IN THE SUPREME COURT OF OHIO

DOUGLAS S. CALDWELL, et ux.,	:	On Appeal From the Mahoning
	:	County Court of Appeals, 7th
Plaintiffs-Appellants, and	:	Appellate District:
Cross-Appellees	:	Court of Appeals
	:	Case No. 05 MA-12
v.	:	
	:	OHIO SUPREME COURT
PETERSBURG STONE COMPANY, et al.,	:	CASE NO. 06-184
	:	
Defendants-Appellees, and	:	**MOTION FOR RECONSIDERATION**
Cross-Appellants	:	

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MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

MOTION FOR RECONSIDERATION

NOW COME the plaintiffs, Douglas S. Caldwell, and Pamela Caldwell, by and through their undersigned counsel, and pursuant to Rule XI of the Ohio Supreme Court Practice Rules, hereby move this Honorable Court for an Order re-instating the Caldwells' case at the Ohio Supreme Court, notwithstanding the Court's January 31, 2007 *sua sponte* dismissal of the case on grounds that the appeal was improvidently granted.

Respectfully submitted,
Douglas S. Caldwell, et ux.

Plaintiffs,

By: _____

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MEMORANDUM IN SUPPORT

Rule II of the Ohio Supreme Court Practice Rules reads in pertinent part as follows:

> Discretionary appeals. An appeal that involves a felony or a question of public or great general interest invokes the discretionary jurisdiction of the Supreme Court and shall be designated a discretionary appeal. In accordance with S. Ct. Prac. R. III, the Supreme Court will determine whether to accept the appeal.

On April 26, 2006, the Court accepted the Caldwell's appeal on Proposition of Law No. I, and the Petersburg Defendants' cross-appeal.

As the Court knows, the Caldwells argued in their appeal that the trial and intermediate

appellate courts misapplied and/or did not correctly apply prevailing mandatory Ohio Supreme Court precedent (*Sopkovich v. Ohio Edison Co.,* (1998), 81 Ohio St.3d 628, 693 N.E.2d 233) to case facts, and thereby wrongfully denied justice to Mr. Caldwell, an upstanding worker with an amputated leg who has been fighting in the Ohio judicial system now for almost a decade.

The Court was correct in accepting the appeal: the facts and legal issue in this case present a question of public or great general interest that invokes the discretionary jurisdiction of the Ohio Supreme Court.

This is supported by the Court's own ruling that ordered "...that the opinion of the court of appeals may not be cited as authority except by the parties inter se." *Caldwell v. Petersburg Stone Co.,* (2007), 112 Ohio St.3d 1212, 2007-Ohio-150. The Caldwells respectfully assert that this Honorable Court not only realized the weight of the inferior courts' injustice to the Caldwells, but also the magnitude of the appellate court's misapplication of Ohio Supreme Court precedent; otherwise, there would have been no reason for the Court to rule this way.

Furthermore, this matter constitutes one of public or great general interest through the practical effect of the *Caldwell* ruling at the intermediate appellate level. This ruling misapplies *Sopkovich* and allows landowners and general contractors to circumvent worker safety so long as they do not dictate the manner and mode of worker performance *regardless* of their gross negligence in failing to secure their exclusively-controlled work environment. This is the practical effect of the Caldwell case, despite this Court's admonition that it not be cited as authority, because the ruling does not require landowners/general contractors to provide a safe work environment.

Thus, through misapplication, the subordinate courts effectually extinguish the *Sopkovich* requirement for environmental safety for the worker. Workers bear the risk of harm they face in the work environment controlled by the landowner/general contractor, and there is no economic reason for landowners/general contractors to provide a safe work environment. This has all been approved

by the Court in refusing to exercise jurisdiction over the Caldwells' case. With all due respect, how many others must suffer life-shattering tragedies before this matter will be of public or great general interest?

As the Court can foresee, the result in this case is the beginning of a slippery slope of litigation, gross misconduct in environmental safety, and injuries for which Ohio law affords no relief. The Court can prevent this from happening here and now. The *Caldwell* facts are ripe for clear application of *Sopkovich* and clarification of the impact it has on safety in the working environment. Such a ruling would stop its unwarranted, unsupported, and unjust misapplication, as seen herein: the Petersburg Defendants circumvent liability on a core case theory although they violated federal law by failing to trim a boulder on the highwall they exclusively controlled, despite their knowledge of the boulder's presence, and, in result, Mr. Caldwell was crushed by it, and his leg amputated.

Moreover, the Court should recall that it took the time and explained and discussed the legal issues before the Court in this case in *Sopkovich v. Ohio Edison Co.*, 81 Ohio St.3d 628, 693 N.E.2d 233 (1998), upon which the Caldwells rely heavily. Even though the Court addressed a conflict in precedent between the Ninth and Eleventh District Courts of Appeals in accepting *Sopkovich,* the fact remains that the underlying legal issues concerning active participation were important enough for the Court to not only decide the conflict, but also to consider and discuss Ohio's inherently dangerous work rule in Ohio, case by case, point by point, as it related to worker safety in the environment.

The *Caldwell* case is of even greater importance than *Sopkovich* for the simple reason that Ohio Supreme Court case precedent is worthless if it is not correctly applied: *Caldwell* allows the Court to clarify, demonstrate, and mandate correct application of *Sopkovich,* so that its meaning and precedent are not further distorted into something clearly unintended, undesired, and unwarranted

by the Court. Otherwise, as a practical matter, injured workers such as Caldwell are never afforded relief, despite the *Sopkovich* precedent, if intermediate appellate courts continue to misapply it, and this Court continues to deny jurisdiction over such cases.

Therefore, for the foregoing reasons, those reasons stated in their memorandum in support of jurisdiction, and in their response to the Petersburg Defendants' memorandum in support of jurisdiction, the Caldwells respectfully request this Honorable Court to reconsider its January 31, 2007 decision, re-instate their case on appeal, and render a decision on the merits.

Finally, and in the alternative, the Caldwells respectfully implore the Court to reconsider its *sua sponte* dismissal and to take the other alternative under Rule XII of the Ohio Supreme Court Practice Rules and "...summarily reverse...on the basis of precedent" the intermediate appellate court's decision in this instance. As discussed above, the intermediate appellate decision may not be cited as precedent anyway - its reversal would at least assist in establishing the duty Mr. Caldwell argues the Petersburg Defendants owed him.

WHEREFORE, the plaintiffs-appellants, cross-appellees, Douglas S. and Pamela Caldwell, respectfully pray that the Court reconsider its January 31, 2007 decision, re-instate their case on appeal, and render a decision on the merits or, alternatively, that it summarily reverse the opinion of the intermediate court of appeals at issue.

Respectfully submitted,

Douglas S. Caldwell, et ux.

Plaintiffs,

By: Frank X. Duff

John M. Jurco

AND

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MOTION FOR RECONSIDERATION was sent by regular U.S. mail and facsimile to the Petersburg Defendants on February 9th, 2007, as follows:

Via facsimile no. 330-255-0040
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