

IN THE SUPREME COURT OF OHIO

EURAND AMERICA, INC.

CASE NO. 07-0640

Appellant,

vs.

RANDALL J. DOHME

Appellee.

On Appeal from the Montgomery
County Court of Appeals,
Second Appellate District

Court of Appeals
Case No. 21520

**REPLY BRIEF OF APPELEE DOHME PER
COURT'S OCTOBER 1, 2008 ENTRY**

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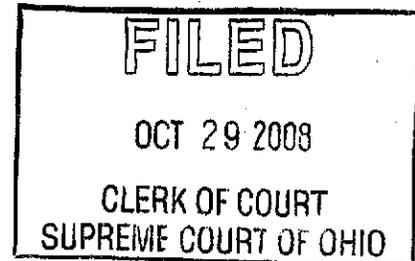


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REPLY BRIEF

Eurand's first proposition of law erroneously proceeds upon mere speculation and irrelevant hypothetical. *See*, Merit Brief Addressing Proposition of Law No. 1 ("Merit Brief") at 16. The "what if" colloquy conjured by Eurand simply is not relevant to this appeal. Eurand's argument distances itself from the underlying record, as well as the "specific safety policy in existing law that applied to his specific circumstances." *Id.*

A hallmark of judicial restraint is to rule only on those cases that present an actual controversy. To do otherwise -- to simply answer a hypothetical question merely for the sake of answering it--would make this court nothing more than an advisory board. This Court does not provide advisory opinions. *Ahmad v. AK Steel Corp.*, 119 Ohio St.3d 1210, 2008-Ohio-4082, *citing Cascioli v. Cent. Mut. Ins. Co.* (1983), 4 Ohio St.3d 179, 183, 448 N.E.2d 126.

The "actual controversy" under Eurand's first proposition of law is whether Dohme pleaded his wrongful discharge public policy claim with sufficient clarity and specificity so as to adequately notice Eurand. Because Dohme's allegations articulate a "specific safety policy in existing law that applied to his specific circumstances," Eurand's first proposition of law must be resolved in Dohme's favor. *Cf.*, Merit Brief at 16.

Dohme's allegations nearly parallel the allegations previously considered by this Court in *Pytlinski*. *Cf.*, Complaint at ¶¶ 7, 10, 11, 30, 31, 32, 33, 34, and 37. *See*, *Pytlinski v. Brocar Prod., Inc.* (2002) 94 Ohio St.3d 77, 78 2002-Ohio-66:

In 1997, Larry J. Pytlinski, appellant, was hired by appellee John Helmsderfer, the president of appellee Brocar Products, Inc. ("Brocar").(fn1) While employed with Brocar, Pytlinski complained several times to Helmsderfer regarding working conditions he believed jeopardized employee health and safety. Subsequent to making these complaints, Pytlinski was demoted. On February 5, 1998, Pytlinski delivered a memorandum to appellees identifying health violations occurring at Brocar that Pytlinski believed to be in violation of Occupational Safety and Health Administration ("OSHA") regulations. Pytlinski's employment was terminated the next day.

Like Pytlinski, Dohme pleaded that he "complained several times" to Eurand "regarding working conditions he believed jeopardized employee health and safety." *See, e.g.*, Complaint, ¶ 7, 30, 32. Like Pytlinski, "[s]ubsequent to making these complaints, [Dohme] was demoted." *Id.*, ¶ 33, 34. Like Pytlinski, Dohme also memorialized his safety concerns to Eurand. *Id.*, ¶ 30-34, *see also, e.g.*, Dohme Depo. Ex. I. And, like Pytlinski, Dohme was terminated. *Id.*, ¶ 37.

Eurand was fully aware of Dohme's several concerns related to workplace safety. Incongruently, Eurand applauds Pytlinski's internal complaints of OSHA violations, yet ignores Dohme's substantially similar conduct. *See*, Merit Brief at 12. Fairly viewed, there is no marked distinction between Pytlinski and Dohme's protected conduct. Under the law crafted by *Pytlinski*, nothing more *specific* is required. The clarity element is sufficiently demonstrated. *Cf., Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 152.

Eurand's purposeful confusion of the clarity and jeopardy also casts unfair criticism upon the Second District Court of Appeals, which did nothing more than evaluate existing law relative to Dohme's allegations:

The Supreme Court has recognized the abundance of Ohio statutory and constitutional provisions that support workplace safety and form the basis of Ohio's public policy, which is 'clearly in keeping with the laudable

objectives of the federal Occupational Safety and Health Act.’ *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 152, 677 N.E.2d 308. See also *Pytlinski v. Brocar Products, Inc.*, 94 Ohio St.3d 77, 89, 2002-Ohio-66. Ohio’s Fire Code includes rules relating to the installation, inspection, and location of fire protection equipment. R.C. 3737.82; O.A.C. 1301:7-7-01, *et seq.* Further, there are federal laws relating to fire protection and employee alarm systems. 29 C.F.R. _ 1910.164, 1910.165. Employers also are subject to inspections from local fire authorities. There is a clear public policy favoring workplace fire safety. Therefore, retaliation against employees who raise concerns relating to workplace fire safety contravenes a clear public policy.

* * *

We do not suggest that Dohme will or should prevail on his claim of wrongful discharge. Rather, we conclude only that the trial court erred in finding that there was not a public policy that protects Dohme from being fired for sharing information with an insurance inspector that relates to workplace safety. In order to prevail on his claim, Dohme must carry his burden to prove the remaining elements of a wrongful discharge claim.

Dohme v. Eurand Am., Inc., 170 Ohio App.3d 593, 599, 602, 2007-Ohio-865.

This measured analytical framework is precisely that which this Court has consistently advocated:

We note as well that a finding of a “sufficiently clear public policy” is only the first step in establishing a right to recover for the tort of wrongful discharge in violation of public policy. In cases where this required element of the tort is met, a plaintiff’s right of recovery will depend upon proof of other required elements. Full development of the elements of the tort of wrongful discharge in violation of public policy in Ohio will result through litigation and resolution of future cases, as it is through this means that the common law develops.

Painter v. Graley (1994), 70 Ohio St.3d 377, 384, 634 N.E.2d 51, 57.

Further indicative of Eurand’s blurred analysis, many of the cases it presently references in support of its’ first proposition of law, were expressly distinguished or rejected by the Second District during the appellate district’s consideration of the jeopardy element:

Eurand also argues that summary judgment was appropriate because Dohme cannot establish the jeopardy element. The trial court did not specifically address this element, but the trial court's discussion of the employee's self-interest in bringing a concern to the insurance inspector, according to Eurand, arguably implicates the jeopardy element. Because the jeopardy element concerns a question of law, we will address Eurand's argument. According to Eurand, Dohme cannot establish that the public policy favoring workplace safety is jeopardized by Dohme's discharge from employment. Eurand cites four cases in support of its argument. We find that all four of these cases are inapposite.

Dohme, supra, 170 Ohio App.3d at 600 (emphasis supplied)

In two of the same cases revisited by Eurand within its first proposition of law, the Second District flatly rejected Eurand's reliance: finding in one instance, *Mitchell v. Mid-Ohio Emergency Services, L.L.C.*, Franklin App. No. 03AP-981, 2004-Ohio-5264, that Eurand's reliance was "far from Dohme's situation, which involves the more precise public policy relating to fire safety;" and finding in the other, *Herlik v. Continental Airlines, Inc.* (6th Cir. Oct. 4, 2005), No. 04-3790, "the *Herlik* opinion misconstrues Ohio law on this issue. The Supreme Court has made it very clear that a public policy preventing termination of an employee may flow from sources other than a statute that specifically prohibits firing employees for engaging in a particular protected activity." *Dohme, supra*, 170 Ohio App.3d at 602.

The balance of authority cited by Eurand similarly fails to offer any meaningful application related to Eurand's first proposition of law. The Second District held, "Retaliation against employees who raise concerns relating to workplace fire safety contravenes a clear public policy." *Dohme, supra*, 170 Ohio App.3d at 599 (emphasis supplied); *Cf., Pytlinski, supra*, 94 Ohio St.3d 80. But, Dohme was even more specific than credited below.

Dohme pleaded that he “became aware of environmental safety concerns related to diaphragm pumps and their attendant venting that he reasonably believed posed an imminent risk of physical harm to employees and the physical integrity of the facility itself,” Complaint, ¶ 30, and that he “was wrongfully terminated in contravention of public policy for his perceived role in an on-site insurance adjuster’s discovery of certain violations relative to Defendant’s fire alarm system, which, upon information and belief, jeopardized workplace safety and placed employees in an unreasonable and dangerous setting.” *Id.*, ¶ 37.

Eurand’s reliance on *Lesko v. Riverside Methodist Hosp.*, 2005-Ohio-3142 and *Schwenke v. Wayne-Dalton Corp.*, 2008-Ohio-1412, is inapposite to what Dohme alleged. *See*, Merit Brief at 13-14. As illustrated above, Dohme did not generically allege “safety,” but rather pleaded specific facts supported by specifically crafted public policy, which he in turn related to his discharge. *Id.*

Finally, Eurand’s reference to *Miller v. Medcentral Health Systems, Inc.*, 2006-Ohio-63 and *Krickler v. City of Brooklyn*, 149 Ohio App.3d 97, raises the same sort of hypothetical circumstances that are not pertinent to this appeal. *Ahmad, supra*, 119 Ohio St.3d 1210, *citing Cascioli, supra*, 4 Ohio St.3d at 183. Eurand’s firing-for-effect is not helpful or relevant to the matter of this appeal.

As this Court first discussed in *Kulch*, it is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety. *Kulch, supra*, 78 Ohio St.3d at 150-151, 677 N.E.2d at 321. And in determining the legal viability of Pytlinski’s public policy claim, this Court determined, the “complaint clearly sets forth the allegation that appellees

retaliated against him for lodging complaints regarding workplace safety.”

Pytlinski, supra, 94 Ohio St.3d 80.

Under Ohio law, there is no, nor need there be, any requirement that employers “identify a specific statement of policy” to properly plead a wrongful discharge public policy claim. *See*, Merit Brief at 15. This Court has already set forth a clear, staged framework that controls and guides the prosecution of public policy claims, which already effectively ensures that not every fact pattern will “contort” to a workplace safety case. *Painter*, 70 Ohio St.3d at 384, fn. 8; Merit Brief at 15.

The doctrine of stare decisis is designed to provide continuity and predictability in our legal system. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 226, 2003-Ohio-5849. We adhere to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs. *Id.*, citing, *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 4-5, 539 N.E.2d 103. Those affected by the law come to rely upon its consistency. *Galatis, supra*, 100 Ohio St.3d at 226, citing, *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604. Accordingly, stare decisis is long revered. *Galatis, supra*, 100 Ohio St.3d at 226, citing, 1 Blackstone, Commentaries on the Laws of England (1765) 70 (“precedents and rules must be followed, unless flatly absurd or unjust * * *”).

Eurand identifies nothing “flatly absurd or unjust” about *Painter’s* progeny, or the manner in which the same was applied to the record of this appeal. Instead,

Eurand's efforts to date have depended on its' ignorance of the pleadings and the record. This Court should not be persuaded to bend upon such a shallow argument.

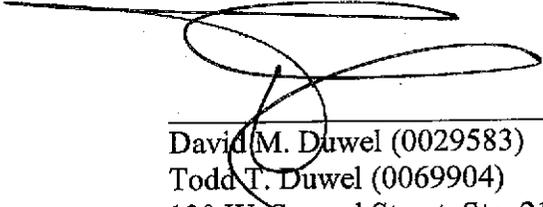
Rather, this Court need only re-emphasize the plain parameters of *Painter*, and remind employers and appellate districts alike of the unnecessary pains caused by Eurand's blurred analysis. Eurand's first proposition of law fails upon the record and under the considerable weight of this Court's existing precedent.

CONCLUSION

The decision of the Second District Court of Appeals expressly followed the parameters of *Painter*, and should be identified as an example to other Ohio appellate courts faced with the staged legal and factual examination of the wrongful discharge public policy tort.

Respectfully submitted,

DUWEL & ASSOCIATES

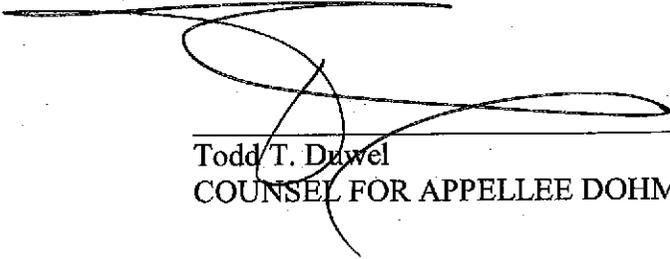


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Dohme's Reply Brief (per the October 1, 2008 Entry) was served via regular U.S. mail upon counsel for Appellant, Todd D. Penney, 11025 Reed Hartman Highway, Cincinnati, OH 45242, Defendant's counsel, via regular U.S. mail, this 29 day of October 2008.



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