

## The demise of employer intentional tort claims in Ohio: A trial lawyer's perspective

by Frank A. Ray

*The reports of my death are greatly exaggerated.*  
—Samuel Clemens, aka Mark Twain, 1897

All of us have probably chuckled at Samuel Clemens' often-quoted witticism. Under current Ohio law, if "employer intentional tort" has not met its demise, it teeters on life support.

Effective in 2005, the General Assembly enacted its most recent iteration of the tort as RC 2545.01. Current R.C. 2545.01 did not materially deviate from key language in two prior versions of the statute. Both enactments were "repealed" as unconstitutional by decisions of the Ohio Supreme Court.<sup>1</sup> Despite prior holdings, the Court ruled in 2010 that R.C. 2545.01 is constitutional.<sup>2</sup>

Ohio Revised Code 2745.01 directs that for "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*" and defines "substantially certain" as occurring when "*an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death*" (emphasis added).

For any lawyer contemplating acceptance of a claimant's case against an employer based on this statutory scheme, I offer one word, "yikes!"

Subsequent to enactment of R.C. 2745.01, Ohio trial and appellate courts have demonstrated a proclivity to "broom" injured employees' statutory employer intentional tort claims by issuing and upholding summary judgment for employers.

To pound another nail into the casket for intentional torts, the Supreme Court instructed that "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system."<sup>3</sup>

If R.C. 2745.01 offers any glimmer of hope for a plaintiff to prevail in an employer intentional tort, this flicker in the statute offers, "Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another."

If an employer were to engage in conduct that rates as an exception to virtual immunity under the intentional tort statute, the employee might have a shot at prevailing on the claim. A couple of Ohio courts have denied summary judgment for employers when plaintiffs have placed at issue their employers' deliberate removal of safety guards from equipment.<sup>4</sup>

Yet, the Supreme Court has drawn a tightly defined circle around any exception under the statute that relates to an employer's "deliberate removal of an equipment safety guard."<sup>5</sup>

**"Ohio trial and appellate courts have demonstrated a proclivity to 'broom' intentional tort claims by issuing and upholding summary judgment for employers."**

If the statutory burden of R.C. 2745.01 does not deflect plaintiffs' lawyers from undertaking employer intentional torts under Ohio law, those attorneys should be mindful of application of tort reform legislation. Effective in 2003, the General Assembly enacted changes in Ohio law governing operation of "joint and several liability" when the tort arises "from the tortfeasor's conduct that occurs on premises owned, leased, or supervised by the employer" pursuant to R.C. 2307.11(D) and/or when a non-party's tortious conduct contributes to cause the plaintiff's injury. If an employer's tortious conduct is either on or off the site of the employer's premises and when any third-party is a joint tortfeasor, an apportioned amount of fault by any third-party results in apportioned reduction of the employee's award against the employer.

Dictated by tort reform legislation, an employee's "contributory fault," defined by R.C. 2307.011(B), applies to statutory employer intentional tort claims that occur on the site of the employer's premises.

If the employee somehow secures a settlement or wins at trial and survives on appeal, the Ohio Bureau of Workers' Compensation will have its hand out. The bureau is subrogated for statutory reimbursement of benefits paid and to be paid from funds recovered in settlement or judgment produced by the employee's collateral tort claim.<sup>6</sup>

Plaintiffs' lawyers will struggle to find solace in the prospect of winning an employer intentional tort case when factoring the cost of litigation, the employee's potential contributory fault, and subrogation of the Bureau. Today, in Ohio, an employer intentional tort claim, even if meritorious, will rarely qualify as a good "business decision" for a plaintiffs' lawyer.

R.I.P., Ohio employer intentional tort claims. 📖

## Endnotes

- <sup>1</sup> *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624 (1991), and *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298 (1999), striking down former R.C. 4121.80 and R.C. 2745.01, respectively.
- <sup>2</sup> *Kaminski v. Metal & Wire Products Company*, 125 Ohio St.3d 250, 2010-Ohio-1027; and *Stetter v. R.J. Corman Derailment Services, LLC*, 125 Ohio St.3d 280, 2010-Ohio-1029.
- <sup>3</sup> *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685.
- <sup>4</sup> *Smith v. Ray Esser & Sons, Inc.*, 2013-Ohio-1095 (9th Dist. Ct. App.); *Beyer v. Rieter Automotive North American, Inc.*, 2012-Ohio-2807 (6th Dist. Ct. App.); and *Cantu v. Irondale Industrial Contractors*, 2012-Ohio-6057 (6th Dist. Ct. App.).
- <sup>5</sup> *Hewitt v. L.E. Meyers Company*, 134 Ohio St.3d 199, 2012-Ohio-5317.
- <sup>6</sup> R.C. 4123.93 and 4123.931.

## Author bio



Frank A. Ray Co., L.P.A.  
Columbus, Ohio

# The Right Pick

## FOR PROFESSIONAL LIABILITY COVERAGE

- *Admitted Carrier with an "A" (Excellent) rating by A.M. Best\**
- *\$50,000 in Claims Expenses Outside the Limits included*
- *Deductible Abatement – For each year of continuous coverage with PSIC, an abatement of the deductible is provided in increments of \$2,500 up to a maximum of \$10,000*
- *Consent-to-Settle Benefit: No Hammer Clause*



**AttorneyShield®**  
PROFESSIONAL LIABILITY INSURANCE

**Call 1-800-282-9786 to  
speak with a specialist.**



**PSIC**

Professional Solutions  
INSURANCE COMPANY

Professional liability insurance is underwritten by Professional Solutions Insurance Company.  
A.M. Best ratings range from A++ to S. License Number 118691 ©2013 PSIC NFL 9288

