No. _____

In the
Supreme Court of the United States

HEATHER HENRY AND SHAWN HENRY,
Petitioner,

v.

CMBB, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit of the United States Court of Appeals erred in affirming the decision of the District Court that Petitioners' claim is barred by Tennessee Code Annotated § 50-6-108(a) and that the common law intentional injury exception did not apply to save Petitioners' tort claim.

2. Whether this question at issue should be certified to the Supreme Court of Tennessee.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All parties to the proceedings are listed in the caption.

Petitioners are individuals and private parties.

RULE 14.1(b)(iii) STATEMENT

Heather Henry and husband, Shawn Henry, *v. CMBB, LLC*, Case No. H4092, Circuit Court of Gibson County, Tennessee at Humboldt. This case was removed to the *United States District Court* by Notice of Removal filed December 13, 2018.

Heather Henry and Shawn Henry v. CMBB, LLC, Case No. 1:18-cv-01244 (W.D. Tenn.). The western district of Tennessee entered judgment dismissing Petitioners' claims on February 27, 2019.

Heather Henry and Shawn Henry v. CMBB, LLC, Case No. 19-5296, (6th Cir.). The Sixth Circuit entered judgment in this matter on January 14, 2020.

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CASES

STATUTES AND RULES

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, 797 Fed. Appx. 258 (6th Cir. 2020), is not published, but is reproduced at App. 1a. The district court's opinion is reported at 2019 WL 961999 and reproduced at App. 10a.

JURISDICTION

The judgment of the Court of Appeals, Sixth Circuit, was entered on January 14, 2020. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 to review the decision of the Sixth Circuit Court of Appeals.

STATUTORY PROVISIONS AND LEGAL PRINCIPLES INVOLVED

The relevant provisions of Tennessee Code Annotated § 50-6-108(a) and Tenn. Sup. Ct. R. 23 are reproduced in the appendix to this petition. App. 15a and 16a.

STATEMENT OF THE CASE

A. Factual Background

This case stems from an injury suffered by Petitioner Heather Henry on November 15, 2017, while working at Respondent's facility as an employee of Personnel Placements, LLC. App. 1a; 10a. Ms. Henry's injury resulted in amputation of both upper extremities after a 200-ton press cycled, crushing her upper extremities. *Id.*

The safety mechanism, specifically light curtains in place on the 200-ton press designed to protect machine operators such as Heather Henry, was not monitored and/or adjusted in a manner to prevent unknowing access to the point of operation when cycling the press. *Id.* Respondent knew the light curtain did not function properly such that it did not protect machine operators such as Ms. Henry. *Id.*

A mere two weeks before Ms. Henry's injury, Respondent witnessed another machine operator operating the 200-ton press and realized that the light curtain was not detecting and/or protecting the operator. Instead of inspecting or adjusting the light curtain, Respondent simply removed the machine operator from the 200-ton press and assigned another machine operator who previously operated the press, to the press. *Id.* Knowing the light curtain on the 200-ton press did not protect machine operators such as Ms. Henry, Respondent ordered horizontal light curtains to install on the machine.

Although the horizontal light curtains had neither been received nor installed on the press, Respondent assigned Heather Henry to operate the 200-ton press again on November 15, 2017, knowing the existing light curtain would not detect her while the press cycled. *Id.* On this date, Ms. Henry placed aluminum parts into the die of the 200-ton press, the light curtain did not detect her, the press cycled, and her arms were amputated by the press. *Id.*

B. Procedural History

On November 14, 2018, Appellants filed this action in the Circuit Court of Gibson County, Tennessee at Humboldt. App. 1a.

Appellees removed this action to the United States District Court for the Western District of Tennessee, Eastern Division, pursuant to 28 U.S.C. § 1132, predicated on diversity of citizenship. App. 10a.

On December 20, 2018, Appellee filed a Motion to Dismiss with Prejudice on the ground that as her statutory employer or co-employer, it was immune from suit under the exclusivity provision of the Tennessee Workers' Compensation Act. On January 17, 2019, Appellants filed Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss with Prejudice arguing that the factual allegations in their complaint supported a finding of an actual intent to injure Appellant Heather Henry. Appellee filed a Reply to Appellants' Response on January 30, 2017. App. 10a.

On February 27, 2019, the District Court entered its ruling granting Appellee's Motion to Dismiss with Prejudice. App. 10a. In its Order, the District Court found that there were no facts alleged supporting the claim that Appellee intended to hurt Appellant Heather Henry, and that Appellants' claims are barred by the Tennessee Workers' Compensation Act. App. 10a.

After filing their Notice of Appeal on March 27, 2019, the Sixth Circuit Court of Appeals issued its opinion affirming the decision of the District Court on January 14, 2020. App. 1a.

REASONS FOR GRANTING THE PETITION

Petitioners ask this Honorable Court to grant their Petition and in support of their request, submit that review of the lower Court's decision is necessary as the lower Court did not properly apply the relevant law to the facts of this case. Alternatively, Petitioners submit that the question at issue in this case should be certified to the Tennessee Supreme Court.

I. The Sixth Circuit failed to properly apply applicable law to this case.

a. Tennessee's exclusive remedy and intentional tort exception

Tennessee's workers' compensation law, specifically Tenn. Code Ann. § 50-6-108(a), provides the exclusive remedy for an employee who is injured during the course and scope of his or her employment, meaning the employee is precluded from seeking tort damages for the injury. App. 15a; *Liberty Mut. Ins. Co. v. Stevenson*, 212 Tenn. 178, 368 S.W.2d 760 (1963).

Tennessee courts have created an exception to the exclusivity provision for intentional torts committed by an employer against an employee, and these torts give rise to a common-law tort action for damages. *Valencia v. Freeland & Lemm Constr. Co.*, 108 S.W.3d 239, 243 (Tenn. 2003).

b. The *Valencia* decision

In granting Respondent's Motion to Dismiss, and in affirming that decision, the District Court and the Court of Appeals relied on *Valencia v. Freeland & Lemm Constr. Co.*, a case where a construction worker was working in an open trench that collapsed and caused his death. *Valencia v. Freeland & Lemm Constr. Co.*, 108 S.W.3d 239, 241 (Tenn. 2003). Safety regulations required that companies using construction trenches either slope the sides of the trenches or use "trench-boxes" to ensure that the trenches did not collapse. The employer had previously been cited for violating these regulations, but, in spite of the citations, it continued to construct trenches that were neither sloped nor reinforced. The employer also committed other safety violations, and the collapse that killed the worker was "likely" a result of these safety violations. The worker's next of kin filed suit against the employer, asserting claims for intentional misrepresentation, negligence, strict liability, wrongful death, and assault. Despite the allegation in the complaint that the employer "acted with the 'actual intent' to injure [the worker]," the trial court granted the employer's motion to dismiss the tort claims, finding that, although the complaint "indicated that the employer's conduct was 'substantially certain' to cause death ... the employer's conduct was not indicative of an 'actual intent' to injure [the worker]." *Id.*

c. Distinction between *Valencia* and the case herein

The facts alleged in Petitioners' complaint, when construed in a light most favorable to Petitioners, show actual intent, and are distinguishable from those in *Valencia,* the line of cases addressing the 'actual intent' exception discussed in *Valencia,* as well as in the more recently decided case, *Kizer v. Pinnacle Foods Grp.*, LLC, No. 1:17-cv-01214-STAegb, 2018 U.S. Dist. LEXIS 4185 (W.D. Tenn. Jan. 10, 2018).

Although the employee in *Valencia* was similarly situated to Ms. Henry in that he was subjected to an unsafe work environment, lacking in *Valencia* was proof that the employer knew that the trench that collapsed and killed the deceased employee would indeed collapse. To equate *Valencia* to Ms. Henry's case, the employer in *Valencia* would have had to have seen the trench in question collapse, order the sides to be sloped or a trench box that would protect future, similar employees, and then place an employee to work in the trench before the sides were sloped or trench box installed.

Likewise, the facts in each of the cases relied upon by the *Valencia* court are all distinguishable from the facts and circumstances in Petitioners' case. In *Mize v. Conagra, Inc.*, there was no proof that the employer knew that allowing a dangerous level of grain dust to accumulate with inadequate ventilation could cause an explosion and fire. *Mize v. Conagra, Inc.*, 734 S.W. 2d 334 (Tenn.Ct.App. 1987) (Rule 11 permission to appeal denied). In *King v. Ross Coal Co.*, the allegation was that

the employee was required to work in dangerous conditions and that the employer violated state and federal statutes, but again, there was no allegation that the employer knew that a rock could fall and hit the employee in the head. *King v. Ross Coal Co.*, 684 S.W. 2d 617, 618 (Tenn.Ct.App. 1984) (Rule 11 permission to appeal denied). In *Estate of Schultz v. Munford, Inc.*, there was no actual allegation of intentional conduct on the part of the employer by the plaintiff; only negligent conduct was alleged. *Estate of Schultz v. Munford, Inc.*, 650 S.W. 2d 37, 40 (Tenn.Ct.App. 1982) (Rule 11 permission to appeal denied). Finally, in *Cooper v. Queen*, the Court found that the employee's allegation that the employer's conduct was gross or criminal negligence was not the equivalent of an allegation of intentional tortious conduct. *Cooper v. Queen*, 586 S.W. 2d 830, 833 (Tenn.Ct.App. 1979) (Rule 11 permission to appeal denied). In doing so, the *Cooper* Court discussed the meaning of "accidental means" as defined in *Brown Shoe Co. v. Reed*, 350 S.W.2d 65 (1961), which includes, in part, the following, "…not a natural or probable consequence…cannot be reasonably anticipated…produced by unusual combination of fortuitous circumstances."

In a more recently decided case, *Kizer v. Pinnacle Foods Group*, LLC, 2018 WL 358514 (W.D.Tenn. 2018), the District Court that dismissed Heather Henry's case found that not adequately training an employee, committing safety violations, and not revealing a dangerous situation to an employee were all insufficient to meet the

definition of actual intent when it was alleged that a safety guard on the machine operated by the plaintiff was not adequately maintained. However, there was no allegation that the employer had direct knowledge that the guard was not adequately maintained, and yet still required the plaintiff to operate the machine.

The facts in Petitioner Heather Henry's case go multiple steps further than the facts in each of these cited cases. This is not a case of simply placing an employee in a dangerous working condition or an employer committing safety violations. Heather Henry's injuries were not produced by an unusual combination of fortuitous circumstances. (quoting *Brown Shoe Co.*, 350 S.W.2d at 69). Therefore, Ms. Henry's injury was not caused by accidental means.

Respondent knew that the light curtains would not detect Ms. Henry, and therefore, knew that the 200-ton prese would injure her. Respondent witnessed the press' light curtains fail no more than two (2) weeks prior to Ms. Henry's injury while being operated by an employee similar to Ms. Henry. Respondent removed this similar employee from the press and ordered replacement light curtains. Despite that the replacement light curtains had not been installed, Respondent ordered Ms. Henry to operate the press with full knowledge that it would likewise not detect her, that the safety mechanism would likewise fail, and would, therefore, injure Ms. Henry.

As stated by Judge John K. Bush in his dissenting opinion,

> "Based on *Valencia*, therefore, when an employer does nothing to correct an unsafe working condition, that fact alone does not make the injury non-accidental. But, Valencia does not address the scenario, as Henry alleges here, where an employer actually initiated action to do something to address the unsafe condition, but then nonetheless subjected the worker to that condition, and the consequent injury, before the corrective measure was completed." App. 1a.

To do so constituted an intent to injure Ms. Henry.

II. The Sixth Circuit should have certified the question at issue to the Tennessee Supreme Court.

a. Tenn. Sup. Ct. R. 23

Rule 23 of the Tennessee Supreme Court Rules gives the Supreme Court discretion to answer questions of law certified to it by either the Supreme Court of the United States, a Court of appeals of the United States, a District Court of the United States in Tennessee, or a United States Bankruptcy Court in Tennessee. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Tennessee. App. 16a.

As stated by Judge John K. Bush in his dissenting opinion in this case, "Federal-to-state certification is a remarkable device: workable, efficient, and guaranteed to yield a doubt-free answer." App. 1a, citing *Doe v. Mckesson*, 2019 WL 6837921, at *15 (5th Cir. Dec. 16, 2019)(Willett, J., concurring in part and dissenting in part). Judge Bush also noted that certification ensures that federal judges "minimize the risk of unnecessary interference with the autonomy and independence of the states" in the development and exposition of their own laws, citing *Lindenberg v. Jackson Nat'l Life Ins.*, 91 F.3d 992, 1002 (6th Cir. 2019) (Bush, J., dissenting from denial of en banc rehearing). *Id.* Along those lines, Petitioners case was originally filed in Tennessee state court seeking a state-court adjudication, and Tennessee's Supreme Court has emphasized that certification is valuable to preserve the sovereignty of the State of Tennessee, through its Supreme Court, to control the interpretation of Tennessee law. *Haley v. Univ. of Tenn.-Knoxville*, 188 S.W.3d 518, 521 (Tenn. 2006).

b. *Valencia* does not squarely answer question at issue

As argued in Section I, above, Petitioners submit that the *Valencia* holding does not dispose of the issue in this case because the facts herein are different and support of finding of an intentional tort.

Valencia held that an injury is not "by accident" if an employer has "actual intent" to injury the employee. Thus, Petitioners would have remedies available outside Tennessee's workers compensation act if Heather Henry's injuries occurred for a reason other than "by accident".

For the sake of not being repetitious and relying on their arguments already made herein, Petitioners simply state that *Valencia* and the cases cited therein involve facts less condemning than the facts of this case where Respondent did not merely violate a safety regulation, but also took "deliberate affirmative action that recognized there was a safety problem before the injury occurred." App. 1a, quoting the dissent of Judge John K. Bush.

Because *Valencia* can be distinguished from the facts herein and because there is no Tennessee Supreme Court decision that Petitioners or the courts below have found addressing this factual scenario, this case presents a question of state law that is new and unsettled and which, therefore, justifies certification to the Supreme Court of Tennessee.

III. Shawn Henry's claim.

Petitioners recognize and agree that Mr. Shawn Henry's loss of consortium claim is derivative in nature in that it originates from Ms. Henry's tort claim. *Hunley v. Silver Furniture Mfg. Co.*, 38 S.W.3d 555, 557 (Tenn. 2001). Petitioners further agree that if this claim were one sounded in workers' compensation, only, the loss of consortium claim would be meritless, and therefore barred. However, Petitioners assert that their claims fall within the intentional tort exception to the exclusivity provision of Tennessee's Workers' Compensation Act, such that they are not bound to remedies provided solely by the Act. Should this Court reverse the Court of Appeals' ruling or certify the question at issue to the Supreme Court of Tennessee, Petitioners respectfully assert that Mr. Henry's derivative claim should continue with the claim from which it originates – Ms. Henry's.

CONCLUSION

Petitioners respectfully request that this Honorable Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5296

Heather Henry and Shawn Henry,
Appellants,

v.

CMBB, LLC,
Appellee.

On Appeal from the United States District Court
for the Western District of Tennessee
District Court No. 1:18-cv-01244-STA-jay
District Judge: The Honorable S. Thomas Anderson

Before: McKeague, *Senior Circuit Judge*, Bush, *Circuit Judge*, and Nalbandian, *Circuit Judge*

(Filed: January 14, 2020)

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OPINION

McKeague, *Circuit Judge*.

If you're injured on the job, then workers' compensation is usually your only remedy. That's the case in Tennessee. But there is an exception: you can sue your employer in tort if the employer actually intended to injure you. Heather Henry tried to invoke this exception. In a tragic workplace accident, her arms were crushed by a 200-ton Bliss press. Henry alleged that her employer noticed that a safety mechanism in the press was not working, ordered replacement parts, but still sent her to work the machine. The district court dismissed her complaint, finding that she had not plausibly alleged that her employer actually intended to injure her. We agree. Noticing a defect and ordering replacement parts, while suggesting an awareness of the potential for injury, does not make it plausible that Ms. Henry's employer actually intended to injure her. We **AFFIRM**.

I. Background

We recite the facts as they are alleged in the complaint. Back in November 2017, Heather Henry was working for a temp agency called Personnel Placements, LLC. Personnel Placements brought her to Chicago Metallic, a manufacturer located in Humboldt, Tennessee and owned by the defendant, CMBB, LLC.

In her job at Chicago Metallic, Ms. Henry operated a 200-ton piece of industrial equipment called a Bliss press. She put pieces of metal into the press, and the press used hydraulic pressure to shape the metal. Of course, such a powerful machine presents safety risks for its operators. To prevent injuries, the Bliss press contains a safety mechanism known as a light curtain. A functioning light curtain will detect operators inside the press and prevent it from cycling while operators are reaching inside.

Prior to Ms. Henry suffering her injuries, while a different operator was working with the Bliss press, CMBB's employees noticed that the press's light curtain was not functioning properly. So CMBB took that operator off the press and put a more experienced operator on the job. CMBB also ordered new light curtains. It did not, however, take the Bliss press out of operation.

Two weeks later, on November 15, 2017, Ms. Henry was operating the Bliss press, but the new light curtains had not yet arrived. Disaster struck. The press cycled while

Ms. Henry was placing aluminum parts into it. The 200-ton machine crushed her arms, which were amputated above the elbow.

Ms. Henry and her husband Shawn then sued in Tennessee state court, Ms. Henry for her injuries and Mr. Henry for his loss of consortium. CMBB removed the case to the United States District Court for the Western District of Tennessee, invoking the court's diversity jurisdiction under 28 U.S.C. § 1332. The district court then dismissed the complaint for failure to state a claim because it was barred by the Tennessee Workers' Compensation Act. The Henrys then appealed.

II. Standard of Review

We review the district court's grant of a motion to dismiss de novo. *Linkletter v. W. & S. Fin. Grp., Inc.*, 851 F.3d 632, 637 (6th Cir. 2017). Under Federal Rule of Civil Procedure 12(b)(6), a complaint can be dismissed for "failure to state a claim upon which relief can be granted." When reviewing a motion to dismiss under Rule 12(b)(6), the court should disregard the complaint's legal conclusions, assume that the pleaded facts are true, and determine whether the complaint contains "sufficient factual matter" to state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. Analysis

The only issue in this appeal is whether the Henrys' complaint is barred by the exclusive-remedy provision of the Tennessee Workers' Compensation Act. The "rights and remedies" given to an employee under the statute "on account of personal injury or death by accident ... shall exclude all other rights and remedies of the employee." Tenn. Code Ann. § 50-6-108(a). Thus, the workers' compensation statute "provides the exclusive remedy for an employee who is injured during the course and scope of his employment." *Valencia v. Freeland & Lemm Constr. Co.*, 108 S.W.3d 239, 242 (Tenn. 2003).

Tennessee courts have recognized an exception to this exclusive-remedy provision, allowing employees to bring intentional-tort claims in which the employer actually intended to injure the employee. *Id.* at 242–43. "The theoretical basis for that result is that the employer cannot allege an accident when he has intentionally committed the act." *Cooper v. Queen*, 586 S.W.2d 830, 833 (Tenn. Ct. App. 1979). In other words, it is the "*actual intention* to injure that robs the injury of accidental character." *King v. Ross Coal Co.*, 684 S.W.2d 617, 619 (Tenn. Ct. App. 1984) (quotation omitted); *see*

also Valencia, 108 S.W.3d at 242; *Gonzales v. Alman Constr. Co.*, 857 S.W.2d 42, 47 (Tenn. Ct. App. 1993); *Mize v. Conagra, Inc.*, 734 S.W.2d 334, 336 (Tenn. Ct. App. 1987). This theoretical justification tracks the statutory language, since by its terms the statute applies only to those injuries that occur "by accident." Tenn. Code Ann. § 50-6-108(a).

The intentional-tort exception is a narrow one. *Rodgers v. GCA Servs. Grp., Inc.*, No. W2012-01173-COA-R3-CV, 2013 WL 543828, at *4 (Tenn. Ct. App. Feb. 13, 2013). It requires a heightened showing of intent, higher than the showing typically required in tort law. In *Valencia*, the Tennessee Supreme Court noted how, in the usual tort context, the "intent" element can be satisfied if the tortfeasor believes "that the consequences are substantially certain to result from [his] actions." 108 S.W.3d at 243. But "that definition is not applicable in workers' compensation cases." *Id.* Instead, "the definition of actual intent is the actual intent to injure the employee." *Id.* Accordingly, it is not enough to show that the employer breached its duty to provide a safe workplace. *Gonzales*, 857 S.W.2d at 47. Nor is it enough to show that the employer knowingly ordered the employee to perform an extremely dangerous job. *Id.* at 48. The employer must have actually intended for the employee to be injured.[1]

The Tennessee Supreme Court's application of this rule in *Valencia* demonstrates just how strictly it is construed. There, the employee was working in an open construction trench, a work environment that presents a rather obvious safety concern: collapse. *Valencia*, 108 S.W.3d at 241. Under Tennessee's safety regulations, construction companies like the defendant in *Valencia* are required to take steps to prevent collapse, either by sloping the sides of trenches or by using "trench-boxes." *Id.* at 241& n.3. The employer's failure to take these steps was especially egregious for two reasons. First, it knew that its failure to reinforce the trenches was against the law: the employer had been cited twice for safety violations. *Id.* Second, the employer had trench boxes on site at the time of the accident, suggesting that it could have fixed the safety issues relatively quickly. *Id.* at 241 n.2. And yet, that conduct still was not enough to show actual intent to injure and escape the exclusive-remedy provision of the workers' compensation statute. *Id.* at 243. The court held that an employee cannot recover in tort for a workplace injury even if the employer's "conduct made injury substantially certain." *Id.*

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[1] For other examples of employer conduct that did not amount to an actual intent to injure, see *Gonzales*, 857 S.W.2d at 43–44 (allowing a construction crew to use dynamite even though the crewmembers were not registered, accredited, or licensed to do so); *Mize*, 734 S.W.2d at 335–36 (inadequately ventilating the facility and allowing grain dust to accumulate "in a grossly negligent manner," leading to an explosion); and *King*, 684 S.W.2d at 618 (ignoring multiple warnings and "the obvious danger to the workers" from a highwall in a strip-mining operation).

Other states have reached similar results when applying the exclusive-remedy provisions of their workers' compensation laws to bar claims. For example, in one Maryland case, the employer was cited for a "serious violation" of state safety regulations for keeping dangerous and defective electrical connections to a sump pump. *Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246, 503 A.2d 708, 709 (1986). After the citation, the employer reported back to the workplace safety administration that the violation had been corrected—only that wasn't true. *Id.* And two months later, a sixteen-year-old employee was electrocuted to death while using the exact same defective sump pump. *Id.* But the Maryland Court of Appeals barred his estate's wrongful-death claim because the alleged facts did not show that the employer had "deliberate intent" to injure the employee, so the exclusive-remedy provision of the workers' compensation statute applied. *Id.* at 712. For another example, one New York case involved an allegation that the employer deliberately removed the safety guards from the machine the plaintiff was operating. But even that was not enough to escape the exclusive-remedy provision of the workers' compensation statute, because the employer intended only to increase profits, not injure the plaintiff. *Santiago v. Brill Monfort Co.*, 11 A.D.2d 1041, 205 N.Y.S.2d 919 (1960), *rev'g* 23 Misc.2d 309, 201 N.Y.S.2d 167 (1960), *aff'd* 10 N.Y.2d 718, 219 N.Y.S.2d 266, 176 N.E.2d 835 (1961). These states aren't outliers; requiring an actual intent to injure remains the majority rule. *See* 9 *Larson's Workers' Compensation Law* § 103.03 (2019). In short, in Tennessee and elsewhere, it's difficult to escape the exclusive-remedy provisions of workers' compensation statutes.

Against this backdrop, the question is whether the facts of this case, as alleged in the complaint, give rise to a reasonable inference of an actual intent to injure.[2] The Henrys argue that their case does give rise to such an inference. They argue that CMBB knew the press would injure Ms. Henry. Because CMBB noticed the defective light curtains and ordered replacements, so the argument goes, it knew that eventually the press would injure Ms. Henry.

But this does not amount to an actual intent to injure. If CMBB truly intended to injure Ms. Henry, why even order replacement light curtains? Why not simply let her use the press and wait for an accident to happen? It is not reasonable to infer that because an employer ordered replacement safety parts—designed to *prevent* workplace injuries—the employer actually intended for one of its employees to be injured before the replacement parts arrived. True, ordering new light curtains does show that CMBB acknowledged the potential for injuries. But it is not enough under Tennessee law that the employer knows there is a risk of injury—it's not even enough

[2] The parties agree that Mr. Henry's loss of consortium claim is derivative of his wife's, so his claim rises and falls with hers.

that the employer is "substantially certain" that an injury will occur. *Valencia*, 108 S.W.3d at 243. The employer must actually intend to injure the employee. *Id.*[3]

The Henrys' complaint thus does not plausibly allege an actual intent to injure. Ms. Henry's injury is a tragic one, but not one that is compensable in tort. We hold that the Henrys' complaint is barred by the exclusive-remedy provision of the Tennessee Workers' Compensation Act, Tenn. Code Ann. § 50-6-108(a). Accordingly, we **AFFIRM**.

JOHN K. BUSH, Circuit Judge, dissenting.
The facts alleged by Heather Henry in her complaint are horrific. A 200-ton aluminum press crushed both of her arms when the safety mechanism malfunctioned. Both of Henry's arms were amputated. She alleges that her employer, CMBB, LLC, knew before her injury that the safety mechanism on the aluminum press was not functioning, and that the malfunction would result in a user's arms being crushed, because CMBB had ordered the new part to fix it. Nevertheless, CMBB directed Henry to operate the press. She alleges it was no accident that CMBB placed her in harm's way.

Henry brought suit for battery in Tennessee state court, alleging in her complaint that CMBB wrongfully caused her injuries. The majority holds that the Tennessee Workers' Compensation Act provides her exclusive relief. Because I do not believe that the Tennessee Supreme Court decision on which the majority relies addresses the type of factual scenario that Henry alleges, I would certify to the Supreme Court of Tennessee the question whether the workers' compensation remedies are exclusive here.

As the majority recognizes, the Tennessee Workers' Compensation Act generally provides the only remedies for workplace injuries. It contains an exclusivity provision, which provides:

Right to compensation exclusive.—(a) The rights and remedies herein granted to an employee subject to the Workers' Compensation Law on account of personal injury or death ***by accident***, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, such employee's personal

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[3] The dissent contends that *Valencia* does not control here because it does not address a scenario in which the employer takes affirmative steps to acknowledge the unsafe working condition. True, but the question is not simply whether the facts of this case are different from the facts of *Valencia* or other Tennessee cases. The question is whether the facts of this case give rise to a reasonable inference of an actual intent to injure—the standard announced by those Tennessee cases. And for the reasons discussed above, this case does not give rise to such an inference.

representative, dependents or next of kin, at common law or otherwise, on account of such injury or death.

Tenn. Code Ann. § 50–6–108(a) (emphasis added). The scope of this provision turns on the meaning of the two words emphasized above—"by accident." *See Brown Shoe Co. v. Reed*, 209 Tenn. 106, 350 S.W.2d 65, 69 (Tenn. 1961) (noting that the appropriate inquiry is to "see whether or not under the factual situation herein if this injury was an accident as is used in the Workmen's Compensation Law"). If the employee's injury or death was "by accident," then the Workers' Compensation Act provides the exclusive remedies. If the injury or death occurred for a reason other than "by accident," then other remedies beyond the relief provided by the Act may be available.

We have some guidance from the Supreme Court of Tennessee as to which types of injuries are not "by accident." In *Valencia v. Freeland and Lemm Const. Co.*, 108 S.W.3d 239 (Tenn. 2003), the court determined that if the employer has "actual intent" to injure the employee, the injury is not "by accident." *See id.* at 242. The court in *Valencia* noted, however, that "actual intent" requires more than simply proof that the employer's acts were substantially certain to cause injury. *Id.* at 243. Indeed, "actual intent" requires a high level of scienter, above even gross or criminal negligence. *See id.* (citing *Gonzales v. Alman Constr. Co.*, 857 S.W.2d 42, 45 (Tenn. Ct. App. 1993).

The majority concludes that *Valencia* forecloses Henry's claim. I respectfully disagree. Neither *Valencia* nor the plethora of Tennessee Court of Appeals cases cited by the court in *Valencia*, address a fact pattern with a sequence of events like here, where the employer allegedly took deliberate affirmative action that recognized there was a safety problem before the injury occurred. In *Valencia* the employer had been "cited twice for violating ... safety regulations," *id.* at 241, but there was no evidence that the employer had done anything to acknowledge a safety issue after receiving the citations. This inaction may have indicated that the employer did not consider that the condition that was the subject of the citations—construction trenches—actually needed to be changed to prevent worker injury. Based on *Valencia*, therefore, when an employer does ***nothing*** to correct an unsafe working condition, that fact alone does not make the injury non-accidental. But, *Valencia* does not address the scenario, as Henry alleges here, where an employer actually initiated action to do ***something*** to address the unsafe condition, but then nonetheless subjected the worker to that condition, and the consequent injury, before the corrective measure was completed. These additional facts alleged by Henry may support a finding that the injury was not accidental. I am not aware of any Tennessee Supreme Court opinion that addresses a situation as Henry alleges. Therefore, I believe we should go the route of certification.

The Tennessee Supreme Court will answer questions certified from a federal court when "there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee." *Yardley v. Hosp. Housekeeping Sys., LLC*, 470 S.W.3d 800, 803 (Tenn. 2015) (quoting Tenn. Sup. Ct. R. 23, § 1). Rule 23 allows for the Supreme Court of Tennessee to review the question I believe we should certify because its resolution would be determinative of this appeal and, as noted, there appears to be no controlling precedent in the decisions of the Supreme Court of Tennessee. As to the latter point, although *Valencia* establishes that an employer's mere knowledge of an unsafe working condition that is substantially probable to cause injury is not enough to establish "actual intent," there is no controlling precedent to answer whether the additional facts alleged by Henry—the employer's affirmative acknowledgment through its conduct that the condition is unsafe, yet subjection of the employee to the unsafe condition nonetheless—would permit a finding of non-accidental injury for which remedies outside the Workers' Compensation Act may be available.

Where, as here, a case before us presents a question of state law that is new and unsettled, certification may be appropriate. *See, e.g., Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995). Although neither side asked either the district court or our court for certification, we have the power to certify questions sua sponte. *See, e.g., Am. Booksellers Found. For Free Expression v. Strickland*, 560 F.3d 443, 444 (6th Cir. 2009) (order). Also, by filing her complaint in state court, Henry initially indicated her preference for state-court adjudication of the legal issue that I would certify.

"Federal-to-state certification is a remarkable device: workable, efficient, and guaranteed to yield a doubt-free answer." *Doe v. Mckesson*, 945 F.3d 818, 840 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). Certification "save[s] time, energy, and resources and helps build a cooperative judicial federalism." *In re Amazon.com, Inc.*, 942 F.3d 297 (6th Cir. 2019) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974)). Certification ensures that we, as federal judges "minimize the risk of unnecessary interference with the autonomy and independence of the states" in the development and exposition of their own laws. *See Lindenberg v. Jackson Nat'l Life Ins. Co.*, 919 F.3d 992, 1002 (6th Cir. 2019) (Bush, J., dissenting from denial of en banc rehearing). The Supreme Court of Tennessee, in particular, has emphasized that certification is valuable to preserve the sovereignty of the State of Tennessee, through its Supreme Court, to control the interpretation of Tennessee law. *See Haley v. Univ. of Tenn.-Knoxville*, 188 S.W.3d 518, 521 (Tenn. 2006).

Because I do not agree with the majority that precedent from the Supreme Court of Tennessee squarely forecloses Henry's claim, I would seek guidance from Tennessee's highest court before ruling on the appeal of the district court's dismissal of the complaint. Therefore, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE,
EASTERN DIVISION

Heather Henry and Shawn Henry,	)	
Plaintiffs,	)	
v.	)	No. 1:18-cv-01244-STA-jay
CMBB, LLC,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

S. Thomas Anderson, Chief United States District Judge.

Plaintiffs Heather and Shawn Henry filed this action in the Circuit Court of Gibson County, Tennessee, against Defendant CMBB, LLC, to recover for injuries that Plaintiff Heather Henry received while working for Defendant. Defendant removed the action to this Court with jurisdiction predicated on diversity of citizenship, 28 U.S.C. § 1332. Defendant has filed a motion to dismiss the complaint. (ECF No. 7.) Plaintiffs have filed a response to the motion (ECF No. 8), and Defendant has filed a reply to Plaintiffs' response. (ECF No. 9.) For the reasons set forth below, Defendant's motion is **GRANTED**.

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). A complaint need not contain "detailed factual allegations," but it must contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action...." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not "suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). "To survive a motion to dismiss, a complaint

must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly*, 550 U.S. at 556.

The complaint alleges as follows. Defendant operates a business known as Chicago Metallic in Humboldt, Tennessee. On or about November 15, 2017, Plaintiff Heather Henry was an employee of Personnel Placements, LLC, and she was placed at Chicago Metallic. On that date, she was injured while operating a press. Plaintiffs allege that the safety mechanism on the press was not properly adjusted and monitored. Plaintiffs further allege that Defendant and its agents and employees knew that the safety mechanism did not function properly and did not protect machine operators such as Plaintiff Heather Henry. Defendant and its agents and employees ordered a part to adjust the safety mechanism. Although that part had not been received or installed, Plaintiff Heather Henry and other machine operators were assigned to work on the press, and Plaintiff was subsequently injured. Plaintiffs allege that, by assigning Heather Henry to operate the press knowing that the safety mechanism did not function properly, Defendant intentionally injured her. Plaintiff Shawn Henry has brought a claim for loss of consortium. (Cmplt. ECF No. 1-2.)

Defendant has moved to dismiss the complaint on the ground that at the time of Plaintiff's accident it was the statutory employer or co-employer of Plaintiff, and, therefore, it is immune from suit under the exclusivity provision of the Tennessee Workers' Compensation Act. That statute provides:

> The rights and remedies granted to an employee subject to this chapter, on account of personal injury or death by accident ... shall exclude all other rights and remedies of such employee, such employee's personal representative, dependents or next of kin, at common law or otherwise, on account of the injury or death.

Tenn. Code Ann. § 50-6-108(a).[4] This provision has been interpreted to bar tort claims against an employer that arise out of work-related injuries unless the employer committed an intentional tort against the employee. *See Valencia v. Freeland and Lemm Constr. Co.*, 108 S.W.3d 239, 242-43 (Tenn. 2003).

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[1] The parties agree that, if Plaintiff Heather Henry's claim is barred, then so also is the claim for loss of consortium brought by Plaintiff Shawn Henry.

Tennessee Workers' Compensation Act applies to employees of temporary agencies placed at a business, such as Plaintiff Heather Henry, as well as regular employees. It is well settled under Tennessee law that "an employee of a temporary manpower service is considered also to be an employee of the company to which the employee is assigned, for workers' compensation purposes." *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 75 (Tenn. Ct. App. 2016), *appeal denied* (Apr. 13, 2017) (quoting *Abbott v. Klote Int'l Corp.*, 1999 WL 172646 at *3 (Tenn. Ct. App. Mar. 24, 1999), *perm. app. denied* (Tenn. Sept. 13, 1999)). As explained in *Stephens*,

When a temporary worker accepts employment and enters into an employment agreement with a temporary agency, he or she "necessarily consents to work for the clients of the agency" and enters into "an implied contract with a special employer."

Tedder v. Union Planters Corp., No. W1999-01971-COA-R3-CV, 2001 WL 589139, at *2 (Tenn. Ct. App. May 29, 2001) (concluding that an employee of a temporary employment agency was a co-employee of the bank where she was assigned to work, pursuant to the loaned servant doctrine, and therefore, her exclusive remedy against the bank was under the workers' compensation statutes); *see also Bennett [v. Mid–S. Terminals Corp.*, 660 S.W.2d 799, 801-02 (Tenn. Ct. App. 1983)] (finding the loaned servant doctrine applicable to an employee of a supplier of temporary manpower). *Stephens*, 529 S.W.3d at 75.

In the present case, as an employee of Personnel Placements, LLC, Plaintiff was directed to report to Chicago Metallic. The fact that she entered into this employment arrangement constitutes a general consent to work for Defendant as a loaned employee for purposes of workers' compensation protection. Thus, Defendant became liable for her workers' compensation.

To meet the exception of Tennessee's workers' compensation intentional tort exclusivity provision, the employee must "show that the employer actually intended to injure the employee. Proof of gross or criminal negligence is insufficient in this regard." *Valencia*, 108 S.W.3d at 243. To survive a motion to dismiss, the complaint must "allege facts showing that the employer actually intended to injure the employee." *Id.* In the absence of actual intent, the plaintiff is limited to her workers' compensation remedies. *Id.* at 240.

In *Valencia*, a construction worker was working in an open trench, which collapsed and caused his death. *Id.* at 241. Safety regulations required that companies using construction trenches either slope the sides of the trenches or use "trench-boxes" to ensure that the trenches did not collapse. The employer had previously been cited for violating these regulations, but, in spite of the citations, it continued to construct trenches that were neither sloped nor reinforced. The employer also committed other

safety violations, and the collapse that killed the worker was "likely" a result of these safety violations. The worker's next of kin filed suit against the employer, asserting claims for intentional misrepresentation, negligence, strict liability, wrongful death, and assault. Despite the allegation in the complaint that the employer "acted with the 'actual intent' to injure [the worker]," the trial court granted the employer's motion to dismiss the tort claims, finding that, although the complaint "indicated that the employer's conduct was 'substantially certain' to cause death ... the employer's conduct was not indicative of an 'actual intent' to injure [the worker]." *Id.*

On appeal, the Tennessee Supreme Court rejected the plaintiff's argument that "actual intent" should be broadly interpreted to include an employer's conduct that was "substantially certain" to cause injury or death such as committing safety violations. *Id.* at 243. "Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist [or] knowingly ordering claimant to perform an extremely dangerous job, ... this still falls short of the kind of actual intention to injure that robs the injury of accidental character." *Id.* at 242.

In the present case, Plaintiffs' allegations that Defendant's violations of safety standards resulted in her injury do not meet Tennessee's requirement of alleging an actual intention to harm the employee in order to fall into the intentional tort exception. *See Mize v. Conagra, Inc.*, 734 S.W.2d 334, 336 (Tenn. Ct. App. 1987) (reiterating that "an employer's duty to provide a safe place to work is not equated with an actual intent to injure nor intentional tortious conduct"). "[I]njuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of *general intentional injury*" do not fall within the ambit of the intentional tort exception. *Id.* (emphasis in original) (internal citations omitted). Even "knowingly ordering [an employee] to perform an extremely dangerous job, willfully and unlawfully violating a safety statute, this still falls short of the kind of *actual intention* to injure that robs the injury of accidental character." *Id.* (emphasis in original).

In *Rodgers v. GCA Servs. Grp.*, 2013 WL 543828 (Tenn. Ct. App. Feb. 13, 2013), the Court emphasized that, at the motion-to-dismiss stage, a plaintiff is entitled only to the reasonable inferences of his or her allegations. *Id.* at *25. In reviewing the specific allegations surrounding the assignment of the plaintiff employee to clean up mold and mildew, the Court held that assigning an employee to arguably dangerous working conditions and even lying to the employee about the safety of the allegedly harmful environment did not give rise to a reasonable inference that the employer actually intended to injure the employee. *Id.* Absent any allegations that the employer's acts were anything other than routine, job related tasks, the plaintiff failed to demonstrate an actual intent to injure. *Id.* at *25-26.

In the present case, the only intentional act alleged is the assignment of Plaintiff Heather Henry to operate the press that allegedly caused her injuries. No facts are alleged supporting a claim that Defendant intended to hurt Plaintiff. As discussed above, merely assigning an employee to a task, even if that task is dangerous and results in an injury, does not meet the pleading standard required to escape the reach of the exclusive remedy provision of the Tennessee Workers' Compensation Act. Accordingly, the Court finds that Plaintiffs' claims are barred by Tennessee Workers' Compensation Act, and Defendant's motion to dismiss is **GRANTED**, and this matter is hereby **DISMISSED** with prejudice.

IT IS SO ORDERED.

s/S. Thomas Anderson
S. THOMAS ANDERSON
CHIEF UNITED STATES DISTRICT JUDGE

Date: February 27, 2019.

Tenn. Code Ann. § 50-6-108. Exclusive rights and remedies; third party indemnity

(a) Right to compensation exclusive. — (a) The rights and remedies herein granted to an employee subject to the Workers' Compensation Law on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, such employee's personal representative, dependents or next of kin, at common law or otherwise, on account of such injury or death.

Tennessee Supreme Court Rule 23: Certification of Questions of State Law from Federal Court.

> The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a District Court of the United States in Tennessee, or a United States Bankruptcy Court in Tennessee. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.