ORIGINAL

IN THE SUPREME COURT OF OHIO

EURAND AMERICA, INC.	CASE NO. 10-1621
Defendant-Appellant,	
vs.	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
RANDALL J. DOHME	
Plaintiff-Appellee.	Court of Appeals Case No. 23653

MEMORANDUM IN RESPONSE OF RANDALL J. DOHME

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EURAND'S DISCRETIONARY APPEAL DOES NOT RAISE A MATTER OF PUBLIC OF GREAT GENERAL INTEREST

In this matter, the Second District Court of Appeals construed a specific and particular set of facts against an already clearly defined public policy exception to an employee's at-will employment. Though Eurand America Inc. may disagree with the appellate court's ultimate construction of these facts, the court cannot be fairly accused of confounding precedent or unnecessarily expanding its' breadth.

Rather, the Second District expressly turned to "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.'" *See,* Opinion at 9, citing, *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 152, 677 N.E.2d 308; *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St.3d 77, 89, 2002-Ohio-66. After identifying several other factually applicable statutory sections, the court concluded, "There is a clear public policy favoring workplace safety. Therefore, retaliation against employees who raise concerns relating to workplace fire safety contravenes a clear public policy." *See*, Opinion at 9.

Eurand's jurisdictional motion is overreaching and far beyond the finite scope of issues before the Second District. Confirming this assertion, since the Second District's original 2007 Opinion that first prompted Eurand's requested certiorari, no Ohio court has cited *Dohme* for the substantive propositions at issue herein. Nor has Ohio's wrongful discharge public policy tort spawned the expanse cautioned by Eurand. Rather, *Dohme* is but one decision amidst the panoply of Ohio public policy authority that has been decided on its particularized set of facts. This Court should deny Eurand jurisdiction.

Proposition of Law No. 1: To satisfy the clarity element of a wrongful discharge claim an employee must articulate a policy based in existing Ohio law that addresses the specific facts of the incident rather than merely making a generic reference to workplace safety.

From the beginning of this litigation, Eurand has consistently ignored the specific identity of Dohme's public policy claim, and the undisputed fact that such policy "is manifested ... in a statute ... or the common law." *Leininger v. Pioneer National Latex* (2007), 115 Ohio St.3d 311, 314, 875 N.E.2d 36. Dohme did not loosely allege workplace safety, nor conjure up a "generic" claim. His *Greeley* claim was based on this Court's developed public policy favoring employee advocacy for workplace safety, and specifically, the danger associated with Eurand's administration of its' fire alarm system. *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, 234, 551 N.E.2d 981, 987; *cf.* Complaint at ¶¶ 7, 30-33, 37. Further, Dohme's wrongful discharge claim was made with Eurand's full knowledge and understanding of Dohme's internal and external complaints about Eurand's fire safety, and the attendant issues and investigations related thereto.

At all times material, Eurand knew, or should have known, of the "specific facts" that formed the "gist" of Dohme's claim, and cannot ignore such knowledge in order to better a contrived defense. To require any broader "articulation" would ignore the shared experiences and workplace familiarities each party brought to the lawsuit. Whether *amicus* or some other non-party could appreciate such "articulation" has never been the test.

The parties to this lawsuit were at all times well aware of the relevant circumstances such that the proposed "articulation" would have been superfluous.

Interested, yet distant bystanders must be charged to perform their own review of circumstances to determine applicability to their cause. The affected parties need not be required to shoulder the burden of such non-party inquiry, as requiring the same would unravel the development of the tort itself. Borrowing from former Chief Justice Moyer, "because both the text and the underlying logic of [the Second District's decision], as well as the nature of the tort of wrongful discharge in violation of public policy," Eurand's strained interpretation of the Decision below, achieves only personal interest, and not the "public or great general interest" required to invite this Court's jurisdiction. *Cf. Bickers v. W. & S. Life Ins. Co.* (2007), 116 Ohio St.3d 351, 358, 879 N.E.2d 201.

The complaint "addressed the specific facts of the incident," which, in part, formed his lawsuit, and "satisfy the clarity element of a wrongful discharge claim * * * [by] articulat[ing] a policy based in existing Ohio law." *See, e.g.,* Complaint at:

> ¶ 7 ("As Engineering Supervisor, Plaintiff would routinely notice Defendant as to ongoing organizational concerns, employee performance, overtime issues, plant safety and a flawed chain of communication or command in an effort to better maximize Defendant's business operation and encourage workplace safety"); ¶ 30 ("In the course of his employment and following a fire at the facility on February 10, 2002, Plaintiff 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"); ¶ 31 ("Plaintiff informed Cruz and Larned [his supervisors] of his concerns, and following a discussion regarding the same, was instructed to keep the matter confidential"); ¶ 32 ("During the next several months, Plaintiff continued to express concerns to Cruz and periodically requested additional meetings to further discuss Plaintiff's workplace safety concerns"); ¶ 33 ("On or about June 17, 2002, a meeting was scheduled and was to include Plaintiff, Cruz and Dan Salain, vice president of plant operations, in order to further explore the safety concerns. Despite the same, Cruz failed to attend the meeting, purportedly upon the earlier expressed sentiments on or about May 30, 2002 that Plaintiff was a "troublemaker" and that Plaintiff's continued disagreement as to workplace safety concerns would lead to termination"); and ¶ 37 ("On or about March 27, 2003, Plaintiff 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. Despite reasonable concerns to the aforementioned system, the site and the employees themselves, Defendant actively attempted to prevent employee communication with said adjuster pursuant to an interoffice email sent by management personnel to all employees, including Plaintiff, days prior to the adjuster's arrival, which expressly prohibited communication with said adjuster").

These allegations are neither "generic" nor the type of hyperbole argued by Eurand. Further, Eurand's Proposition does not comport to the underlying facts of this case, nor is descriptive of the rationale of the Second District.

Dohme's public policy claim largely mirrored this Court's analysis in *Pytlinski* (where that plaintiff "claimed that he was discharged in violation of Ohio public policy favoring workplace safety because the discharge was predicated upon his complaints regarding workplace safety," *Pytlinski, supra,* 94 Ohio St.3d at 79.)

Corroborative of Dohme's sufficient specificity - both originally pleaded and consistently argued - and despite the "abundance" of supportive authority related to workplace safety, the Second District addressed specific statutes involving fire safety. *See,* Opinion at 9, citing, R.C. 3737.82; O.A.C. 1301:7-7-01 *et seq*. and 29 C.F.R. §§1910.164, 1910.165 ("Ohio's Fire Code includes rules relating to the installation, inspection and location of fire protection equipment * * * Further, there are federal laws relating to fire protection and employee alarm systems.")

"Where the General Assembly has spoken, and in so speaking violated no Constitutional provision, [courts] must not contravene the legislature's expression of public policy." *Painter v. Graley* (1994), 70 Ohio St. 3d 377, 385, 639 N.E.2d 51. "Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy." *Id.* Eurand seeks to

silence both this Court and the General Assembly's clear pronouncements on this public policy.

As this Court has consistently held, "We have confidence that the courts of this state are capable of determining as a matter of law whether alleged grounds for a discharge, if true, violate a clear public policy justifying an exception to the common-law employment-at-will doctrine, thereby stating a claim." *Painter,* 70 Ohio St.3d at 383-384. Further, while discussing the origin of the exception to Ohio's at-will employment doctrine, this Court in *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 68-69, 652 N.E.2d 653, observed:

> In adopting the exception, it is often pointed out that the general employment-at-will rule is a harsh outgrowth of outdated and rustic notions. The rule developed during a time when the rights of an employee, along with other family members, were considered to be not his or her own but those of his or her paterfamilias. The surrender of basic liberties during working hours is now seen "to present a distinct threat to the public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out" (citations omitted).

In *Kulch*, this Court followed the suggestion of the *Painter* Court and applied the analysis of Professor Perritt, who set forth the elements of a wrongful discharge claim in violation of public policy. *Kulch,* 78 Ohio St.3d at 150-151; *Painter,* 70 Ohio St.3d at 384. The elements of the tort do not include a requirement of specificity, or something beyond traditional notice pleading. Only that the discharge by the employer be related to the public policy. *Pytlinski,* 94 Ohio St.3d at 80.

Pytlinski found: [I]t is the retaliatory action of the employer that triggers an action for violation of the pubic policy favoring workplace safety." *Pytlinski*, 94 Ohio St.3d at 80. Like *Pytlinski*, Dohme's complaint plainly alleges Eurand retaliated against him for

lodging complaints regarding workplace safety." *Id.* Eurand's proffered justification for Dohme's discharge is simply not ripe at the time the clarity element is engaged.

The Second District did not award judgment to Dohme; that much was left for a jury's deliberation. It resolved the legal issues, and passed the factual discrepancies. In so doing, it looked beyond Eurand's subjective, factually manipulated interpretation of Dohme's public policy claim, and determined that Dohme's discharge not only related to a cognizable public policy, but also jeopardized one, and as such determined that Dohme's claim should be determined by a jury capable of assessing the parties' true intentions.

As contemplated by this Court, that is how public policy is to be developed:

> 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,* 70 Ohio St.3d at 384.

The Second District did no more than what has long been contemplated, intended and favored by this Court. Eurand's clear attempt to blur the multi-staged analytical framework of any public policy claim, or the deference extended by this Court to the state courts' concerning their collective construal of the underlying affected policies is inapposite to the direction outlined by this Court. Eurand's first proposition of law must be denied.

Proposition of Law No. 2: **To satisfy the jeopardy element of a wrongful discharge claim upon an alleged retaliation voicing concerns regarding workplace safety an employee must voice the concerns to a supervisory employee of the employer or to a governmental body.**

Proposition of Law No. 3: **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.**

Fundamentally, Eurand's final two Propositions attempt to turn the tort of wrongful discharge in violation of public policy on its head. Despite the "fits and starts" the tort's 20-year history has encountered, Eurand's urged Propositions have never formed this Court's intent. *Cf., Bickers*, 116 Ohio St.3d at 352. Rather, the tort is tailored to Ohio's at-will employees who are the intended beneficiaries of its protection. As recognized by this Court long ago, "Laws should be like clothes. They should be made to fit the people they are meant to serve." *Greeley*, 49 Ohio St.3d at 235, citing, (Clarence Seward Darrow), Bradley, Daniels & Jones, The International Dictionary of Thoughts (J.G. Ferguson Pub. Co. 1969) 429. "Children and employees, as others, are entitled to such protections." *Greeley*, 49 Ohio St.3d at 235.

The "jeopardy element" is acutely positioned to assess whether "dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize Ohio's public policy." *Kulch*, 78 Ohio St.3d at 151. If anything, this element involves inquiring into the existence of any alternative means of "promoting the particular public policy to be vindicated..." *Wiles v. Medina Auto Parts* (2002), 96 Ohio St.3d 240, 244,

773 N.E.2d 526. Given Ohio employees at-will employment status, this element constitutes an effective barrier between an employer's unlawful encroachments, and has never turned on overt requirements tailored to guard against an employer's perceived prejudice. Rather, the particular "circumstances" of every wrongful discharge claim should be uniquely examined, as below, to evaluate a plaintiff's harm and the public's interest. Requiring more of an employee in an already employer-leveraged work environment would unfairly "confuse" if not compromise the intended benefits of the tort, and unnecessarily cater to employers who prefer to stick their heads in the sand. *Leininger*, 115 Ohio St.3d at 315.

Regardless, due to the inherent similarity in Eurand's second and third Propositions, Dohme has consolidated his response to each as such responses are equally applicable. Notably, both Propositions are predicated upon at least one flawed premise. For this Court to adopt either of Eurand's proposals, it, like Eurand, must unreasonably limit review of the record to a five-minute conversation on March 25, 2005, and elect to ignore the balance and totality of the other circumstances that otherwise caused and contributed to Dohme's claim.

The relevant circumstances are not limited to Dohme's conversation with an insurance agent, or whether same violated a curious company directive. Such inquiry must also include why Eurand instructed Dohme not to talk to the agent, why Eurand refused to recognize the other occasions Dohme advised Eurand of his workplace safety concerns, and the probative affect of Eurand's ineffective distribution of job assignments and oversight concerning its fire safety equipment.

When the totality of the record is considered, Dohme's actions and conduct plainly satisfy Eurand's final Propositions. But, by ignoring the same, Eurand has engaged in an end-round jurisdictional play to entice this Court's review of Propositions that are not supported by the record.

Mindul of Dohme's entire work experience at Eurand, and as the record capably establishes, Dohme "voice[d] concerns" to both his supervisor(s) and an appropriate "governmental body." Such advice and conduct by Dohme reasonably "advise[s] and/or apprises the employer that the employee's conduct implicates a public policy." Eurand should not be heard to argue that Dohme's concerns caught the company by surprise, or that Dohme's concerns were only manufactured to fuel Dohme's wrongful discharge claim.

The elements of the tort do not include a requirement that there be a complaint to a specific entity, only that the discharge by the employer be related to the public policy. H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie? (1989), 58 U.Cin.L.Rev. 397, 398-399. *See*, *Pytlinski*, 94 Ohio St.3d at 80, fn. 3.

Accordingly, this Court in *Pytlinski* specifically "disagree[d] with any contention * * * that [the employee's] claim fail[ed] because his complaints were not filed with OSHA * * * [I]t is the retaliatory action of the employer that triggers an action for violation of the pubic policy favoring workplace safety." *Pytlinski*, 94 Ohio St.3d at 80. Like *Pytlinski*, Dohme's complaint "clearly sets forth the allegation that [Eurand] retaliated against him for lodging complaints regarding workplace safety." *Id*; *Infra* at p. 4.

However, even if presently deemed required, Dohme's allegations squarely apprised Eurand both pre- and post-litigation, particularly due to the work environment that was defined by the Dohme-Eurand relationship and the parties shared experiences. *Cf.*,

Dohme's Affidavit, attached to his Memorandum in Opposition, ¶¶ 3-8. Dohme also expressed other workplace safety concerns to Richard Francisco, a captain with the Vandalia Fire Department. (Dohme Depo. 134-141) As a result of those conversations, an investigation of the plant was conducted. (Id.) And while that particular investigation returned no city code violations, given Dohme's considerable concerns, which included cyclohexane leaks (a highly volatile hazardous material), improper exhausting, deteriorating wires leading to the pump in the 1000 gallon suite, etc., (Id.), Francisco advised Dohme to consult with an attorney. (Dohme Depo. at 137) Aside from the investigation above identified, Francisco has been in the building "several" other times. (Id.)

Based on Francisco's recommendation, Dohme's attorneys were involved, and his workplace safety concerns were relayed to Eurand. (Dohme Depo. at 141) Eurand was fully aware of Dohme's several concerns related to workplace safety. Under the law crafted by *Pytlinski*, nothing more is required. Though Eurand has sought to minimize its workplace safety issues, Dohme's fears were real, documented and routinely expressed to Eurand.

Finally, despite its feigned benevolence on behalf of all Ohio's employers, Eurand is only asked in this matter to defend against a well-rooted exception to at-will employment already found to exist: workplace safety. Regardless of Eurand's convenient perspective of the state of wrongful discharge law in Ohio, it matters little on the limited issues involved in this case. Nor have such concerns proven true. No Ohio appellate court has relied upon the Second District's *Dohme* Opinion(s) to fashion a decision related to the substantive issues raised. Instead, Ohio appellate courts have done precisely what this

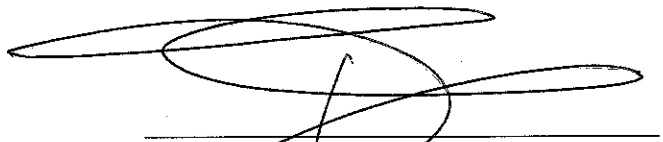
Court has long instructed; examine each case on its particular merits and determine whether those instances impinge upon Ohio's clear public policy.

CONCLUSION

For these reasons, Dohme respectfully requests that this Court deny Eurand's jurisdictional request and decline jurisdiction to decide the case on the merits. This is not a case of public or great general interest, and it does not upset the existing state of the law in this area. Instead, this is a fact-sensitive matter arising from a firmly rooted exception to the employment at-will doctrine based upon a clear public policy that if restricted would jeopardize Ohio's public policy that promotes the rights of employees.

Respectfully submitted,

DUWEL LAW



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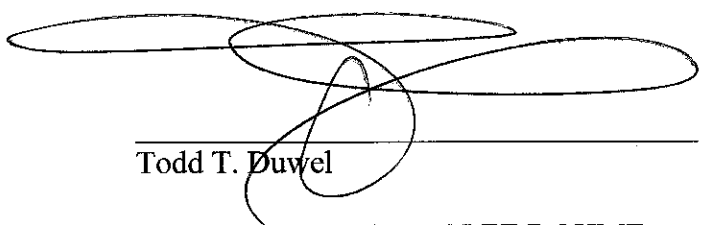
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Memorandum in Response has been served via regular U.S. mail upon counsel for Eurand, Todd D. Penney, 11025 Reed Hartman Highway, Cincinnati, OH 45242, Defendant's counsel, and Donald R. Keller, 100 South Third Street, Columbus, Ohio 43215, Counsel for Amicus Curiae, Ohio Management Lawyers Association, via regular U.S. mail, this 12th day of October 2010.



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