[Cite as *Smith v. Inland Paperboard & Packaging, Inc.*, 2009-Ohio-3148.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

JEREMY SMITH, et al.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2008-P-0072**
- vs -	:	
INLAND PAPERBOARD AND PACKAGING, INC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 0315.

Judgment: Affirmed.

John R. Liber, II, Liber & Associates, L.L.C., 350 Stepnorth Building, 100 North Main Street, Chagrin Falls, OH 44022 (For Plaintiff-Appellant).

Keith L. Pryatel and *Thomas Evan Green*, Kastner, Westman & Wilkins, L.L.C., 3480 West Market Street, #300, Akron, OH 44333 (For Defendants-Appellees, Inland Paperboard and Packaging, Inc., and Temple-Inland, Inc.).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Jeremy Smith, appeals from the July 25, 2008 judgment entry of the Portage County Court of Common Pleas, granting the motion for summary judgment of appellees, Inland Paperboard and Packaging, Inc. and Temple-Inland, Inc. (collectively "Inland").

{¶2} The facts emanating from the record are as follows:

{¶3} Appellant worked at Inland, a paperboard manufacturing plant located in Streetsboro, Ohio, for about one and a half years as an operator assistant on paperboard box machines. When first hired on September 9, 2003, appellant went through rigorous safety training, which emphasized that the safeguarding key system was to be used to power-down a machine before making any adjustments or repairs or reaching into the machine. Appellant signed off on a document regarding Inland's explicit machine safeguarding policies on October 3, 2003. Appellant was also shown a series of safety videotapes.

{¶4} On June 1, 2005, appellant was tested and quizzed by Inland on basic safeguarding rules. Near the end of his shift on June 2, 2005, appellant's machine had no work, so a supervisor asked him to begin training on the EG-24 machine. According to shift supervisor Tom Reminder, the three paperboard box machines at Inland are similar. According to production shift supervisor Austin Crane, all the paperboard machines essentially perform the same operation. Appellant had worked with two different machines, but had not worked with the EG-24 machine. The current operator, Eric Bissler ("Bissler"), was soon leaving Inland. Bissler was given the task of showing appellant how the EG-24 machine operated.

{¶5} The EG-24 machine required intermittent service to remove paper glue tabs that fell into its ink pan, which would clog ink if not removed. In order to get at the ink pan, the operator had to lower a chain and warning sign placed across the entry point to the machine and go down a small set of steps to the ink pan, under the rollers of the EG-24 machine. Three keys that operators could use to completely de-energize the EG-24 machine were hung on the side of the machine in plain view. Bissler did not

power-down the machine prior to skimming the paper tabs. Inland's employee training required that the safeguarding key system be used to power-down the machine and stop the rollers before such activity was undertaken. Bissler's procedure was directly contrary to Inland's employee training.

{¶6} According to Ryan Short ("Short"), an employee at Inland who operated the EG-24 machine on another shift, employees often took the chain down and left it down as a convenience. Short indicated that when supervisors walked by, the employees were told to put the chain back up.

{¶7} After appellant watched Bissler a number of times, Bissler told him to skim the tabs. Appellant did not use the safeguarding key system to power-down the machine. Like Bissler, appellant walked past the hanging chain and warning sign to the bottom step. From there, appellant used the metal rod to skim tabs from the ink pan. When finished, as appellant pulled the metal rod out of the ink pan, it caught on something which pulled the rod and appellant's hand into the machine, causing severe injuries.[1] Because Inland had publicized a zero-tolerance policy for safety infractions, appellant was soon discharged.

{¶8} On October 10, 2006, appellant filed an industrial intentional tort suit in the Cuyahoga County Court of Common Pleas against Inland, Hayward Gillespie

1. Appellant's co-worker, and later co-plaintiff, Quentin A. Cottrell ("Cottrell"), an assistant machine operator, sustained injuries to his hand while working on an EG-122 machine on September 29, 2003, prior to the incident involving appellant. Cottrell filed his action sounding in intentional tort against Inland on September 25, 2005. On September 28, 2007, the trial court granted summary judgment to Inland. Cottrell filed a timely appeal with this court, Case No. 2007-P-0088. On December 31, 2008, this court affirmed the judgment of the trial court. *Smith v. Inland Paperboard and Packaging, Inc.*, 11th Dist. No. 2007-P-0088, 2008-Ohio-6984.

("Gillespie"), and Bissler.[2] Shortly thereafter, appellant filed an amended complaint, adding co-plaintiff Cottrell.[3] The case was ultimately transferred to the proper venue, Portage County.

{¶9} On January 11, 2008, appellees filed a motion for summary judgment pursuant to Civ.R. 56. Appellant filed his opposition on May 30, 2008.

{¶10} Pursuant to its July 25, 2008 judgment entry, the trial court granted the motion for summary judgment of appellees. It is from that judgment that appellant filed a timely notice of appeal, asserting the following assignment of error for our review:[4]

{¶11} "The trial court erred to appellant['s] prejudice by granting appellees' Motion for Summary Judgment."

{¶12} In his sole assignment of error, appellant argues that the trial court erred by granting the motion for summary judgment of appellees. He presents two issues: (1) "R.C. 2745.01 Is Unconstitutional[;]" and (2) "In a *Blankenship/Fyffe* Workplace Intentional Tort action, it is reversible error for a trial court to either ignore evidence entirely, or construe evidence *against* the non-moving party, when the evidence satisfies the non-moving party's burden under Civ.R. 56." (Emphasis sic.)

2. Both Gillespie and Bissler were voluntarily dismissed on January 13, 2009, and are not named parties to the instant appeal.

3. Cottrell is not a named party to the present appeal.

4. At the April 1, 2009 oral argument, appellant submitted supplemental authority for this court to consider. Due to the late nature of the disclosure, we permitted the parties to submit memoranda concerning the recently decided opinions in *Henson v. Cleveland Steel Container Corp.*, 11th Dist. No. 2008-P-0053, 2009-Ohio-180, and *Hoffman v. Stearns & Lehman Inc.*, 5th Dist. No. 2008-CA-29, 2008-Ohio-5978. On April 2, 2009, appellant filed a motion for leave to submit supplemental authority, which this court granted that same day. On April 9, 2009, appellant filed a memorandum in support of supplemental authority. Appellees filed a response the next day. We note, however, that appellant's post-argument supplemental authority is un-instructive with respect to the particular facts and issues presently before us in this case.

{¶13} Preliminarily, we note that "[t]his court reviews de novo a trial court's order granting summary judgment." *Hudspath v. The Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, at ¶8, citing *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, at ¶13. "'A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.' Id."

{¶14} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280, 296,] the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory 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) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate

shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112 ***." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40. (Parallel citation omitted.)

{¶15} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, *** is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff.* (Emphasis added.)" Id. at ¶41. (Parallel citation omitted.)

{¶16} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' Id. at 276. (Emphasis added.)" Id. at ¶42.

{¶17} With respect to appellant's first issue, we note that on August 1, 2008, this court in *Fleming v. AAS Service, Inc.*, 177 Ohio App.3d 778, 2008-Ohio-3908, at ¶48, held that R.C. 2745.01 is unconstitutional (Cannon, J., concurring in part and dissenting in part).[5] Several months later, on January 16, 2009, this court in *Henson*, at ¶43, relied

5. The opinion was written by Judge Cynthia Westcott Rice, with Judge Mary Jane Trapp concurring. *Fleming* relied upon R.C. 2745.01's similarity to previous attempts to statutorily codify the elements of an employer intentional tort, struck down as unconstitutional by the Ohio Supreme Court in *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, and *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298.

on *Fleming* in holding that R.C. 2745.01 is unconstitutional.[6] However, this writer dissented and Judge Diane V. Grendell concurred in judgment only with a concurring opinion.[7]

{¶18} R.C. 2745.01 provides in part:

{¶19} "(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.

{¶20} "(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.

{¶21} "(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result."[8]

{¶22} In her well-written concurring in judgment only with concurring opinion, Judge Grendell in *Henson*, supra, at ¶92-102, indicated the following:

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6. The opinion was again written by Judge Cynthia Westcott Rice.

7. In her concurring opinion, Judge Grendell indicated that she concurred in the judgment to affirm the grant of summary judgment in favor of the employer. However, Judge Grendell noted that she disagreed in declaring R.C. 2745.01 to be unconstitutional.

8. The issue of R.C. 2745.01's constitutionality is pending before the Supreme Court of Ohio in at least two separate appeals: *Kaminski v. Metal & Wire Prods. Co.*, 119 Ohio St.3d 1407, 2008-Ohio-3880; and *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 119 Ohio St.3d 1452, 2008-Ohio-4562.

{¶23} "At issue in *Johnson* was a former version of R.C. 2745.01 that is readily distinguishable from the current version. The former version of R.C. 2745.01 defined an 'employment intentional tort' 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.' Former R.C. 2745.01(D)(1). Moreover, the employee was required to demonstrate 'by clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort.' Former R.C. 2745.01(B).

{¶24} "The Ohio Supreme Court found R.C. 2745.01 unconstitutional in its entirety for 'creat(ing) a cause of action that is simply illusory.' *Johnson*, 85 Ohio St.3d at 306. '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.'"' Id. at 308 (citations omitted).

{¶25} "The current version of R.C. 2745.01 is distinguishable in essential respects from the version at issue in *Johnson*. The current version does not contain a heightened burden of proof. Under the former statute, the employer's conduct must have been 'both *deliberate* and *intentional*.' Id. at 306 (emphasis sic). In the current version, the employer must commit 'the tortious act with the intent to injure another *or* with the belief that the injury was substantially certain to occur (i.e. with deliberate intent).' R.C. 2745.01(A) (emphasis added). While the former statute required conduct that was deliberate *and* intentional, the current version imposes liability where the conduct is intentional *or* deliberate. As defined by R.C. 2745.01, an employer

intentional tort is not an illusory cause of action. Thus, *Johnson* does not mandate that the current version of R.C. 2745.01 be declared unconstitutional.

{¶26} "The *Brady* decision concerned former R.C. 4121.80, which defined an employer intentional tort in terms substantially similar to the current version of R.C. 2745.01: 'an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur,' i.e. 'that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.' Former 4121.80(G). Despite the similarity in the two statutes, the *Brady* decision is not controlling *** [as it] was a plurality opinion. Since it failed to garner the support of four justices, it is not controlling law. *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 633 ***.

{¶27} "*Brady* held that former 'R.C. 4121.80 exceeds and conflicts with the legislative authority granted to the General Assembly pursuant to Sections 34 and 35, Article II of the Ohio Constitution, and is unconstitutional *in toto*.' 61 Ohio St.3d 624, *** at paragraph two of the syllabus (emphasis sic).

{¶28} "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 employees; and no other provision of the constitution shall impair or limit this power.' The plurality opinion in *Brady* concluded that Section 34 did not authorize the General Assembly to enact former R.C. 4121.80. 'A legislative enactment that attempts to remove a right to a remedy under common law that would otherwise benefit the employee cannot be held to

be a law that furthers the "(***) comfort, health, safety and general welfare of all employes (***).'" Id. at 633.

{¶29} "Section 35, Article II of the Ohio Constitution created the Ohio's system of workmen's compensation '(f)or 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 (***).' As interpreted by the *Brady* plurality, 'Section 35, Article II authorizes only enactment of laws encompassing death, injuries or occupational disease occasioned within the employment relationship.' Id. at 634. From this, the court reasoned '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.' Id.

{¶30} "According to the *Brady* plurality, then, former R.C. 4121.80 was unconstitutional because the Legislature lacked consitutional (sic) authority for enacting such legislation. ***

{¶31} "This opinion, however, was not shared by the fourth justice voting to hold former R.C. 4121.80 unconstitutional. Justice Brown properly recognized that former 4121.80 was a valid exercise of the General Assembly's police power. Id. at 640 (Brown, J., concurring). With respect to 'the public safety, the public health and morals, and the general welfare (***) the power of the legislative branch of the state government is plenary, except as it may be specifically and clearly limited in the constitution.' *Bd. of Commrs. of Champaign Cty. v. Church* (1900), 62 Ohio St. 318, 344 ***. This power may be exercised to modify the common law by legislative enactment. *Thompson v.*

Ford (1955), 164 Ohio St. 74, 79 *** ('the legislative branch of the government, unless prohibited by constitutional limitations, may modify or entirely abolish common-law actions and defenses').

{¶32} "Although Justice Brown recognized the General Assembly's power to enact former R.C. 4121.80, he found that statute unconstitutional for violating Section 5, Article I of the Ohio Constitution (right to a trial by jury), by imposing limits on the damages that may be awarded and by providing that damages would be determined by the Industrial Commission rather than by a civil jury. *Brady*, 61 Ohio St.3d at 641 (Brown, J., concurring). Current R.C. 2745.01 does not contain either of the provisions found to violate Section 5, Article I.

{¶33} "For the foregoing reasons, this court was not bound to follow either the *Johnson* or the *Brady* decisions in ruling on the constitutionality of R.C. 2745.01 in *Fleming*. In the absence of controlling precedent, this court should accord R.C. 2745.01 the presumption of constitutionality to which it is entitled. E.g. *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011, at ¶21 *** (a statute 'enjoy(s) a strong presumption of constitutionality' and 'will be upheld unless the challenger can meet the burden of establishing beyond a reasonable doubt that the statute is unconstitutional') (citations omitted). The trial court's judgment should be affirmed on the basis of R.C. 2745.01." (Parallel citations and footnote omitted.)

{¶34} In the case at bar, the trial court did not err by granting appellees' motion for summary judgment. R.C. 2745.01 does not violate Sections 34 and 35, Article II, of the Ohio Constitution, and is, therefore, constitutional on its face. The flexibility of constitutional decision-making and stare decisis directly applies to this case. Because

the General Assembly's police power is plenary, Sections 34 and 35, Article II, of the Ohio Constitution, do not render R.C. 2745.01 unconstitutional since they do not place specific and clear limitations on the General Assembly's authority.

{¶35} Appellant's first issue is without merit.

{¶36} With regard to appellant's second issue, based on our determination in his first issue that R.C. 2745.01 is constitutional, we will not apply the common law factors set forth in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115. In order to maintain an action under R.C. 2745.01, appellant was required to offer proof that Inland intended to injure him or Inland acted with deliberate intent to cause him injury.

{¶37} Here, the record establishes that appellant was experienced in working around paperboard machines and was aware of the dangers presented. Appellant knew, through both Inland's training policies and his own experience, to not go into a machine while its moving parts were still under power. When appellant was training on the EG-24, neither he nor Bissler were told or required by Inland to keep the chain and warning sign down or keep the machine running while pulling tabs out of the ink pan. Inland's training policy emphasized that the safeguarding key system was to be used to power-down a machine before making any adjustments or repairs, or reaching into the machine. Although some employees would detach the chain and warning sign apparently for their own convenience, they were told and required by Inland supervisors to put the chain back up. Thus, this safety measure was enforced by Inland.

{¶38} In addition, appellant asserts that taking the chain from across the steps leading into the machine amounts to a deliberate removal by Inland of a safety guard, thereby implicating the rebuttable presumption of intent to injure pursuant to R.C.

2745.01(C). We note, however, that employees, not the employer, often took the chain down as a convenience. Again, whenever a supervisor of Inland would walk by and see the chain down, he would require the employee to put the chain back up, in accordance with Inland's safety policies. Inland made constant efforts to keep the chain and warning sign in place. Thus, the presumption of intent to injure against Inland has not been met.

{¶39} The evidence presented does not show that Inland intended to harm or deliberately injure appellant. The trial court correctly found that appellant failed to raise genuine issues of material fact to sustain his burdens under R.C. 2745.01.

{¶40} Appellant's second issue is without merit.

{¶41} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed. It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J., concurs,

TIMOTHY P. CANNON, J., concurs with Concurring Opinion.

TIMOTHY P. CANNON, J., concurring.

{¶42} I concur with the result in this case. Since the precedent from this court has held R.C. 2745.01 unconstitutional, I would conduct an analysis of the claim under the test set forth in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115. See *Fleming v. AAS Serv., Inc.*, 177 Ohio App.3d 778, 2008-Ohio-3908. Consistent with the analysis in a

similar case, *Smith v. Inland Paperboard & Packaging, Inc.*, 11th Dist. No. 2007-P-0088, 2008-Ohio-6984, I would determine that summary judgment was proper. For the reasons set forth in *Fleming*, I believe the *Fyffe* test should be applied. Further, applying that standard to the case sub judice, I believe summary judgment was proper.

{¶43} By the opinion in this case, this court now has conflicted itself, making the dissent in *Henson v. Cleveland Steel Container Corp.*, 11th Dist. No. 2008-P-0053, 2009-Ohio-180 even more difficult to understand. In that case, one judge from this court found the statute unconstitutional, citing our *Fleming v. AAS Serv., Inc.*, 2008-Ohio-3908 precedent, but agreed summary judgment was proper under the *Fyffe* test. Id. at ¶40-47. Another judge found the statute to be constitutional and also agreed that summary judgment was proper. Id. at ¶89-102. (Grendell, J., concurring in judgment only.) The third judge dissented, without specifically commenting on the constitutionality of the statute.

{¶44} Although there is no reason given for the dissent, the only logical conclusion to be drawn from the dissent in *Henson* is disagreement with the result, i.e. affirming the grant of summary judgment. The only way to disagree with the result, and hold that summary judgment was improper, would be to find the statute unconstitutional and that there was some question of fact raised under the *Fyffe* test. Otherwise, the dissent would have concurred, at least in part, with one of the other two positions.

{¶45} While the majority opinion herein acknowledges the dissent in *Henson*, there is no explanation as to how that reconciles with the position taken here that the statute is constitutional.

{¶46} I do not believe it is proper to overturn the prior precedent of this court as set forth in *Fleming v. AAS Serv., Inc.*, 2008-Ohio-3908.