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A Memorandum to Our Clients

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CLIENT ALERT

11th District Court of Appeals Finds Employer Liability Statute Unconstitutional

On August 8, 2008, the 11th District Court of Appeals which includes Ashtabula, Geauga, Lake, Portage and Trumbull Counties, became only the second appellate district, the 7th District being the other, to hold that Ohio's intentional tort statute, violates the Ohio Constitution. R.C. 2745.01 governs causes of action by an employee against his or her employer for the employer's alleged intentional willful or wrongful acts occurring within the course of the employee's employment. There had been two previous attempts by the legislature to put into law what was typically found only in common law or case law. Those two similar statutes were deemed unconstitutional by the Supreme Court of Ohio.

In this decision, the Court ruled that under the statute, the employer is essentially given immunity because it required the employee to prove that the employer's conduct was deliberate or intentional. The Court went on to find that the statute limited the wrong to occurrences only within the employment relationship and that almost all tortious conduct falls outside of such a relationship. The Court stated that this creates an insurmountable obstacle for the employee to overcome. So much so that the chances for recovery for an intentional tort committed while in the course of employment would be virtually zero.

As a result of finding R.C. 2745.01 unconstitutional, the 11th District reinstated the common law standard for employees seeking a remedy for an employer's alleged intentional tortious conduct as articulated in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St. 3d 115. The Ohio Supreme Court set forth the test for an employer's intentional torts as follows: "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; (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." This case establishes that the employee must demonstrate proof of intent by the employer beyond mere negligence or recklessness. In other words, the employer must be substantially certain that an employee would be injured if exposed to the dangerous condition and failed to do anything to prevent the employee falling prey to that dangerous condition.

Employers should not be worried that it will make it easier now for employees to receive damages for alleged intentional torts while at the work place. The courts have acknowledged that the second requirement in *Fyffe*, the knowledge requirement or proving an employer was substantially certain that an employee would be injured if exposed to the dangerous condition is still a difficult burden to overcome.

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