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# Workers' Compensation Law: Employers May No Longer Assert Immunity from Civil Liability for Intentional Torts Committed against Employees

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# CASENOTES

## WORKERS' COMPENSATION LAW: EMPLOYERS MAY NO LONGER ASSERT IMMUNITY FROM CIVIL LIABILITY FOR INTENTIONAL TORTS COMMITTED AGAINST EMPLOYEES—*Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

### I. INTRODUCTION

Workers' compensation[1] statutes were first enacted to establish a more efficacious means of compensating employees for the work-related injuries. The system disregards the employer's fault and holds the employer strictly liable for the work-related injuries of his employees.[2] The Ohio Workers' Compensation system was established by section 35, Article II of the Ohio Constitution.[3] The system is codified as the

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1. Workers' compensation is a product of modern law dealing with the mutually existing duties and rights of employers, employees, and the state relative to injuries sustained and diseases contracted within the course of the employees' employment. J. YOUNG, WORKMEN'S COMPENSATION LAW OF OHIO § 1.1 (2d ed. 1971 & Supp. 1981) [hereinafter cited as J. YOUNG]. *See generally* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 1.10, 1.20, 2.20 (1982) [hereinafter cited as A. LARSON].

2. Prior to the enactment of workers' compensation laws, an employee's recovery for an industrial injury was based solely on a negligence theory of liability arising out of a master-servant relationship. Consequently, workers had to prove that their injuries resulted from their employer's negligence. Likewise, they had to overcome the common law defenses available to the employer: contributory negligence, assumption of the risk, and the fellow-servant rule. 1 A. LARSON, *supra* note 1 § 4.30.

As industrialization became increasingly complex, changes occurred which affected an employee's chances of recovering compensation for a work-related injury under the negligence theory. Since the employer was often not present at the job site, it was less likely that the employer's negligence was a direct cause of an employee's work-related injury. Without that causal link, the employee could not recover for his injury. The rate of recovery for work-related injuries declined so that only six to thirty percent of employees suffering work-related injuries were able to recover compensation under the common law system of negligence. J. CHELIUS, WORKPLACE SAFETY AND HEALTH: THE ROLE OF WORKER'S COMPENSATION 19 (1977) (citing W. PROSSER, THE LAW OF TORTS 530 (4th ed.)) [hereinafter cited as J. CHELIUS]. *See* 1 A. LARSON, *supra* note 1 §§ 4.30, 4.50.

By having a workers' compensation system which disregards the employer's fault, the employee has an effective means of being compensated for injuries without the often impossible burden of proving employer fault. *See, e.g.*, J. CHELIUS, *supra*, at 17-19; 1 A. LARSON, *supra* note 1 §§ 4.00-4.50, 5.20-5.30; J. YOUNG, *supra* note 1 §§ 1.7, 1.12; UNITED STATES CHAMBER OF COMMERCE, ANALYSIS OF WORKMEN'S COMPENSATION LAWS 3 (1966).

3. OHIO CONST. art. II, § 35 provides in pertinent part:

> 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 employ-

Ohio Workers' Compensation Act[4] and was first enacted in 1911.[5]

Under typical workers' compensation statutes, employers provide guaranteed compensation for their employees' work-related injuries and in return, they receive statutory immunity from employee civil damage suits.[6] The scope of the employer's statutory immunity under the Ohio Workers' Compensation Act[7] was the issue before the Ohio Supreme Court in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*[8] The court decided that there is an implied exception to an employer's statutory immunity from civil damage suits by an employee and that this exception is invoked when an employee is injured as the result of an employer's intentional tort.[9] Generally, judicial response to the scope of employer immunity from civil liability under workers' compensation laws has varied. Despite the existence of an immunity statute, some state courts have permitted civil damage suits for "nonaccidental" inju-

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ment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, . . . . Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.

4. OHIO REV. CODE ANN. §§ 4123.01-.99 (Page 1980 & Supp. 1981).

5. 1911 Ohio Laws 524. The first workers' compensation law in Ohio was voluntary so that an employer, if he wished, could elect not to participate in the system. If the employer chose not to participate, he remained subject to common law actions, but he could no longer invoke the defenses of assumption of the risk, contributory negligence, or the fellow-servant rule. J. YOUNG, *supra* note 1 §§ 1.09, 1.10.

In 1913, the Ohio General Assembly made the workers' compensation law compulsory for employers having five or more employees. 1913 Ohio Laws 72. Mandatory participation for employers having three or more employees was effected in 1924. 1923 Ohio Laws 224.

6. J. YOUNG, *supra* note 1 § 1.12. *See generally* 2A A. LARSON, *supra* note 1 §§ 65.11, 65.30, 65.40.

7. OHIO REV. CODE ANN. § 4123.74 (Page 1980) provides:

Employers who comply with section 4123.35 of the Revised Code *shall not be liable to respond in damages* at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, . . . whether or not such injury, occupational disease, bodily condition, or death is compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code.

*Id.* (emphasis added).

OHIO REV. CODE ANN. § 4123.741 (Page 1980) provides:

No *employee* of any employer, . . . shall be liable to respond in damages at common law or by statute for any injury or occupational disease, received or contracted by any other employee of such employer . . . on the condition that such injury, occupational disease, or death is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code.

*Id.* (emphasis added).

8. 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

9. *Id.*

ries[10] as well as for injuries resulting from the employer's own violent acts.[11] Following the lead of these few courts,[12] the Ohio Supreme Court established an exception to employer immunity in the absence of a legislatively enacted statutory exception.[13]

This note will explore the court's decision in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, which effectively denied an employer immunity from civil liability for his intentionally tortious conduct which resulted in an employee's work-related injury.[14] The court's decision has, quite possibly, destroyed the balance of the employer-employee rights and remedies which is the essence of the workers' compensation system.[15]

## II. Facts and Holding

Eight employees[16] of Cincinnati Milacron Chemicals, Inc. contended that they were exposed to allegedly harmful chemicals[17] used in the chemical manufacturing process at Milacron. These employees filed a civil suit against Milacron and several fellow employees seeking compensatory and punitive damages.[18] The employees alleged "chemical in-

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10. "[D]espite the exclusive remedy rule, some courts [have allowed a civil damages action on the theory] that the employer is estopped from claiming his intentional act was accidental and covered exclusively by compensation provisions." Comment, *Intentional Employer Torts: A Matter for the California Legislature*, 15 U.S.F.L. Rev. 651, 674 (1981) (footnote omitted) [hereinafter cited as Comment, *Intentional Employer Torts*].

11. Courts have found another exception to statutory immunity where an employer's intentional torts are involved. These courts have theorized that when an employer's act becomes violent, the employment relationship is terminated. Comment, *Intentional Employer Torts*, *supra* note 10, at 674.

12. The California Supreme Court attempted to infer an exception to statutory employer immunity in the absence of any legislatively enacted exception. *See, e.g.*, Johns-Manville Prod. Corp. v. Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (despite the existence of a workers' compensation statute, the court sustained a civil damages action against the employer for the intentional tort of fraud).

13. Comment, *Intentional Employer Torts*, *supra* note 10, at 674-76. Ten states have enacted specific statutory exceptions to their respective employer immunity statutes so that workers' compensation is not the exclusive remedy if an employer intentionally causes an employee injury. *See* Ariz. Rev. Stat. Ann. § 23-1022 (1982); Idaho Code § 72-209 (1973); Ky. Rev. Stat. Ann. § 342.610 (4) (Baldwin 1978); La. Rev. Stat. Ann. § 23:1032 (West Supp. 1982); Md. Ann. Code art. 101, § 44 (1979); N.J. Stat. Ann. § 34:15-8 (West Supp. 1982); Or. Rev. Stat. § 656.156 (2) (1981); S.D. Comp. Laws Ann. § 62-3-2 (1978); Wash. Rev. Code § 51.24.020 (1982); W. Va. Code § 23-4-2 (1981).

14. 69 Ohio St. 2d at 613, 433 N.E.2d at 576.

15. 2A A. Larson, *supra* note 1 §§ 65.11, 65.30, 65.40. *See* J. Young, *supra* note 1 § 1.12.

16. 69 Ohio St. 2d at 608, 433 N.E.2d at 573. The employees were current or former employees of Cincinnati Milacron Chemicals, Inc.

17. *Id.* at 608 & n.2, 433 N.E.2d at 573 & n.2.

18. *Id.* at 608-09 & nn.3,4, 433 N.E.2d at 573-74 & nn.3,4. The employees asserted six causes of action. Counts one through three were directed against chemical manufacturers and distributors used by Milacron. Counts four and five were asserted against Milacron and fellow

toxication"[19] and permanent disabilities resulting from toxic chemical exposure. Additionally, they alleged five omissions on the part of Milacron which constituted "intentional, malicious, . . . willful and wanton" conduct that directly and proximately caused their injuries.[20]

Milacron moved to dismiss the employees' complaint on the grounds that the complaint failed to state a cause of action upon which relief could be granted.[21] The trial court granted Milacron's motion to dismiss[22] reasoning that Milacron was a self-insured employer in compliance with the Ohio Workers' Compensation Act[23] and that a chemical intoxication injury was a compensable injury under the Act.[24] Thus, the trial court held that section 35, Article II of the Ohio Constitution[25] and Ohio Revised Code sections 4123.74[26] and 4123.741[27] barred the employees' civil suit.[28]

The Hamilton County Court of Appeals, First Appellate District, affirmed the trial court's decision granting the employer statutory immunity,[29] holding that a court lacks subject matter jurisdiction over an employee's civil suit for damages if his injury results from the hazards of his employment. According to the appeals court decision, the intentional conduct of the employer was of no consequence.[30]

The Ohio Supreme Court reversed the judgment of the court of appeals.[31] In doing so, it stated that the employer's intentional torts are not within the scope of employment.[32] Accordingly, the court held that if the fact-finder decides that an employer's conduct constitutes an intentional tort, neither section 35, Article II of the Ohio Constitution, nor sections 4123.74 and 4123.741 of the Ohio Revised Code bar an

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employees. Count six was filed by the employees' spouses for loss of consortium. Only counts four and five were raised on appeal in this case.

19. Blankenship v. Cincinnati Milacron Chem., Inc., No. C-790768, slip op. at 2 (Ohio Ct. App. Jan. 14, 1981).

20. 69 Ohio St. 2d at 608-09, 433 N.E.2d at 574. The employees alleged that Milacron: 1) failed to correct allegedly unsafe conditions; 2) failed to warn of said conditions; 3) failed to report said conditions to certain governmental agencies; 4) failed to warn of occupational health hazards; and 5) failed to provide state required medical examinations.

21. *Id.* at 609, 433 N.E.2d at 574. *See* OHIO R. CIV. P. 12(B)(1), (6) (Page 1982).

22. 69 Ohio St. 2d at 609-10, 433 N.E.2d at 574.

23. OHIO REV. CODE ANN. §§ 4123.01-.99 (Page 1980 & Supp. 1981).

24. *Id.* § 4123.68 (Page 1980).

25. OHIO CONST. art. II, § 35. *See supra* note 3.

26. OHIO REV. CODE ANN. § 4123.74 (Page 1980). *See supra* note 7.

27. OHIO REV. CODE ANN. § 4123.741 (Page 1980). *See supra* note 7.

28. 69 Ohio St. 2d at 609-10, 433 N.E.2d at 574.

29. *Id.* at 610, 433 N.E.2d at 574.

30. *Blankenship*, No. C-790768, at 9.

31. 69 Ohio St. 2d at 616, 433 N.E.2d at 578. There were three justices who concurred in the majority opinion, one justice who concurred in part, dissented in part and two justices who dissented.

32. *Id.* at 613, 433 N.E.2d at 576.

employee's civil suit against the employer.[33]

## III. ANALYSIS

### A. *The Court's Rationale—Case Law*

*Blankenship v. Cincinnati Milacron Chemicals, Inc.*[34] was a case of first impression[35] for the Ohio Supreme Court. The court primarily focused upon the employee's right to prosecute a common law action against his employer[36] for an intentional tort, although section 35, Article II of the Ohio Constitution[37] and Ohio Revised Code sections 4123.74[38] and 4123.741[39] seemingly bar such an action.

The court's analysis of employer immunity under section 4123.74 began with a consideration of *Delamotte v. Midland Ross.*[40] In *Delamotte,* the court sustained an employee's action against his employer for fraud, reasoning that the employer's false representations did not arise out of the employment relationship.[41] As a result, the *Delamotte* court declined to extend immunity to the employer under section 4123.74.[42]

The *Blankenship* court seemingly expanded the *Delamotte* decision by concluding that *any* intentionally tortious conduct committed by an employer is not within the employment relationship.[43] The court read section 4123.74 narrowly by limiting the scope of employer immunity to those employee injuries received as a direct result of the employer-employee relationship.[44] The court's restriction of the types of injuries which it considered within the scope of employment effectively reduced the number of situations in which an employer will be able to claim immunity under section 4123.74. The net result is that the

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33. *Id.* at 608, 433 N.E.2d at 572-73.

34. *Id.* at 608, 433 N.E.2d at 572.

35. *Id.* at 618, 433 N.E.2d at 579.

36. *Id.* at 610, 433 N.E.2d at 574. It was undisputed that Milacron was an employer in compliance with Ohio's Workers' Compensation Act.

37. OHIO CONST. art. II, § 35. *See supra* note 3.

38. OHIO REV. CODE ANN. § 4123.74 (Page 1980). *See supra* note 7.

39. OHIO REV. CODE ANN. § 4123.741 (Page 1980). *See supra* note 7.

40. 64 Ohio App. 2d 159, 411 N.E.2d 814 (1978). The case involved a civil suit by an employee against his employer for allegedly withholding X-ray results obtained in employer-sponsored physicals. The X-rays allegedly indicated that the employee had developed silicosis.

41. *Id.* at 161-62, 411 N.E.2d at 816-17. The court decided that employer fraud was not a hazard of employment within the meaning of § 4123.74. Secondly, the court claimed that the obligation of the employer in reference to physicals was unrelated to the employer-employee relationship.

42. *Id.* at 161, 411 N.E.2d at 816. Since the court decided that employer fraud was outside the scope of employment, it ruled that § 4123.74 was not applicable to the case.

43. 69 Ohio St. 2d at 613, 433 N.E.2d at 576.

44. *Id.* at 612-13, 433 N.E.2d at 576.

court's decision is a broad construction of section 4123.74 in the employee's favor. The employee will thus not be limited merely to his statutory recovery under workers' compensation law for an injury caused by an employer's intentional tortious act.

It is important to note that the court in both *Delamotte* and *Blankenship* apparently ignored the fact that the employees' injuries occurred within the context of the employer-employee relationship. In both cases, the workers incurred their injuries within their employment status.[45] This is strikingly evident in *Blankenship,* where the employees' complaint actually contended that their chemical exposure occurred *within the scope of their employment.*[46] Since the workers' compensation system was enacted as a means of compensating employees for work-related injuries by dispensing with the requirement of employer fault,[47] it is important to determine whether the injury occurred within the employer-employee relationship. If the injury did, it clearly falls within the workers' compensation system, regardless of the intent of the employer.[48] Rather than focusing on the employer-employee relationship at the time of the employee's injury, however, the court in both *Delamotte*[49] and *Blankenship*[50] focused on the intent of the employer. This focus is erroneous, however, since the question of the employer's intent is dispensed with under the workers' compensation statute.

In focusing upon employer intent, the *Blankenship* court apparently relied upon a variety of prior decisions in which employees were awarded compensation for their work injuries in civil damage suits against the employer. In these cases, liability and the compensation awarded were based on the fact that the employer had committed an intentional tort.[51] These cases, however, are arguably distinguishable from *Blankenship.* In the cases cited by the *Blankenship* court, the employer could not avail himself of the statutory immunity afforded in his respective state because his intentionally tortious conduct did not arise directly out of the worker's employment relationship with the em-

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45. *See* Guy v. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978). The key concept in workers' compensation coverage is the status of the employer-employee relationship *at the time the employee injury occurs.* In other words, the employee must have been injured while acting within the scope of his employment in order to be entitled to compensation under the Workers' Compensation Act. *See generally* 1 A. LARSON, *supra* note 1 § 14.00.

46. 69 Ohio St. 2d at 608, 433 N.E.2d at 573.

47. See *supra* note 2 and accompanying text for a discussion of employer fault.

48. *See* Guy v. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978). *See generally* 1 A. LARSON, *supra* note 1 § 14.00.

49. 64 Ohio App. 2d at 159, 411 N.E.2d at 814.

50. 69 Ohio St. 2d at 613-14, 433 N.E.2d at 576-77.

51. *Id.* at 612-14 & nn.7-9, 433 N.E.2d at 576 & nn.7-9.

ployer.[52] Rather, the employer's misconduct occurred away from the workplace or his actions were not within the context of his duties as an employer.

The *Blankenship* court relied upon a general rule propounded by the Ohio Supreme Court in *Mercer v. Uniroyal, Inc.*[53] for determining whether an employer's act falls within the scope of the employment relationship. The *Mercer* court stated that section 4123.74 does not bar recovery in a civil action against an employer if the hazard to the employee is one common to the public, rather than one which affects the employee strictly by virtue of his employment.[54] In its reasoning, however, the *Blankenship* court did not analyze the facts before it in terms of the *Mercer* standard. Instead, it presumptively decided that because the employer's conduct constituted an intentional tort, the act fell outside the scope of employment; therefore, the employer immunity statute was not applicable.[55]

The hazard of chemical exposure which affected the Milacron employees was a potential danger peculiar to chemical processing and manufacturing. The general public was not exposed to this potential danger. Therefore, applying the *Mercer* standard,[56] section 4123.74 could arguably bar recovery to the injured Milacron employees, a result inapposite to that reached by the *Blankenship* court.

Additionally, the *Blankenship* court reasoned that the Workers' Compensation Act affords the protection of statutory immunity to an employer only for negligent acts, not for intentional torts.[57] In support of its reasoning, the court cited the West Virginia case of *Mandolidis v. Elkins Industries, Inc.*.[58] However, it is important to note that the West Virginia Workers' Compensation Act affords protection *only* for negligent acts, and *expressly* creates an exception to the doctrine of

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52. *See, e.g.*, Skelton v. W. T. Grant Co., 331 F.2d 593 (5th Cir.) (false imprisonment of employee not within employment relationship), *cert. denied*, 379 U.S. 830 (1964); Cohen v. Lion Prod. Co., 177 F. Supp. 486 (D. Mass. 1959) (employer's deliberate harassment of employee is not within employment relationship); Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930) (employer's assault and battery upon employee is outside employment relationship); Artonio v. Hirsch, 3 A.D.2d 939, 163 N.Y.S.2d 489 (1957) (corporate officers are not employers within the employment relationship); Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976) (employee-user of employer's product not within scope of employment merely by using the product).

53. 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

54. *Id.* at 279, 361 N.E.2d at 493.

55. 69 Ohio St. 2d at 613, 433 N.E.2d at 576.

56. 49 Ohio App. 2d at 279, 361 N.E.2d at 493.

57. 69 Ohio St. 2d at 614, 433 N.E.2d at 577 (citing Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 913 (W. Va. 1978)).

58. 246 S.E.2d 907, 913 (W. Va. 1978).

employer immunity for intentional employer misconduct.[59] Thus, the *Blankenship* court's reliance on *Mandolidis* appears to be misplaced since the Ohio Workers' Compensation Act makes no such express exception to employer immunity for intentional employer misconduct.[60]

### *B. The Court's Rationale—Statutory Interpretation*

The *Blankenship* court attempted to justify its interpretation of the statutory immunity provision by pointing to the *absence* of an express provision in section 35 of the Ohio Constitution and section 4123.74 of the Ohio Revised Code dealing with intentional employer misconduct.[61] A majority of the court believed that the lack of a specific provision was the General Assembly's way of allowing the judiciary the "freedom" to interpret the Act,[62] particularly in light of the Act's liberal construction statute which provides that the Act should be construed in favor of employees.[63] Unfortunately, however, neither the dissenting justices[64] nor Ohio case law apparently support that view of judicial "freedom."

In her dissenting opinion, Justice Krupansky criticized the majority's view for reading too much into the Ohio Revised Code and the Ohio Constitution under the cloak of the Act's liberal construction statute.[65] She read the provisions to mean precisely what they say: workers' compensation is to be in lieu of all other rights to compensation or damages for injuries, and that an employer who complies with the Act shall not be liable for damages in a common law action.[66] It is interesting to note, however, that the majority of the court likewise claimed to be interpreting the statutory provisions of the Workers' Compensation Act according to their clear meaning.[67]

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59. *Id.* at 910 (referring to W. VA. CODE § 23-4-2 (1978)). *See supra* note 13 and accompanying text. The *Mandolidis* premise was viewed as misplaced in cases where there was no *express* statutory exception to employer immunity. Houston v. Bechtel Assoc. Professional Corp., 522 F. Supp. 1094 (D.D.C. 1981).

60. 69 Ohio St. 2d at 612-14, 433 N.E.2d at 575-76. *See* OHIO REV. CODE ANN. §§ 4123.74, .741 (Page 1980).

61. 69 Ohio St. 2d at 612-13, 433 N.E.2d at 576.

62. *Id.*

63. The liberal construction provision of the Workers' Compensation Act is OHIO REV. CODE ANN. § 4123.95 (Page 1980): "Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees." *Id.*

64. 69 Ohio St. 2d at 621-24, 433 N.E.2d at 581-83. Dissenting opinions were written by Justices Holmes and Krupansky. Justice Holmes' dissent was based on his view that any bodily condition which an employee contracts in the course of employment should be considered a hazard of the employment and not actionable against the employer in a civil suit. *Id.* at 622, 433 N.E.2d at 581.

65. *Id.* at 622-24, 433 N.E.2d at 582-83.

66. *Id.*

67. *Id.* at 612, 433 N.E.2d at 576.

Justice Krupansky's opinion is supported by earlier Ohio Supreme Court interpretations of section 35 of the Ohio Constitution and section 4123.74 of the Ohio Revised Code. The Ohio Supreme Court had occasion to interpret section 35 in *State ex rel. Engle v. Industrial Commission.*[68] That court held that section 35 (as amended in 1923)[69] indicated a clear legislative intent to provide the only compensation for workers' injuries.[70] The court stated that *regardless* of how an employee's injury occurs, the right of an employee to maintain a common law action against his employer is extinguished by the employer's compliance with the Act. By virtue of his compliance with the Act, the court held that it was without jurisdiction to entertain the employee's damage suit against the employer.[71]

The Ohio courts have also had numerous occasions to interpret section 4123.74 prior to 1978.[72] The Ohio Supreme Court looked to the language of section 4123.74[73] and what it considered to be the clear meaning of the statute in *Bevis v. Armco Steel Corp.*[74] That court stated that the provisions of section 4123.74 which bar civil suits against an employer who is in compliance with the Act are not altered when the employer's conduct becomes intentional. The court refused to grant the employee any greater rights to recovery than he would have for an action based merely upon the employer's negligence.[75]

Until the court of appeals rendered its decision in *Delamotte*[76] in 1978, Ohio case law had consistently held that the provisions of section 4123.74 afforded an employer, who was in compliance with the Act, immunity from common law damage suits pursued by employees.[77] Thus, Justice Krupansky criticized the majority of the *Blankenship* court, claiming that its decision usurps the legislature's power[78] by in-

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68. 142 Ohio St. 425, 52 N.E.2d 743 (1944).

69. 1923 Ohio Laws 631 amended art. II, section 35 of the Ohio Constitution to its present form. *See supra* note 3.

70. 142 Ohio St. at 431, 52 N.E.2d at 747.

71. *Id.* at 430-31, 52 N.E.2d at 746. *Accord* State *ex rel.* Allied Chem. Corp. v. Earhart, 37 Ohio St. 2d 153, 155-56, 310 N.E.2d 230, 232 (1974).

72. *See, e.g.,* Roof v. Velsicol Chem. Corp., 380 F. Supp. 1373 (N.D. Ohio 1974); Greenwalt v. Goodyear Tire and Rubber Co., 164 Ohio St. 1, 128 N.E.2d 116 (1955); Allen v. Eastman Kodak Co., 50 Ohio App. 2d 216, 362 N.E.2d 665 (1976); Lacher v. Roxana Petroleum Corp., 40 Ohio App. 444, 179 N.E. 202 (1931).

73. *See supra* note 7.

74. 156 Ohio St. 295, 102 N.E.2d 444 (1951). *Accord* Greenwalt v. Goodyear Tire and Rubber Co., 164 Ohio St. 1, 128 N.E.2d 116 (1955). In *Bevis,* the employee's wife filed a civil suit against Armco on behalf of her husband and herself seeking damages for the employer's alleged misrepresentation of the employee's contraction of silicosis.

75. 156 Ohio St. at 301, 102 N.E.2d at 446-47.

76. *See supra* notes 40-42 and accompanying text.

77. 380 F. Supp. at 1374.

78. 69 Ohio St. 2d at 612-16, 433 N.E.2d at 575-78 (interpreting § 35 of the Ohio Consti-

ferring an exception to the employer immunity provisions of section 35 of the Ohio Constitution and section 4123.74 of the Ohio Revised Code. Although the court's decision in *Blankenship* is inapposite to the weight of the case law before 1978 (precedent which the court did not take into consideration in its decision), the court justified its interpretative action under the pretext of the liberal construction statute.[79]

The *Blankenship* court's claim of judicial authority to infer an exception to employer immunity in section 35 of the Ohio Constitution and section 4123.74 of the Ohio Revised Code[80] seems to conflict with the guidelines previously outlined by the Ohio Supreme Court. The court had propounded general rules for statutory interpretation,[81] and in particular, for interpreting the Workers' Compensation Act under the mandate of section 4123.95.[82] According to the court opinion in *Provident Bank v. Wood*,[83] the cardinal rule in interpreting statutes is that the court look first to the language of the statute itself. If the language is clear, the interpretative effort of the court should end.[84] Likewise, under the liberal construction mandate of section 4123.95,[85] the court has authority to construe the workers' compensation statutes in favor of employees, but *not to read into the statutes* something which cannot reasonably be implied.[86] Applying these rules of statutory interpretation, it was not reasonable for the *Blankenship* court to carve an exception into section 4123.74 when the statute clearly stated that workers' compensation be the only recovery for a worker's industrial injury. Additionally, if the General Assembly wanted to provide an exception to section 4123.74 for intentional employer misconduct, it certainly could have done so as other state legislatures have.[87] Thus, although the court claimed the judicial "freedom" to read an exception into section 4123.74, its exercise of this "freedom" seems to exceed the guidelines propounded by the Ohio Supreme Court[88] which limits judi-

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tution and § 4123.74 of the Revised Code in light of "humanitarian" purposes and goals).

79. *Id.* at 622-24, 433 N.E.2d at 582-83 (Krupansky, J., dissenting).

80. *Id.* at 612-13, 433 N.E.2d at 575-76.

81. *See, e.g.*, Provident Bank v. Wood, 36 Ohio St. 2d 101, 304 N.E.2d 378 (1973); Katz v. Department of Liquor Control, 166 Ohio St. 229, 141 N.E.2d 294 (1957).

82. *See* Felske v. Daugherty, 64 Ohio St. 2d 89, 413 N.E.2d 809 (1980); Szekely v. Young, 174 Ohio St. 213, 188 N.E.2d 424 (1963). *See also* OHIO REV. CODE ANN. § 4123.95 (Page 1980).

83. 36 Ohio St. 2d 101, 304 N.E.2d 378 (1973).

84. *Id.* at 105-06, 304 N.E.2d at 381 (citing Sears v. Weimer, 143 Ohio St. 312, 55 N.E.2d 413 (1944)). *See Katz*, 166 Ohio St. at 231, 141 N.E.2d at 295-96.

85. OHIO REV. CODE ANN. § 4123.95 (Page 1980). *See supra* note 63.

86. *Szekely*, 174 Ohio St. at 218, 188 N.E.2d at 428.

87. See *supra* note 13 for a list of the states whose immunity statutes make an express exception in the case of intentional employer misconduct.

88. *See supra* notes 81-86 and accompanying text.

cial interpretation to the clear meaning of the statute or to that which can be reasonably implied.

Finally, the *Blankenship* court discussed the policy implications which influenced its ultimate decision that intentional employer torts fall outside the scope of the immunity statute. The court reasoned that since workers' compensation is a type of insurance, it would be against public policy to extend its coverage so as to provide an employer with protection from the consequences of his own intentional acts.[89] Additionally, the court stated that the threat of increased workers' compensation premiums is not a sufficient penalty to discourage an employer from committing intentional acts with impunity.[90] However, the court offered no support for this argument.

## IV. CONCLUSION

Although the court's policy considerations may be legitimate, the fact remains that the court's decision in *Blankenship* is against the weight of pre-1978 Ohio case law and arguably inapposite to the previously established court guidelines for statutory interpretation. The court's narrow interpretation of the types of employee injuries which fall within the scope of employment[91] effectively gives section 4123.74 a broad construction in employees' favor. The court's aversion to employer misconduct does not justify its interference with the legislative policy choice: workers' compensation as an exclusive remedy for work-related injuries, regardless of the cause.

The importance of the *Blankenship* decision can be seen by its use as precedent in the recently decided case of *Nayman v. Kilbane*.[92] It is apparent that unless the General Assembly acts, the *Blankenship* decision will stand, thus eliminating statutory immunity for employers' intentional tortious conduct.

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89. 69 Ohio St. 2d at 615, 433 N.E.2d at 577.
90. *Id.*
91. *Id.* at 612-13, 433 N.E.2d at 576.
92. 1 Ohio St. 3d 269, 439 N.E.2d 888 (1982).