LITIGATING AND DEFENDING CLAIMS AGAINST AN EMPLOYEE AFTER WORKERS' COMPENSATION RECEIVED

Generally, an employee is immune from liability if the injury or death is found to be compensable under workers' compensation.[1]

But, what if the employee's conduct was intentional which resulted in the injury or death of a person? Can the injured person or an estate of the person killed sue the employee? A court referred this issue as unsettled.[2] Some courts have held that a plaintiff is not barred from bringing claims for intentional torts against an employee because, under similar reasoning, a plaintiff may bring claims for intentional torts against the employer even if the plaintiff received workers' compensation benefits.[3]

If a claim is not barred, then what is a plaintiff's pleading requirement in a case against an employee? An analysis of claims against an employer is helpful to determine the burden of proof on plaintiff for claims for intentional torts against an employee.

Pursuant to Article II, Section 35 of the Ohio Constitution and O.R.C. 4123.74, employers are conferred with immunity for a majority of workplace injuries, and an employee's exclusive remedy for such injury lies within the workers' compensation system.[4] The only exception is for an intentional tort.[5]

O.R.C. 2745.01 provides:[6]

> In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer **committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.**

"Substantially certain" is defined to mean that "an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death."[7]

"The General Assembly's intent in enacting R.C. 2745.01 was to 'significantly restrict' recovery for employer intentional torts to situations in which the employer 'acts with specific

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[1] *See* O.R.C. Section 4123.741.
[2] *Moore v. ThorWorks Industries*, 2024-Ohio-1617, 243 N.E.3d 655, ¶ 74 (6th Dist.).
[3] *See Gundel v. Whalen Lawn & Landscaping*, LLC, 5th Dist. Stark No. 2021CA00128, 2022-Ohio-2763, ¶ 34.
[4] *See Cincinnati Ins. Co. v. DTJ Ents. (In re Hoyle)*, 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.3d 122, ¶ 7; *see also Parker v. Ford Motor Co.*, 2019-Ohio-882, 124 N.E.3d 893 (1st Dist.) (Dismissal of wrongful death and survival action as barred by workers' compensation immunity affirmed).
[5] *Hoyle* at ¶ 7.
[6] (Emphasis added.)
[7] O.R.C. 2745.01(B).

intent to cause an injury.'"[8] "'[W]hat appears at first glance as two distinct bases for liability is revealed on closer examination to be one and the same.'"[9]

A heightened standard of review for Ohio Civil Rule 12(B)(6) is used for intentional tort claims against an employer due to the "need to deter the number of baseless claims against employers, the importance of preventing every workplace injury from being converted into an intentional tort claim, and the goal of facilitating the efficient administration of justice . . . ."[10] Accordingly, "in order to survive a Civ.R. 12(B)(6) motion to dismiss, a plaintiff bringing an intentional tort claim against an employer must allege certain facts with particularity."[11]

Even if a plaintiff uses appropriate words or phrases, such as harm to the employee was a substantial certainty, those words or phrases alone would not amount to pleading an intentional tort.[12]

A plaintiff who received worker's compensation benefits should be barred from suing an employee. If there is an exception for intentional torts, then the plaintiff must satisfy the heightened standard in order for the case to move passed a motion to dismiss.

[8] *Hoyle* at ¶ 11.
[9] *Cincinnati Ins. Co. v. DTJ Ents. (In re Hoyle)*, 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.3d 122, ¶ 10, quoting *Rudisill v. Ford Motor Co.*, 709 F.3d 595, 602-603 (6th Cir.2013).
[10] *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991).
[11] *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991).
[12] *See Bullis v. Sun Healthcare Group*, 2d Dist. Miami No. 2011-CA-21, 2012-Ohio-2112, ¶ 16 ("There is simply nothing in the facts, taken as true, that would establish that [the employer] acted with deliberate intent to cause an injury to [the employee]").