

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

FLEMING et al.,	:	O P I N I O N
Appellants,	:	
- v -	:	CASE NO. 2007-P-0071
AAS SERVICE, INC. et al.,	:	8/1/08
Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2006 CV 00974.

Judgment: Affirmed in part, reversed in part, and remanded.

James J. Gutbrod, for appellants.

Kristen E. Campbell and Hans Nilges, for appellees AAS Service, Inc. and Urs Schneeberger.

John V. Rasmussen, for appellees Mr. and Mrs. Keith Mamajek.

CYNTHIA WESTCOTT RICE, Judge.

{¶1} Appellants, William A. Fleming and others, appeal from the decision of the Portage County Court of Common Pleas granting summary judgment to appellees, AAS Service, Inc. and others. For the reasons discussed below, we affirm in part, reverse in part, and remand the matter for further proceedings.

{¶2} Beginning in 2002, appellant William Fleming started as a part-time employee of appellee A.A.S. Service, Inc. as a subcontractor assisting with painting

jobs. In 2003, Fleming became a full-time employee assisting with, inter alia, chimney cleaning and repair. Fleming had no prior experience with chimneys but was given “on the job” training by appellee Urs Schneeberger, the owner and employee of AAS. In July 2005, AAS, through Schneeberger and Fleming, visited the one-story home of Keith and Shannon Mamajek to examine their chimney and provide an estimate for its repair. The Mamajeks subsequently signed a contract with AAS for the repair work.

{¶3} Schneeberger and Fleming arrived at the Mamajek home at approximately 8:00 a.m. on August 9, 2005. They worked on the chimney for several hours without incident. After finishing the chimney repairs, Fleming commenced cleaning the roof top. He was the only person on the roof during the cleaning process. While cleaning, Fleming had rinsed the roof with a water hose and had placed larger pieces of mortar and other debris in a 3-5 gallon bucket, which also contained flashing seal.

{¶4} While he was completing the cleaning process, Fleming noticed the bucket beginning to slide down the slope of the roof. He testified that at the time, the roof was dry and clear of debris. Fleming was unable to explain why the bucket began its descent; however, he testified that Schneeberger explicitly advised him never to chase any equipment or tool from a roof. If equipment begins to fall, “[i]t happens, but you just don’t go after it. You let it fall, go down and pick it up. If it’s broke, it’s just broke. Better it than you is the philosophy that I was taught from [Schneeberger].” Fleming even acknowledged in his complaint that “the cardinal rule when working on a roof is not to chase a tool that slides off the roof.”

{¶5} Despite Schneeberger's explicit training and instructions, Fleming darted after the bucket "at a full run." He testified that he had heard voices from below and was concerned that the falling debris would fall and strike one of the Mamajeks, who had been outside in their backyard. As he pursued the bucket, he dodged a vent stack on the roof and swatted at the bucket to change its direction. At this point, however, Fleming had reached the roof line and, rather than attempt to stop, decided to leap off the edge of the roof and attempt to land safely in the grass. Unfortunately, Fleming landed on the Mamajeks' concrete driveway, injuring his leg and foot. Although the bucket tumbled off the roof with Fleming, the Mamajeks were not harmed. In fact, Shannon Mamajek testified that she and her two daughters were between 18 and 20 feet from the roof at the time of the incident. Fleming repeatedly testified that he did not fall from the roof but, rather, jumped of his own free will, and at no point did Schneeberger advise him to act as he did.

{¶6} On May 15, 2006, appellants filed their complaint in the Cuyahoga County Court of Common Pleas alleging negligence against the Mamajeks, intentional tortious conduct on behalf of AAS and Schneeberger, and loss of consortium. After filing their answer, the cause was transferred to the Portage County Court of Common Pleas. On December 22, 2006, the Mamajeks filed their motion for summary judgment to which appellants responded on January 17, 2007. On March 19, 2007, AAS and Schneeberger filed their motion for summary judgment, to which appellants duly responded. On March 21, 2007, the trial court granted summary judgment in the Mamajeks' favor. Later, on July 12, 2007, the trial court awarded summary judgment in

AAS's and Schneeberger's favor. Appellants filed a timely appeal and now assign three errors for our review.

{¶7} Appellant's first assignment of error alleges:

{¶8} "The trial court erred in granting summary judgment to Keith and Shannon Mamajek."

{¶9} We review a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is appropriate under Civ.R. 56(C) when (1) there is no genuine issue of material fact remaining to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence in favor of the nonmoving party, that conclusion favors the moving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶10} The moving party bears the initial burden of providing the trial court a basis for the motion and is required to identify portions of the record demonstrating the absence of genuine issues of material fact pertaining to the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The burden then shifts to the nonmoving party to set forth specific facts that would establish a genuine issue for trial. *Id.* The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a blank assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C). *Dresher*, supra. Similarly, the nonmoving party may not rest on conclusory allegations or denials contained in the pleadings; rather, he or she must submit evidentiary material

sufficient to create a genuine dispute over material facts at issue. Civ.R. 56(E); see also *Dresher*.

{¶11} To determine whether a genuine issue exists, a reviewing court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must necessarily prevail as a matter of law. *Spatar v. Avon Oaks Ballroom*, 11th Dist. No. 2001-T-0059, 2002-Ohio-2443, at ¶ 16, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340. “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶12} Under their first assignment of error, appellants argue that Keith and Shannon Mamajek, the owners of the home off which Fleming leapt, were negligent in creating a dangerous condition when Mrs. Mamajek remained in her backyard with her children while Fleming was on their roof repairing the chimney. Appellant contends, “With the grinding of the mortar and debris flying everywhere, along with the presence of the ladder, by being in the backyard the Mamajeks were in harm’s way.” We disagree with appellants’ argument.

{¶13} To defeat the Mamajeks’ motion for summary judgment, it was necessary for appellants to identify a duty owed them by the Mamajeks that was breached. *Fuehrer v. Westerville City School Dist. Bd. of Edn.* (1991), 61 Ohio St.3d 201, 204. In *Michaels v. Ford Motor Co.* (1995), 72 Ohio St.3d 475, 478, the Supreme Court of Ohio

underscored that an owner of property on which construction is taking place may only be held liable for the injuries of an independent contractor's employees if the owner actively participates in the details of a contractor's work, e.g., where "the owner 'interfered with the *mode* of the job operation,' '*actually participated in the job operation by dictating the manner and mode* in which the * * * job was to be performed,' and 'had sole control over the safety features necessary to eliminate the hazard.'" (Emphasis sic.) *Id.*, quoting, *Hirschbach v. Cincinnati Gas & Elec. Co.* (1983), 6 Ohio St.3d 206, 208. The phrase "actively participates" has been defined as directing the activity that resulted in the injury and/or giving or denying permission for the critical acts that led to the employee's injury as opposed to merely exercising a general supervisory role over the project. *Bond v. Howard Corp.* (1995), 72 Ohio St.3d 332, 337.

{¶14} Appellants assert that a genuine issue of material fact exists in this case to the extent that the Mamajeks were "in their backyard" when Fleming's injury occurred. Appellants allege that Fleming's actions leading to his injuries were undertaken pursuant to the rescue doctrine, and as a result, there remain triable issues as to whether the Mamajeks were comparatively negligent for the injuries.

{¶15} First, there is no evidence in the record indicating that the Mamajeks "actively participated" in the construction job so as to impose a duty of reasonable care upon them. Even if Mrs. Mamajek and her children had been in the backyard at the time of Fleming's injury, they were not directing the manner in which he was cleaning the roof. The record simply indicates that the Mamajeks hired AAS to repair their chimney and allowed it to do its job in a manner it saw appropriate. From these facts, it

would be difficult to conclude the Mamajeks were engaging in even a “general” or “passive” supervisory role. The Mamajeks did not interfere with the contractor’s mode of job operation; they did not actually participate in the job via dictating the manner it would be accomplished; and they had no input, let alone control, over safety features necessary to eliminate the potential hazard. In short, appellants have failed to establish that the Mamajeks owed Fleming a duty of reasonable care that they breached, causing appellant’s injury.

{¶16} Further, appellants’ contention that issues of fact remain as to comparative negligence assumes, at the least, that they established a breach of duty on behalf of the Mamajeks. They did not. Comparative negligence is a legal concept related to proximate causation. See, e.g., *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 11. It is axiomatic that absent the establishment of a duty and a breach thereof, a court need not examine the issue of proximate causation. Appellants’ argument therefore misunderstands the necessary sequence of proof in a negligence cause of action.

{¶17} Further, appellant’s argument relating to the rescue doctrine also assumes what still needs to be proven; namely, negligence on behalf of the Mamajeks. The “rescue doctrine” is applicable when an injured party is hurt in an attempt to rescue a person in danger as a result of that person’s own negligence. *Skiles v. Beckloff* (Aug. 4, 1993), 9th Dist. No. 93CA005550, citing *Reese v. Minor* (1981), 2 Ohio App.3d 440. Hence, it follows that a rescuer may recover only from one found negligent. By alleging

that there are genuine issues of material fact as to appellant's role as a rescuer, he presumes the Mamajek's negligence, a conclusion that requires its own separate proof.

{¶18} For these reasons, appellant's first assignment of error is without merit.

{¶19} Appellant's second assignment of error alleges:

{¶20} "The trial court erred in failing to find Ohio Revised Code 2745.01 unconstitutional."

{¶21} Under their second assignment of error, appellants assert that the current version of R.C. 2745.01, effective April 7, 2005, is unconstitutional because it essentially mirrors former R.C. 2745.01, which was declared unconstitutional in *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298. We hold that appellants' constitutional challenge has merit.

{¶22} Current R.C. 2745.01, which governs causes of action premised upon employer intentional torts, provides:

{¶23} "(A) In an action brought against an employer by an employee * * * for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

{¶24} "(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."

{¶25} The foregoing statute is the only recourse for an employee whose employer has committed an intentional tort.

{¶26} Current R.C. 2745.01 had two statutory predecessors, both of which were respectively declared unconstitutional by the Supreme Court of Ohio. First, in 1986, the General Assembly enacted former R.C. 4121.80. Under this statute, injuries occasioned by an employer's intentional tort fell under the rubric of Ohio's Workers' Compensation Act and permitted an injured employee to seek damages for employer intentional torts committed in the course of the employee's employment. Under former R.C. 4121.80(G), an intentional tort was defined in the same manner as current R.C. 2745.01, i.e., "an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur." R.C. 4121.80(G). The former statute further provided, " 'Substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death." *Id.*

{¶27} In *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, the Supreme Court of Ohio analyzed former R.C. 4121.80 in relation to Sections 34 and 35, Article II of the Ohio Constitution. Section 34, Article II of the Ohio Constitution provides, "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 employe[e]s*; and no other provision of the constitution shall impair or limit this power." (Emphasis added.) Moreover, the opening sentence of Section 35, Article II provides a basis for legislative enactments in the area of workers' compensation: "For the purpose of providing compensation to workmen and their dependents, for death, injuries or

occupational disease, *occasioned in the course of such workmen's employment * * **” (Emphasis added.) The court, seizing upon the foregoing, emphasized language, determined former R.C. 4121.80 exceeded and conflicted “with the legislative authority granted to the General Assembly pursuant to Sections 34 and 35, Article II of the Ohio Constitution,” and therefore deemed it unconstitutional. *Brady* at paragraph two of the syllabus.

{¶28} In relation to Section 34, the court held that the statute acted to confer a functional immunity to employers and, consequently, was “totally repugnant to Section 34, Article II.” *Brady*, 61 Ohio St.3d at 633. The court reasoned a statute that attempts to remove a common law right to a remedy that would generally benefit an employee cannot be a law “providing for the comfort, health, safety and general welfare of all employees.” *Id.* Section 34, Article II of the Ohio Constitution. See also *Brady*, at 633-635.

{¶29} With respect to Section 35, the court underscored 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.” *Brady*, 61 Ohio St.3d at 634. The court, quoting a previous case, elaborated:

{¶30} “ ‘Injuries resulting from an employer’s intentional torts, even though committed at the workplace, are utterly outside the scope of the purposes intended to be achieved by Section 35 and by the Act. *Such injuries are totally unrelated to the fact of employment.* When an employer intentionally harms his employee, that act effects a

complete breach of the employment relationship, and for purposes of the legal remedy for such an injury, the two parties are not employer and employee, but intentional tortfeasor and victim.” (Emphasis sic.) *Brady*, 61 Ohio St.3d at 634, quoting *Taylor v. Academy Iron & Metal Co.* (1988), 36 Ohio St.3d 149, 162 (Douglas, J., dissenting.)

{¶31} The court pointed out that Section 35 is concerned solely with compensating employee injuries arising from the employment relationship. However, the statute concerned itself solely with injuries which, by their very nature, have no connection with the fact of employment. *Brady*, 61 Ohio St.3d at 634. Thus, the court held, “[T]he 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.” *Id.* at 635. The statute was therefore held unconstitutional in toto, thereby reanimating the common law cause of action for an employer’s intentional tortious conduct.

{¶32} Subsequent to *Brady*, the General Assembly enacted former R.C. 2745.01, effective November 1, 1995, to replace former R.C. 4121.80. However, the new statute encountered similar and equally fatal constitutional problems to those encountered by former R.C. 4121.80. As a result, in *Johnson v. BP Chems., Inc.*, 85 Ohio St.3d 298, it was declared unconstitutional. Former R.C. 2745.01(D)(1) set forth the elements of the cause of action, stating:

{¶33} “ ‘Employment intentional tort’ means 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.”

{¶34} Further, the statute required the employee to prove by clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort. See former R.C. 2745.01(C)(1).

{¶35} In light of these requirements, the court in *Johnson* determined that former R.C. 2745.01 “created a cause of action that is simply illusory.” *Johnson*, 85 Ohio St.3d at 306. That is, pursuant to the standards of 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 [former] R.C. 2745.01(D)(1), the employee * * * 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 [former] R.C. 2745.01(D)(1).” *Johnson*, 85 Ohio St.3d at 306-307. In relation to this analysis, the court held that former R.C. 2745.01 violated Section 34, Article II of the Ohio Constitution; to wit, “Because [former] 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 employ[e]es.” ’ ” *Johnson*, 85 Ohio St.3d at 308.

{¶36} The court also cited its Section 35 analysis in *Brady* as a basis for its holding. The court pointed out that Section 35, Article II grants the legislature authority to enact laws regarding injuries occasioned within the employment context, and therefore, Section 35 precludes the enactment of any law affecting injuries outside the

scope of employment. *Johnson*, 85 Ohio St.3d at 308. Thus, citing *Brady*, the court additionally held, “[Former] 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.’” *Johnson*, citing *Brady*, 61 Ohio St.3d at 634.¹

{¶37} Current R.C. 2745.01 (effective April 7, 2005) represents the latest attempt by the legislature to regulate causes of action alleging employer intentional torts occurring within the course of an employee’s employment. Current R.C. 2745.01 provides that in an action for intentional tort “committed by the employer during the course of employment,” an employee must prove 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.” The belief that an injury is substantially certain to occur exists when the employer “acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” R.C. 2745.01(B).

{¶38} We initially point out that all legislative enactments enjoy a strong presumption of constitutionality. *Groch v. GMC*, 117 Ohio St.3d 192, 196, 2008-Ohio-546. Moreover, where possible, courts must apply all presumptions and all pertinent rules of construction in an effort to uphold a statute challenged on constitutional grounds. See, e.g., *Johnson*, 85 Ohio St.3d at 303.

1. The court acknowledged that the new numerical statutory designation placed former R.C. 2745.01 outside the Workers’ Compensation Act (R.C. Chapter 4123.); however, the court evidently did not believe former R.C. 2745.01 was outside the purview of the authority delimited under Section 35, Article II. Moreover, it noted, by way of comparison, the new statute was enacted with the same purpose as former R.C. 4121.80, i.e., “to shield employers from civil liability for employee injuries caused by the intentional tortious conduct of the employer.” *Johnson*, 85 Ohio St.3d at 305, fn. 9.

{¶39} We first emphasize that a comparison of former R.C. 4121.80 and current R.C. 2745.01 reveals that the legislature retained the same substantive standard of proof held unconstitutional in *Brady*. This standard of proof was stricken as “totally repugnant” to and therefore violative of Section 34, Article II of Ohio’s Constitution. Moreover, notwithstanding the legislature’s subsequent decision to codify the cause of action outside the Ohio’s Workers’ Compensation Act, the court in *Johnson* determined that former R.C. 2745.01 stood in violation of Section 35, Article II. As discussed above, the court construed Section 35 as an explicit limitation upon the legislature’s constitutional powers, i.e., the Constitution permits the General Assembly to regulate only causes of action occurring *within the employment relationship*, and, therefore, it does not possess the constitutional authority to codify legislation governing employee injuries that fall outside this relationship.

{¶40} After careful review of controlling case law in this area, we hold that current R.C. 2745.01 cannot pass constitutional scrutiny. Current R.C. 2745.01 cannot be coherently reconciled with the manner in which Sections 34 and 35, Article II of the Ohio Constitution have been construed by the Supreme Court. Current R.C. 2745.01 is another attempt by the General Assembly to enact legislation governing intentional torts occurring within the employment relationship that according to the Supreme Court in *Brady* and *Johnson*, stands contrary to Section 35, Article II of the Ohio Constitution. See *Brady*, 61 Ohio St.3d at 635; see also *Johnson*, 85 Ohio St.3d at 308.

{¶41} Moreover, under the current statute, an employer’s conduct must be either deliberate or intentional. As the court in *Johnson* pointed out, these requirements “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. * * * [This] ‘creates an insurmountable obstacle for victims of “employment intentional torts.” ’ ” Id. at 307, quoting *Johnson v. BP Chems., Inc.* (Nov. 18, 1997), Allen App. No. 1-97-32. By requiring an employee to demonstrate that his employer acted with an “intent to injure” or “with the belief that [the] injury was substantially certain to occur” (i.e., acting with “deliberate intent” to injure), creates an unreasonably high standard of proof which does not provide for the “comfort, health, safety and general welfare of all employes * * *.” *Brady*, 61 Ohio St.3d at 633.

{¶42} The instant issue has not been broached by the great balance of our sister districts. However, our research reveals that the Seventh Appellate District has ruled on the constitutionality of current R.C. 2745.01 and, in doing so, has arrived at the same conclusion as this panel. In *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App.3d 227, 2008-Ohio-1521, 886 N.E.2d 262, the Seventh District recently held current R.C. 2745.01 unconstitutional pursuant to *Brady* and *Johnson*. In support of its holding, the court in *Kaminski* reasoned:

{¶43} “R.C. 2745.01, as currently written, is similar to the earlier version found by the *Johnson* Court to be unconstitutional. R.C. 2745.01(A) provides that in an employer intentional tort action, the employee must prove ‘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.*’ * * * Thus, pursuant to section A, in order to succeed on the claim, the employee must prove one of two things: (1) the employer acted with

intent to injure or (2) the employer acted with the belief that injury was substantially certain to occur. This leads one to believe there are two alternate ways for an employee to succeed on an intentional tort claim against the employer. However, we must consider the rest of the statute.

{¶44} “ ‘Intent to injure’ is clear and, therefore, is not defined in the statute. ‘Substantially certain,’ however, is not as clear. Therefore the legislature provided a definition. R.C. 2745.01(B) defines ‘substantially certain’ as acting ‘with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.’

{¶45} “When we consider the definition of ‘substantial certainty’ it becomes apparent that an employee does not have two ways to prove an intentional tort claim as R.C. 2745.01(A) suggests. The employee’s two options of proof become (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure. Thus, under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury. The *Johnson* court held that this type of action was simply illusory * * *

{¶46} “* * *

{¶47} “Pursuant to the Ohio Supreme Court’s holdings in *Brady*, supra, and *Johnson*, supra, and consistent with Sections 34 and 35, Article II of the Ohio Constitution, we must conclude that R.C. 2745.01 is unconstitutional. Because of its excessive standard of requiring proof that the employer intended to cause injury, ‘it is clearly not “a law that furthers the * * * comfort, health, safety and general welfare of all employe[e]s.’ ” ’ *Johnson*, 85 Ohio St.3d at 308, 707 N.E.2d 1107, quoting *Brady*, 61

Ohio St.3d at 633, 576 N.E.2d 722, quoting Section 34, Article II of the Ohio Constitution. Additionally, ‘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.” ’ Id. quoting *Brady*, 61 Ohio St.3d at 634, 576 N.E.2d 722.” (Emphasis omitted.) *Kaminski*, 2008-Ohio-1521, 2008 WL 817083, at ¶ 29-31 and 34.

{¶48} We therefore hold, pursuant to *Brady*, *Johnson*, and the supplemental persuasive analysis set forth in *Kaminski*, that current R.C. 2745.01 is unconstitutional, standing in violation of Sections 34 and 35, Article II of the Ohio Constitution. As a result, the common law standard set forth in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, is again the viable standard of proof for an employee seeking redress for an employer’s allegedly intentional tortious conduct.

{¶49} Appellant’s second assignment of error is therefore sustained.

{¶50} Appellants’ third assigned error reads:

{¶51} “The trial court erred in granting summary judgment to defendants A.A.S. Service, Inc. and Urs Schneeberger.”

{¶52} Although we have found current R.C. 2745.01 unconstitutional, we shall review the trial court’s decision by applying the common law test for employer intentional torts set forth in *Fyffe*, supra.²

2. Even though Fleming’s injury occurred after April 7, 2005, thereby triggering the elements set forth in current R.C. 2745.01, the trial court, whether through accident or divination, applied the proper common law test set forth in *Fyffe*.

{¶53} In *Fyffe*, the Supreme Court of Ohio announced the test for an employer intentional tort as follows:

{¶54} “[I]n 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. * * *.” *Id.* at paragraph one of the syllabus.

{¶55} To establish an intentional tort by an employer, an employee must demonstrate proof beyond that required to prove negligence or recklessness. *Id.* at paragraph two of the syllabus. “If a plaintiff can show that harm or consequences will follow the risk, that the employer knows that injuries to employees are certain or substantially certain to result from the risk, and yet the employer still requires the employee to proceed, the employer is treated by the law as if he had in fact desired the end result.” *Wallick v. Willoughby Supply Co.*, 168 Ohio App.3d 640, 2006-Ohio-4728, at ¶12, citing *Fyffe*, 59 Ohio St.3d 115.

{¶56} Here, after the Mamajeks’ chimney repair had concluded, Fleming was on top of the roof, cleaning off remaining dust and debris. He had used a water hose to remove most of the brick dust and placed other larger debris in a three-gallon bucket.

Neither Fleming nor the bucket was secured by a safety harness or a rope. Fleming testified that he observed the bucket begin to slide down the roof and attempted to prevent it from falling. Fleming then did the following:

{¶57} “[C]aught [the bucket] maybe three feet or so from the edge of the roof, but for me, that’s one stride. I have a six-foot stride. So for me to get three feet away, I had one more step left and I was over.

{¶58} “So the bucket had already gotten to the point where it was headed to the right and Mrs. Mamajek and her daughters were below me. I could hear them, but I couldn’t see them where I was because they were small enough that I had no clue where exactly they were. And when the bucket started to slide, normally I would just let it slide to the bottom, but with people down there, I wasn’t sure where they were so I tried to head it off and stop it from going off the roof.

{¶59} “When it started sliding, I said ‘shit’ and I started running immediately after it. I caught it, and like I said, I don’t remember where I was on the roof by the time I actually got within arm’s reach of the bucket, and I reached down, kind of hit it as hard as I could to the left because, like I said, I could hear them to the right, so I figured anything left was my best bet, and it just kind of went right in line with me and we both - - I was at a full run at that point, so stopping was out of the question. I had no way to stop, and I just - - my only out was to jump.

{¶60} “So I tried to jump as far as I could in case they were under me, and as I was going over, I just kind of saw movement on the right, and the bucket hit the ground

and I was just hoping there was grass under me and there wasn't. After that, I just hit the ground. I knew as soon as I hit the ground I broke my leg.”

{¶61} The record indicates that although Fleming heard the Mamajeks, they were not near the house at the time of the fall. Mrs. Mamajek testified that she was standing approximately 18 feet away from the corner of the house at the time of the fall while her daughters were behind her, approximately 20 feet from the house. Moreover, Fleming's boss, appellee Schneeberger, was not on the roof when appellant chased the bucket and jumped from the roof. Further, Fleming conceded that Schneeberger did not direct him to retrieve the bucket, and his decision to chase the bucket and ultimately leap from the roof was of his own volition.

{¶62} We begin the analysis by pointing out that the elements of *Fyffe* are conjunctive, and a plaintiff must establish a genuine issue of material fact relating to all three prongs of the test to avoid summary judgment. See, e.g., *Wallick*, 168 Ohio App.3d 640, at ¶ 15. To satisfy the first prong of the test, the plaintiff must demonstrate that there was a dangerous process and the employer had actual knowledge of the consequences of the precise dangers that ultimately caused the injury. See, e.g., *Hubert v. Al Hissom Roofing & Constr., Inc.*, 7th Dist. No. 05 CO 21, 2006-Ohio-751, at ¶ 18. “[D]angerous work must be distinguished from an otherwise dangerous condition within that work. It is the latter of which that must be within the knowledge of the employer before liability could attach.” *Naragon v. Dayton Power & Light Co.* (Mar. 30, 1998), 3d Dist. No. 17-97-21. “Were it otherwise, any injury associated with inherently

dangerous work * * * could subject an employer to intentional tort liability, whatever the cause.” Id.

{¶63} Here, the job in which Fleming engaged on a daily basis, i.e., roof work, can be reasonably construed as dangerous work. The condition within such dangerous work that Fleming identifies as dangerous, separate from the work itself, was Schneeberger’s failure to provide safety equipment. Ohio Adm.Code 4123:1-3-03(J)(1) requires an employer to provide and compel his or her employees to use lifelines, safety belts or harnesses, and lanyards on “steeply pitched roofs” and “when exposed to hazards of falling where the operation being performed is more than six feet above ground * * *.” Although this section of the Ohio Administrative Code does not provide a grade for defining a “steep pitch,” it is undisputed that the Mamajeks’ roof line was 11 feet five inches. With this in mind, we agree with Fleming that he was exposed to a dangerous condition for purposes of *Fyffe* and that Schneeberger had knowledge of this dangerous condition.

{¶64} During his deposition, Fleming testified that Schneeberger neither provided nor required him to use safety equipment while executing his job duties in general, let alone at the Mamajek residence. Fleming stated he told Schneeberger “several times” they needed to obtain safety equipment, but Schneeberger’s response was “you can either do it or go home.” Moreover, Schneeberger acknowledged that no safety equipment was provided at the Mamajek job, and he provided the same only when the roof was “too steep” pursuant to his own subjective determination. Given these facts, we conclude that Fleming established a genuine issue of material fact as to

whether Schneeberger had knowledge of the dangerous condition to which Fleming was subjected. Accordingly, appellants have met their burden under *Fyffe*'s first prong.

{¶65} The second prong of *Fyffe* requires a plaintiff to demonstrate that the employer was substantially certain that an employee would be injured if exposed to the dangerous condition. Courts have acknowledged that *Fyffe*'s second element "is a difficult standard to meet." *McGee v. Goodyear Atomic Corp.* (1995), 103 Ohio App.3d 236, 246; see also *Hubert*, 2006-Ohio-751, at ¶ 33. In *Fyffe*, the court stated:

{¶66} "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 negligence. As 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." *Id.* at paragraph two of the syllabus.

{¶67} Under *Fyffe*, an employee is not required to show that an employer subjectively intended the injury at issue to prove intent. See *Hubert*, 2006-Ohio-751, at ¶ 35; see also *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 117. Rather, evidence indicating that an employer knew that subjecting an employee to a

dangerous condition would, with substantial certainty, cause an injury is sufficient to show intent.

{¶68} During his deposition, Fleming testified that Schneeberger seemed to expect him to fall and be injured during the course of his duties at some point:

{¶69} “He asked me daily, ‘What are you going to do when you fall and get hurt and break your leg?’

{¶70} “I can’t tell you how many times I heard that. But how do you answer that? When you’re not in that situation, it’s like, ‘I’ll be fine. If it happens, it happens.’ That’s all I could say. I’ve never been in any kind of situation like that.

{¶71} “But he asked me all the time. I’d be up there or we’d be driving somewhere, ‘What are you going to do one of these days when you fall down and get hurt,’ almost like he was wishing it to happen. And I didn’t think about it too much then. But now in hindsight, if you knew it was going to happen to me, why did you not do anything about it?”

{¶72} The foregoing testimony, viewed in conjunction with Fleming’s testimony that Schneeberger did not offer him (let alone require him to wear) safety equipment while on a rooftop, creates a genuine issue of material fact as to whether Schneeberger knew that harm to Fleming was substantially certain to result from the dangerous condition. Thus, we hold that appellants met their burden as it relates to the second prong of *Fyffe*.

{¶73} Finally, the third prong of *Fyffe* requires proof that “the employer, with knowledge of a dangerous condition and of a substantial certainty of harm, [had]

required the employee to perform a dangerous task.” *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 486. In analyzing this element, the Supreme Court has held that an employer need not explicitly require an employee to perform a dangerous task.

{¶74} “Instead, to overcome a motion for summary judgment, an opposing party can satisfy this requirement by presenting evidence that raises an inference that the employer, through its actions and policies, required the [plaintiff] to engage in that dangerous task.” *Id.* at 487.

{¶75} As discussed under our analysis of the first element of *Fyffe*, Ohio Adm.Code 4123:1-3-03(J)(1) requires an employer to provide and to take responsibility for his or her employees use of specific safety equipment on “steeply pitched roofs” or “when exposed to hazards of falling where the operation being performed is more than six feet above ground * * *.” One can reasonably infer that an employee, exposed to the perils of falling from a height greater than six feet above ground, is involved in a dangerous task. *Slack v. Henry* (Dec. 1, 2000), 4th Dist. No. 00CA2704, 2000 WL 33226197, *5 (“Failure to comply with safety regulations is relevant to show that an employer required an employee to perform a dangerous task, knowing of the substantial certainty of injury”). We therefore hold that there are genuine issues of material fact as to *Fyffe*’s third element, viz., whether Schneeberger, with knowledge of a dangerous condition and of a substantial certainty of harm, required Fleming to continue to perform a dangerous task.

{¶76} As a post script to the foregoing analysis, we recognize that the trial court's holding was premised upon its view that the "dangerous task" in this case was Fleming's pursuit of the bucket down the slope of the Mamajeks' roof. While we agree with the trial court that there is no evidence in the record indicating that Schneeberger instructed Fleming to place himself in peril to retrieve equipment that, in his judgment, was sliding from a roof, to protect people who may or may not be standing below. In fact, the opposite is true. Fleming testified that Schneeberger actively discouraged pursuing a tool or equipment that was or was in the process of falling from a roof. However, we do not believe the issue in this case was whether Fleming's specific voluntary actions caused his injury; rather, under *Fyffe*, the thrust of the inquiry is whether there are genuine issues of material fact that Schneeberger, through his policies and conditions of employment, placed Fleming in a position in which he was subjected to a dangerous condition, and harm was substantially certain to follow. *Gibson v. Drainage Prods., Inc.*, 95 Ohio St.3d 171, 2002-Ohio-2008, ¶ 27. Given our reading of the law in this area, we believe that Fleming has presented sufficient evidence on the foregoing requirements to create an issue for trial.

{¶77} Appellants' third assignment of error is therefore sustained.

{¶78} While we overrule appellants' first assignment of error, their second and third assignments of error are hereby sustained. The judgment of the Portage County Court of Common Pleas is therefore affirmed in part and reversed in part, and the matter is remanded for further proceedings.

Judgment affirmed in part

and reversed in part,
and cause remanded.

TRAPP, J., concurs.

CANNON, J., concurs in part and dissents in part.

CANNON, Judge, concurring in part and dissenting in part.

{¶79} I respectfully dissent from the majority opinion as it relates to application of the *Fyffe* test but concur in the balance of the opinion.

{¶80} The record suggests that appellant William A. Fleming was awarded workers' compensation benefits for this injury. The facts of this matter are similar to those in *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916. In *Gross*, an employee at a KFC restaurant injured himself when he put water in a deep fryer and heated the fryer, in contravention of safety rules and verbal warnings. *Id.* at ¶ 4. In recognizing the “no-fault nature” of Ohio’s Workers’ Compensation Act, the Supreme Court of Ohio reconsidered its prior holding and reinstated the injured worker’s benefits. *Id.* at ¶ 22-26. In the instant matter, Fleming disobeyed specific instructions not to chase an object down the roof. However, due to Ohio’s “no-fault” workers’ compensation scheme, he was entitled to benefits because he was injured in the course of his employment. *Id.*

{¶81} In assessing intentional torts, the Supreme Court of Ohio has held that “[t]o establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established.” *Fyffe v.*

Jeno's, Inc. (1991), 59 Ohio St.3d 115, paragraph two of the syllabus. In this matter, it is questionable whether the employer's actions even rise to the level of negligence. We cannot forget the need to establish the element of proximate cause. The old test of *Palsgraf v. Long Island RR. Co.* is certainly applicable here – “[t]he risk reasonably to be perceived defines the duty to be obeyed.” *Palsgraf*, 248 N.Y. 339, 344, 162 N.E. 99, 100. The threshold question is “how did the injury occur?” It did not occur because Fleming's foot slipped and he slid down a steep slope. It did not occur because Fleming was concentrating on his work and inadvertently tripped on something on the roof. It did not occur because Fleming misjudged his location on the roof and fell. Those instances are typical risks associated with working on a roof and help define the duty to be obeyed.

{¶82} In this case, the following facts are undisputed: (1) the injury to Fleming occurred because he chased after a bucket that he alone had failed to secure; (2) he was specifically trained that if a tool or bucket was falling off the roof, he was not to chase it and was to let it fall; and (3) Fleming ignored his training and *jumped* off the roof. He did *not* fall.

{¶83} Analyzing this in another way, we might ask, what should the employer have done if he could have reasonably foreseen the risk that this employee might jump off the roof to chase a bucket? The somewhat obvious answer is that there should be some training to advise the employee not to do that. In this case, Fleming *admits* he was told by his employer not to do precisely what he did. He was *trained* not to do *the precise act* that was unquestionably the proximate cause of his injury. Therefore, the

employer discharged his duty to Fleming by specifically warning him not to chase an item down the slope of a roof. Couple this with the clear standard in Ohio established by *Fyffe* that “the mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent.” *Fyffe v. Jenos, Inc.*, 59 Ohio St.3d 115, paragraph two of the syllabus.

{¶84} I do not believe there are any genuine issues of material fact in this matter. Further, appellees are entitled to judgment as a matter of law. The undisputed evidence shows that Fleming’s injuries were caused by his own actions, which were in express violation of the safety training and instructions he received. The injuries were not a result of the employer’s intentional tort. Accordingly, Fleming’s proper remedy lies within Ohio’s workers’ compensation system.

{¶85} There is no indication that the existence of fall-protection equipment would have prevented this injury. That equipment is designed to prevent accidental falls such as those referred to herein. They are not designed to prevent someone from making the conscious decision to jump off the roof. The lack of fall-protection equipment on this roof had as much to do with the injury as, let’s say, the lack of tail lights on the vehicle that took Fleming to work that day.