

**OHIO EMPLOYER LIABILITY FOR WORKPLACE
ACCIDENTS AFTER *KAMINSKI V. WIRE PRODUCTS*,
(2010) 125 Ohio St. 3d 250 and *STETTER v. R.J. CORMAN*
DERAILMENT SERVICES, (2010) 125 Ohio St. 3d 280 --
EMPLOYER INTENTIONAL TORT INSURANCE
COVERAGE FOR OHIO EMPLOYERS IS ALL BUT
GONE**

CAPITAL AREA SAFETY COUNCIL PRESENTATION

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Douglas J. Suter Biography

Douglas J. Suter is a partner with the Columbus, Ohio law firm of Isaac, Brant, Ledman & Teetor, which was named one of the top litigation firms in the country by *American Lawyer* magazine. He has been named to Who's Who in American Law countless times and has received legal ratings of "preeminent in his field" of practice by numerous legal organizations. He was named one of the top attorneys in Central Ohio in both 2004 and 2005 by *Business First* magazine and in 2009 and 2010 by *Columbus C.E.O.* magazine. He was also recognized for 2010 and 2011 as an Ohio Super Lawyer by *Columbus Monthly* magazine and *Cincinnati* magazine. In 2007, he was selected to the Multi-Million Dollar Advocates forum recognizing the top 1% of all trial attorneys in the country who have won multi-million dollar cases. On the limited occasions when Doug has represented injured workers or the families of employees killed on the job, Doug has recovered over Eight Million Dollars in awards and settlements for his clients.

Mr. Suter devotes a large portion of his litigation practice to representing employers nationwide in OSHA litigation before the Occupational Safety & Health Review Commission, MSHA litigation, and defending employers in other labor and employment matters, including wrongful death defense, defense of employers in multi-employer worksite accidents and fatalities, Workers' Compensation matters, V.S.S.R. actions, intentional tort actions and construction litigation. Mr. Suter defended the first Ohio company ever charged with criminal willful OSHA violations by the United States Justice Department following a workplace fatality and he has been involved in at least one hundred wrongful death and significant injury cases and over three hundred OSHA cases.

Mr. Suter has lectured and written on OSHA, workplace safety, and liability matters for The Ohio State University, Marshall University, the American Society of Safety Engineers, the Ohio Division of Safety & Hygiene, the Builders Exchange of Central Ohio, the Ohio State Bar Association Continuing Legal Education Institute, the Columbus Area Chamber of Commerce, the National Business Institute, The County Engineers Association of Ohio, The American Gas Association, Ohio Rural Electric Cooperative and numerous trade associations and safety councils. In 2001, he represented the Builders Exchange of Central Ohio in contract negotiations with the United States Department of Labor, resulting in the OSHA/Builders Exchange Partnership Agreement.

Mr. Suter obtained his B.S. degree in Business Administration with honors from West Liberty State College, where he was named management student of the year. He obtained his Juris Doctorate degree *cum laude* from the Capital University Law School, where he was one of the editors of the Law Review. He was appointed by the American Bar Association to the Occupational Safety & Health Law Committee in 1992. He is also a member of the Society of Ohio Safety Engineers, National Safety Counsel, Builders Exchange of Central Ohio, Safety Advisory Council and American Society of Safety Engineers.

INTRODUCTION

Though it has been coming for years, 2010 saw the combination of Ohio Statutes and Court decisions virtually eliminate any type of insurance coverage available to Ohio employers for legal defense, settlement or indemnity for a workplace accident that causes death or injury to an employee.

Worse yet, even if an Ohio Employer is a complying employer under Ohio's Worker's Compensation Statute and pays worker's compensation premiums, an Ohio employer sued for a workplace intentional tort may be liable to the State of Ohio and the Ohio Bureau of Worker's Compensation to repay all worker's compensation benefits paid out to the widow/children of a deceased employee (*i.e.*, BWC death benefits – Ohio Revised Code Section 4123.59) or benefits to an injured employee (*i.e.*, medical expenses, temporary total compensation - O.R.C. Section 4123.56, permanent and total disability – O.R.C. Section 4123.58, etc.). See Ohio Revised Code Sections 4123.93 and 4123.931.

Further, in a multi-employer accident resulting in an employee injury or death, other employers sued for the accident/fatality may be able to sue the Ohio employer for contribution or indemnity in the event the Court or jury decides the employer committed a workplace intentional tort. See, Ohio Revised Code Sections 2307.22, 2307.25.

Ohio employers who get sued now for a workplace accident can no longer just send the lawsuit to an insurance company and expect it to go away. Ohio employers must now hire their own attorneys to defend these cases. These materials briefly outline these changes in the law.

I. OLD LAW: Allowed Insurance Coverage for Ohio Employer Intentional Torts: *Harasyn v. Normandy Metals, Inc. v. Fireman's Fund Insurance* (1990) 49 Ohio St. 3d 173

Ohio Public Policy did not prohibit an Ohio employer from purchasing insurance coverage for employee intentional tort lawsuits since the legal standard to hold the employer liable was not “direct intent” to injure but rather was where the employer's tortious act was an act performed with the knowledge that injury was “substantially certain to occur.” In other words, negligence or recklessness so egregious it was called an intentional tort – but shy of the employer directly intending to injure the employee.

A. Old Common Law Test to hold Ohio Employer Liable for Employer Intentional Tort:

Fyffe v. Jenos, Inc. (1991) 59 Ohio St. 3d 1159 and *Van Fossen v. Bobcock & Wilcox Co.* (1988) 36 Ohio St. 3d 100:

- (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within his business operation;
- (2) knowledge by the employer that if employees are required by virtue of their employment to be subjected to such dangerous process, procedure, instrumentality or condition, then harm to them would be a substantial certainty, and not just a high risk; and
- (3) that the employer, under such circumstances, and with such knowledge, did act to so require the employee to continue performing his employment tasks.

B. New Ohio Employer Intentional Tort Statute; Ohio Revised Code Section 2745.01 (April 2005):

- (A) 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 tortuous act with the intent to injure another or with the belief that the injury was substantially certain to occur.
- (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.
- (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.

- (D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112 of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121 and 4123 of the Revised Code, contract, promissory estoppel or defamation.

CURRENT STATUS

Despite Ohio's Employer Intentional Tort Statute becoming effective April 7, 2005, many Ohio Courts ruled that Ohio's new Employer Intentional Tort Statute was unconstitutional, so the Statute was not applied to ongoing cases and the insurance issue did not come to the forefront until recently.

In March 2010, the Ohio Supreme Court in two related cases *Kaminski v. Wire Products* (2010) 125 Ohio St. 3d 250 and *Stetter v. R.J. Corman Derailment Services* (2010) 125 Ohio St. 3d 280, ruled that Ohio's new Employer Intentional Tort Statute was unconstitutional.

Now, insurance companies that sold Ohio Employers Stop Gap Employer Liability insurance policies are arguing that since, by statute, "substantially certain" is now defined as the employer acting with "deliberate intent" to cause an employee to suffer injury or disease, it is against public policy to insure for intentional acts and the insurance coverage is void. See, *Irondale Industrial Contractors, Inc. v. Virginia Surety Co., Inc.*, 2010 U.S. Dist. Lexis 129631 (N.D. Ohio, W.D.); *Thanakeo v. Congrind*, Case No. 07-CV-005803 (Franklin Cty. Common Pleas Court).

See also, *Simpson v. Internet and National Union Fire Ins. Co.*, 2007 U.S. App. Lexis 758 (6th Cir. 2007); *Penn Traffic Co. v. AIU Ins. Co.* (2003) 99 Ohio St. 3d 227. The Ohio Courts have also ruled that if there is no legal duty to indemnify an Ohio employer for a workplace intentional tort, there is no duty by the insurance company to provide a legal defense either.

CONCLUSION

Any Ohio employer now sued for a workplace accident or death must pay its own lawyers to defend the lawsuit and will be liable for any Court judgment out of the employer's own pocket if found liable for injury or death to an employee; in addition to possibly having to pay the Ohio BWC back for all benefits paid to the employee or widow.