.IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

DAVID L. MARSHAND,	)	CASE NO. 2006CV01537
	)	
Plaintiff,	)	
	)	JUDGE GARY L. YOST
vs.	)	
	)	**PLAINTIFF'S BRIEF IN**
CSP OF OHIO, LLC., *et al.*	)	**OPPOSITION TO DEFENDANT'S**
	)	**MOTION FOR SUMMARY**
Defendants.	)	**JUDGMENT**

INTRODUCTORY STATEMENT

Defendant's Motion for Summary Judgment should be denied, for the following reasons:

1. The Missing Guard Which Would have Completely Prevented Plaintiff's Injury was Deliberately Removed Prior to his Injury[1].

The guard at issue is a piece of very heavy, formed sheet steel, bolted into the base of the mold. Its sole purpose is to prevent the press operator's feet from sliding under the ejector plate, and being crushed with 1700 psi of hydraulic force as the plate descends. From the time the mold is manufactured, the guard cannot possibly be removed except deliberately. The die setters who spent over seven hours installing the molds the night prior to the accident affirmed in writing that all four guards were in place prior to the first shift (7 a.m. to 3 p.m.). Witnesses verify the guard was removed that day, and was sitting next to the press until it was replaced within a few minutes after Plaintiff lost most of his foot.

2. Defendants Knew that Defendant's Injury was Substantially Certain to Occur.

[1] Defendant admits the unguarded ejector plate was the sole proximate cause of Plaintiff's injury.

The definition of "substantial certainty" in the current version of O.R.C. Section 2745.01 is completely nonsensical, illogical, bears no relation to the actual meaning of the words, is contained in an unconstitutionally enacted statute, and is therefore unenforceable. The actual meaning and application of the "substantial certainty" standard in an employer intentional tort was settled years ago by the Ohio Supreme Court. Defendant's managers had actual knowledge of the substantial certainty that an operator working a press containing a mold without an ejector plate guard would suffer a massive crush injury to their foot: four years before, Ruth Hoback, Defendants' Manager of Manufacturing Operations, whose job it was to supervise the press room the day of Plaintiff's injury, suffered the identical injury to the identical foot on the identical press for the identical reason (unguarded ejector plate), and filed suit over it, claiming an intentional employment tort! (Exhibit 1) The managers with responsibility for press safety on the day Plaintiff was injured, including the Director of Plant Operations, were in the plant on the day in 2002 when Ruth Hoback lost most of her foot. And, on the day Plaintiff lost his, these same managers had knowledge of the unguarded condition of the mold in this press:

A) The guard had been deliberately removed, and was next to the press;

B) Both the Director of Operations and the Manufacturing Engineer personally showed Plaintiff how to load Press 20, by doing it themselves. They had already done this for the first shift operators. The removed guard and unguarded mold were in plain sight;

C) The job duties of the first shift supervisor included affirming in writing, on the "Maintenance Checklist," that all guards on Press 20 were in place. He came by and spoke with the 1st shift press operator [2]several times. When he did, he had an unobstructed view of the molds. The removed guard and unguarded mold were in plain sight. The daily Maintenance Checklist he was to sign off on that day is the only one missing for the period October-November 2006;

D) Ruth Hoback was still the Manager of Manufacturing Operations the day Plaintiff lost his foot. She, too, stopped by Press that day; and

E) There were two molds in Press 20 at the time. One mold had a guard at both ends. The other only had a guard at one end. The guards are about two feet wide, and eight inches high, and painted bright red. They stand out against the dirty, oily press like Rudolph the Red-Nosed Reindeer's nose. The absence of a guard would be obvious to someone (e.g. Scott Gill or Ruth Hoback) whose job included ensuring the presence of a guard (see attached Deposition Exhibits 13-15, 19).[3]

With knowledge an unguarded ejector plate could cause a massive crush injury, and with hours of knowledge that the guard had been removed, Defendant's Plant Manager and Manufacturing Engineer taught him how to run the press with this new

[2] On the day he was injured, David Marshand was the press operator on Press 20, on the second shift.
[3] Deposition Exhibits 14 and 15 are both pictures taken by Plant Engineer Dana Pebbles just after Plaintiff's injury. Exhibit 5 was taken looking into the west side of the press, and the bright red guards on both molds can plainly be seen. Exhibit 6 was taken looking into the east end, where Plaintiff was. It shows the guarded mold on the right. Depo. Exhibits 14 and 19 show the unguarded mold just after Plaintiff's injury with the ejector plate lifted. In the opening under the ejector one can observe the wide footprint left by Plaintiff's crushed boot. Depo. Exhibit 13 shows both the unguarded and guarded molds right afterwards.

mold, and a few minutes later, his foot was crushed while loading it exactly as he was instructed, and exactly how all operators of the press load the mold.

3. Ohio Revised Code Section 2745.01 Violates the Ohio Constitution:

A) though on its face it only purports to regulate intentional torts "committed by the employer during the course of employment," in fact it describes criminal conduct, which is outside the employment relationship. Therefore, the legislation regulates activity outside the employment relationship, and is beyond the scope of the authority granted the legislature.

B) It imposes excessive standards which can effectively deprive an employee of their right to sue, and is therefore unlawful legislation not intended for the "comfort, health, safety and general welfare of all employees."

C) given the elements imposed by the statute, "it is even conceivable that an employer might actually be guilty of a criminal assault but exempt from civil liability under R.C. 2745.01(D)(1). Taylor, 36 Ohio St.3d at 162-163, 522 N.E.2d at 476 (Douglas, J., dissenting)" See, Johnson v. BP, *supra,* at 307. This would be in violation of both the Equal Protection and Privileges and Immunities Clause of the Ohio Constitution.

STATEMENT OF FACTS

1. The Ejector Plate and its Guard.

CSP of Ohio is a division of Continental Structural Plastics, Inc., the largest injection molding business in North America. (See Exhibit 1). The Conneaut Plant has been in existence for well over 20 years. There have been a number of owners in that time: Transplastics, Bailey, Venture Industries, and since 2005, CSP of Ohio. But, the presses, and all the key witnesses here, have been in the plant well over ten years. (*e.g.*, Murtha Depo., pp. 9-12; Hoback Depo., p. 6; Gill Depo., p. 5; Pebbles Depo., p. 12). Plaintiff was injured on Press No. 20, the largest and most powerful press in the entire plant. Press No. 20 is a 2500-ton press, delivered new to the plant many years before

Plaintiff's injury. (Murtha Depo. at pp. 13-14). Press No. 20 is over twenty-five feet tall, approximately fifteen feet wide and fifteen feet deep. There is no question it is an extremely powerful and dangerous press.

There is an enormous opening in the press in which injection molds of various types can be inserted and bolted to the floor, or "platen". CSP makes a variety of large automotive parts. For each part, there is a unique mold.

The molds in Press No. 20 the day Plaintiff was injured were designed and constructed with a built-in ejector plate guard, designed to keep the press operator's foot from being caught under the descending ejector plate. The ejector plate guard is fixed to the ejector plate by threaded machine bolts with an allen key head. The mold was drilled, tapped and threaded to accommodate the guard bolts. (Lamont Depo., pp. 46, 49-50; Platt Depo., p. 49). The ejector plate guards can be removed for purposes of mold set-up, maintenance and repair. The guards are about two feet wide and eight inches high. They cover both the front and sides of the ejector plate opening. They are all painted bright red.

The ejector plate lies flat at the bottom of the mold. As soon as a part is molded, the plate is driven upward to "pop" and dislodge the newly molded part free of the mold, so the operator can easily remove the part by hand.

A "load" or "charge" of plastic is placed into the mold at the beginning of the molding cycle. (Pebbles Depo. at pp. 45-49). On May 17, 2007, an inspection of Press 20 was conducted while it was being operated with the same molds in use the day Plaintiff was injured. The videotape of that inspection is attached hereto as Exhibit 4. In the video, the male in the black T-shirt is the press operator performing the same job Dave

Marshand was performing when he was injured. Both the operator in the video and Plaintiff performed the loading procedure exactly as required.

The molds must be loaded by standing at the head, or end, of the mold and reaching over. (Pebbles Depo., pp. 48-49). In the videos, the operator can be seen placing his foot on or in front of the red guards as he loads the "charges" into the molds. If the guard had not been there, the operator's foot would certainly have been caught under the ejector plate. [4] Note how the press operator places the new "charge" in the mold immediately after the newly formed part is removed. This is the point in the molding cycle when the press operator's foot is vulnerable: he has his foot at the base of the mold so he can lean in and place the new charge, just as the ejector plate has finished ejecting the part and is descending back down. Per die setter George Lamont, the ejector plate descends under hydraulic pressure of approximate 1700 pounds per square inch, and the plate is solid steel. (Lamont Depo. pp. 35-36).

2. Management's Awareness of the Certainty of Injury from an Unguarded Ejector Plate Guard.

> "Any pinch point should be guarded. That's common knowledge." (Hoback Depo., p. 52). Ruth Hoback, Manager of Manufacturing Operations.

On March 20, 2002, Ruth Hoback, Manager of Manufacturing Operations, suffered the identical injury to the identical foot in the very same press for the very same reason as Plaintiff: an unguarded ejector plate came down on her foot with massive crushing force. (Hoback Depo. p. 19). That day, she was at Press No. 20, instructing press operators how to load and unload a mold in Press No. 20. (Hoback Depo., pp. 12-24; Depo. Exhibit 31). She was standing on the south side of the press, in the same area

[4] See, Exhibit 4 at the following points in the film: 12:58, 14:26, 15:51, 17:21, 18:33.

where Plaintiff Dave Marshand was later injured. She was unloading an unguarded mold. The ejector plate descended on her left foot. (Hoback Depo., pp.19-25). Her screams could be heard throughout the plant. (Hoback Depo. pp. 30-31; Gill Depo. p. 41). Just like Plaintiff, she was first taken to Brown Memorial Hospital in Conneaut, and then taken to Hamot Medical Center in Erie, Pennsylvania. And, her injuries were almost identical to Plaintiff's: "Everything was blown out the back of my foot." She suffered crush injuries, lost toes, scarring, mutilation and permanent pain. (Hoback Depo., pp. 31-37). David Murtha was 30' to 40' away when her foot was crushed, and investigated the cause of her injury. (Murtha Depo., pp. 21-24). Scott Gill was "nearby" (Gill Depo., p. 41).

Mrs. Hoback filed suit before this Court in 2003, Case No. 03CV1150, alleging her injury was the result of an intentional tort. (Depo. Exhibit 1). All of Defendants' key managers on March 25, 2002, when Ruth Hoback suffered her grievous injury, were also key managers when David Marshand was injured: the Director of Plant Operations was still David Murtha, the Manufacturing Engineer was still Dana Pebbles, Ruth Hoback was still the Manager of Manufacturing Operations, and Beverly Picard was the Head of Human of Resources. (Murtha Depo., pp. 8, 12, 30; Pebbles Depo at pp. 21-25; Hoback Depo. at pp. 18, 37-38).

Both Shift Supervisor Gill, and Manager of Manufacturing Operations, Hoback admitted they had responsibility for ensuring guards were in place. (Gill Depo., pp. 71-72; Hoback Depo., pp. 51-52).

3. <u>Management was Aware the Safety Guard had been Deliberately Removed.</u>

The mold whose ejector plate caused Plaintiff's injury was one of three identical molds transferred to the Conneaut Plant from the Defendants' Carey, Ohio Plant. (Pebbles Depo. pp. 29-39 ; Lamont Depo. p. 15). The night of November 15, 2006, die setter George Lamont and Earl Baumgartner were ordered to install two of the molds in Press No. 20, to commence making the Ford Explorer "G.O.R." (Depo. Exhibit 20) (Lamont Depo. pp. 14-22). Mr. Lamont and Mr. Baumgartner are in the Maintenance Department, and report directly to Plant Director of Operations David Murtha. (Lamont Depo. pp. 12-13). It took them from 10:30 p.m. to 6:05 a.m. to install the molds (7:35 total). They "double-check each other's work." (Lamont Depo., p. 28).

When Lamont brought the molds from storage area and put them in the die cart to bring into Press No. 20, he recalls all the guards, painted bright red, were attached to the mold by a bolt drilled and tapped into the mold. (Lamont Depo., pp. 41). He and Earl Baumgartner did not have to put the guards on, as they were already on. As far as Mr. Lamont knew, there was no guard missing, and, if a guard were missing, and he had to put one on, he would have had to make a written note that he put the guard on. He made no such note, *i.e.*, the guards were on at the beginning of the first shift at 7:00 a.m., November 16, 2006. (Lamont Depo. pp. 41-42).

After Mrs. Hoback lost her foot due to an unguarded ejector plate, the plant instituted new procedures to attempt to prevent another injury like hers. In April, 2002, Director of Plant Operations, Dave Murtha and Director of Human Resources, Bev Picard created a "Maintenance Checklist" which was filled out on each shift, every day. (Murtha Depo., pp. 24-25, 29) (Depo. Exhibits 2-A, 2-B). Ultimately the Shift Supervisor, who is a management employee, signs off on the checklist, and in so doing,

ensures that the guards are in place on each press. (Murtha Depo., pp. 24-25, 29; Pebbles Depo., pp. 41-43; Gill Depo., p.43; Hoback Depo., pp. 41-41). Each shift rotates responsibility for checking particular presses. During November 2006, Press No. 20 was being checked daily by the first shift maintenance representative, and the first shift supervisor, Scott Gill (Murtha Depo., pp. 24-25, 29). There exists a maintenance checklist for the day before, and the day after Plaintiff's injury (Exhibits 2A-2B), but there is no checklist for November 16, 2006, the day of the injury.[5] Gill has no explanation for the missing checklist (Gill Depo. pp. 45-48). The first shift begins at 7:00 a.m., and ends at 3:00 p.m. (Murtha Depo. pp. 7-8).

After the mold was installed by Lamont and Baumgartner, it would have been "set up" by the lineman. (Lamont Depo., pp. 27- 31). After the lineman sets up the new mold, it is checked by the shift supervisor. (Lamont Depo., pp. 31-32). On the day of Plaintiff's accident, George Lamont remembers that Ruth Hoback was the shift supervisor, (who is a member of management). (Lamont Depo., pps 32-33). His understanding is the shift supervisor, *e.g.*, Ruth Hoback, is to check the machine before it is operated. However, Scott Gill testified he was the shift supervisor on the day of Plaintiff's injury, but Ruth Hoback "oversees day to day press operations." (Gill Depo. pp. 22-25; Hoback Depo., p. 44). Regardless, both had the duty and opportunity to look for the missing guard.

The molds were running in Press No. 20 throughout first shift the day of Plaintiff's injury. Director of Plant Operations, David Murtha, and Manufacturing

[5] This "missing" Maintenance Checklist would likely indicate the guards were all on at the beginning of first shift, and were, therefore, deliberately removed before second shift began. Where critical evidence under the control of a party is missing, the Court may infer the evidence would have been adverse to the party which controlled the evidence at the time.

Engineer, Dana Pebbles, personally instructed the first shift operators into the proper methods of loading the “charge" into the molds, cycling the press, retrieving parts, trimming them, etc. (Murtha Depo., pp. 64-67; Gill Depo., pp. 31, 36-37). Pebbles admitted he personally demonstrated proper loading technique while the press was in operation. (Pebbles Depo., p.55). During this demonstration, Pebbles had a full and unobstructed view of both molds. Per Gill, Pebbles was on all sides of the press. (Gill Depo., p. 37).

The job duties of the first shift supervisor Scott Gill, included affirming in writing, on the “Maintenance Checklist” that all guards on Press 20 were in place. He was at Press No. 20 pre-start up in the morning and came by and spoke with the 1st shift press operator four to five times,[6] and watched her operate the press. (Gill Depo., pp. 31-41, 46-48). When he did, Scott Gill had an unobstructed view of the molds, and could readily determine the guard was not in place. The daily Maintenance Checklist Gill was to sign off on that day is the only one missing for the period of October-November 2006. If filled out accurately, it would have shown the guard was not in place (which may well explain why this document never surfaced).

As Manager of Manufacturing Operations on November 16, 2002, one of Ruth Hoback’s responsibilities was to ensure that all presses were properly operating. (Hoback Depo., pp. 17-18, 38) To carry out this responsibility, she personally visited every operating press at some point during the hours she spent at the plant. She specifically recalled that on November 16, 2006, she observed the operation of Press No. 20 during the first shift, with the first shift press operator, Cindy Bercham, at her station. (Hoback Depo., pp. 45-46).

[6] On the day he was injured, David Marshand was the press operator on Press 20, on the second shift.

On November 16, 2000, Plaintiff arrived at work at 3:00 p.m., for second shift and immediately attended a meeting conducted by David Murtha and Dana Pebbles in a conference room. At the meeting, Mr. Marshand and co-workers, Jerry Brumet, John Carrier and Betty Andrews (nka Betty Carrier) were told they would be producing a new Ford Explorer part on Press No. 20. They were given basic instructions in the office, and then led down to Press No. 20 for hands-on instruction. Mr. Murtha and Mr. Pebbles personally instructed Plaintiff in the proper methods of preparing the charge, and loading and unloading the press. (Pebbles Depo., pp. 49-56). Mr. Pebbles performed them himself in Plaintiff's presence, actually producing parts on the live, running press. Plaintiff had not operated Press No. 20 in years, and had never run any press with this particular mold before. While instructing Plaintiff into the proper method of loading the molds, the missing guard was in Pebbles' plain view.

After Pebbles demonstrated the proper method of loading the molds, Plaintiff began working. After only a few cycles of the press, Plaintiff's left foot was caught and crushed under the descending, unguarded ejector plate. He yelled to his fellow operators, who eventually heard and understood what he was saying, but neither one of them knew how to reverse the operation of press. Not until Dana Pebbles came around to the other side of the press, was the press reversed. (Pebbles Depo., pp. 55-57). Plaintiff never screamed, and, in fact, wanted to keep working! After a few minutes, he began feeling faint, sat down, removed his boot, and does not remember much after that point until he woke up in the hospital with his severe and permanent injuries. (Pebbles Depo., pp. 57-59). Almost immediately, David Murtha, who was on the scene, ordered that the guard

be put back on.[7] (Carrier Affidavit). Murtha called Vaughan Platt to the scene. Platt recalls the guard was put on the mold by fellow maintenance employee Dave Carter. Per Platt, the guard was "already made up for it." It fit perfectly, screwed right in and was painted red like the other three. (Vaughan Platt Depo., pp. 48-49).

John Carrier and his wife, Betty, were working Press No. 20 with Plaintiff. Per his sworn Affidavit, the guard had been removed during the first shift, was lying next to the press and was immediately put back on after Plaintiff's injury. (Affidavit of John Carrier).

Murtha claims he never found out why the guard was missing, or where it went. He also claims the replacement guard had to be fabricated. (Murtha Depo., pp. 47-49). The eyewitnesses flatly contradict this. Maintenance Job Leader Platt testified he went to the fabrication shop, and the guard had been quickly put on before he returned. Platt did not know where Carter got the guard, but it screwed right on and fit perfectly. (Platt Depo., pp. 46-49).

There is no evidence that the guard put on after Plaintiff's foot was crushed was anything other than the guard that had been removed earlier. There is no admissible, credible evidence that the guard was removed from the third mold in a storage area, or fabricated in the shop.[8] Testimony that the replacement guard came from the third, identical mold sitting in storage, is pure hearsay (Lamont Depo., pp. 41-44; Platt Depo., pp. 48-49). There is no evidence that this was not the very guard shipped with the mold, and removed prior to Plaintiff's injury. The two die setters, Lamont and Baumgartner

[7] Murtha wrote up Shift Supervisor Scott Gill after Plaintiff's injury, and demoted Ruth Hoback from Manager of Manufacturing Operations to First Shift Supervisor (Gill's job). (Gill Depo., pp. 52-57; Hoback Depo., pp. 5, 48-49.)

[8] Murtha ordered Maintenance to fabricate and weld small pieces of bare metal to cover the opening in the guard in front of the ejector plate piston. These are irrelevant to this case. (Platt Depo., pp. 46-49).

observed the molds for seven and a half hours while installing them before verifying in writing that each mold had both its bright red guards. And, photographs taken by Manufacturing Engineer Dana Pebbles immediately after the accident show red paint "overspray" on the mold where Plaintiff was injured, likely from spray painting the guard red while it was attached to the mold sometime prior to the accident. (Depo. Exhibits 14, 15; Pebbles Depo., p. 61).

LAW & ARGUMENT

The intentional tort law of Ohio has been a tort reform battleground for well over 25 years. Prior attempts to impose a "deliberate intent" standard under Ohio Revised Code §2745.01 have been declared unconstitutional on the grounds that a "deliberate intent" standard is an impossible threshold, totally depriving employees of any intentional tort remedy whatsoever. See, Johnson vs. BP Chemicals, Inc. (1999), 85 Ohio St.3d 298.[9]

The "substantial certainty" test set forth in the syllabus of Fyffe v. Jeno's, Inc., 59 Ohio St.3d 115 (1991) is the law applicable to plaintiff's intentional tort claim. Here, Plaintiff can easily demonstrate every element of that test.

Plaintiff can also meet the deliberate intent of the current, unconstitutional statute, O.R.C. Section 2745.01. Defendant deliberately removed the safety guard which admittedly would have prevented Plaintiff's debilitating injuries, and its intent to injure is thus presumed as a matter of law per the express terms of the statute.

I. DEFENDANT DELIBERATELY REMOVED THE SAFETY GUARD.

[9] Nonetheless, the Ohio Legislature has once again included a deliberate intent standard in the current O.R.C.§2745.01, applicable to all injuries occurring after April 7, 2005.

An employer's intent to injure can be established by: (1) an admission of deliberate intent to injure, or (2) the employee's subjective observation of intent: "I believe my employer hated me and intended to harm me." The former admission is rarer than the Ivory-Billed Woodpecker, as any sane employer would invoke their 5th Amendment right to remain silent, rather than admit deliberate intent to cause injury or death to another, especially to a particular individual. And, the latter evidence is as self-serving as the employer's denial of intent and claim of mere negligence.

Over the last two decades, versions of the Ohio's employment intentional tort statutes have resolved this evidentiary problem by the following clear and objective test of intent: [10]

"Deliberate removal of a safety guard creates a rebuttable presumption that employer acted with deliberate intent to injure."

Current Section 2745.01 contains the following standard:

"Deliberate removal by an employer of an equipment safety….creates a rebuttable presumption that the removal ….was committed with intent to injure another if an injury….occurs as a direct result."[11]

An employer may be liable for the consequences of its acts even though it never intended a specific result. Gibson, *supra*, at 179. "`If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.'" Gibson,

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[10] See, *e.g.*, former Ohio Revised Code §4121.80(G), discussed in Volz vs. Hamilton Tool Company (12th Dist. Ct. of Appeals, CA 90-09-194 (March 11, 1991), 1991 Ohio App. LEXIS 959; former Ohio Revised Code §2745.01 (discussed in Johnson vs. BP Chemicals, Inc., *supra*).

[11] Defendant's argument that Plaintiff has no proof that management sought to harm him individually is meritless. O.R.C. Section 2745.01 only requires a showing of intent to injure "another," not a particular individual.

supra, at 179, quoting Van Fossen v. Babcock & Wilcox Co., 36 Ohio St.3d 100, 115. Nevertheless, an employer is considered to have intended to cause injury to an employee "only when a reasonable person could infer from the surrounding circumstances that the employer, with knowledge of a risk of certain injury from a dangerous condition, still requires an employee to perform the dangerous procedure." (Emphasis in the original.) Youngbird v. Whirlpool Corp. (1994), 99 Ohio App.3d 740, 747, citing Fyffe, *supra*, at paragraph two of the syllabus. See, also, Gibson, *supra*, at 179.

"Any analysis of the employer's intent must turn not only on the hazards of the machine but also the skills of the employee. If an employer sent a new hiree with no experience or training to operate the machine, it would clearly be an intentional tort."

Whisler v. Merrico, Inc., (5th Dist. Ct. of Appeals, No. 2004CA70, July 20, 2005).

(And, see Huggins v. Federal Equipment, et al., 8th Dist. Ct. of Appeals, No. 64828, November 2, 1995; employee newly assigned to extruder suffered amputation after being trained in operation but not safety; summary judgment in intentional tort action reversed.)

In Moebius v. GM Corp., *supra*, the Court held the absence of a known safety device demonstrates injury is substantially certain to occur. 2002 Ohio 3918, at p. 38. When determining an employer's knowledge that an injury is substantially certain to occur, the court may consider prior injuries as a factor. However, "absence of a prior injury **is not** the sole factor" in determining the employer's knowledge. Moebius v. GM Corp., 2002 Ohio at p.38, (emphasis added). "What constitutes a 'substantially certain' result will vary from case to case, based on the facts involved." Jones v. General Motors Corp., 1997 Ohio App. LEXIS 2010, 8 (1997).

Even if there were no Die Setter's Checklist, no testimony from Mr. Lamont and

no direct proof the guards were on that day, Defendant would still be liable. There is no legal distinction between "deliberate removal" of a legally required safety guard and deliberate failure to attach it. Defendant is not relieved of intentional tort liability if it can characterize its conduct as mere failure to "take corrective action, institute safety measures, or properly warn the employees of the risks involved." The United States Sixth Circuit Court of Appeals put this argument to rest in Cantrell vs. GAF Corporation, 999 F2d 1007, (C.A. 6 1993):

> "We note further that almost any dangerous conduct undertaken by an employer can be characterized as a failure to take affirmative protective action for its employees. The removal of a guard from machinery can be characterized as a failure to take corrective action or institute safety measures….The characterization of an employer's action does not control its liability, however. The critical inquiry in an intentional tort case is the likelihood that injury will occur. Where the employer acts with knowledge that injury is a substantial certainty, the employer has gone beyond negligence, recklessness and wantonness and committed an intentional tort. *E.g.*, Tulloh v. Goodyear Atomic Corp., 62 Ohio St.3d 541, 584 N.E.2d 729, 730-33 (1992) (reversing dismissal of complaint alleging that employer intentionally exposed plaintiff to radioactive materials, knowing that injury was substantially certain to occur, while concealing this information from plaintiff and failing to warn and establish safety standards); Fyffe, 570 N.E.2d at 1113-14 (reversing summary judgment for employer where injury caused by employer's removal of guard and employer allegedly knew removal of guard created a substantial risk of harm to employees); Ailiff v. Mar-Bal, Inc., 62 Ohio App.3d 232, 575 N.E.2d 228 (1990) (reversing directed verdict for employer on evidence that employer instructed employees to use toxic chemical in unsafe manner without adequate protection, with knowledge of toxic effects of exposure)." 999 F. 2d at 1016.

Here, even if the Court believes the rumor that the guard put on the machine afterwards came from the third mold in storage, management's ratification of the installation of the only one of three identical molds which was (allegedly) missing a guard is the functional and legal equivalent of deliberate removal.

Cases involving workplace intentional torts must be judged on the totality of the circumstances surrounding each incident. Gibson v. Drainage Prod., Inc. (2002), 95 Ohio St.3d 171, 178. Mere knowledge and appreciation of a risk do not establish "intent" on the part of the employer. Cross v. Hydracrete Pumping Co., Inc. (1999), 133 Ohio App.3d 501, 507, citing to Fyffe, *supra*, at 155. Proof that the employer knew to a substantial certainty that harm to the employee would result often must be demonstrated through circumstantial evidence and inferences drawn from the evidence. See Hannah v. Dayton Power & Light Co. (1998), 82 Ohio St.3d 482, 485; Emminger v. Motion Savers, Inc. (1990), 60 Ohio App.3d 14, 17. The Emminger court explained:

> "Proof of the employer's intent***is by necessity a matter of circumstantial evidence and inferences drawn from alleged facts appearing in the depositions, affidavits and exhibits."

Here, CSP's deliberate removal is established by overwhelming direct and circumstantial evidence:

1) The guard at issue in this case is an integral part of the mold, and required by law; it can only be removed by a human, using an allen wrench. It cannot simply "fall off." There was red paint overspray on the mold at the time of the accident, indicating the guard was painted while attached to the mold.

2) Defendants' lead die setter, George Lamont, testified he and fellow die setter Earl Baumgartner labored overnight from 10:30 p.m. on November 15, 2006 to 6:05 a.m. on November 16, 2006 moving the two massive molds out of storage, and installing them with all their fittings, and bright red guards. After working only on these two molds for seven and half hours, Mr. Lamont signed off on an elaborate Die Setter's Checklist expressly verifying in writing that "all guards in place." (See Exhibit 20.)

There is no credible evidence contradicting this business record of the Defendant. Defendant would have this Court simply ignore Mr. Lamont's damning testimony and checklist, arguing there is "no evidence the guard was ever on." (Brief in Support of Defendants' Motion for Summary Judgment, p. 9).

3) After Plaintiff's injury, the guard was immediately replaced by order of the Director of Plant Operations David Murtha, who was nearby, having personally instructed Plaintiff on how to cut the material prior to loading the press. Eyewitness testimony verifies the guard lying next to the press, from where it was simply picked up and quickly screwed back on. Maintenance Job Leader Vaughn Platt testified the guard was quickly put on while he went to the shop, and it screwed right in and fitted perfectly.

4) The top four management employees with direct responsibility for safety and guarding each either personally instructed the operators of the press that very day, or observed the press, which indisputably no longer had the guard on which had been there in the morning when Lamont verified it. And, the top two – Murtha and Pebbles – personally instructed Plaintiff on the loading of the press in direct view of the missing guard.

The inferences to be drawn in Plaintiff's favor from the objective, admissible evidence here lead to the following conclusions: (1) the mold was guarded prior to first shift, (2) the guard cannot be removed except by the use of tools, and (3) when Plaintiff's foot was crushed, the guard that would have saved him this fate was lying next to the press, and screwed back on immediately. Plaintiff has more than met his burden of demonstrating deliberate removal. Defendants claim that the mold was never guarded is

based on speculation, hearsay, and self-serving denials of liability contradicted by admissible evidence.

There is no dispute of material fact: self-serving denials, speculation and rumors are neither facts, nor admissible, and may not be considered in deciding a Motion for Summary Judgment. All the credible, admissible evidence supports Plaintiff's claim of liability. When presented with a Motion for Summary Judgment, the Trial Court may only consider admissible evidence, and with respect to the material facts in dispute, inferences in the light most favorable to the non-movant. Civil Rule 56(C).

In fact, all the admissible evidence points to deliberate removal of the safety guard. This Court would be appropriate, and within this Court's discretion to grant summary judgment in Plaintiff's favor on Defendants' liability for intentional tort, even under currently-enacted O.R.C. Section 2745.01. Plaintiff respectfully requests and moves this Court to do so.

II. OHIO REVISED CODE SECTION 2745.01 IS UNCONSTITUTIONAL.

The intentional tort law of Ohio has been a tort reform battle ground in the 25 years since the Blankenship decision. All attempts to impose a "deliberate intent" standard under Ohio Revised Code §2745.01 have been declared unconstitutional on the grounds that a "deliberate intent" standard is an impossible threshold, totally depriving employees of any intentional tort remedy whatsoever, and an unauthorized enactment beyond the power of the Legislature See, Johnson vs. BP Chemicals, Inc. (1999), 85 Ohio St.3d 298.[12]

But, like the swallows returning to San Juan Capistrano, or the buzzards to

[12] Nonetheless, the Ohio Legislature has once again included a deliberate intent standard in the current O.R.C.§2745.01, applicable to all injuries occurring after April 7, 2005.

Hinckley Lake, manufacturer employers predictably descend on Columbus to convince the Legislature to – yet again – ignore the Ohio Constitution and binding precedent of the Ohio Supreme Court, and immunize them from intentional tort actions by employees.

The definition of "substantial certainty" in the current version of O.R.C. Section 2745.01 is unenforceable, because:

A) it is either such a bizarre and illogical definition, and one so unrelated to either the legal or dictionary definition of "substantial certainty" as to be impossible to apply, or

B) it is in fact the exact definition of deliberate intent contained in the 1995 version of O.R.C. Section 2745.01 which was stricken down as unconstitutional by the Ohio Supreme Court in Johnson v. BP Chemicals (1999), 85 Ohio St. 3d 298

The current statute imposes liability on employer who acts with deliberate intent to injure another, or with the belief that the injury was substantially certain to occur. Logical enough, and in keeping with 25 years of precedent. But then it defines "substantial certainty" as follows:

> "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."

Substituting this absurd definition directly into the relevant portion of Section 2745.01(A) yields the following Jabberwockian nonsense:

> "The employer shall not be liable unless the employer committed the tortious act with intent to injure another or with the belief that the injury was **acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition or death** to occur."

This language is completely illogical, and, in fact, downright nonsensical. A court cannot and should not enforce legislation which is illogical, nonsensical, or plain incomprehensible.

If the Ohio Legislature meant to say "an employer shall not be liable for an intentional tort unless it committed the tortious act with deliberate intent to injure another or deliberate intent to cause an employee to suffer an injury," then the statute sets forth "pure deliberate intent" standard. The Supreme Court of Ohio has steadfastly ruled that a pure "deliberate intent" standard is unconstitutional. The following passage from Johnson v. BP Chemicals succinctly describes all the defects of the current legislation, and the reasons why this Court should declare it unconstitutional and apply Fyffe[13]:

"In response to our holdings in 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 Dev. Co. (1984), 15 Ohio St.3d 90, 15 OBR 246, 472 N.E.2d 1046, the General Assembly enacted former R.C. 4121.80 (Am.Sub.S.B. No. 307, 141 Ohio Laws, Part I, 733-737). See Brady v. Safety-Kleen Corp. (1991), 61 Ohio St.3d 624, 631, 576 N.E.2d 722, 727, citing Kunkler v. Goodyear Tire & Rubber Co. (1988), 36 Ohio St.3d 135, 136-137, 522 N.E.2d 477, 479. In Brady, the court invalidated former R.C. 4121.80 in its entirety, and, in doing so, we thought that we had made it abundantly clear that any statute created to provide employers with immunity from liability for their intentional tortious conduct cannot withstand constitutional scrutiny. See, also, State ex rel. Ohio AFL-CIO v. Voinovich (1994), 69 Ohio St.3d 225, 230, 631 N.E.2d 582, 587.(fn5) Notwithstanding, the General Assembly has enacted R.C. 2745.01, and, again, seeks to cloak employers with immunity. In this regard, we can 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. In any event, we will state again our holdings in Brady and hopefully put to rest any confusion that seems to exist with the General Assembly in this area."

"In Brady, the court held that former R.C. 4121.80 exceeded the power conferred by and conflicted with both Sections 34 and 35, Article II of the Ohio Constitution. Specifically, this court concluded that former R.C. 4121.80 was "totally repugnant" to Section 34, Article II, because, in enacting the legislation, the General Assembly eliminated an employee's right to a common-law cause of action for an employer intentional tort that would otherwise benefit the employee. Brady, 61 Ohio St.3d at 633, 576 N.E.2d at 728. Therefore, former R.C. 4121.80 was not a law that furthered the "comfort, health, safety and general welfare of all employees." *Id*., quoting Section 34, Article II."

[13] Every Judge of the Court of Common Pleas is duty-bound to uphold the Ohio Constitution, and empowered to declare an enactment of the Ohio Legislature unconstitutional. Courts of Common Pleas have held previously declared various enactments of Ohio employer intentional tort laws to be unconstitutional. See, Browning v. N. Gateway Tire, Inc. (1997), 92 Ohio Misc. 2d 1, 659 N.E. 2d 141 (Common Pleas).

"Additionally, the court in Brady adopted the rationale from the dissent in Taylor v. Academy Iron & Metal Co. (1988), 36 Ohio St.3d 149, 162, 522 N.E.2d 464, 476, and concluded that R.C. 4121.80 represented an invalid exercise of legislative authority. Specifically, the court held that "the legislature cannot, consistent with Section 35, Article II, enact legislation governing intentional torts that occur within the employment relationship, because such intentional tortious conduct will always take place outside that relationship. Blankenship, *supra*. Since we find that Section 35, Article II authorizes only enactment of laws encompassing death, injuries or occupational disease occasioned within the employment relationship, R.C. 4121.80 cannot logically withstand constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of its constitutional empowerment." (Emphasis sic.) Brady, 61 Ohio St.3d at 634, 576 N.E.2d at 729."

"Clearly, the constitutional impediments at issue in Brady, concerning former R.C. 4121.80, also apply with equal force to R.C. 2745.01. Both statutes were enacted to serve identical purposes. Like former R.C. 4121.80, R.C. 2745.01 was created to provide immunity for employers from civil liability for employee injuries, disease, or death caused by the intentional tortious conduct of employers in the workplace."

"Specifically, R.C. 2745.01(A) provides that an employer is not generally subject to liability for damages at common law or by statute for an intentional tort that occurs during the course of employment, but that an employer is subject to liability only for an "employment intentional tort" as defined.(fn10) "Employment intentional tort" is defined in R.C. 2745.01(D)(1) as "an act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee." (Emphasis added.) Further, R.C. 2745.01(B) states that employees or the dependent survivors of deceased employees who allege an intentional tort must demonstrate "by clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort." (Emphasis added.) This standard of clear and convincing evidence also applies to a response by the employee or the employee's representative to an employer's motion for summary judgment. R.C. 2745.01(C)(1). In addition, the statute requires that "every pleading, motion, or other paper" be signed by the attorney of record or, if the party is not represented by an attorney, by the party. R.C. 2745.01(C)(2).(fn12) And, if the requirements of R.C. 2745.01(C)(2) are not complied with, the court shall impose "an appropriate sanction." Id. The sanction may include, but is not limited to, reasonable expenses incurred by the other party, including reasonable attorney fees. *Id*."

"By establishing the foregoing standards in R.C. 2745.01, the General Assembly has created a cause of action that is simply illusory. Under the definitional requirements contained in the statute, an employer's conduct, in order to create civil liability, must be both deliberate and intentional. Therefore, in order to prove an intentional tort in accordance with R.C. 2745.01(D)(1), the employee, or his or her survivors, must prove, at a minimum, that the actions of the employer amount to criminal assault. In fact, given the elements imposed by the statute, it is even conceivable that an employer might actually be guilty of a criminal assault but exempt from civil liability under R.C.

2745.01(D)(1). Taylor, 36 Ohio St.3d at 162-163, 522 N.E.2d at 476 (Douglas, J., dissenting).”

“Indeed, the requirements imposed by R.C. 2745.01 are so unreasonable and excessive that the chance of recovery of damages by employees for intentional torts committed by employers in the workplace is virtually zero. In this regard, we agree with the court of appeals that R.C. 2745.01 "creates an insurmountable obstacle for victims of 'employment intentional torts.' " See, also, Claybon, Ohio's "Employment Intentional Tort": A Workers' Compensation Exception, or the Creation of an Entirely New Cause of Action? (1996), 44 Clev.St.L.Rev. 381, 405-406 ("To impose a clear and convincing standard of proof, in addition to requiring specific intent, distorts the very balance the legislature was trying to achieve. Foreseeably, it will be extremely difficult for an employee to prove a case of intentional tort in anything short of a flagrant battery. With the threat of sanctions it is also foreseeable that an employee['s] attorney will not want to file employee cases, otherwise risk being punished for what the court feels was not a “good faith” argument, or for “causing unnecessary delay or needless increase in the cost of the action.”)”

“Accordingly, we find that R.C. 2745.01 is unconstitutional in its entirety. Because R.C. 2745.01 imposes excessive standards (deliberate and intentional act), with a heightened burden of proof (clear and convincing evidence), it is clearly not "a law that furthers the ' * * * comfort, health, safety and general welfare of all employees.' " Brady, 61 Ohio St.3d at 633, 576 N.E.2d at 728, quoting Section 34, Article II of the Ohio Constitution. See, also, Blankenship, 69 Ohio St.2d at 615, 23 O.O.3d at 509, 433 N.E.2d at 577 ("one of the avowed purposes of the [Workers' Compensation] Act is to promote a safe and injury-free work environment. * * * Affording an employer immunity for his intentional behavior certainly would not promote such an environment, for an employer could commit intentional acts with impunity with the knowledge that, at the very most, his workers' compensation premiums may rise slightly."). Furthermore, because R.C. 2745.01 is an attempt by the General Assembly to govern intentional torts that occur within the employment relationship, R.C. 2745.01 "cannot logically withstand constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of constitutional empowerment." Brady, 61 Ohio St.3d at 634, 576 N.E.2d at 729.”

“After determining the constitutionality of R.C. 2745.01, and after reviewing the complaint, the court of appeals concluded that Johnson properly set forth a claim for common-law intentional tort against BP. We agree. In his complaint, Johnson alleged that he was exposed to a dangerous situation at the plant and that BP knew that such exposure would be substantially certain to cause injury. Accepting these allegations as true, as we are required to do, we hold that the complaint properly sets forth a claim of intentional tort sufficient to survive a Civ.R. 12(B)(6) motion to dismiss. See Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190, 532 N.E.2d 753.”

“Therefore, for the foregoing reasons, the judgment of the court of appeals is affirmed with respect to its holding that R.C. 2745.01 is unconstitutional and with respect to its ruling that the complaint states a cause of action for common-law intentional tort

sufficient to withstand a Civ.R. 12(B)(6) motion to dismiss. Thus, Johnson's common-law intentional tort claim is reinstated."

To summarize, the current statute is unconstitutional for at least the following reasons:

1) though on its face it only purports to regulate intentional torts "committed by the employer during the course of employment," in fact it describes criminal conduct, which is outside the employment relationship. Therefore, the legislation regulates activity outside the employment relationship, and is beyond the scope of the authority granted the legislature.

2) It imposes excessive standards which can effectively deprive an employee of their right to sue, and is therefore unlawful legislation not intended for the "comfort, health, safety and general welfare of all employees."

3) given the elements imposed by the statute, "it is even conceivable that an employer might actually be guilty of a criminal assault but exempt from civil liability under R.C. 2745.01(D)(1). Taylor, 36 Ohio St.3d at 162-163, 522 N.E.2d at 476 (Douglas, J., dissenting)" See, Johnson v. BP, *supra*, at 307. This would be in violation of both the Equal Protection and Privileges and Immunities Clause of the Ohio Constitution.

III. DEFENDANT ACTED WITH SUBSTANTIAL CERTAINTY THAT AN UNGUARDED EJECTOR PLATE WOULD CAUSE SERIOUS INJURY.

The currently-enacted version of Section 2745.01 states that an employer is liable if it committed "the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur." As discussed in Section II, supra, defining "substantial certainty" as "deliberate intent," renders the current statute an unconstitutional "pure deliberate intent statute." Fyffe v. Jeno's, Inc., 59 Ohio St.3d 115 (1991) is states the law applicable to plaintiff's intentional tort claim.

A. All Roads Lead to Fyffe

The binding precedent of both Brady and Johnson require this Court to apply the "substantial certainty" standard for employer intentional torts set forth in Fyffe v. Jeno's, Inc. (1991), 59 Ohio St. 3d 115, either by:

a) finding current O.R.C. Section 2745.01 on the whole to be an unconstitutional pure deliberate intent statute, or

b) refusing to apply the nonsensical, illogical, absurd and intentionally deceptive definition of "substantial certainty" set forth at subpart (B) of current O.R.C. Section 2745.01, and applying instead the common law definition of substantial certainty set forth in Fyffe.

Where O.R.C. Section 2745.01 is unconstitutional on its face, then the common law definition of employer intentional tort prior to its enactment is retained. Brant v. Lewark Spinning, Inc. (1998), 1998 Ohio App. Lexis 972.

B. The Fyffe Standard for Employer Intentional Torts

In Fyffe v. Jeno's, Inc.(1991), 59 Ohio St. 3d 115, The Ohio Supreme Court articulated a three-prong test to determine whether an employer has committed an intentional tort:

> "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."

To satisfy the first element of Fyffe, the injured employee must demonstrate there was a dangerous process, procedure or condition and the employer knew it existed. A

dangerous condition or procedure is not a "natural hazard of one's employment," the "dangerous work must be distinguished from an otherwise dangerous condition within that work." Moebius v. GM Corp., (Aug. 2, 2002) 2nd Dist. No. 19147, 2002 Ohio 3918, p. 27. An employer must have actual knowledge the dangerous condition existed. Moebius v. GM Corp., 2002 Ohio 3918, at p.28.

The second element of Fyffe is whether the employer knew that when the employee was subjected to the dangerous condition, the employer was substantially certain harm would occur. An employer may be liable for the consequences of its acts even though it never intended a specific result. Gibson, *supra*, at 179. "`If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.'" Gibson, *supra*, at 179, quoting Van Fossen v. Babcock & Wilcox Co., 36 Ohio St.3d 100, 115.

As defense counsel succinctly stated in its firm's on-line guide entitled "Ohio Employer Intentional Tort Law in Ohio:"

> "Removal or absence of a safety guard is among common themes in employer intentional tort cases. A survey of appellate cases shows that the majority trial courts will deny summary judgment and the appellate courts will reverse summary judgment in cases where a safety guard has been removed by the employer. See Koeth v. Time Savers, Inc. (May 26, 2000), Geauga App. No. 99-G-2211, 2000 Ohio App. LEXIS 2273, Hamilton v. Mitchellace, Inc. (Feb. 6, 1990), Scioto App. No. 1783, 1990 Ohio App. LEXIS 386; Watson v. Aluminum Extruded Shapes (1990), 62 Ohio App.3d 242. Sometimes, the absence of the safety guard makes the danger so obvious that the court can find intent on behalf of the employer. See *e.g.*, Adock v. Scandura Ohio, Inc., 2002 Ohio 6237 (court found it self evident that feeding material into unguarded nip points poses great danger); Russell v. Interim Personnel, Inc. (1999), 135 Ohio App.3d 301."

"Ohio Employer Intentional Tort Law, copyright 2004 by Gallagher Sharp Fulton & Norman (See Ex. 2)."

In Moebius v. GM Corp., *supra*, the Court held the absence of a known safety device demonstrates injury is substantially certain to occur. 2002 Ohio 3918, at p. 38.

An employer's deliberate removal of a safety guard from a press can support not only a finding of an intentional tort, but an award of punitive damages and attorneys' fees. Taylor vs. Triple A in the U.S.A. (1995), 107 Ohio App. 3d. 14.

Where the safety feature omitted is not a secondary or ancillary guard, but the primary protective device, the failure of the employer to attach such a guard creates a factual issue sufficient to overcome summary judgment. Walton vs. Springwood Products, Inc. (1995), 105 Ohio App. 3d 400.

When determining an employer's knowledge that an injury is substantially certain to occur, the court may consider prior injuries as a factor. Prior accidents are probative of the employer's knowledge whether an injury is substantially certain to result from a dangerous condition. Yoder v. Greensteel Corp., (Nov. 3, 1998), Stark App. No. 1998 CAOO106, 1998 Ohio App. LEXIS 5671; Ross v. Maumee City Schools (1995), 103 Ohio App. 3d 58. However, "absence of a prior injury **is not** the sole factor" in determining the employer's knowledge. Moebius v. GM Corp., 2002 Ohio at p.38, (emphasis added). By itself, an absence of previous accidents is not sufficient to prove that an employer was unaware of a dangerous condition. Cook vs. Cleveland Electric Illuminating Co., (1995), 102 Ohio App. 3d 417. "What constitutes a 'substantially certain' result will vary from case to case, based on the facts involved." Jones v. General Motors Corp., 1997 Ohio App. LEXIS 2010, 8 (1997). And:

> "Any analysis of the employer's intent must turn not only on the hazards of the machine **but also the skills of the employee**. If an employer sent a new hiree with no experience or training to operate the machine, it would clearly be an intentional tort."

Whisler v. Merrico, Inc., (5th Dist. Ct. of Appeals, No. 2004CA70, July 20, 2005). (And, see Huggins v. Federal Equipment, et al., 8th Dist. Ct. of Appeals, No. 64828, November 2, 1995; employee newly assigned to extruder suffered amputation after being trained in operation but not safety; summary judgment in intentional tort action reversed.)

The third element of Fyffe is that the employer, with knowledge of the dangerous condition, and with knowledge that injury was substantially certain to occur, required the employee to continue to perform the dangerous task. In Gibson v. Drainage Products, Inc., 95 Ohio St. 3d 171 (2002), the Ohio Supreme Court held the employer need not expressly order the employee to perform the dangerous task. The Court held that, in order to overcome a motion for summary judgment, the employee need only present evidence that "raises an inference that the employer, through its actions and policies, required the employee to engage in the dangerous task." *Id.* at p.23, citing In Hannah v. Dayton Power & Light Co., 82 Ohio St. 3d 482, 487 (1998). When there is credible evidence that the employer merely *expected* the employee to perform the dangerous task, there is a genuine issue of material fact for the jury. Gibson v. Drainage, 95 Ohio St. at p. 24.

Here, the overwhelming evidence demonstrates all three elements of the intentional tort standard set forth in Fyffe: CSP knew that an unguarded mold was a dangerous process, procedure instrumentality or condition within its business operation. It readily admits this to be true, and all of the employees so testified. Ruth Hoback's extraordinarily serious injury on this very same press for the very same reason erased any

doubt. There is no question that CSP knew that if David Marshand operated Press No. 20 with an unguarded mold, that his foot would eventually, that is, with substantial certainty, be caught in the descending ejector plate. The guards would be unnecessary if the press operators were not placing their foot at the forward end of the mold each time the ejector plate had just finished popping out the prior piece. As seen on the videotapes provided in support of this Brief, the operator's foot is placed on or abutting the guard during each cycle of the press. But for the guard, the operator cannot feel where his or her foot should be placed to avoid the descending ejector plate, and it will be crushed underneath.

Finally, there is no doubt that the very top management in the plant personally gave David Marshand instruction on preparing and loading the press, and immediately thereafter, directed him to load and cycle the press for the very first time, with an unguarded mold that had been observed by numerous managers throughout the prior shift and at the beginning of Mr. Marshand's shift while he was being instructed in the use of the press.

Finally, there is binding precedent in this County for denying Defendants' Motion for Summary Judgment. In Corry Shauberger v. Wayne-Dalton Corp., Case No. 2003 CV 00981, Judge Mackey was presented with similar facts in an employer intentional tort action.[14] In Shauberger, the plaintiff was operating an extremely dangerous ripping saw whose original guard had been removed years before anyone's memory of the machine. Like Plaintiff, he had just been instructed in the feeding and loading of the machine, and shortly thereafter suffered loss of the thumb, index finger, and most of the next two

[14] In more ways than one, the Shauberger case is related: Corry Shauberger is the nephew of David Marshand's fiancé. Judge Mackey was also presented with another employer intentional tort case in the same family, when Corry Shauberger's grandfather, William McKinley, sued GenCorp. Marian McKinley v. GenCorp., *et al.*, Case No. 1998 CV 00797, never reached the summary judgment stage, but was settled for a confidential sum.

fingers of his dominant hand. Judge Mackey denied the employer's motion for summary judgment. Attached hereto as Exhibit 3 is Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment.

CONCLUSION

The current version of Ohio Revised Code Section 2745.01 is unconstitutional, for the reasons set forth above. However, Plaintiff can prevail both under the unconstitutional "pure deliberate intent" standard, and the lawful, "substantial certainty" standard set forth in Fyffe.

For all these reasons, Defendants' Motion for Summary Judgment should be denied.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment was served upon Thomas Cabral, Esq., Gallagher Sharp, 1501 Euclid Avenue, 6th Floor, Cleveland, Ohio 44115 by regular U.S. Mail this _____ day of December, 2007.

_____
Kevin T. Roberts