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Sent: Wed 11/16/2016 4:21 PM
Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Have there been any recent cases interpreting Ohio's "intentional tort" statute, R.C. § 2745.01, involving lawsuits brought by employees against employers for workplace injuries?

On April 7, 2005, Ohio's General Assembly enacted R.C. § 2745.01 to codify Ohio law governing employer "intentional" torts. Prior to the passage of that statute, common law provided that an employer could be sued for injuries arising from work-related incidents where the employer subjected the employee to a dangerous process, procedure, instrumentality or condition with "knowledge that injuries are certain or substantially certain to result." *Fyffe v Geno's Inc.*, (1991) 59 Ohio St.3d 115. When it was passed, the statute was thought to "significantly restrict" recovery for employer intentional torts, limiting them to situations in which the employer acts with "specific intent to cause injury." *Kaminski v Metal & Wire Products*, 175 Ohio App.3d 223, 2008-Ohio-1521. While most Ohio courts have followed this interpretation, others have construed the statute more narrowly. Recently, the Fifth Appellate District was presented with a case involving an employer "intentional tort" case, and whether the claim survived a review pursuant to R.C. § 2745.01.

Ball v MPW Indus. Servs., Inc., 2016-Ohio-5744, involved an employee who was severely burned while shoveling "fly ash," a by-product of burning coal to generate electricity. It is often gathered in piles, and while the top of the pile may be cool, the inside of the pile remains hot, unstable, and subject to collapse, and therefore the work is known to be dangerous. Workers are often required to wear protective equipment, heat shields, and special shoes. In 2010, the claimant in *Ball* was working as a crew leader for a company that disposed of fly ash. While working on a pile of fly ash, which consisted of shoveling the ash into a vacuum for disposal, the pile collapsed and trapped the claimant, causing severe burns over a good portion of his body. As a result, the claimant filed a workers' compensation claim, which was certified by the employer, and compensation was paid. Approximately two (2) years later, the claimant filed a lawsuit against his employer, alleging "employer intentional tort" in the Licking County Court of Common Pleas. The basis for the suit was that the employer knew that the fly ash pile in question was hot, unstable, and subject to collapse, and that the employer in fact wanted the fly ash pile to collapse. The employer filed a motion for summary judgment alleging that the complaint did not state a cause of action under R.C. § 2745.01 because the evidence did not support a conclusion that the employer had "specific intent to injure" the claimant. The employer's motion was granted by the trial court, prompting an appeal as of right to the Fifth Appellate District.

The Fifth District affirmed, finding that under the statute it was incumbent upon the claimant to demonstrate a "deliberate intent to injure," and the evidence adduced did not satisfy that burden. The opinion began with a lengthy history of employer intentional torts in Ohio, and the sweeping impact of R. C. § 2745.01. The Court noted that the Sixth Appellate District had decided a case, *Cantu v Irondale Indus. Contr.*, 2012-Ohio-6057, in which it found that the term "intent" should be distinguished from "motive," and that "intent" only referred to the intention to cause the

consequence of an act, and not the resulting harm. The *Cantu* court argued that the only substantive addition caused by § 2745.01 was the adjective “deliberate,” meaning to “carefully consider...characterized by awareness of the consequences.” The Court rejected this analysis of “intent,” and concluded that R.C. § 2745.01 in fact required an employee to show the employer had the deliberate intent to injure, not that an injury was “substantially certain to occur.” In the case at bar, there was no evidence, beyond the employer’s general knowledge of the hazards of a fly ash pile, that the employer intended to injure the claimant. The Court also rejected attempts to argue that the employer made deliberate misrepresentations about the nature of fly ash, finding they were not based in fact.

Ball affirms several other cases concluding that a “deliberate intent to injure” is a necessary prerequisite to an employer intentional tort claim. The mere fact that an employer knowingly permits a hazardous work condition to exist and/or knowingly orders its employees to perform a dangerous job “falls short of the kind of actual intention to injure that robs the injury of accident character.” *Houdeck v ThyssenKrupp Materials, N.A., Inc.*, 134 Ohio St.3d 491, 2012 Ohio-5685.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers’ compensation issues, please feel free to contact me.

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