

IN THE SUPREME COURT OF OHIO

RANDALL J. DOHME,	:	Case No. 2007-0640
	:	
Appellee,	:	
	:	On Appeal from the Montgomery
v.	:	County Court of Appeals,
	:	Second Appellate District
EURAND AMERICA, INC.	:	
	:	
Appellant.	:	

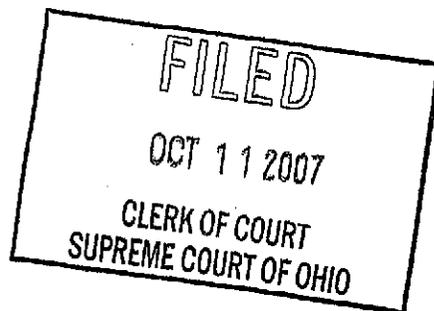
REPLY BRIEF OF APPELLANT EURAND AMERICA, INC.

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ARGUMENT

In its Brief, Eurand demonstrated that the Second District's extension of the limited wrongful discharge exception to Ohio's employment-at-will doctrine is unwarranted and unsupported by existing Ohio law or policy. In response, Appellee Dohme conceded the propriety of the propositions of law proposed by Eurand but argued that the facts of the current case would not violate the adopted propositions.¹ (Appellee Brief at 1, 12, 16) A brief was also filed as an Amicus Curiae by the Ohio Employment Lawyers Association ("Amicus Curiae"), which addressed only Eurand's first proposition of law and argued for boundless protection for the acts of employees it considered "whistleblowers." Neither position has merit.

It remains true that "[t]he traditional rule in Ohio and elsewhere is that a general or indefinite hiring is terminable at the will of either party, for any cause, no cause or even in gross or reckless disregard of any employee's rights, and a discharge without cause does not give rise to an action for damages." *See Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 67 (citations omitted). The decision of the Second District in this case is a large stride toward rendering this rule irrelevant and the varying propositions of law advocated by the Amicus Curiae invite an even larger attack on this longstanding doctrine. This Court should use this opportunity to reject the erosion of the

¹ In his Brief, Dohme used such phrases as "[e]ach proposition fails not for the legal proposal advanced, but upon the simple explanation that the full record actually satisfies each proposition," "enticing this Court's review of two arguably colorable issues . . ." and "[t]hough the expansive legal theories contrived by Eurand certainly appear logical . . ." to express his view of the propriety of the propositions of law. (Appellee Brief at 1, 12, 16)

at-will doctrine and reinforce to the lower courts the limited role of the wrongful discharge exception.²

Proposition of Law No. I:

To satisfy the jeopardy element of a wrongful discharge claim based upon an alleged retaliation for voicing concerns regarding workplace safety an employee must voice concerns to a supervisor employee of the employer or to a governmental body.

A. The Second District's Decision is Unsupported by Existing Law.

Trial courts participate in a day-to-day interaction with Ohio's communities – both business and individual. As a result of this unique vantage point, trial courts oftentimes develop workable, real-life solutions to the disputes before them. In the present case, the trial court used its expertise, reviewed the existing law and the record before it, and developed a holding and an analysis that was workable and well-supported by existing law. To that end, the trial court held:

In the instant case, Plaintiff was discharged for disobeying a specific order from his employer to not speak with a representative from a private insurance company. Plaintiff fails to articulate what public policy Defendant violated when it discharged Plaintiff for such action. Although Plaintiff claims that he was discharged for voicing a concern for work place safety, the insurance representative's purpose for being on the premises was to provide Defendant an insurance quote. Moreover, Plaintiff's statements did not indicate a concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing inspection report is an attempt by Defendant to set him up for a deficient job performance. The only relevance safety has in the instant case is that the missing report contained the results of a fire

² This case involves only the jeopardy element of the wrongful discharge claim. *Painter v. Graley* (1994), 70 Ohio St. 3d 377, 384; *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 69-70 citing *H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U. Cin. L. Rev. 397, 398-399.

alarm system inspection. Based on the facts presented to the court, it appears that due to the deteriorating relations between the parties at the time of the incident, the content of the report would not have changed Plaintiff's basis in making the statements. Plaintiff feared he was being set up for failure, as evidenced by the plain language of his statements, and the lack of any insinuation for work place safety concerns.

(Appx. at 29)

In other words, the trial court looked at what was actually said, to whom it was said, and why it was said, and concluded no public policy was jeopardized by Dohme's termination. The propositions of law proposed by Eurand merely formalize this analysis.

Unfortunately, the appellate court failed to follow this straightforward path. Rather, the Second District strayed from the purpose of the wrongful discharge exception when it expanded the setting to which a wrongful discharge claim would apply and ruled that "[a]n employee who reports safety concerns to the employer's insurance inspector, regardless of the employee's intent in doing so, is protected from being fired solely for the sharing of the safety information." (Appx. at 13) Contrary to the contention of the Amicus Curiae, this ruling extends the public policy umbrella significantly beyond its prior coverage.

The Second District appears to have believed that its conclusion was merely an application of the law announced in *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77, 80. However, as Eurand demonstrated in its Brief, *Pytlinski* makes no such mandate. *Pytlinski* addressed *only* the clarity element of the tort and the appropriate limitations period. There was no discussion whatsoever of the jeopardy element, which is the element at issue in this case, and the footnoted observation cited by the Second District as supporting its decision was merely dicta. This limitation is clearly evidenced

by Justice Cook's concurring opinion in *Pytlinski*. Without the perceived mandate of the *Pytlinski* decision, the Second District's ruling is unsupported by existing Ohio law.

Despite the fact that the Second District's conclusion was unprecedented in Ohio, the Amicus Curiae asks the Court to go even further astray with its decision in this case. To that end, the Amicus Curiae urges the Court to adopt the jurisprudence used in the First Amendment law to develop the parameters to be articulated in this case.

However this proposition is contrary to the approach adopted by other courts. For example, in *Petrovski v. Federal Express Corp.* (N.D. Ohio 2002), 210 F. Supp. 2d 943, the Federal District Court was called upon to interpret the role of the Ohio and federal constitutional free speech protections in Ohio's wrongful discharge tort. The *Petrovski* court concluded that "[i]n light of *Stephenson* and other persuasive authority, I hold that, absent state action, plaintiff's *Greeley* claim based on the public policy embodied in the First Amendment and § 11, Article I fails." *Id.* at 948 citing *Stephenson v. Yellow Freight Systems, Inc.* (Ohio App. 1999), 1999 WL 969817; see also *Mitchell v. Mid-Ohio Emergency Services, LLC* (Franklin Cty App. 2004), 2004-Ohio-5264 at fn4.

Other jurisdictions have also rejected the proposition proposed by the Amicus Curiae. See, e.g., *Tiernam v. Charleston Area Med. Ctr., Inc.* (W. Va. 1998), 506 S.E.2d 578, 589 (citing cases); *Edmondson v. Shearer Lumber Products* (Idaho 2003), 75 P.3d 733; *Grinzi v. San Diego Hospice Corp.* (Cal. App. 2004), 120 Cal. App. 4th 72, 80-81; *Barr v. Kelso-Burnett Co.* (IL. 1985), 478 N.E.2d 1354, 1357; *Korb v. Raytheon Corp.* (Mass. 1991), 574 N.E.2d 370; *Prysak v. R.L. Polk Co.* (Mich. App. 1992), 483 N.W.2d 629, 634; *Johnson v. Mayo Yarns* (N.C. App. 1997), 484 S.E.2d 840, 843; *Drake v. Cheyenne Newspapers, Inc.* (Wyo. 1995), 891 P.2d 80, 82; see also David C. Yamada,

Voices From the Cubicle; Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace, 19 BERKELEY J. EMP. & LAB. L. 1, 22 (1998) (“In arguing for protection of private employee speech under the public policy exception, advocates and commentators have turned to the First Amendment and its state counterparts as the requisite sources of public policy. This argument, however, has had little success in the courts.”); Lisa B. Bingham, *Employee Free Speech in the Workplace; Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 391 (1994) (“The prevailing view is that the First Amendment cannot be the basis of a public policy exception in wrongful discharge claims in the absence of state action.”). In short, constitutional free speech protections applicable only in matters involving state action should not serve as justification to further erode the employment-at-will doctrine in the private sector.

The Amicus Curiae also attempts to draw support for its position by referring to various other statutes that protect “whistleblowers.” However, under Ohio law if an employee does not comply with the dictates of the whistleblower statute, then he or she is not a whistleblower for purposes of a wrongful discharge claim. *See, e.g., Contreras v. Ferro Corp.* (1995), 73 Ohio St. 3d 244; *Keisler v. FirstEnergy Corp.* (Ottawa Cty App. 2006), 2006-Ohio-476; *Celeste v. Wiseco Piston* (Lake Cty App. 2005), 2005-Ohio-6893. Stated another way, the Amicus Curiae urges the Court to adopt the protections afforded to statutory whistleblowers without requiring the employees to comply with any of the procedural safeguards adopted in the same statutory schemes to protect employers. This Court has already rejected that proposition in *Contreras*.

Further, even if the Court was to look for guidance from the complete anti-retaliation schemes adopted in the various legislative enactments, it is clear that the Amicus Curiae overstates the protections available to “whistleblowers” under the other statutory schemes. For example, the conduct sufficient to trigger the anti-retaliation protections under Title VII of the Civil Rights Act of 1964 is very limited. Only retaliation that is “because [an employee] has ‘opposed’ a practice that Title VII forbids or ‘has made a charge, testified, assisted, or participated in’ a Title VII ‘investigation, proceeding, or hearing’” is prohibited. *See Burlington Northern & Santa Fe Railway Co. v. White* (2006), 126 Sup. Ct. 2406. When a claim of retaliation is asserted under the opposition clause, “[t]he general idea is that Title VII ‘demands active, consistent opposing activities to warrant protection against retaliation.’” *Bell v. Safety Grooving and Grinding, LP* (6th Cir. 2004), 107 F. Appx. 607, 610. Isolated or limited complaints will not suffice. In fact, even responding to questions during an internal sexual harassment investigation does not constitute “opposition” for purposes of Title VII. *See Crawford v. Metropolitan Government of Nashville and Davidson County Tenn.* (6th Cir. 2006), 99 Fair Empl. Prac. Cases (BNA) 438. Thus, the open-ended standard urged in this case is even unavailable under the statutory schemes upon which the Amicus Curiae attempts to rely.

No Ohio court that has addressed the issue has believed that Ohio law protects employee complaints irrespective of to whom they are made. Rather the other Ohio Appellate Courts that have been faced with the issue of to whom a “protected complaint” can be expressed have uniformly limited the recipients to internal management or a governmental agency. In *Branan v. Mac Tools* (Franklin Cty. App.

2004), 2004-Ohio-5574 at ¶40, the Franklin County Court of Appeals addressed whether a public policy was implicated when an employee was terminated due to calls made to a co-worker. The *Branan* court rejected private party contact as a basis of a public policy by noting that the employee “arguably had the right to report the incident to administrative or law enforcement authorities” but found that nothing in the law upon which the policy was allegedly based implicated protection for calls made to co-workers. In *Mitchell v. Mid-Ohio Emergency Services L.L.C.* (Franklin Cty App. 2004), 2004-Ohio-5264 at ¶19, the Franklin County Court of Appeals addressed whether a public policy exists under Ohio law in a situation where a physician wrote letters to other physicians expressing concerns over emergency room overcrowding and patient care issues. The Franklin County Court of Appeals rejected the third-party contact as supporting the claim and “decline[d] to extend the *narrow* public policy exception to the employment at-will doctrine this far.” Finally, in *Herlik v. Continental Airlines, Inc.* (6th Cir. 2005), 2005 U.S. App. LEXIS 21784 the Sixth Circuit noted that a public policy could not be jeopardized where the concerns were not expressed to the government or even upper management. *Herlik*, 2005 U.S. App. LEXIS 21784 at *14.

Eurand’s Proposition of law strikes the proper balance between the competing interests of Ohio’s employers and employees. If a safety complaint is to be protected in the wrongful discharge context it must be made to either internal management of the company or to the government – the two entities with a direct ability to remedy the allegedly unsafe condition.

B. The Second District's Holding is an Unworkable Rule of Law.

Eurand's proposition of law not only strikes the proper balance between the competing interests but also is a workable solution that will allow employees and employers alike to regulate their behavior without requiring further litigation to develop the boundaries of the rule. In contrast, the Second District's recognition of an indefinite form of non-governmental third-party contact and indirect market forces (which is itself more confined than the boundless rule urged by the Amicus Curiae) results in a completely unworkable rule of law that is certain to cause confusion and promote litigation. This Court should reject a proposed rule of law that merely muddies the waters of Ohio's workplace.

The difficulty in applying an open-ended rule such as the one adopted by the Second District is demonstrated by a review of the Amicus Curiae's Brief. In establishing its position for the Court, the Amicus Curiae attempted to identify its own proposed rule of law. However, because of the amorphous position it is advancing, even identifying the proposed standard to be adopted by the Court proved no easy task.

More specifically, in its Proposition of Law the Amicus Curiae suggests that the jeopardy element is satisfied any time "an employer learns that an employee has raised protected concerns" regardless of to whom the concerns were raised. (Amicus Brief at 4). In its Summary of Argument, the Amicus Curiae instead suggests that protection is triggered only by communications with "any other private entity that serves important public purposes for the health and safety to all Ohioans." (Amicus Brief at 1) In the Argument section of the Brief, multiple standards are advanced. First, it is suggested that protection is triggered when the recipient of the complaint is anyone who

the employee believes in good faith “could affect plant safety in a positive way.”

Alternatively, the standard is articulated that the jeopardy element is satisfied when a complaint is made to “the government, with an insurance inspector, with a newspaper, or with anyone else whose actions could reasonably lead to a correction of a danger.”

(Amicus Brief at 6) Still later in the Argument section of its Brief, the Amicus Curiae suggests that it is only the content of the complaint that is relevant and any recipient will suffice. (Amicus Brief at 7, 10) Finally, the Amicus Curiae suggests that “as long as the employee raises the concern with someone who can fix it, the public interest is served.”

(Amicus Brief at 14) This collection of different, sometimes conflicting standards vividly demonstrates the problems that will occur when applying the rule of law adopted by the Second District. It is impossible to determine who will satisfy the necessary criteria without fact-specific litigation. There is simply no reason to adopt a standard that invites litigation when a workable, logical alternative is readily available.

This Court should adopt Eurand’s rule of law and hold that to satisfy the jeopardy element, an employee who contends that his discharge was prompted by his workplace safety complaints must show that his complaints were directed to someone within the company with authority to address the issue or to a governmental agency.

C. Dohme’s Conduct is not Protected under Ohio Law.

Normally, no discussion of facts is required in a Reply Brief. However, Dohme’s position is unique. Dohme concedes the propriety of Eurand’s propositions of law but argues that the facts of the present case do not run afoul of those propositions. (Appellee Brief at 1, 12, 16) Unfortunately, Dohme supports his “factual” argument with unsubstantiated allegations from his Complaint, citationless assertions that are

contradicted by his own deposition testimony, and contrived hypotheticals unrelated to actual events. As a result, Eurand feels compelled to briefly highlight the operative facts actually contained in the record.

According to Dohme, his employment with Eurand was terminated as a result of *only* his conversation with a private insurance agent. (Dohme Depo. at 284) The termination occurred following that event and that event was the only issue discussed at his termination. (Dohme Depo. at 247) Although Dohme may have raised other concerns with his neighbor or with management in the past, he worked for more than a year after these conversations and there is no evidence in the record to suggest such incidents motivated his termination.³ Thus, the contact that Dohme identifies as causing his termination was not with a governmental agency or management as required for protection under the first proposition of law.

Secondly, Dohme's suggestion (and the Amicus' adoption) that an improper motive can be inferred from Eurand's policy that information for third parties come from named individuals is undercut by Dohme's own testimony. The record reveals that facility inspections are routine at Eurand. A facility review by an insurer occurred only months before the one at issue in the case. (Dohme Depo. at Ex. Q) Eurand also has routine inspections by local fire officials to insure its plant's safety. (Dohme Depo. at 137-138) The facility is also reviewed by the Food and Drug

³ Dohme testified that he spoke with his neighbor, a member of the local fire department, regarding a small pump fire that occurred while he was on vacation in 2002. However, Dohme admitted in his testimony that he did not mention this fire to the insurance employee in the confrontation that caused his termination, admitted that he was involved in addressing the issue with the pump, and admitted he "was perfectly happy with what they were doing about checking the pumps." (Dohme Depo. at 142, Exhibits G-H, J-L) It is likely Dohme's awareness of this testimony is the reason that Dohme did not reference the pump issue in his Brief.

Administration. (Dohme Depo. at 249-250) As the Amicus Curiae has noted, such individuals have a need for “full and accurate information.” (Amicus Brief at 2, 13)

Because of the frequency of review and the need for those involved to have complete and accurate information, Eurand merely formalized its information delivery process. As Dohme himself explained, the process of having points of contact in such reviews is something “that would normally come out whenever FDA was there or anything like that” and acknowledged that it was a “standard” practice. (Dohme Depo. at 249-250). In short, when Eurand sent an e-mail to all of its Vandalia employees explaining that on March 24 and 25 an employee of an insurance company would be visiting the premises and instructing employees to direct contact with him through certain identified employees, Dohme understood what was expected of him, understood why it occurred, and knew that nothing inappropriate was involved. (Supp. at 70-72, 87; Dohme Depo. at 248-250, Exhibit DD) The “conspiracy theory” suggested in Dohme’s and the Amicus Curiae’ Briefs simply is unsupported by the record.

Reduced to its basics, the record demonstrates that Dohme was terminated because he violated a company directive regarding contact with a vendor to further his own self-interest. Such a termination does not violate public policy.

Proposition of Law No. II:

To satisfy the jeopardy element of a wrongful discharge claim based upon an alleged retaliation an employee must advise the employer or act in a manner that reasonably apprises the employer that the employee's conduct implicates a public policy.

Neither Dohme nor the Amicus Curiae make any argument why Proposition of Law II should not be adopted as the law of Ohio. In fact, the Amicus Curiae's Brief repeatedly stresses that the proper content of the alleged "whistle blowing" is key to triggering protection. (Amicus Brief at 5, 7, 10) Nevertheless, the Second District's decision suggests that Eurand was required to go beyond what was actually said and done, ignore the motivation of the employee engaging in the conduct, and ascertain what unspoken and indirect implications might lie beyond the words and conduct before a response to the conduct can be made. This Court must not impose such extraordinary requirements on Ohio's employers.

A. Eurand's Rule of Law Should be Adopted.

An employer must not be required to read its employees' minds when addressing an employee's behavior. *See, e.g., Tripp v. Beverly Enterprises-Ohio, Inc.* (Summit Cty App. 2003), 2003-Ohio-6821 at P32; *Pfost v. Ohio State Attorney General* (Franklin Cty App. 1999), 1999 Ohio App. LEXIS 1792 at *8 Rather, an employer must be permitted to take its employee's conduct for what it is and the employee's proffered explanation at face value, and respond accordingly. This rule is equally applicable in the jeopardy analysis of a wrongful discharge claim as it is in other areas of Ohio law.

The Sixth Circuit adopted the jeopardy requirement proposed by Eurand in *Jermer v. Siemens Energy & Automation* (6th Cir. 2005), 395 F.3d 655, where it held that:

The question before us is the meaning of the second element, the so-called “jeopardy element.” Our interpretation of this gateway element is as follows: although complaining employees do not have to be certain that the employer’s conduct is illegal or cite a particular law that the employer has broken, the employee must at least give the employer clear notice that the employee’s complaint is connected to a governmental policy. It must be sufficiently clear from the employee’s statement that he is invoking governmental policy that a reasonable employer would understand that the employee relies on the policy as the basis for his complaint. Because the employee here never connected his statements . . . to governmental policy or mentioned or in any way invoked governmental policy as the basis of his complaint, we agree with the district court that his case must be dismissed for the failure to show that his dismissal would “jeopardize” Ohio’s public policy.

Jermer, 395 F.3d at 656. Since the *Jermer* decision, the other courts have endorsed this approach without questioning its rationale or ease of application.

In *Aker v. New York and Co., Inc.* (N.D. Ohio 2005), 364 F. Supp. 2d 661 court noted:

Nothing in plaintiff’s complaint indicates that plaintiff told defendant that, if she was terminated, defendant would be violating the Ohio public policy favoring workplace safety. Because plaintiff did not put the defendant on notice that her termination would be contrary to Ohio public policy, she has not pleaded facts sufficient to establish the jeopardy element.

Id. at 666. Similarly, in *Avery v. Joint Township Dist. Memorial Hosp.* (N.D. Ohio 2007), 2007 WL 1567668, the court held that:

To prove that dismissing employees under circumstances like those involved in her dismissal would jeopardize a particular public policy, Avery must prove that her statement to [her employer] would put a reasonable employer on notice that Avery was invoking a governmental policy as the basis of her complaint.

Avery, 2007 WL 1567668 at 8. Because Avery’s comments, like Dohme’s, appeared to only advance her own interests, the court found she had not satisfied her burden of proof on the jeopardy element. *Id.* at 9. Finally, in *Milhouse v. Care Staff, Inc.* (Mahoning Cty

App. 2007), 2007-Ohio-2709, the court rejected a public policy claim where it found that “Appellant never told her employer that [the advancement of a public interest] was her goal.” *Id.* at ¶ 28.

Requiring an employee to “say what he means” is not only logical but it has its roots in the delicate balancing of the competing interests that is the essence of the jeopardy element. *Urda v. Buckingham, Doolittle, & Burroughs* (Summit Cty App. 2006), 2006-Ohio-6915. The individuals making employment decisions for employers cannot “read minds” and must not be required to extrapolate unstated intentions and consequences. A rule of law that requires managers to run through a protracted series of “what ifs” rather than reacting to what was actually said and done is unprecedented in Ohio law and potently disrupts the balance of responsibilities in the workplace. This Court must reject this proposition and instead adopt the proposition of law advocated by Eurand.

B. Dohme’s Conduct is not Protected Under Ohio Law.

Upon reading his Merit Brief, a reader could reach the mistaken conclusion that Dohme was terminated when he responded to Eurand’s request that he speak with an insurance appraiser and then truthfully expressed concerns stemming from a fire in which he was involved more than two years earlier. However, every facet of this yarn is undercut by Dohme’s own sworn testimony.

First, Dohme is mistaken in his contention that Eurand “invited his role” and that he approached the insurance representative “only at the request of Eurand.” (Appellee Brief at 6, 9) Dohme’s own testimony contradicts this position. In truth, Dohme received a telephone call from a receptionist who was merely looking for one of

the specified contacts and Dohme took it upon himself to contact the insurance representative. (Dohme Depo. at 252) Specifically, Dohme testified, "I said I will try to find him but I'll come down and greet him." (Supp. 73-74; Dohme Depo. at 251-252) Thus, Dohme's confrontation of the insurance representative was hardly at the "request" of any manager at Eurand.

Second, when Dohme sought out the insurance company employee he did not merely "greet" the individual and he certainly did not relay concerns about a 2001 fire. Instead, Dohme immediately took out papers and, as Dohme describes it, "I just said you might want to find out what happened with that inspection, and that was the end of the conversation." (Supp. 73; Dohme Depo. at 251) Contrary to the inference suggested by the Second District, Dohme did not contend to the agent that he was concerned because the inspection was not completed. Rather, Dohme stated that he believed that the record of the inspection was removed to make it look as if he did not perform it. To that end, Dohme specifically testified:

Q. What were you intending to suggest to her then?

A. I didn't know who it was that took it out of the computer. I assumed it was her so I just said he already knows the answer, tell him the truth....

Q. Did you believe that Dell had done something inappropriate by taking that out?

A. I had believed that Dell did it because they all had passwords, but Dell was the only one that was actively working in MP2. I think she's probably the one that did it.

Q. But when you say it, do you mean - -

A. Took the fire alarm inspection out. I think she was either told or she did something to take that fire inspection out of there.

(Supp. at 75-76; Dohme Depo. at 253-254)

Finally, in his Brief Dohme goes to great lengths to stress the role of a 2001 fire in his motivation for the contact with the insurance representative. Tellingly, through 299 pages of deposition testimony regarding solely his employment with Eurand and his termination, Dohme failed to make a single mention of the August 2001 fire. A reference to this motivation is also absent from Dohme's Complaint. Instead, only in his post-deposition, post-motion for summary judgment affidavit did Dohme suggest that this never-before-mentioned August 2001 fire was his "motivation" for violating Eurand's directive. However, even in his affidavit Dohme acknowledges the true motivation of his actions when he admits that he "was concerned not only for my self-interest, given my most recent performance appraisal. . . ." (Dohme Affidavit at ¶ 8)

In short, Dohme feared only that he was being "set up" for a performance deficiency and told the insurance employee only that – "I told Mr. Lynch, somebody made this disappear and I'm afraid they're trying to make it look like I wasn't doing my job."⁴ (Supp. 77; Dohme Depo. at 255) Any suggestion that the conversation with the insurance representative involved more substance than that is merely an after-the-fact rewrite of the incident.

As found by the trial court and acknowledged by the Second District, the record in this case is clear. "Plaintiff's statements did not indicate a concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing report is an attempt by Defendant to set him up for a deficient job

⁴ Dohme' admits that he had previously speculated that management's behavior towards him following his return from leave was "a textbook way of getting rid of somebody" and his concern in raising the removed entry was only to prevent that from happening. (Dohme Depo. at 231, 255)

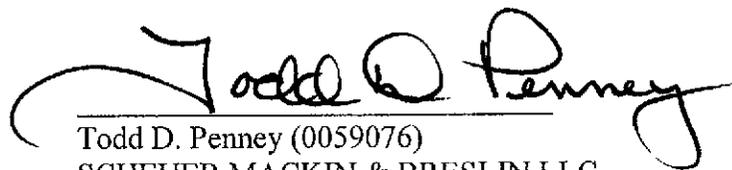
performance.” (Appx. at 29) As the trial court noted, the subject of the removed inspection was irrelevant to Dohme. (Appx. at 29)

Dohme did not express a workplace safety concern to the insurance appraiser nor was he motivated by workplace safety issues. This too is insufficient to satisfy the jeopardy element of his wrongful discharge claim.

CONCLUSION

The decision below is fundamentally wrong and is a dangerous encroachment on the at-will doctrine. Thus, the decision below must be reversed.

Respectfully submitted,

A handwritten signature in black ink that reads "Todd D. Penney". The signature is written in a cursive style with a large, sweeping initial "T" and a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief of Appellant was sent by ordinary U.S. Mail to

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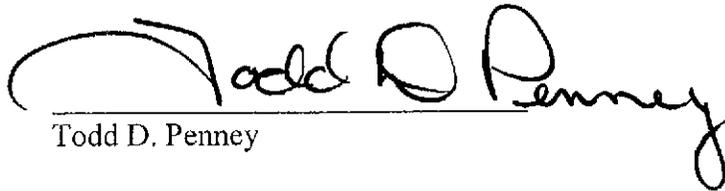
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A handwritten signature in black ink that reads "Todd D. Penney". The signature is written in a cursive style with a large, sweeping initial "T".

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