[Cite as *Magda v. Greater Cleveland Regional Transit Auth.*, 2009-Ohio-6219.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92570

JONEL MAGDA, ET AL.

PLAINTIFFS-APPELLANTS

vs.

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-635167

BEFORE: Stewart, P.J., Dyke, J., and Jones, J.

RELEASED: November 25, 2009
JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Plaintiffs-appellants, Jonel and Liliya Magda, appeal from two separate orders that terminated their personal injury action against defendants-appellees, Greater Cleveland Regional Transit Authority ("RTA") and John McLaughlin ("McLaughlin): a Civ.R. 12(B)(6) dismissal in RTA's favor and a summary judgment in McLaughlin's favor. Jonel Magda ("Magda"), an RTA employee, had been ordered by his supervisor, McLaughlin, to install an electrical conduit at an RTA substation. Magda received a severe electrical shock during the installation and claimed that his injuries occurred because McLaughlin ignored safety rules and regulations to the point where the electrical shock was substantially certain to occur. RTA sought dismissal on grounds of political subdivision immunity; McLaughlin sought summary judgment on grounds that there was no evidence that McLaughlin acted with a deliberate intent to harm. The court granted both motions. On appeal, Magda argues that political subdivision immunity does not apply to RTA because liability had been expressly imposed by several statutes and that the workplace intentional tort statute, R.C. 2745.01, is unconstitutional because it impermissibly redefined the standard for intentional conduct. We find no error and affirm.

I

{¶ 2} Magda first complains that the court erred by granting RTA's Civ.R. 12(B)(6) motion for dismissal. He argues that (1) the political subdivision immunity statute, R.C. Chapter 2744, does not apply to a claim when liability is expressly imposed by two other sections of the Revised Code, R.C. 2745.01 (employer liability for intentional tort) and R.C. 4101.11 (employer duty to protect employees); (2) there is no governmental immunity for willful, wanton or intentional acts; and (3) immunity does not attach to claims that concern conditions or other terms of employment.

A

{¶ 3} We engage in a three-tiered analysis to determine whether a political subdivision is entitled to immunity from civil liability pursuant to R.C. Chapter 2744. *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶10. We first determine whether the entity claiming immunity is a political subdivision and whether the alleged harm occurred in connection with a governmental or a propriety function. If the political subdivision is entitled to immunity, we next consider whether the plaintiff has shown that there are any exceptions to immunity under R.C. 2744.02(B). If there are exceptions to immunity, we then consider whether the political subdivision can assert one of the defenses to liability under R.C. 2744.03. See *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421.

{¶ 4} R.C. 2744.02 generally provides that a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision in connection with a governmental or proprietary function. R.C. 2744.01(G)(2) states that "[a] 'proprietary function' includes * * * (c) [t]he establishment, maintenance, and operation of * * * a railroad, a busline or other transit company * * *." Magda alleged that he had been working on a rapid transit substation when injured, so RTA has established that it is a political subdivision that was engaged in a proprietary function.

{¶ 5} The second tier of the political subdivision immunity analysis requires us to consider whether there are any applicable defenses under R.C. 2744.02(B). Political subdivisions are generally immune from intentional tort claims. *Wilson v. Stark Cty. Dept. of Human Services*, 70 Ohio St.3d 450, 1994-Ohio-394; *Harris v. Sutton*, Cuyahoga App. No. 91879, 2009-Ohio-4033, at ¶17; *Maggio v. Warren*, Trumbull App. No.2006-T-0028, 2006-Ohio-6880, at ¶39-40 (finding that the express terms of R.C. 2744 does not provide for an exception for intentional tort claims and that plaintiff must cite the statutory authority imposing liability). An exception to immunity can exist, however, under R.C. 2744.02(B)(5), which states:

{¶ 6} "In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to

person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term 'shall' in a provision pertaining to a political subdivision."

{¶ 7} R.C. 2744.01(B)(5) only serves as an exception when a statute specifically and explicitly imposes liability. *Butler v. Jordan*, 92 Ohio St.3d 354, 357, 2001-Ohio-204.

B

{¶ 8} Magda argues that R.C. 4101.11 and 4101.12 places a specific duty of care on employers. R.C. 4101.11, the so-called "frequenter statute," states:

{¶ 9} "Every employer shall furnish employment which is safe for the employees engaged therein, and for frequenters thereof, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every

other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters."

{¶ 10} R.C. 4101.12 states in relevant part:

{¶ 11} "No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe."

{¶ 12} In *Thayer v. W. Carrollton Bd. of Edn.*, Montgomery App. No. 20063, 2004-Ohio-3921, the Second District Court of Appeals considered and rejected the same arguments made by Magda. Thayer, an employee of the West Carrollton Board of Education, brought an intentional tort action against the board alleging that she had been exposed to toxic mold. The board sought summary judgment under R.C. 2744.02, but Thayer claimed that R.C. 4101.11 created an exception to immunity under R.C. 2744.02(B)(5). The Second District rejected this argument:

{¶ 13} "Clearly, R.C. 4101.11 establishes a requirement that employers provide a safe work place. However, although R.C. 4101.11 establishes a responsibility, it does not expressly impose liability for a failure to meet the responsibility. '[L]iability is not to be found to exist simply because a *responsibility* is imposed.' *Zellman v. Kenton Bd. of Educ.* (1991), 71 Ohio App.3d 287, 290, 593 N.E.2d 392, emphasis in original.

{¶ 14} "Because R.C. 4101.11 does not expressly establish liability, the R.C. 2744.01(B)(5) [sic] exception is inapplicable in this case. Therefore, the trial court did not err in granting summary judgment in favor of the Board." Id. at ¶24-25.

{¶ 15} We agree with *Thayer's* conclusion – neither R.C. 4101.11 nor 4101.12 expressly establish liability for an employer's failure to meet its responsibility to provide a safe workplace. Those statutes cannot create an exception to liability under R.C. 2744.02(B)(5). See, also, *Coolidge v. Riegle*, Hancock App. No. 5-02-59, 2004-Ohio-347, at ¶25.

C

{¶ 16} Magda also argues that R.C. 2745.01 imposes a statutory liability for employers who commit intentional torts. That section states:

{¶ 17} "(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.

{¶ 18} "(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.

{¶ 19} "(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.

{¶ 20} "(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, contract, promissory estoppel, or defamation."

{¶ 21} As previously noted, the courts have consistently found that political subdivisions are immune from intentional tort claims unless, as relevant here, liability is "expressly" imposed by a section of the Revised Code. R.C. 2745.01 does not expressly impose liability upon a political subdivision — it only states the requirements for employer liability in the general area of intentional torts against employees, with emphasis on the kind of proof necessary to show that an injury is "substantially certain to occur." While a political subdivision is typically an employer, there is no express mention of political subdivisions in R.C. 2745.01 in a way that would manifest the General Assembly's intent to confer liability specifically on political subdivisions. The grant of immunity to political subdivisions for

intentional torts is too clearly acknowledged to permit such a generalized reference to "employer" under R.C. 2745.01 to constitute an exception under R.C. 2744.02(B)(5). Without a clear legislative intent to impose separate liability on political subdivisions, R.C. 2745.01 does not constitute an exception to immunity.

D

{¶ 22} Finally, Magda argues that there is an exception to RTA's immunity under R.C. 2744.09(C), which states that political subdivision immunity does not apply to "[c]ivil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment." He maintains that his complaint contained allegations concerning the conditions and general terms of employment because it detailed how he was ordered to perform the electrical work as instructed by his supervisor.

{¶ 23} Courts have held that R.C. 2744.09(C) "make[s] R.C. Chapter 2744 inapplicable to civil actions pertaining to terms of employment brought by employees of political subdivisions against their employers." *Poppy v. Willoughby Hills City Council*, Lake App. No. 2004-L-015, 2005-Ohio-2071, at ¶29. This is because "[a]n employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside the scope of employment." *Ellithorp v. Barberton City School Dist. Bd. of Edn.*

(July 9, 1997), Summit App. No. 18029, at 7. To the extent that Magda argues that RTA committed an intentional tort against him, that tort would have occurred outside the employment relationship, *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 634, therefore R.C. 2744.09(C) is inapplicable. See *Young v. Genie Industries United States*, Cuyahoga App. No. 89665, 2008-Ohio-929, at ¶23.

E

{¶ 24} Civ.R. 12(B)(6) allows a complaint to be dismissed for failure to state a claim only when it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 524, 1996-Ohio-298, citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245. "[W]hen a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the non-moving party." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60. The complaint cannot be dismissed unless it appears beyond all doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *O'Brien*, 42 Ohio St.2d at 245.

{¶ 25} RTA is a political subdivision and enjoys immunity under R.C. 2744.02 unless there is an exception to immunity. Magda cites to no statute

that expressly imposes liability upon a political subdivision. He therefore cannot establish any set of facts showing an exception to RTA's immunity, so we find that the court did not err by granting RTA's motion to dismiss the complaint.

II

{¶ 26} Magda next argues that the court erred by finding that political subdivision immunity, as codified in R.C. Chapter 2744, is constitutional. He maintains that political subdivision immunity violates his constitutional rights to redress for injury and due process under Article I, Section 16 of the Ohio Constitution; his right to a jury trial under Article I, Section 5 of the Ohio Constitution; his right to equal protection under Article I, Section 2 of Ohio Constitution; and further constitutes a conflict with laws affecting the comfort, health, safety, and general welfare of employees under Article II, Section 34 of the Ohio Constitution. Finally, he claims that political subdivision immunity conflicts with common sense.

{¶ 27} As RTA notes, political subdivision immunity is the subject of clear and unambiguous precedent that finds it constitutional in all respects. At one time, three justices of the supreme court expressed their view that they would abolish sovereign immunity on grounds that it violated the right to a jury trial. See *Butler v. Jordan* (2001), 92 Ohio St.3d 354, 372, (Douglas, J., with Sweeney & Pfeifer, JJ., concurring in opinion). However, that view

has never commanded a majority of the justices, and it appears that only one sitting justice continues to adhere to the view that sovereign immunity violates the Ohio Constitution. See *Doe v. Marlington Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, at ¶38-40 (Pfeifer, J., dissenting) ("Governmental immunity, including municipal immunity, is contrary to the clear meaning and mandate of the Ohio Constitution.") (internal quotation omitted).

{¶ 28} The supreme court recently stated its view on the subject in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, when it refused to consider the constitutionality of R.C. Chapter 2744. The supreme court stated: "In reviewing our precedent and that of numerous appellate courts, we conclude that this issue is one that is settled and need not be discussed any further in this case." Id. at ¶95 (citations omitted). We have likewise adhered to this view. See *O'Brien v. Olmsted Falls*, Cuyahoga App. No. 89966, 2008-Ohio-2659, at ¶26-27 (collecting cases). Magda's arguments offer no new basis for finding R.C. Chapter 2744 unconstitutional, so the court did not err by refusing to declare R.C. Chapter 2744 unconstitutional.

III

{¶ 29} For his third assignment of error, Magda argues that the court erred by granting summary judgment to John McLaughlin on the intentional tort claim.

A

{¶ 30} Summary judgment may issue when, after viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue as to any material fact and reasonable minds could conclude only that judgment must issue as a matter of law. See Civ.R. 56(C).

B

{¶ 31} In the context of workplace intentional torts, R.C. 2725.01(A) states that an employer is not liable for damages to an employee resulting from an intentional tort committed by an employer during the course of employment "unless the [employee] 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." For purposes of R.C. 2725.01(A), an injury is "substantially certain" to occur if the employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death. See R.C. 2725.01(B).

{¶ 32} The R.C. 2725.01(B) definition of "substantially certain" is a legislative reaction to a line of supreme court cases that dealt with a worker's right to participate in the workers' compensation fund. Section 35, Article II of the Ohio Constitution, provides for the passage of laws to establish and administer a fund for injured workers, and that any compensation paid by the fund "shall be in lieu of all other rights to compensation, or damages, for such

death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. * * * "

{¶ 33} Section 35, Article II of the Ohio Constitution was long understood as the exclusive remedy for employees injured at the workplace. See, e.g., *Zajachuck v. Willard Storage Battery Co.* (1922), 106 Ohio St. 538, 541 ("In its scheme of compensatory legislation, and acting within its constitutional power, that of taking away rights of action, the Legislature did pass a comprehensive law granting to those employers complying with the Workmen's Compensation Law complete immunity for any 'injury or death' occurring during the period covered by the premium paid.").

{¶ 34} The exclusive nature of the workers' compensation remedy became somewhat less clear in 1959, however, after the General Assembly revised R.C. 4123.74 to cover injuries "received or contracted by any employee in the course of or arising out of his employment." In *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, the supreme court cited to "in the course of or arising out his employment" language of R.C. 4123.74 to hold that a worker who received workers' compensation benefits could nonetheless bring an intentional tort action against an

employer because an injury occurring as a result of an intentional tort does not arise out of the course of employment. Id. at 613.

{¶ 35} Having ruled that the workers' compensation laws did not bar intentional tort claims against employers, the supreme court next addressed the concept of what constituted "intent" to injure. In *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, the supreme court held that "[a]n intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur." Id. at paragraph one of the syllabus. The supreme court went on to state that a "specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is substantially certain to occur, not merely likely, to occur." Id. at 95. By focusing on the element of "substantial certainty," the supreme court distinguished "a merely negligent act from intentionally tortious conduct." Id.

{¶ 36} The *Jones* standard of "substantial certainty" proved difficult for the courts to administer because some confused mere knowledge and appreciation of a risk as intent, even though mere knowledge and appreciation of a risk fell short of being a substantial certainty. In *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, the supreme court conceded that it had left the law in a posture where "trial courts have been led to misconstrue [a 'substantial certainty'], transforming negligence cases

into intentional tort cases." Id. at 115. Clarifying the standard, the supreme court held:

{¶ 37} "Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed.1984), in order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (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 not just a high risk; 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."

{¶ 38} The supreme court went on to hold:

{¶ 39} "To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligent. Where the risk is great and the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the

consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure, or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk — something short of substantial certainty — is not intent. (*Blankenship v. Cincinnati Milacron Chemicals, Inc.* [1982], 69 Ohio St.2d 608, 23 O.O.3d 504, 433 N.E.2d 572; and *Jones v. VIP Development Co.* [1984], 15 Ohio St.3d 90, 15 OBR 246, 472 N.E.2d 1046, explained.)" Id. at paragraph six of the syllabus.

{¶ 40} With these decisions as a backdrop, the General Assembly enacted R.C. 4121.80. That section created a statutory right of action for employees injured as a result of their employers' intentional torts, but with several important limitations: a damage set-off against a workers' compensation award [R.C. 4121.80(A)]; a requirement that the industrial commission, not a jury, determine the amount of damages for employer intentional torts [R.C. 4121.80(D)]; and the creation of a state-managed tort fund from which all compensation for employer intentional tort damages would be paid [R.C. 4121.80(E)]. In the context of defining what constituted intentional conduct, the General Assembly enacted R.C. 4121.80(G)(1) to define "substantially certain" to mean that "an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death."

{¶ 41} In *Brady*, the supreme court invalidated R.C. 4121.80 stating: "R.C. 4121.80 exceeds and conflicts with the legislative authority granted to the General Assembly pursuant to Sections 34[1] and 35, Article II of the Ohio Constitution, and is unconstitutional in toto." Id. at paragraph two of the syllabus. The supreme court found that Article II, Section 35 of the Ohio Constitution conferred legislative authority solely within the employment relationship, but that employer intentional torts "always take place outside that relationship." Id. at 634. Concluding that workplace injuries resulting from the intentional conduct of an employer were "utterly outside the scope of the purposes" of both Section 35, Article II of the Constitution and the workers' compensation statutes, the supreme court stated its "firm belief" that the legislature could not, under the guise of regulating the comfort, health, safety and general welfare of all employees "enact legislation governing intentional torts that occur within the employment relationship, because such intentional tortious conduct will always take place outside that relationship." Id.

{¶ 42} With R.C. 4121.80(G)(1) having been declared invalid, courts continued to apply the *Van Fossen* standard for employer intentional torts.

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[1]Section 34, Article II of the Ohio Constitution states: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power."

But the application of this standard did not continue without difficulty — its language that an intentional tort claim might be premised on "high risk" conduct continued to cause some confusion. In *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, the supreme court sought to clarify this confusion. Id. at 117. It recognized that acts of the employer that are termed a "high risk" could correctly be viewed as mere recklessness. But it also agreed that in some situations involving activities with a high risk of harm, an employer's conduct would fall within the scope of an intentional tort. Id. The supreme court therefore revised the *Van Fossen* syllabus to remove the reference to "high risk." Id. at 118. The standard for employer intentional torts is thus:

{¶ 43} "1. Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed.1984), in order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (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. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)" Id. at paragraph one of the syllabus.

{¶ 44} *Fyffe's* attempt to clarify the standard for intentional conduct did not sit well with the General Assembly.[2] In 1993, the General Assembly again enacted comprehensive reforms of the workers' compensation laws including, as relevant here, former R.C. 2745.01(B). That section stated that employers could be held liable for their intentional torts against employees, but only upon proof by clear and convincing evidence that "the employer deliberately committed all of the elements of an employment intentional tort." The statute also imposed a requirement that every complaint alleging an employer intentional tort contain a signed attestation that the complaint was supported by the facts.

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[2]1995 Ohio Laws 43, Section 3, states:

"The General Assembly hereby declares its intent in enacting sections 2305.112 and 2745.01 of the Revised Code to supersede the effect of the Ohio Supreme Court decisions in *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St. 2d 608 (decided March 3, 1982); *Jones v. VIP Development Co.* (1982), 15 Ohio St. 3d 90 (decided December 31, 1982); *Van Fossen v. Babcock & Wilcox* (1988), 36 Ohio St. 3d 100 (decided April 14, 1988); *Pariseau v. Wedge Products, Inc*. (1988), 36 Ohio St. 3d 124 (decided April 13, 1988); *Hunter v. Shenago Furnace Co.* (1988), 38 Ohio St. 3d 235 (decided August 24, 1988); and *Fyffe v. Jeno's, Inc*. (1991), 59 Ohio St. 3d 115 (decided May 1, 1991), to the extent that the provisions of sections 2305.112 and 2745.01 of the Revised Code are to completely and solely control all causes of actions not governed by Section 35 of Article II, Ohio Constitution, for physical or psychological conditions, or death, brought by employees or the survivors of deceased employees against employers."

{¶ 45} Former R.C. 2745.01(B) did not last long — in *Johnson v. BP Chemicals* (1999), 85 Ohio St.3d 298, the supreme court invalidated R.C. 2745.01, finding that the General Assembly's heightened standard of proof for employer intentional tort claims was so "unreasonable and excessive" that an employee had a "virtually zero" chance of proving an employer's intentional tort. It concluded that R.C. 2745.01 was not "a law that furthers the * * * comfort, health, safety and general welfare of all employees" and thus violated Article II, Section 34 of the Ohio Constitution. Id. at 307-308.

{¶ 46} In addition to invalidating R.C. 2745.01, the supreme court in *Johnson* took the General Assembly to task for attempting to legislate employer intentional torts. Citing to *Brady*, it stated, "we thought we had made it abundantly clear that any statute created to provide employers with immunity from liability for their intentional torts cannot withstand constitutional scrutiny." Id. at 304. The supreme court said that it could "only assume that the General Assembly has either failed to grasp the import of our holdings in *Brady* or that the General Assembly has simply elected to willfully disregard that decision." Id.

{¶ 47} Undeterred by the rebuke in *Johnson*, the General Assembly enacted a new version of R.C. 2745.01 — the version currently at issue in this appeal. This version has omitted the attestation requirement and the clear and convincing evidence standard. The definition of "substantially certain"

continues to require a showing that the employer had a "deliberate intent" to cause an injury.

C

{¶ 48} Magda set forth two separate intentional tort claims against McLaughlin — "common law" and statutory under R.C. 2745.01 — both of which alleged that McLaughlin committed an intentional tort by failing to take the necessary and appropriate steps to ensure that high-voltage electrical equipment was either shut off or safely isolated from the work area, knowing that from these omissions, his injury was substantially certain to occur. Magda's injuries occurred on September 8, 2005, after the effective date of R.C. 2745.01, so that section presumptively applies to his claims.

{¶ 49} However, Magda's intentional tort claims raise the issue of whether the definition of "substantially certain" set forth in R.C. 2745.01(B) is viable in light of the supreme court's admonition to the General Assembly in *Johnson* that "any statute created to provide employers with immunity from liability for the intentional torts cannot withstand constitutional scrutiny." This issue is presently before the Ohio Supreme Court, awaiting a resolution of this conflict.[3] This district, in *Barry v. A.E. Steel Erectors,*

[3]There are two separate appeals raising this issue: *Kaminski v. Metal & Wire Prods. Co.*, 119 Ohio St.3d 1407, 2008-Ohio-3880, and *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 119 Ohio St.3d 1452, 2008-Ohio-4562.

Inc., Cuyahoga App. No. 90436, 2008-Ohio-3676, has ruled that R.C. 2745.01(B) is unconstitutional under *Johnson* and *Brady* because the requirements for establishing an intentional tort "create an insurmountable burden for employees and thus an illusory cause of action." Id. at ¶26. Following precedent from this court until such time as the supreme court resolves the matter in *Kaminski*, we continue to find R.C. 2745.01(B) unconstitutional. We therefore address Magda's tort claims against McLaughlin only under the *Fyffe* common law standard.

D

{¶ 50} Civ.R. 56(C) states that summary judgment may issue when, after viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue as to any material fact and reasonable minds could conclude only that judgment must issue as a matter of law.

{¶ 51} RTA employed Magda as a maintenance technician. McLaughlin, a rail facilities supervisor for RTA and a licensed electrician, acted as Magda's direct supervisor. Magda is not a licensed electrician.

{¶ 52} Viewed most favorably to Magda, the facts show that RTA wished to improve the exterior lighting at one of its substations. When discussing lighting improvements during the planning stages of construction, McLaughlin and his supervisor noted that existing in-ground wiring for the exterior lighting had proven unsatisfactory. They agreed that the wiring

should be placed on top of the walls, in aluminum conduit. Conduit is empty tubing through which electrical wires are pulled. Although it would have been more aesthetically pleasing to run the conduit on the interior of the wall, McLaughlin and his supervisor agreed that running the conduit on the exterior, along the top of the wall, would make it more easily accessible for future maintenance — a transformer yard with high-voltage (33,000 volts) equipment sat seven to eight feet from the other side of the wall.

{¶ 53} A two-person work crew began installation of the conduit without incident. When one of the members of that crew took vacation time, McLaughlin assigned Magda and his helper to the job. On the day of his injury, Magda reported to RTA's central rail station and attended a "toolbox" or safety meeting conducted by McLaughlin. He and the helper then drove to the substation work site. The height of the wall (ranging from eight to 12 feet) required them to erect a make-shift scaffold consisting of two ladders and an aluminum platform strung along the third rung of each ladder. Magda climbed onto the platform and saw a standard 10-foot piece of conduit resting on top of the wall.

{¶ 54} It is unclear exactly what happened next, for Magda had no independent recollection of events and his helper had been looking away. McLaughlin speculated that the wrong end of the conduit had been laid before Magda — the conduit had one coupling end that would fit into the

non-coupled end of the next section. Aluminum conduit is very light, so Magda probably tried to rotate the conduit. However, a small tree located near the wall might have impeded his abilty to turn the conduit, so he probably held the conduit over his head and, in the process of trying to avoid the tree, might have unwittingly extended the conduit over the wall and touched the electrical equipment. In any event, the helper said that he saw a flash of light and heard the sound of thunder. He ducked for cover and then saw Magda on the ground, his clothes in flames. Following the event, the non-coupled end of the conduit had been melted.

E

{¶ 55} The *Fyffe* standard for employer intentional torts requires a showing of (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.

{¶ 56} We must not, however, construe these elements too broadly: "'the dividing line between negligent or reckless conduct on the one hand and intentional wrong on the other must be drawn with caution, so that the

statutory framework of the [Workers' Compensation] Act is not circumvented simply because a known risk later blossoms into reality. We must demand a virtual certainty.'" *Van Fossen,* 36 Ohio St.3d at 116, quoting *Millison v. E.I. du Pont de Nemours & Co.* (1985), 101 N.J. 161, 178. Establishing that an employer's conduct was more than negligence or recklessness "'is a difficult standard to meet.'" *Goodin v. Columbia Gas of Ohio, Inc.* (2000), 141 Ohio App.3d 207, 220, quoting *McGee v. Goodyear Atomic Corp*. (1995), 103 Ohio App.3d 236, 246.

{¶ 57} The *Fyffe* elements are conjunctive — the failure to establish any one of the elements is grounds for summary judgment. *Fleming v. AAS Service, Inc.*, 177 Ohio App.3d 778, 2008-Ohio-3908, at ¶62.

1

{¶ 58} The first element of the *Fyffe* test requires us to determine whether McLaughlin had actual knowledge of the dangerous condition. The mere existence of a dangerous condition alone is not sufficient to satisfy the first prong, nor is knowledge of the mere possibility of a dangerous condition sufficient. "The employee bears the burden of proving by a preponderance of the evidence that the employer had actual knowledge of the exact dangers which ultimately caused the injury." *Reed v. BFI Waste Systems* (Oct. 23, 1995), Warren App. No. CA95-06-062, citing *Sanek v. Duracote Corp*. (1989), 43 Ohio St.3d 169, 172.

{¶ 59} McLaughlin acknowledged that 33,000 volts of electricity ran through the substation electrical equipment. Although he did not specifically testify in deposition to concerns about workers being so close to this equipment, he did state that he advocated placing the conduit on the exterior wall of the substation instead of the interior because "given the environment, I didn't believe that was a safe or good way to do it because then if we had to service anything, we had to involve another department." He went on to say that he and his supervisor agreed to put the conduit on the exterior of the wall "to where if my guys had to service it, they were able to get to it easily, we were able to control the power from our end of it in the house power, and when it came to relamping and maintenance, it would be much more easier for my crew * * *."

{¶ 60} McLaughlin argues that he did not have knowledge of a dangerous process, claiming that he simply assigned Magda to install harmless aluminum conduit and had no particularlized knowledge of overhead conductor clearances. Yet McLaughlin acknowledged what he called the "10-foot rule" — that being the distance one should maintain from an overhead conductor. By creating a 10-foot safety buffer between the worker and high-voltage equipment, an inference arises that McLaughlin, a licensed electrician, must have known that the high-voltage equipment could be dangerous. In any event, regardless whether McLaughlin had ever dealt

with issues of overhead clearances for transformers and electrical conductors of the kind situated at the substation, the 10-foot rule would have been in place for no other reason than worker safety. Given the obvious danger posed by the high-voltage equipment, we find that Magda established that McLaughlin had knowledge of the exact danger associated with the physical contact with high-voltage electrical transformers, and therefore created a genuine issue of material fact on whether the electrical equipment constituted a dangerous condition.

2

{¶ 61} The second element of the *Fyffe* test is 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. The key to this element is not the degree of harm that will ensue if the employee is subjected to the dangerous process or condition, but whether the employer knew that by merely subjecting the employee to the dangerous condition that harm was substantially certain to follow. An employee cannot establish an employer's intentional tort simply by showing that a known risk later blossomed into reality. Rather, "the level of risk-exposure [must be] so egregious as to constitute an intentional wrong." *Sanek v. Duracote Corp.* (1989), 43 Ohio St.3d 169, 172. Hence, the employee must show more than just a dangerous condition in order to

establish the existence of a genuine issue of material fact regarding whether an employer knew that injury to its employee was substantially certain to occur — the employee must "prove that the employer knew that, because of the exact danger posed, the employee would be harmed or was substantially certain to be harmed in some manner similar to the injury the employee sustained." *Ford v. Complete Gen. Constr. Co.*, Franklin App. No. 06AP-394, 2006-Ohio-6954, at ¶16, citing *Yarnell v. Klema Bldg., Inc.* (Dec. 24, 1998), Franklin App. No. 98AP-178.

{¶ 62} Magda has not met the second prong of the *Fyffe* test. There is no evidence to show, despite the danger posed by the high-voltage equipment, that McLaughlin had any reason to know that Magda was substantially certain to be injured while installing the conduit. Magda knew how to install conduit, and had done so on other jobs. He implied that the task of installing conduit at the substation was free from worry about electricity because "[c]onduit is nothing but empty tubing. There's no power involved whatsoever." Another work crew had spent several days installing the same conduit in the same location without incident. McLaughlin had been present at the site at least twice as this other work crew performed their work and noticed nothing about the proximity of the electrical equipment that would make him think that addditional safety measures were required.

{¶ 63} Against this evidence, Magda could only offer conjecture. When asked if he had reason to believe that McLaughlin intended to injure him, Magda stated it was "possible" because "[i]f you send a worker to a lion den with a piece of meat on their neck, do you think you intend the lion to attack the person?" The better way of looking at Magda's lion metaphor is to view it in the context of the second element of the *Fyffe* test. If one were attacked by a lion, one would likely be seriously injuried. But if that lion is confined in a cage, the danger decreases to the point of being trivial; hence lion exhibits at zoos. If one were, despite the obvious danger, to momentarily extend an arm into a lion cage, the likelihood of injury would increase, but would not be certain — the lion might be on the other side of the cage or might be disinterested in attacking. In no event, however, would an injury be certain to follow as a result of one extending an arm into the lion's cage.

{¶ 64} If we substitute the electrical transformers for the lion and the wall for the lion's cage, we come to the same conclusion. Plainly, other workers had installed conduit without incident at the same job site as Magda, safely separated from the electrical equipment by the wall. But when Magda extended the length of conduit over the wall, he metaphorically put his arm into the lion's cage. Even doing so, there was no evidence offered to show that his injury was certain to follow.

{¶ 65} Magda makes much of his lack of training in electrical processes as excusing his act, saying that he had not been trained to avoid touching the high-voltage tranformers. It seems implausible that a person with Magda's job experience would not have known that touching a high-voltage transformer with a piece of metal is dangerous. Magda plainly knew the dangers inherent in electricity, as shown by his statement that the installation of the conduit posed no danger because it contained no wires or power.

{¶ 66} In the end, there is no evidence that McLaughlin had actual knowledge that one of his workers would twist a 10-foot piece of conduit over his head, extend it across the wall and accidently touch a live, high-voltage electrical transformer. The high-voltage equipment might have been dangerous, but the assigned task was not. McLaughlin had no reason to know that Magda's injury was substantially certain to occur.

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{¶ 67} The third element of the *Fyffe* test is whether the employer, knowing that an injury was substantially certain to occur, acted to require the employee to continue to perform the dangerous task. Given our finding that Magda failed to establish the second element of the *Fyffe* test, we need not consider this issue, as the failure to establish even one of the *Fyffe* elements is enough to warrant summary judgment.

{¶ 68} It follows that the court did not err by granting summary judgment under the common law employer intentional tort standard set forth in *Fyffe*.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

ANN DYKE, J., and
LARRY A. JONES, J., CONCUR