL

No. 13-1405

IN THE
SUPREME COURT OF OHIO

DUANE HOYLE,
Plaintiff-Appellee
-and-
THE CINCINNATI INSURANCE COMPANY
Intervening Plaintiff-Appellant
v.
DTJ ENTERPRISES, INC., et al.
Defendants-Appellees

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NOS. CA-26579 & CA-26587

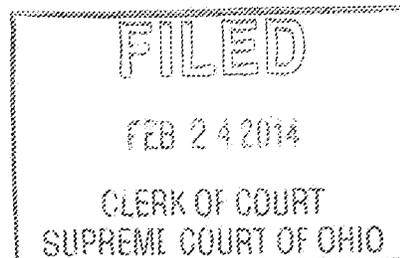
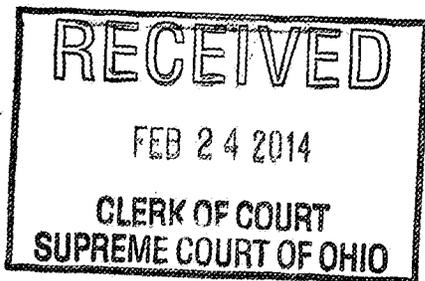
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I. STATEMENT OF FACTS

In 2008, the Plaintiff/Appellee Mr. Hoyle was injured when he fell approximately thirteen feet from a scaffold while employed by DTJ and Cavanaugh. (See Trial Docket, 1). Hoyle was working on a ladder jack scaffold when the platform lifted up like a teeter totter and came crashing down. (Id.) The right side lifted up and came unattached, causing the left ladder, the platform and Mr. Hoyle to fall to the ground. (Id.)

Hoyle filed suit against DTJ and Cavanaugh alleging a workplace intentional tort. More specifically, Hoyle alleged his employer: 1) removed the ladder jack bracket safety pins; 2) failed to secure the ladders used to construct the ladder jack scaffold at either their tops or at their bases; 3) used a pick/platform that was too long for this application; 4) failed to provide and require the use of fall protection; 5) failed to supervise the assembly of the ladder jack; and 6) permitted and intended for two ladder jack scaffold assemblies to be impermissibly bridged. (Id.)

DTJ and Cavanaugh purchased a general commercial liability contract from CIC. (See Trial Docket, 41, 43). CIC intervened in the underlying case and asked for a declaratory judgment that it was not required to cover DTJ and Cavanaugh based upon certain exclusions contained in the insurance contract. (Id.)

An exclusion in CIC insurance contract applies to an employer's conduct constituting "intentional tort" as defined in R.C. §2745.01. (See Decision and Entry of Ninth District Court of Appeals, ¶8, Court of Appeals Docket No. 26). The insurance contract contained an endorsement for "Employers Liability Coverage." (Id.) Therein, Cincinnati Insurance provided coverage for specific "intentional act[s]," as follows:

[Cincinnati Insurance] will pay those sums that an insured becomes legally obligated to pay as damages because of “bodily injury” sustained by your “employee” in the “workplace” and caused by an “intentional act” to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages.

The policy defined an “intentional act” as “an act which is substantially certain to cause ‘bodily injury,’” and required the following conditions be met for purposes of coverage:

- a. An insured knows of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
- b. An insured knows that if an “employee” is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the “employee” will be a substantial certainty; and
- c. An insured under such circumstances and with such knowledge, does act to require the “employee” to continue to perform the dangerous task.

The contract excluded from coverage “liability for acts committed by or at the direction of an insured with the deliberate intent to injure[.]” (Emphasis added.) (Id.)

The insurance contract plainly and unambiguously excludes claims brought under R.C. §2745.01. That section limits an employer’s liability to those circumstances in which an employee proves the employer specifically intended an injury or acted deliberately with intent to harm:

(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. (emphasis in bold)

(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. (emphasis in bold).

(C) **Deliberate removal** by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation **was committed with intent to**

injure another if an injury or an occupational disease or condition occurs as a direct result. (emphasis in bold).

DTJ and Cavanaugh moved for summary judgment on Mr. Hoyle's intentional tort claims under R.C. §2745.01 arguing that there was no proof of deliberate intent to harm or deliberate removal of a safety guard. (Trial Docket 57). The trial court granted DTJ and Cavanaugh's motion for summary judgment in part, concluding that a material question of fact remained only as to Mr. Hoyle's claim that his injuries were caused by DTJ and Cavanaugh removing a safety guard. (Trial docket 123). The trial court found a question of fact existed on whether the employer "deliberately" removed a guard. (Id).

CIC moved for summary judgment on the declaratory judgment claim. (Trial Docket 72). The trial court granted summary judgment to CIC, concluding that Mr. Hoyle was required to demonstrate "deliberate intent" of DTJ or Cavanaugh to cause him injury in order to prevail on his claim. (Id). The trial court also determined the insurance contract excluded from coverage damages caused by "deliberate intent" of the insured to injure, and thus, CIC was not required to indemnify DTJ or Cavanaugh for any potential judgment against them. (Id).

DTJ and Cavanaugh appealed this judgment and the Ninth District Court of Appeals reversed summary judgment. (Court of Appeals Docket No. 26). The Court of Appeals held, "Although the deliberate intent to injure may be presumed for purposes of the statute where there is a deliberate removal of a safety guard, we conclude that this does not in itself amount to 'deliberate intent' for the purposes of the insurance exclusion." (Id. at ¶19). The implication from this decision is that there could be liability under the statute—created by the rebuttable presumption -- without proof the employer acted with deliberate intent to harm. The Ohio Association of Civil Trial Attorneys hereby urges this Court to review this ruling and reverse the judgment of the Ninth District Court of Appeals.

The appellate court's decision constitutes a dangerous precedent which is inconsistent with Ohio's public policy as stated in R.C. §2745.01 requiring proof of deliberate or specific intent to harm. If this Court does not address the injustice committed by the lower court's decision, the precedent will result in significant harm to both the businesses and the insurers whom the OACTA members represent. Specifically, if this decision is allowed to stand, businesses and possibly insurers will find themselves liable for employer intentional torts under R.C. §2745.01 when the plaintiff/employee argues the employer deliberately removed a safety guard (thus creating a statutory presumption of intent to harm under R.C. § 2745.01 subsection (C)), even when the employer rebuts the statutory presumption of deliberate intent. Based on Ohio's public policy, the legislature never intended to create liability for anything less than an employer's specific or deliberate intent to cause harm.

II. APPELLANTS' PROPOSITIONS OF LAW

Appellant Cincinnati Insurance Company's First Proposition of Law:

Where an employee is relying upon R.C. §2745.01(C) to create a rebuttable presumption of intent to injure arising from the employer's deliberate removal of an equipment safety guard, the ultimate burden remains with the employee to prove that the employer acted with "deliberate intent" in order to establish liability against the employer for an Employer Intentional Tort.

The Court of Appeals determined that the rebuttable presumption created by the removal of an equipment safety guard created a presumption of "deliberate intent" that means something different than the words "deliberate intent" as used in the insurance contract between CIC and DTJ Enterprises or R.C. §2745.01(B). Courts should not interpret R.C. §2745.01 to create a burden of proof for employer intentional torts that is different from what the legislature intended.

Generally, actions for injuries sustained in the course of employment must be addressed within the framework of Ohio's workers' compensation statutes. *Roberts v. RMB Ents., Inc.*, 197 Ohio App.3d 435, 2011-Ohio-6233, ¶ 20 (12th Dist.); *Zuniga v. Norplas Indus. Inc.*, 6th Dist. Wood Nos. WD-11-066 and WD-11-067, 2012-Ohio-3414, ¶ 14. However, in limited circumstances when an employer's conduct is sufficiently egregious to rise to the level of an intentional tort, an employee may sue his employer for an intentional tort under R.C. §2745.01. See *Barton v. G.E. Baker Constr, Inc.*, 9th Dist. Lorain No. 10CA009929, 2011-Ohio-5704, ¶ 7; see also *Ferryman v. Conduit Pipe Prods. Co.*, 12th Dist. Madison No. CA2007-02-007, 2007-Ohio-6417, ¶ 6.

R.C. 2745.01 requires proof of the employer's deliberate or specific intent to harm.

Subsection (A) of the statute reads:

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. (Italics added for emphasis).

As defined by R.C. §2745.01(B), "*substantially certain*" means that an "employer acts with *deliberate intent* to cause an employee to suffer an injury, a disease, a condition, or death." Thus, acting with the belief that an injury is "substantially certain" to occur is not analogous to wanton misconduct, nor is it "enough to show that the employer was merely negligent, or even reckless." *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, ¶ 17; *Weimerskirch v. Coakley*, 10th Dist. Franklin No. 07AP-952, 2008-Ohio-1681, ¶ 8. As noted by this Court, one may recover "for employer intentional torts only when an employer acts with specific intent to cause an injury." *Kaminski v. Metal Wire Prods. Co.*, 125 Ohio St.3d 250,

2010-Ohio-1027, ¶ 56. This Court’s decision in *Kaminiski* further clarified the meaning of R.C. §2745.01 by stating that the new statute required proof of specific or deliberate intent to harm:

As an initial matter, we agree 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 torts **only when an employer acts with specific intent** to cause an injury, subject to subsections (C) and (D).¹

Id. at ¶ 56 (citations omitted).

R.C. §2745.01 replaced the common law and added a requirement for the employee to prove a “specific intent” to cause an injury or a “deliberate intent” to cause injury. (Underline added for emphasis). The Legislature obviously intended to eliminate an employer’s liability for workplace injuries caused by anything short of proof of an employer’s deliberate or specific intent to injure.

Ninth District Court of Appeal’s decision interpreting R.C. §2745.01(C) creates a legal precedent that is inconsistent with the legislature’s intent to limit recovery to a specific and narrow circumstance. The Ninth District Court of Appeals found that the removal of an equipment safety guard creates a legal presumption of an employer’s intent to harm. The court went on to hold that the legal presumption of “intent to injure” created by the removal of equipment safety guard means something different than exact same words used in the exclusion of an insurance policy of the Cincinnati Insurance Company. The policy excluded coverage for an employer who deliberately or intentionally caused harm to an employee. Ultimately, the Ninth District Court of Appeal’s decision raises the question of whether the legal presumption under subsection C, constitutes deliberate or specific intent to harm, without actual proof of deliberate or specific intent to harm. OACTA respectfully urges this Court to find that the plain meaning of R.C. §2745.01 requires the employee to prove deliberate or specific intent to harm, even when

¹Kaminski at ¶ 56 (citations omitted).

the employer triggers the legal presumption found R.C. 2745.01(C) by removing an equipment safety guard.

The General Assembly has made clear through R.C §2745.01 that employers will only be liable for torts committed with proof of specific or deliberate intent to harm. *Kaminski*, supra. Subsection C creates a presumption of proof which shifts the burden of production over to the employer to establish the employer had no deliberate or specific intent to harm the employee. The burden of proof does not change, and the employee still carries the burden of proving deliberate or specific intent to harm. The legal presumption in subsection C helps the employee carry this burden, but the burden of proof never actually shifts over to the employer.

Nevertheless, the Ninth District Court of Appeal's decision implies that an employee can improve his or her case with something less than deliberate or specific intent. This ruling is in direct contradiction to the clear legislative intent behind R.C §2745.01.

The Plain Meaning of "Deliberate" and "Removal"

The lower court's decision is based in part on its finding that the term "deliberate" means one thing in the statute and another in the insurance contract. The Oxford English Dictionary 413 (2nd Ed.) offers the following definitions of "deliberate":

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|---------------|---|
| an adjective: | Well weighted or considered; carefully thought out; formed, carried out, etc. with careful consideration and full intention; done with set purpose; studied; not hasty or rash. |
| of persons: | Characterized by deliberation; considering carefully; careful and slow in deciding; not hasty or rash. |
| a verb: | To weight in the mind; to consider carefully with a view to decision; to think over. |

Webster's New Universal Unabridged Dictionary 480 (2nd Ed. 1983) also states:

an adjective: to consider, weight well; carefully thought out or formed, premeditated, done with purpose; formed with deliberation; careful in considering; not sudden or rash; lacking rapidity; slow, unhurried; as, a deliberate move.

a transitive verb: to weigh in the mind; to consider the reasons for and against; to consider carefully; to ponder on.

synonyms: careful, cautious, intentional, purposed, thoughtful.

Webster's Ninth New Collegiate Dictionary 336 (1985) also states:

an intransitive verb: to think about or discuss issues and decisions carefully

a transitive verb: to think about deliberately and often with formal discussion before reaching a decision

an adjective: characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; slow, unhurried, and steady as though allowing time for decision on each individual action involved.

Since an employer's "deliberate removal" creates a statutory presumption, an examination of the word "removal" is likewise relevant to this analysis. Oxford English Dictionary 601 (2ed.) defines "removal" as:

the act of taking away entirely.

the act of 'removing' a person by murder.

dismissal from an office or post; also, transference to another office, etc.

Webster's New Universal Unabridged Dictionary 480 (2nd Ed. 1983) also states:

a noun: a removing or being removed, specially a taking away or being taken away, dismissal from an office or position or a change of place, residence, etc.

transitive verb: to move from where it is; to lift, push, or carry away, or from one place to another, to take off, to take away by death, to wipe out, to get rid of, to eliminate as, remove the causes of war, to take, extract, separate or withdraw from.

synonyms: displace, separate, abstract, transport, carry, transfer, eject, oust, dislodge, suppress.

intransitive verb: to move or move away; to change place in any manner; to go from one place to another

synonyms: move, migrate, depart.

Thus, to qualify for the rebuttable statutory presumption of deliberate intent to harm under R.C. 2741.01(C), the employee must show the employer “deliberately removed” a safety guard. The law presumes that harm to the employee is the natural and probable result of the employer’s “deliberate removal” of the equipment safety guard. Since the harm to the employee is the natural and probable result of the employer’s act of removing the equipment safety guard, the law presumes intent to harm on the part of the employer.

The employer can rebut this statutory presumption, and if rebutted, the burden then falls on the employee/plaintiff to establish the employer acted with deliberate intent to harm. However, under the Ninth District Court of Appeal’s decision, subsection C’s legal presumption means something less than “specific or deliberate intent” to harm, thus triggering coverage under the Cincinnati Insurance Company’s policy. The legislature never intended for the legal presumption to mean anything less than proof of deliberate or specific intent, consistent with the definition of “substantial certainty” found in R.C. §2745.01 subsection B.

The Rebuttable Presumption of Deliberate Intent

R.C. § 2745.01 (C)’s legal presumption is an evidentiary tool to get past summary judgment when an employer deliberately removes a safety guard. There is a rebuttable legal presumption that the harm to the employee is the natural and probable result of the employer’s act of deliberately removing the equipment safety guard. In *Downard v. Rumpke of Ohio, Inc.*, 2013-Ohio-4760, the court stated:

It is important to note that R.C. 2745.01(C) does not require proof that the employer removed an equipment safety guard with the intent to injure in order for the presumption to arise. The whole point of division (C) is to presume the injurious intent required under divisions (A) and (B). It would be quite anomalous

to interpret R.C. 2745.01(C) as requiring proof that the employer acted with the intent to injure in order [to] create a presumption that the employer acted with the intent to injure. Such an interpretation would render division (C) a nullity.

(Id., citing *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960, at ¶32, fn 2).

But, regardless of whether the employer rebuts the presumption, the plaintiff still carries the burden of proof, because in order to establish liability under R.C. § 2745.01 (C), a jury would still have to find an employer acted with deliberate intent to harm, with or without the statutory presumption.

The Ninth District Court of Appeals ruled the statutory presumption of deliberate intent under subsection (C) of §2745.01 creates a circumstance “where an employee prevails on his claim of intentional tort without the complained action constituting ‘deliberate intent’ to injure” (*Hoyle* App Decision p.10). The court’s ruling is inconsistent with the clear statutory language requiring proof of an employer’s deliberate intent to harm. The General Assembly intended to create a rebuttable presumption—akin to those found in other statutes. See e.g. *Vargo v. Travelers Ins. Co.* (1987), 34 Ohio St.3d 27, 30, 516 N.E.2d 226 (holding that under R.C. 313.19, a coroner’s report creates a rebuttable presumption of the manner, mode and cause of a decedent’s death).

Evid. R. 301 governs legal presumptions and states a presumption does not shift the ultimate burden of proof:

In all civil actions and proceedings not otherwise provided for by statute enacted by the General Assembly or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial on whom it was originally cast.

The effect of the rebuttable presumption in Ohio has been further explained as follows:

Thus, proof of the basic fact (e.g., letter mailed) automatically establishes the presumed fact (e.g., letter received) and shifts the burden of producing evidence rebutting the presumed fact to the other party. If the opposing party fails to offer sufficient evidence to rebut the presumed fact, that party has failed to satisfy its burden of production and suffers a directed verdict on that issue.

* * *

If, however, the opposing party offers sufficient evidence to rebut the presumed fact, the presumption disappears. It has performed its function of shifting the burden of production, and since that burden has been satisfied by the introduction of rebuttal evidence, no further function remains to be served. The burden of persuasion remains with the party to whom it was originally allocated.

See *Giannelli & Snyder*, Evidence, p. 154 (1996); see also *Evans v. Nat'l. Life & Acc. Ins. Co.* (1986), 22 Ohio St.3d 87, 90, 488 N.E.2d 1247; *Ayers v. Woodard* (1957), 166 Ohio St. 138, 140 N.E.2d 401, at syllabus paragraph three.

Where a presumption is rebuttable, such as the case here, the production of evidence disputing or contrary to the presumption causes the presumption to disappear as if it had never arisen. *Id.*, (stating "when either party introduces substantial credible evidence tending to prove a fact which would otherwise be presumed, the presumption either never arises or it disappears"); *In re Guardianship of Breece*, 173 Ohio St. 542 (1962) (holding "the production of evidence disputing or contrary to the presumption causes the presumption to disappear where such evidence to the contrary either counterbalances the presumption or even when it is only sufficient to leave the case in equipoise"); see also 1980 Staff Note, Evid. R. 301 ("once a presumption is met with sufficient countervailing evidence, it fails and the presumption serves no further function. If rebutted, the jury is not instructed that a presumption existed").

Thus, if the presumption is triggered by the removal of a safety guard, the presumption establishes deliberate intent to injure unless it is rebutted. If the employer rebuts the

presumption, the plaintiff must then present evidence of the employer's actual deliberate intent to injure. The Legislature never intended for the plaintiff to prevail absent a finding of deliberate intent to injure—whether established by an un rebutted presumption or by actual evidence of deliberate intent to injure. *Rudisill v. Ford Motor Co.*, 709 F.3d 595 (6th Cir. 2013).

Ohio has a strong public interest against courts circumventing the immunity created by Ohio's Worker's Compensation statutes, and allowing the Court of Appeal's decision to stand enables claims against employers without proof of "deliberate intent" consistent with the requirements of R.C. §2745.01(B). This is in direct conflict with the legislative intent and this Court's holding in *Kaminski*, supra.

R.C. § 2745.01 (C) requires proof of the deliberate removal of a safety equipment guard in order to create a rebuttable presumption that the employer deliberately intended harm to the employee. Evidence Rule 301 requires that the ultimate burden of proof remains with the plaintiff/employee. Thus, regardless whether the employer deliberately caused harm or deliberately removed a safety device, the employee must prove "deliberate" conduct to establish liability. The statute presumes proof of deliberate intent when the employer deliberately removed a safety guard. If the employer fails to rebut the presumption, the presumption stands. If the employer rebuts the presumption, the plaintiff/employee must still prove deliberate intent to harm.

The word "deliberate" must have a consistent meaning, regardless of whether the context is the words of a statute or an insurance contract. "Deliberate" is an adjective that describes action. "Removal" is a noun that refers to the act of taking away. Both terms are active terms, and from the Legislature's use of these terms, Ohio's courts must assume the Legislature's intent to limit an employer's liability to a narrow and specific circumstance in which the employer

specifically or deliberately intended harm. Nothing less should create liability under R.C. §2745.01. The Ninth District Court of Appeals, however, has written a new standard of proof under §2745.01 (C), that falls somewhere short deliberate intent to harm. This new standard is not at all what the General Assembly had in mind when it passed §2745.01.

Appellant Cincinnati Insurance Company's Second Proposition of Law:

Ohio public policy prohibits an insurer from indemnifying its insured/employer for Employer Intentional Tort claims filed under R.C. §2745.01 because an injured employee must prove that the employer committed the tortious act with direct or deliberate intent to injure in order to establish liability.

The Ninth District Court of Appeal's decision creates confusion and uncertainty on whether commercial insurance contracts cover workplace intentional torts. OACTA urges the court to resolve the issue of coverage for intentional tort for both employer and insurer alike.

Appellant Cincinnati Insurance Company's Third Proposition of Law:

An insurer has no duty to indemnify an employer-insured for Employer Intentional Tort liability when an employee invokes R.C. §2745.01(C) for the deliberate removal of an equipment safety guard where an endorsement to the insurer's policy excludes coverage for "liability for acts committed by or at the direction of an insured with deliberate intent to injure."

The Ninth District Court of Appeal's decision creates confusion and uncertainty on whether commercial insurance contracts cover workplace intentional torts. OACTA urges the court to resolve the issue of coverage for intentional tort for both employer and insurer alike.

III. CONCLUSION

R.C. §2745.01 does not have multiple burdens of proof for employer intentional torts. The legislature created one standard of proof: an employer's specific or deliberate intent to harm. This standard of proof applies to all claims for employer intentional tort. R.C. §2745.01 (C) creates a rebuttable presumption of deliberate intent to harm in cases where the employer deliberately removes an equipment safety guard. Deliberate intent is presumed because the

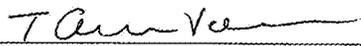
removal of the safety guard is a deliberate act that is normally intrinsically tied to an injury, such that deliberate intent can be inferred. *Allstate v. Campbell* 128 Ohio St.3d 186 (Ohio 2010) at ¶62. Because there can be legitimate reasons for the removal of a safety guard, the employer has the opportunity to rebut the statutory presumption of deliberate intent to harm, and the presumption is not a conclusive inference or presumption. It is rebuttable -- meaning the employer can offer evidence showing a valid, non-malicious reason, short of deliberate intent.

Once that occurs, the presumption is rebutted, and the employee has the burden of proving deliberate intent through other means. *Rudisill*, supra, (“When a presumption is rebutted, the case proceeds as if the presumption had never arose). See, e.g., *In re Guardianship of Breece*, 173 Ohio St. 542, 184 N.E.2d 386, 394 (1962) (“Where the presumption is a rebuttable one, as in this case, the production of evidence disputing or contrary to the presumption causes the presumption to disappear where such evidence to the contrary either counterbalances the presumption or even when it is only sufficient to leave the case in equipoise.”); *Horsley v. Essman*, 145 Ohio App.3d 438, 763 N.E.2d 245, 249 (2001) (“We have previously characterized the effect of rebutting the presumption as ‘bursting the bubble,’ with the case then proceeding as if the presumption had never arisen.”) In either scenario, the employee can only recover if direct intent is proven.

The Ninth District Court of Appeal’s decision is inconsistent with Ohio’s public policy creating immunity to employers for workplace injuries except in narrow circumstances of proof of deliberate conduct. The court ignored the plain meaning of the word “deliberate” in the context of R.C. § 2745.01 (C), the legislative history of employer intentional tort law and the plain language of Evidence Rule 301. Ohio has a strong interest against any statutory interpretation that both ignores the plain meaning of words and results in liability for employers

beyond the limited scope of R.C. §2745.01. Therefore, OACTA respectfully urges this Court to accept jurisdiction of this case to overturn the Ninth District Court of Appeal's decision and render a ruling consistent with Ohio's public policy prohibiting liability absent proof of specific or deliberate intent to harm.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

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