[Cite as *Ball v. MPW Indus. Servs., Inc.*, 2016-Ohio-5744.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CARLOS R. BALL	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 15-CA-89
	:	
MPW INDUSTRIAL SERVICES, INC.	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 12 CV 01421
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 30, 2016

APPEARANCES:

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Delaney, J.

{¶1} Plaintiff-Appellant Carlos R. Ball appeals the November 2, 2015 judgment entry of the Licking County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

The Parties

{¶2} Defendant-Appellee MPW Industrial Services, Inc. is an industrial cleaning company, located in Hebron, Ohio. It provides cleaning services to industries such as power plants and paper mills.

{¶3} MPW hired Plaintiff-Appellant Carlos R. Ball as a technician in the Industrial Cleaning Group in September 2009. Ball is a resident of the State of Ohio. MPW provided Ball with training in subjects such as the use of personal protective equipment and working in confined spaces. During his employment with MPW, Ball was assigned to remove fly ash. In 2010, MPW promoted Ball to crew leader. Crew leaders are responsible for communicating with the job supervisor and relaying the information to the technicians.

The Fly Ash

{¶4} Fly ash is the byproduct of burning coal in an electric power generating plant. When cool, fly ash is gray in color and is light and fluffy in texture. When a power plant hires MPW to remove fly ash from its plant, the fly ash is located in a pile in a confined space area. A fly ash pile is cool on the top of the pile, but it is hot deeper within the pile. Because of the light and fluffy nature of the fly ash, a fly ash pile is unstable and can collapse. Workers removing fly ash wear steel-toed boots, protective eyewear, a full-face or half-face respirator, gloves, and a Tyvek suit. Working with fly ash is very hot work, requiring an employee to take multiple breaks from the work.

{¶5} MPW removes fly ash with the use of an industrial vacuum. A vacuum with a steel hose is placed on the ground near the fly ash pile and workers shovel the fly ash into the vacuum. If the area where the fly ash pile is located has a permit for a confined space, MPW must use confined space procedures. Confined space procedures involve one employee acting as the "hole watch" to observe his or her coworkers in the confined space.

The Job

{¶6} The Tennessee Valley Authority ("TVA") operates the Paradise Fossil Plant, a coal-burning power plant, located in Drakesboro, Kentucky. During "shut downs" or "outages" of units in the Paradise Plant, TVA hires contractors to perform maintenance and cleaning. In August 2010, MPW submitted a bid to TVA for numerous cleaning jobs to be completed during an outage in October 2010. One of the jobs included cleaning the fly ash out of the Unit 1 selective catalytic reduction ("SCR"). TVA stated one of the SCR outlet ducts to be cleaned was 50 feet by 80 feet with an assumed average depth of three feet of fly ash.

{¶7} TVA accepted MPW's bid for cleaning the plant during the outage and the work began on October 22, 2010. MPW assigned Ball to work the job at TVA as crew leader. TVA required the MPW employees to take a day-long, site-specific safety class. Ty Jones was the MPW day shift supervisor in charge of working with TVA's assigned primary contact for MPW. Ty Jones supervised all of the MPW jobs on the day shift from 7:00 a.m. to 7:00 p.m. Tim Pickering was the MPW night shift supervisor from 7:00 p.m. to 7:00 a.m. Ball reported to Pickering on the night shift.

{¶8} On or about October 27, 2010, MPW began work on the SCR outlet duct. Inside the SCR outlet duct, MPW discovered the fly ash pile was not three feet deep as TVA estimated, but 20 to 25 feet high against the wall, 80 feet across, and lower as it sloped away from the wall. The pile had a straight up and down cliff that was against the pile. Jones, Pickering, and Ball acknowledged it was the largest fly ash pile they had ever seen.

{¶9} On October 28, 2010, Ball worked as the crew leader on the night shift overseeing technicians Chris Ramey and Tyler Kelley. Kelley had prior experience working with fly ash, but Ramey had never worked with fly ash before.

{¶10} Pickering and Jones discussed the height of the fly ash pile on October 28, 2010. Pickering and Jones had concerns about the fly ash pile falling. They decided to move the vacuum hose back further from the height of the fly ash pile, about 20 feet away, because they expected the crew would be safe in that location if the fly ash pile shifted or moved. Pickering expected small amounts of the fly ash pile to fall, but he did not expect a big slide. Pickering knew that when vacuuming fly ash, it was helpful if little bits fall because it was easier to vacuum up. The little bits of fly ash keep it moving and do not inundate the end of the vacuum hose.

{¶11} In order to prevent the fly ash pile from falling, Jones and Pickering planned to attack the pile from the front. The crew would do a cross-sweep of the pile from north to south with shovels and not poke the vacuum hose directly into the pile. The crew would vacuum the fly ash near the hose. Ramey thought the fly ash on the floor at the start of the pile was eight to twelve inches deep. Ramey said it was enough work near the hose

to keep them busy throughout the night. The SCR outlet duct was illuminated by portable, standing lights.

{¶12} Prior to starting the night shift on October 28, 2010, MPW supervisors conducted a pre-job safety meeting with all MPW employees working the night shift. At the meeting, they discussed the work and safety hazards. Ball, pursuant to his duties as crew leader, completed a hazard assessment form. He wrote on the form that the fly ash pile could collapse, the fly ash was hot, and the pile was deep. Ball learned at the meeting that the fly ash pile in the SCR outlet duct had shifted during the day shift. Ramey heard at the meeting there was a small cave-in during the first shift. Pickering stated he told Ball, Ramey, and Kelley that the fly ash pile could fall, shift, or move. The danger of the fly ash pile falling was the reason why Pickering moved the vacuum hose 20 feet away from the pile.

The Accident

{¶13} On October 28, 2010 at approximately 7:00 p.m., Ball, Ramey, and Kelley began working in the SCR outlet duct. Ball wore a hard hat, full-face respirator, gloves, paper Tyvek suit, ear plugs, and rubber “blast” boots. Ramey and Kelley wore the same personal protective equipment but they wore steel-toed leather boots. At some point during the work, Kelley expressed his concerns to Pickering about the size of the pile and how they were cleaning the pile. Kelley was concerned that because they were cleaning the pile from the bottom up, the fly ash pile could collapse. He requested additional personal protective equipment from Pickering, such as a fire retardant jacket. Kelley stated that Pickering told him to either do the work or find a ride home.

{¶14} The crew took a break for lunch around 1:00 a.m. on October 29, 2010. The crew believed the fly ash pile collapsed some during their lunch. The crew returned to work and Kelley and Ball shoveled the fly ash pile, while Ramey stood back to take a break. While the men were working, the fly ash pile collapsed. Ball started running, but the pile engulfed him. The falling fly ash pile knocked over the standing lights, extinguishing the light in the outlet duct. Ball ran into a wall and fell. He stood up but realized he could not run because the hot fly ash was in his boots, melting his boots to his legs. The metal in his boots burned his feet. Ramey and Kelley pulled Ball out of the outlet duct. Kelley and Ramey were also burned by the falling fly ash pile. Ball suffered second and third degree burns over forty-percent of his body. Kelley and Ramey were also severely burned.

{¶15} Ramey felt the fly ash pile collapsed because Ball stuck his shovel into a steep portion of the fly ash pile. When Ball put his shovel in the fly ash pile, it immediately collapsed. Ball had no recollection of that happening.

The Lawsuit

{¶16} Based on his work-related injuries, Ball requested and received workers' compensation benefits from the State of Ohio.

{¶17} On October 26, 2012, Ball filed a complaint for employer intentional tort against MPW in the Licking County Court of Common Pleas. Ball also filed a complaint against TVA and MPW in federal court. The trial court stayed the state proceedings. On March 11, 2015, the trial court lifted the stay after the federal court dismissed without prejudice Ball's state claims.

{¶18} On July 17, 2015, MPW filed a motion for summary judgment against Ball. Ball responded. On November 2, 2015, the trial court granted summary judgment in favor of MPW.

{¶19} It is from this decision Ball now appeals.

ASSIGNMENTS OF ERROR

{¶20} Ball raises six Assignments of Error:

{¶21} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR FINDING NO EVIDENCE THAT MPW DELIBERATELY INTENDED TO INJURE BALL.

{¶22} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR FINDING NO EVIDENCE BALL'S SUPERVISOR EXPECTED THE ASH PILE TO COLLAPSE.

{¶23} "III. THE TRIAL COURT ERRED FINDING THAT ACTION WITH A BELIEF THAT INJURY IS SUBSTANTIALLY CERTAIN TO OCCUR IS NOT EQUIVALENT TO ACTING WITH DELIBERATE INTENT TO INJURE ANOTHER.

{¶24} "IV. THE TRIAL COURT ERRED FINDING THAT THIS WAS AN ACCIDENT, NOT AN INTENTIONAL TORT.

{¶25} "V. THE TRIAL COURT ERRED FINDING THAT MPW MADE NO MISREPRESENTATIONS CONCERNING THE FLY ASH.

{¶26} "VI. THE TRIAL COURT ERRED FINDING '[N]ONETHELESS, EVEN APPLYING OHIO'S SUBSTANTIVE LAW, MPW IN ENTITLED TO JUDGMENT.' "

ANALYSIS

Standard of Review

{¶27} Ball argues in his six Assignments of Error that the trial court erred in granting summary judgment in favor of MPW. We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.* * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶28} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth “specific facts” by the

means listed in Civ.R. 56(C) showing that a "triable issue of fact" exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶29} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

Employer Intentional Torts

{¶30} Prior to April 7, 2005, the courts looked to common law to determine whether an employee established his or her employer committed an intentional tort. Pursuant to *Fyffe v. Jeno's, Inc*., 59 Ohio St.3d 115, 118, 570, N.E.2d 1108 (1991), when an employer proceeds despite knowledge that injuries are certain or substantially certain to result, "he is treated by the law as if he had in fact desired to produce the result." Under *Fyffe*, an employee could establish intent based on substantial certainty by establishing the following: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the 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 (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. *Breitenbach v. Double Z Constr. Co*., 5th Dist. Licking No. 15CA53, 2016-Ohio-1272, ¶ 28 citing *Fyffe*.

{¶31} On April 7, 2005, the General Assembly enacted R.C. 2745.01 to supersede the common law governing employer intentional torts. The statute provides as follows:

> (A) In an action brought against an employer by an 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.

{¶32} As noted by the court in *Kaminski v. Metal & Wire Products*, 175 Ohio App.3d 227, 2008–Ohio–1521, 886 N.E.2d 262, "R .C. 2745.01 codifies the common-law employer intentional tort and makes its remedy an employee's sole recourse for an employer intentional tort." *Breitenbach v. Double Z Constr. Co*., 5th Dist. Licking No. 15CA53, 2016-Ohio-1272, ¶ 32 quoting *Kaminski* at ¶ 14. "The General Assembly's intent in enacting R.C. 2745.01 was to 'significantly restrict' recovery for employer intentional torts to situations in which the employer 'acts with specific intent to cause an injury.' *Kaminski* at ¶ 57; *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010–Ohio–1029, 927 N.E.2d 1092, ¶ 26, citing *Kaminski* at ¶ 56. '[A]bsent 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.' *Houdek v. ThyssenKrupp Materials N.A., Inc*., 134 Ohio St.3d 491, 2012–Ohio–5685, 983 N.E.2d 1253, ¶ 2." *Hoyle v. DTJ Ents., Inc*., 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.3d 122, ¶ 11.

Deliberate Intent to Injure

{¶33} Ball contends in his first, second, third, and fourth Assignments of Error that the trial court erred in granting summary judgment in favor of MPW pursuant to R.C. 2745.01(A) and (B). We disagree.

{¶34} Under R.C. 2745.01(A) and (B), Ball must prove that MPW acted with specific intent to injure. 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." 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." *Breitenbach v. Double Z Constr. Co*., 5th Dist. Licking No. 15CA53, 2016-Ohio-1272, ¶ 30 citing *Talik v. Fed. Marine Terminals, Inc*., 117 Ohio St.3d 496, 2008–Ohio–937, 885 N.E.2d 204, ¶ 17; *Weimerskirch v. Coakley*, 10th Dist. Franklin No. 07AP–952, 2008–Ohio–1681.

{¶35} Rather, as noted by the Ohio Supreme Court, a plaintiff may recover "for employer intentional torts only when an employer acts with specific intent to cause an injury." *Breitenbach v. Double Z Constr. Co*., 5th Dist. Licking No. 15CA53, 2016-Ohio-1272, ¶ 31 quoting *Kaminski v. Metal Wire Prods. Co*., 125 Ohio St.3d 250, 2010–Ohio–1027, 927 N.E.2d 1066, ¶ 56; *Houdek v. ThyssenKrupp Materials N.A., Inc*., 134 Ohio

St.3d 491, 2012–Ohio–5685, 983 N.E.2d 1253, ¶ 25 (finding "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").

{¶36} In support of his argument there is a genuine issue of material fact that MPW intended to injure Ball, Ball directs this Court to *Cantu v. Irondale Indus. Contrs*., 6th Dist. Fulton No. F–11–018, 2012–Ohio–6057, where the Sixth District Court of Appeals discussed the term "intent" as used in R.C. 2745.01(A) and (B) and analyzed the term using general tort principles. *Pastroumas v. UCL, Inc*., 1st Dist. Hamilton No. C-150352, 2016-Ohio-4674, ¶ 31. In *Cantu*, the court distinguished between motive and intent, stating that the word "intent" is used to "denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to occur or result from it." *Id*. at ¶ 22, quoting 1 Restatement of the Law 2d, Torts, Section 8(A) (1965). The *Cantu* court further stated that "[w]hen the legislature redefined 'substantially certain' to mean 'deliberate intent,' the only thing added to this equivalency was the adjective 'deliberate,' meaning 'to carefully consider * * * characterized by awareness of the consequences.' " *Id*. at ¶ 24, quoting Merriam Webster's Collegiate Dictionary 305 (10th Ed.1996). *Pastroumas*, ¶ 31.

{¶37} The First District Court of Appeals in *Pastroumas v. UCL, Inc*., 1st Dist. Hamilton No. C-150352, 2016-Ohio-4674, appeal not allowed, 146 Ohio St.3d 1429, 2016-Ohio-4606, 52 N.E.3d 1204, 2016 WL 3534641, ¶¶ 31-32 (2016), disagreed with the Sixth District's definition of "intent" utilizing common law principles. It held the "court's holding in *Cantu* is directly contrary to the Ohio Supreme Court's pronouncements that

R.C. 2745.01 requires the employee to show deliberate intent to injure. The legislature has unequivocally rejected the substantial-certainty standard that the *Cantu* court attempted to read into the statute. As the Ohio Supreme Court stated in *Houdek*, 'an employer's 'knowingly permitting a hazardous work condition to exist [and] knowingly ordering employees to perform an extremely dangerous job * * * falls short of the kind of actual intention to injure that robs the injury of accident character.' ' *Houdek*, 134 Ohio St.3d 491, 2012–Ohio–5685, 983 N.E.2d 1253, at ¶ 24, quoting 6 Larson, Workers' Compensation Law, Section 103.03, 103–7 to 103–8 (2001). *See Spangler v. Sensory Effects Powder Sys., Inc*., N.D.Ohio No. 3:15 CV 75, 2015 U .S. Dist. LEXIS 70427, *2–4 (June 1, 2015)." *Id*. at ¶ 32.

{¶38} We decline to follow the definition of intent as espoused in *Cantu*. R.C. 2745.01 requires the employee to show the employer had a deliberate intent to injure, not that an injury was substantially certain to occur.

{¶39} Ball's central argument is that MPW's knowledge of the hazards of the fly ash pile raises a genuine issue of material fact whether it deliberately intended to injure Ball when he worked with the fly ash pile. Ball argues that Pickering knew the fly ash pile was hot, he knew it was unstable, and in fact, he wanted the fly ash pile to fall, thereby evidencing MPW's intent to deliberately injure Ball. Considering the Civ.R. 56 evidence in a light most favorable to Ball, we find the evidence does not support Ball's argument. The depositions in this case show that all the individuals working with the fly ash pile knew the fly ash pile was hot and unstable, but there was no testimony to support Ball's contention that MPW deliberately intended to injure the crew working in the SCR outlet duct on October 29, 2010.

{¶40} Pickering was the supervisor for Ball's night shift crew. Pickering and Jones went into the SCR outlet duct to assess the fly ash pile and the hazards. (Pickering Depo., 84, 86). They estimated the fly ash pile to be 20 to 25 feet high and decided to move the vacuum hose back further from the height of the pile. (Pickering Depo., 85). The hose was placed 20 feet from the pile based on the height of the pile. (Pickering Depo., 117). Pickering speculated that 20 feet would be enough if the pile shifted, but Pickering could not control how far the pile would go. (Pickering Depo., 120). Pickering expected small amounts of the fly ash pile to fall, but he did not expect a big slide. (Pickering Depo., 99). Pickering and Jones were worried about the pile shifting and the possibility of the crew getting burned, but they weren't anticipating a fall of that magnitude. (Pickering Depo., 120, 135). Pickering knew that when vacuuming fly ash, it was helpful if little bits fall because it was easier to vacuum up. The little bits of fly ash keep it moving and do not inundate the end of the vacuum hose. (Pickering Depo., 111). Jones told Pickering that the fly ash pile had slid a little bit, so to mitigate the situation of the sliding of the pile, Jones and Pickering decided to do a cross-sweep of the pile instead of going forward into the pile head-on. (Pickering Depo., 90). Therefore, the crew would be shoveling the fly ash into the vacuum hose from the side and 20 feet from the pile. (Pickering Depo., 117). Pickering stated he personally advised Ball and the crew that the fly ash pile was unstable and to stay away from the pile; that was what the 20 feet was about. (Pickering Depo., 133-134). Pickering was asked,

> Q. And it was your opinion, as a supervisor, that if they did that, that they would be safe?
>
> A. That was my assumption, yes, sir.

Q. And that's what you told them, I want you here because you'll be safe here?

A. Maybe not in that many – I didn't phrase it exactly the way you did. But the reason why I wanted them there, yes, that I thought they'd be safe there, yes, sir.

Q. They weren't safe there, were they?

A. Obviously not.

(Pickering Depo., 118-119).

{¶41} Ball had prior experience working with fly ash. He testified that fly ash is soft and burnt down, because of that you must be careful, anything can vibrate it and make it fall over or collapse. (Ball Depo., 189, 190). No one instructed Ball that the fly ash pile could not collapse. (Ball Depo., 190). He stated he chose to wear his blast boots while working in the SCR outlet duct because he knew the fly ash was hot and he didn't want to lose the soles of his boots. (Ball Depo., 193). Ball, pursuant to his duties as crew leader, completed a hazard assessment form before working in the SCR outlet duct. He wrote on the form that the fly ash pile could collapse, the fly ash was hot, and the pile was deep. (Ball Depo., 188). Ramey testified that Ball, as crew leader, reviewed with Ramey and Kelley at the beginning of the shift about the potential hazards of cave-ins and that the fly ash pile was hot. (Ramey Depo., 11).

{¶42} The Civ.R. 56 evidence demonstrates that reasonable minds can only conclude that MPW did not have a specific intent to cause injury to Ball. The parties were all aware that the fly ash pile was hot and that it could collapse. With the knowledge that the fly ash pile in the SCR outlet duct could collapse, Pickering moved the vacuum hose

20 feet back from the pile because he thought his crew would be safe there if the fly ash pile collapsed. The evidence shows that Pickering and Jones acknowledged the hazardous work conditions and attempted to mitigate them. As the Ohio Supreme Court stated in *Houdek,* "an employer's 'knowingly permitting a hazardous work condition to exist [and] knowingly ordering employees to perform an extremely dangerous job * * * falls short of the kind of actual intention to injure that robs the injury of accident character.' " *Houdek,* 134 Ohio St.3d 491, 2012–Ohio–5685, 983 N.E.2d 1253, at ¶ 24, quoting 6 Larson, *Workers' Compensation Law,* Section 103.03, 103–7 to 103–8 (2001).

{¶43} Ball's first, second, third, and fourth Assignments of Error are overruled.

Deliberate Misrepresentation about Fly Ash

{¶44} Ball argues in his fifth Assignment of Error that the trial court erred in granting summary judgment in favor of MPW pursuant to R.C. 2745.01(C). We disagree.

{¶45} R.C. 2745.01(C) states, "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 occupational disease or condition occurs as a direct result." Ball contends that Pickering expected and wanted the fly ash pile to collapse because it would be easier to vacuum. Ball states that Pickering deliberately misrepresented the toxic or hazardous characteristics of the fly ash pile to the crew, resulting in their injuries.

{¶46} A review of Pickering's deposition testimony does not support Ball's interpretation of Pickering's intent that the fly ash pile collapse. Pickering expected small amounts of the fly ash pile to fall, but he did not expect a big slide. (Pickering Depo., 99).

Pickering and Jones were worried about the pile shifting and the possibility of the crew getting burned, but they weren't anticipating a fall of that magnitude. (Pickering Depo., 120, 135). Pickering knew that when vacuuming fly ash, it was helpful if little bits fall because it was easier to vacuum up. The little bits of fly ash keep it moving and do not inundate the end of the vacuum hose. (Pickering Depo., 111). Jones told Pickering that the fly ash pile had slid a little bit, so to mitigate the situation of the sliding of the pile, Jones and Pickering decided to do a cross-sweep of the pile instead of going forward into the pile head-on. (Pickering Depo., 90). Therefore, the crew would be shoveling the fly ash into the vacuum hose 20 feet from the pile. (Pickering Depo., 117). Pickering stated he personally advised Ball and the crew that the fly ash pile was unstable and to stay away from the pile; that was what the 20 feet was about. (Pickering Depo., 133-134).

{¶47} The deposition testimony also shows Ball was aware that due to the fluffy nature of fly ash, the fly ash pile could collapse. Ball completed a hazard assessment form that stated the fly ash pile could collapse and it was hot.

{¶48} The record does not create a genuine issue of material fact that MPW deliberately misrepresented the toxic or hazardous characteristics of the fly ash pile in the SCR outlet duct.

{¶49} Ball's fifth Assignment of Error is overruled.

Substantive Law

{¶50} In its motion for summary judgment, MPW argued that Ball's claims were governed by the substantive law of Kentucky, where Ball's injuries occurred. Under Kentucky law, a plaintiff must elect to receive workers' compensation or sue the employer at common law. Pursuant to Kentucky state law, if an employee receives workers'

compensation benefits, the employee waives the right to sue the employer. MPW contended that Ball waived his right to sue because he received workers' compensation benefits. The trial court resolved the issue by stating in its November 2, 2015 judgment entry, "Nonetheless, even applying Ohio's substantive law, defendant is entitled to summary judgment."

{¶51} MPW did not raise as a cross-assignment of error that the trial court erred in applying Ohio substantive law. Instead, it raised the argument pursuant to App.R. 3(C)(2) that if this Court did not affirm the trial court's judgment, this Court should apply Kentucky law.

{¶52} Ball argues in his sixth Assignment of Error that the trial court properly chose to apply Ohio substantive law. Reviewing the issue most favorably to Ball, the non-moving party, we find summary judgment should be granted in favor of MPW.

{¶53} Ball's sixth Assignment of Error is overruled.

CONCLUSION

{¶54} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.,

Farmer, P.J. and

Baldwin, J., concur.