ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO.

On Appeal from the Eighth Appellate District
Cuyahoga County, Ohio
Court of Appeals Case No. 10-095399

11-1076

BRUCE R. HOUDEK, et al.

Plaintiffs-Appellees,

v.

THYSSENKRUPP MATERIALS NA, INC., *et al.*,

Defendant-Appellant

APPELLANT THYSSENKRUPP MATERIALS NA, INC.'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. STATEMENT OF GREAT GENERAL PUBLIC INTEREST

This is a case of great general public interest. The Eighth District Court of Appeals in interpreting Ohio's employment intentional tort statute has failed to follow this Court's clear and concise decisions in *Kaminski v. Metal Meyer Products Co.* (2010), 125 Ohio St.3d 250 and *Stetter v. R.J. Corman Derailment Servs. L.L.C.* (2007), 125 Ohio St.3d 280. Instead, the *Houdek* Court has chosen to disregard the express language of R.C. 2745.01 which this Court painstakingly reviewed and upheld in *Kaminski* and *Stetter.* If left unchecked and unaddressed, the *Houdek* decision will set a dangerous precedent that is wholly at odds with language crafted by the legislature and the decisions of this Court. This decision will enable parties to pursue an employer intentional tort claim under R.C. 2745.01(B) absent proof of an employer's specific intent to cause injury.

In *Kaminski* and *Stetter,* this Court analyzed the statutory language of R.C. 2745.01, concluding the statute was constitutional after taking note of the long standing historical struggle between the courts of Ohio and the Ohio General Assembly in the framing of the scope of an employer intentional tort.[1] In rendering these decisions, this Court specifically rejected the employee's contention that R.C. 2745.01 simply codified the prior common law cause of action developed in *Blankenship v. Cincinnati Milacron Chems., Inc.* (1982), 69 Ohio St.2d 608, *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St. 301 624 and *Johnson v. BP Chems, Inc.* (1999), 85 Ohio St.3d 298. In that regard, the *Stetter* Court reasoned:

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[1] The *Kaminski* Court dedicated eight and a half pages of its opinion to this "developmental

> To accept petitioners' view of the statue, we must ignore the history of employer intentional tort law in Ohio and the dynamic between the General Assembly's attempts to legislate in this area and this court's decisions reacting to those attempts. Instead, we find that R.C. 2745.01 embodies the General Assembly's intent to significantly curtail an employee's access to common-law damages for what we will call a "substantially certain" employer intentional tort. We do not view the statute as a codification of this court's decisions in *Brady,* 611 Ohio St.3d 624, 576 N.E.2d 722, and *Johnson*, 85 Ohio St.3d 298, 1999-Ohio-267, 707 N.E.2d 1107. *Stetter* at ¶¶ 26 and 27.

The holdings rendered in both *Kaminski* and *Stetter* were premised on the conclusion that:

> . . . The General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in R.C. 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to Subsection (C) and (D). *Kaminski* at ¶ 56, *Stetter* at ¶ 26.

In the decision sought to be brought before this Court, the *Houdek* Court overtly ignores this Court's holdings in *Kaminski* and *Stetter* by refusing to apply R.C. 2745.1(B). This section defines the phrase "substantially certain" as "an employer acts with deliberate intent to cause an employer to suffer injury, a disease, a condition, or death." This same definitional section formed the predicate for this Court's conclusion in *Kaminski* and *Stetter* that a claim under R.C. 2745.01 requires proof of an employer's specific intent to cause injury. The *Houdek* Court justifies its disregard of R.C. 2745.01(B), by concluding that it was the product of a legislative "Scrivener's Error." *Houdek* at pg. 13. Based on this conclusion, the *Houdek* Court created its own definition of "substantially certain," finding that it must mean something less than "absolute."[2] In support of this new definition, the Court cited Webster's Dictionary and case law construing the term "substantially" in the context of criminal procedure and sexual

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analysis."

[2] The *Houdek* Court's discussion of the term "absolute" is puzzling to say the least as this term

harassment cases. *Houdek* at pg. 14. Lastly, the *Houdek* Court determined that the legislature's use of the term "belief" in R.C. 2745.01(B) evidences legislative intent that the employer's offending conduct be interpreted objectively. As a consequence, the *Houdek* Court concluded that the appropriate test to determine liability under R.C. 2745.01(B) is "what would a reasonable prudent employer believe," not whether the employer acted with specific intent to cause injury. *Houdek* at pg. 15.

The potential impact of the *Houdek* decision and the uncertainty it will inevitably interject in pending cases throughout this state cannot be overstated. *Houdek* stands for the proposition that: (1) a court need not apply the legislative definition of "substantially certain" in R.C. 2745.01(B); (2) a claimant may establish "substantial certainty" under R.C. 2745.01(B) by proof of something less than the employer's specific intent to cause injury; and (3) a claimant may establish specific intent under R.C. 2745.01(B) by proof of what a reasonable prudent employer would believe.

The *Houdek* decision ignores both the express language of R.C. 2745.01 and the binding precedent rendered by this court in *Kaminski* and *Stetter*. Moreover, the analysis applied by the *Houdek* Court to ostensibly support its conclusion completely disregards the historical efforts of the Ohio General Assembly to limit the scope of an employer intentional tort in a manner consistent with the benefits and immunities afforded employers and employers under Ohio's workers' compensation system. This Court should accept jurisdiction of this matter to once again define the nature of the employer intentional tort remedy and, in so doing, provide guidance to the courts of this state when confronted with claims under R.C. 2745.01(A) and (B).

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is not used anywhere in the statute.

II. STATEMENT OF THE CASE

On June 5, 2009, Houdek filed his complaint against Defendants ThyssenKrupp Materials N.A., Inc. (hereinafter "ThyssenKrupp"), and Ohio Bureau of Workers Compensation (hereinafter "BWC"). Houdek alleged that he was injured at ThyssenKrupp's facility on October 14, 2008 and that the BWC maintained a subrogated interest. All defendants filed timely answers. In addition, on August 6, 2009 BWC filed a motion to realign the parties to position itself as a party plaintiff in the case. The trial court granted the motion and realigned the parties.

After proceeding through the discovery phase, ThyssenKrupp filed a motion for summary judgment arguing that Houdek could not produce any evidence to meet the "intentional tort" standard at either common law or under the latest statutory version, i.e. R.C. §2745.01. The trial court granted summary judgment in favor of ThyssenKrupp on June 23, 2010, determining that Houdek had failed to demonstrate the requisite intent to injure. On July 8, 2010, the trial court clarified its judgment entry to show that the summary judgment was also granted in favor of ThyssenKrupp on the claims of the BWC.

On April 7, 2011, the Eighth District Court of Appeals reversed the trial court decision. (A copy of the Court's opinion is attached hereto as Exhibit "A"). The Eighth District thereafter denied appellant's motion for certification of conflict[3] (a copy of the Eighth District Court of

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[3] The court denied the motion to certify conflict despite the fact that the *Houdek* court's analysis of R.C. 2745.01 is in conflict with every appellate court decision to construe a claim under R.C. 2745.01(B) since this court's decision in *Kaminski* and *Stetter*. See *Klaus v. United Equity, Inc.* 2010-Ohio-3549 (Third District held that R.C. 2745.01(B) permits recovery for employer intentional tort only when employer acts with specific intent to cause injury); *Dover v. Carmeuse Natural Chems.* 2010-Oho-5657 (the Fifth District held that the only way an employer can recover for an intentional tort under R.C. 2745.01(A) and (B) was to prove the employer

Appeals docket referencing the journal entry of 5/16/11 is attached hereto as Exhibit "B") and for an en banc hearing[4] (a copy of this entry is attached as Exhibit "C").

II. STATEMENT OF FACTS

A. Houdek's Work History

Prior to working at ThyssenKrupp, Houdek was employed in various industrial settings, including employment at Clearvue Insulating Glass Company (as foreman and head glass cutter), Warren Roofing Company (laborer), Paul's Roofing (foreman) Bodner's Plumbing (plumbing). He also served as the "safety guy" while working in the roofing industry. As such, Houdek was no stranger to potentially hazardous work environments.

Houdek began working at ThyssenKrupp in December of 2007, where his initial job title was "general warehouse" and his responsibilities included loading trucks, unloading trucks, and packaging. He was provided appropriate safety equipment including hard hats and glasses, as well as training consisting of booklets and safety videos. In March 2008, Houdek was promoted to the position of machinist/saw operator where he received additional training.

With his experience and background, Houdek was knowledgeable about safety issues and he never felt as if ThyssenKrupp failed to provide him with adequate safety equipment or safety

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acted with intent to injure); and *Holloway v. Area Temps,* 2010-Ohio-2106 (a different panel of the Eighth District held that "substantially certain" standard as defined in R.C. 2745.01(B) requires proof of deliberate intent to cause an employer to suffer an injury).

[4] In overruling appellant's motion for an en banc hearing, the Eighth District Court of Appeals held:

> The conflict appellee alleged between the panel's decision and *Holloway v. Area Temps,* Cuyahoga App. No. 93842, 2010-Ohio-2106 asserts that the panel did not apply Ohio Supreme Court precedent set forth in *Kaminski v. Metal & Wire Prods. Co.,* 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066. This alleged error is not an appropriate subject for en banc review. Accordingly, appellee's application is denied.

training. Nor did he feel as if ThyssenKrupp failed to provide his co-workers with adequate safety equipment or safety training. Throughout his employment with ThyssenKrupp, Houdek felt he could approach his supervisors, Bob Gayling and Jared Kuhn, with any safety concern and it would be addressed.

B. Houdek's Accident

Houdek's normal duties as a machinist/saw operator consisted of cutting copper and brass. On Friday, October 10, 2008, he injured his back placing cut copper on a pallet. This injury was a result of his eagerness to leave the facility and start his weekend. He did not return to ThyssenKrupp until the following Tuesday, October 14, 2008.

Upon his return, Houdek obtained medical paperwork indicating that he was restricted to "light duty" assignments. Due to such status, the plant manager, Joseph Matras, asked Houdek to assist in updating the inventory identification system by relabeling inventory within the plant. The assignment consisted of tagging inventory in accordance with the new identification system.

As Houdek was on "light duty" Mr. Matras did not want to place any strain on his condition. Thus, Mr. Matras specifically asked Houdek if he felt he was able to perform the tagging task requested. In response, Houdek answered in the affirmative. Further, Mr. Matras instructed Houdek that he should only perform whatever actions he could perform within his restrictions.

Prior to staring work on the re-labeling task, Houdek received additional video training to accustom him with the identification system. As part of the update, he would go throughout the plant to replace identification tags on merchandise. He would be working in aisles where

mechanized machinery, such as side-loaders, would be operating. He did not have any safety concerns in regards to assisting in the implementation of the facility's new identification update. In accordance with standard procedure, because Houdek would be in the aisles, he informed the local side-loader operator in the area of his presence. As Houdek was changing the tags on items, he bent down to reach a lower bin. It was at this point that Mr. Krajacic came down the aisle in his side-loader machine.

Tragically, despite Houdek's prior warning to Mr. Krajacic that he would be in the aisle way and Mr. Krajacic's own training for that type of situation, Mr. Krajacic had forgotten Houdek's presence in the aisle and he struck Houdek with the side loader. While it is clear that Houdek's accident was tragic, it is equally clear that it was unexpected. There is no evidence to suggest that anyone expected this type of accident to happen. Instead, all of the witnesses have testified that ThyssenKrupp was a safety conscious company and no witness has testified that they believe ThyssenKrupp would ever intend for any of its workers to become injured. Further, each witness also testified that during the numerous years the facility has been operating there were no similar accidents in the company's history.

III. LAW AND ARGUMENT

PROPOSITION OF LAW NO. I

IN ORDER TO ESTABLISH LIABILITY UNDER THE SUBSTANTIALLY CERTAIN PRONG OF R.C. 2745.01(A), AN EMPLOYEE MUST PRESENT EVIDENCE THAT THE EMPLOYER ACTED WITH DELIBERATE INTENT TO CAUSE THE EMPLOYEE'S INJURY.

R.C. 2745.01 provides in relevant part:

"(A) In an action brought against an employer by an employee, or by the

> dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injury another or with the belief that the injury was substantially certain to occur."
>
> "(B) As used in this section, 'substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." (Emphasis added).

By refusing to apply the statutory definition of the term "substantially certain" in R.C. 2745.01(B), the *Houdek* Court ignores the deliberate intent requirement expressly set forth in the statute. The *Houdek* court found that the statutory definition must have been a "scrivener's error," finding:

> According to R.C. 2745.01(A), the "requisite intent" is described as either the "intent to injure" or "the belief that the injury was substantially certain to occur." Then in an about-face the statute defines "substantially certain" as the "deliberate intent" to injure. R.C. 274501(B). These terms are not synonymous. We are left to interpret two terms that are in a state of harmonic dissonance. **We cannot harmonize (A) and (B) as is our charge. Our preference is to believe that dissonant paragraph (B) is a scrivener's error, perhaps contained in an early draft of legislation but later wisely marked out as dissonant**. (emphasis added).

The definitive language read out of the statute by the *Houdek* Court was the same language reviewed in *Kaminski* and *Stetter* which formed the very basis of this Court's conclusion that R.C. 2745.01 requires proof of an employer's specific intent to cause injury.

To truly appreciate this Court's ruling in *Kaminski* and *Stetter*, it is appropriate to review the underlying appellate court decision that was at issue in *Kaminski*. The underlying appellate court interrupted the "substantially certain" prong of R.C. 2745.01(B) as follows:

> When we consider the definition of "substantial certainty," it becomes apparent that an employee does not have two ways to prove an intentional tort claim as R.C. 2745.01(A) suggests. The employee's two options of proof become: (1) the

> employer acted with intent to injury or (2) the employer acted with deliberate intent to injure. Thus, under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury." *Kaminski*, 175 Ohio App.3d 227, 2008-Ohio-1521, 886 N.E.2d 262, ¶29-31. *Kaminski* at ¶ 55.

In responding to this aspect of the appellate court's analysis, this court held in *Kaminski*:

> As an initial matter, *we agree with the court of appeals that the General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D).* See *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, 885 N.E.2d 204, ¶ 17 (the General Assembly in R.C. 2745.01 "modified the common-law definition of an employer intentional tort" by rejecting "the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct"). See also *Stetter,* 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, at paragraph three of the syllabus, in which we hold that R.C. 2745.01 does not eliminate the common-law cause of action for an employer intentional tort. (Emphasis added). *Kaminski* at ¶ 56.

As is evident from the preceding language, this Court, relying "particularly" on the statutory definition afforded the term "substantially certain" in R.C. 2745.01(B), concluded that a plaintiff may only obtain a recovery for an employer intentional tort through proof that the employer "acts with specific intent to cause an injury."

Separate and apart from the failure to follow *Kaminski* and *Stetter,* the *Houdek* Court's determination of a "scrivener's error" is not premised upon established principles of statutory construction. It is an axiom of statutory construction that the General Assembly is not presumed to do a vain or useless thing and that when language is inserted in a statute, it is inserted to accomplish some definite purpose. *State Ex Rel Cleveland Elec. Illum. Co. v. Euclid* (1959), 164 Ohio St. 476, 479; *The State of Ohio v. Wilson* (1997), 77 Ohio St.3d 334, 336. The *Houdek* Court's finding of a "scrivener's error" disregards the Ohio General Assembly's long standing

quest to limit the scope of the employer intentional tort.

In the extensive historical analysis set forth in *Kaminski,* this Court noted that the Ohio General Assembly's enactment of former R.C. 4121.80, in Am. Sub. S.B. No. 307, was in response to this Court's prior decisions in *Blankenship* and *Jones*. *Kaminski* at ¶ 27. The General Assembly sought to limit the scope of the employer intentional tort by inserting a statutory definition for the term "substantially certain" that was identical to the definition contained in R.C. 2745.01(B). Former R.C. 4121.80(G)(1) defined substantially certain as requiring that an employer act with "deliberate intent to cause an employee to suffer injury, disease, condition, or death." *Kaminski* at ¶ 27.[5]

The fact that the language defining "substantially certain" in R.C. 2745.01(B) and former R.C. 4121.80(G)(1) are identical conclusively establishes a clear intent on the part of the Ohio General Assembly to define the phrase "substantially certain" exactly as it is phrased in R.C. 2745.01(B). It was not the product of an unintended "scrivener's error," but an obvious attempt to state a limitation on the scope of employer's intentional tort. As noted in *Kaminski,* the legislature's use of the statutory language in R.C. 2745.01(B) manifested the General Assembly's intent *to permit recovery for employer intentional torts only when an employer acts with specific intent to cause injury*, subject to Subsection (C). (Emphasis added). *Kaminski* at ¶ 56.

In sum, the *Houdek* Court's declaration that the statutory definition of the phrase "substantially certain" in R.C. 2745.01(B) is an unenforceable "scrivener's error" is contrary to

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[5] Former R.C. 4121.80 was subsequently struck down along with other legislative enactments in S.B. 307 as in violation of the one issue rule. See *The State Ex Rel. Ohio Academy of Trial Lawyers, et al. v. Steward,* (1999), 86 Ohio St.3d 451.

standard rules of statutory construction and in direct contradiction to legislative intent expressed by the General Assembly. As a consequence, the *Houdek* Court's attempt to ignore this language and interject a conflicting common law meaning to this phrase is improper, and should be rejected.

PROPOSITION OF LAW NO. II

PROOF OF WHAT A REASONABLE PRUDENT EMPLOYER BELIEVES IS INCONSISTENT WITH THE SPECIFIC INTENT REQUIREMENT OF R.C. 2745.01.

In both *Kaminski* and *Stetter,* this Court held that R.C. 2745.01(B) permits an employee to recovery only with proof that the employer acts with specific intent to cause an injury, subject to Subsection (C) and (D). The *Houdek* Court ignores the requirement of proof of "specific intent" by permitting a claimant to prove the "substantially certain" claim through presentation of evidence of "what a reasonable prudent employer would believe." This aspect of the *Houdek* decision effectively does away with the specific intent requirement recognized in *Kaminski* and *Stetter.* Instead, it creates a viable cause of action under R.C. 2745.01(B) through proof of something less than the employer's "specific intent" to injure the employee.

Once again, this conclusion is contrary to the express language of R.C. 2745.01 and this Court's holdings in *Kaminski* and *Stetter.* In fact, this aspect of the *Houdek* Court's holding gives rise to a standard which is more broad than that previously articulated in *Blankenship, Fyffe, Brady,* or *Johnson.* As this conclusion would lead to the recognition of an employer intentional tort under R.C. 2745.01 absent proof of the employer's specific intent to cause injury, it must be rejected.

PROPOSITION OF LAW NO. III

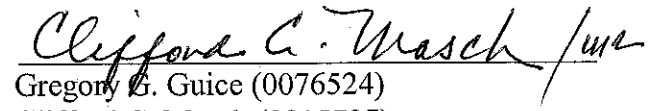
STARE DECISIS REQUIRES LOWER COURTS TO FOLLOW ESTABLISHED LEGAL PRECEDENT DETERMINED BY THE OHIO SUPREME COURT.

An appellate court is bound by the precedent of the Supreme Court of Ohio. Section 3(B)(2), Article IV, Ohio Constitution; *State of Ohio v. Schwietkeman*, 2009-Ohio-2304, ¶ 22. The *Houdek* court has refused to apply this Court's binding legal precedent as found in *Kaminski* and *Stetter*. By determining that R.C. 2745.01(B), a statute explicitly found constitutional and upheld by this Court, to be invalid, the *Houdek* Court has violated the doctrine of stare decisis. As a result, the *Houdek* Court's conclusion that R.C. 2745.01(B) should not be considered when evaluating an employer intentional claim must be rejected.

IV. CONCLUSION

The decision by the *Houdek* Court circumvents both the will of the Ohio General Assembly and ignores the binding precedent established by this Court in *Kaminski* and *Stetter*. If left to stand, this opinion will plunge the status of an employer intentional tort governed under R.C. 2745.01 into a state of uncertainty. Parties will understandably seek to avoid the requirement of proving an employer's specific intent to cause injury by relying on the *Houdek* decision. Parties may likewise seek to pursue an employer intentional tort claim through proof of what a reasonable prudent employer should have believed. This Court should accept jurisdiction of this matter to provide appropriate guidance to Ohio courts confronted with intentional tort claims under R.C. 2745.01. Clarification of this issue is equally important to the individual and corporate citizens of this state.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *ThyssenKrupp Materials NA, Inc.'s Memorandum in Support of Jurisdiction* was sent by regular U.S. mail this 24th day of June, 2011 to:

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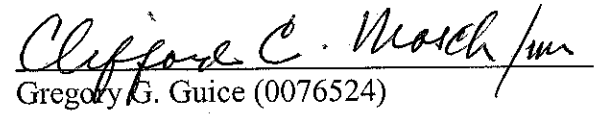

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APPENDIX

EXHIBIT A

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*2011 Ohio 1694, *; 2011 Ohio App. LEXIS 1473, **

BRUCE R. **HOUDEK,** PLAINTIFF-APPELLANT vs. **THYSSENKRUPP** MATERIALS N.A., INC., ET AL., DEFENDANTS-APPELLEES

No. 95399

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2011 Ohio 1694; 2011 Ohio App. LEXIS 1473

April 7, 2011, Released and Journalized

PRIOR HISTORY: [1]**
Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. CV-695034.

DISPOSITION: REVERSED AND REMANDED.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant injured employee sued appellees, the employer and the Ohio Bureau of Workers' Compensation (BWC), seeking damages for his injuries. The BWC's motion to realign the parties to make it a new party plaintiff was granted and the BWC filed its complaint for subrogation. The Cuyahoga County Court of Common Pleas (Ohio) granted the employer's motion for summary judgment on both claims. The employee appealed and the BWC cross-appealed.

OVERVIEW: The employee argued that the trial court erred by granting summary judgment. The appellate court held that the trial court erred by granting summary judgment for the employer because, pursuant to R.C. 2745.01, there were genuine issues of material fact, particularly given the specific supervisory directives to both the employee and the side-loading forklift operator and that operator's warning to the warehouse manager, that the employer objectively believed the injury to the employee was substantially certain to occur. The employee and the side-loading forklift operator acted in accordance with a series of direct orders that resulted in the employee's catastrophic workplace injuries. The employer's direct order placed the employee in harm's way with no chance to avoid the oncoming side-loading forklift. The middle-aged employee's a mobility was limited by his prior physical injury and by being directed by the employer to work a scissors-lift, and thus, could not avoid the forklift.

OUTCOME: The judgment of the trial court granting summary judgment was reversed and the cause was remanded for further proceedings.

EXHIBIT
A

CORE TERMS: coil, aisle, workplace, summary judgment, forklift, intentional tort, co-worker, intent to injure, warehouse, deliberate, load, fork, rack, common-law, supervisor, directives, cause of action, steel, feet, sideloader, workers' compensation, material fact, genuine issues, intentional-tort, requisite, abolish, leg, ran, scissors-lift, metal

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Labor & Employment Law > Occupational Safety & Health > Civil Liability

HN1 R.C. 2745.01 does not eliminate the common-law cause of action for an employer intentional tort. More Like This Headnote

Labor & Employment Law > Occupational Safety & Health > Civil Liability

HN2 Employer tort has not been abolished, but rather constrained. Whether an employer tort occurs in the workplace depends on the facts and circumstances of each case. More Like This Headnote

Labor & Employment Law > Occupational Safety & Health > Burdens of Proof

Labor & Employment Law > Occupational Safety & Health > Civil Liability

HN3 In order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. More Like This Headnote

Labor & Employment Law > Occupational Safety & Health > Civil Liability

HN4 See R.C. 2745.01.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Standards > Appropriateness

HN5 Appellate review of a trial court's grant of summary judgment is de novo and is governed by the standard proffered in Civ. R. 56. Consequently, an appellate court provide no deference to the trial court's conclusion, and instead, independently review the record to determine the appropriateness of summary judgment. Thus, pursuant to Civ. R. 56(C), after reviewing all relevant materials, an appellate court will only affirm a grant of summary judgment when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. More Like This Headnote

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HN6 According to R.C. 2745.01(A), the "requisite intent" for a workplace intentional tort is described as either the "intent to injure" or "the belief that the injury was substantially certain to occur." Then, in an about-face, the statute defines

"substantially certain" as the deliberate intent to injure. R.C. 2745.01(B). These terms are not synonymous. More Like This Headnote

Labor & Employment Law > Occupational Safety & Health > Civil Liability

HN7 Regarding a finding that the workplace intentional injury was substantially certain to occur, the test is, given the facts and circumstances of the case, what would a reasonable prudent employer believe. More Like This Headnote

COUNSEL: FOR APPELLANT: David R. Grant, Jeffrey H. Friedman, Stephen S. Vanek, Friedman, Domiano & Smith Co., L.P.A., Cleveland, Ohio, Joseph A. Condeni, Stacey Walley, Smith and Condeni Co., L.P.A., Brooklyn Heights, Ohio.

FOR APPELLEES: Benjamin W. Crider, Lee M. Smith & Associates, Columbus, Ohio, For Ohio Bureau of Workers' Compensation, Gregory G. Guice, Reminger Co., L.P.A., Cleveland, Ohio, For **ThyssenKrupp** Materials N.A., Inc. Et Al.

JUDGES: BEFORE: Rocco, J., Kilbane, A.J., and Jones, J. MARY EILEEN KILBANE, A.J., and LARRY A. JONES, J., CONCUR.

OPINION BY: KENNETH A. ROCCO

OPINION

JOURNAL ENTRY AND OPINION

KENNETH A. ROCCO, J.:

[*P1] The appellant, Bruce R. **Houdek** ("appellant"), lost his leg, lost his job, and will lose his right to fair recompense, if Justice Pfeiffer's prediction about the most recent version of R.C. 2745.01 is the correct one.

[*P2] "I dissent from the majority opinion for the reasons stated in my dissent in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010 Ohio 1027, 927 N.E.2d 1066. Additionally, I would hold that R.C. 2745.01 restricts employees' constitutional rights to a remedy and to open **[**2]** courts. Section 16, Article I of the Ohio Constitution provides, 'All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.' "

[*P3] "R.C. 2745.01 purports to grant employees the right to bring intentional-tort actions against their employers, but in reality defines the cause of action into oblivion. An employee may recover damages under the statute only if his employer deliberately intends to harm him. It is difficult to conjure a scenario where such a deliberate act would not constitute a crime. Are we to believe that criminally psychotic employers are really a problem that requires legislation in Ohio?"

[*P4] "No, the purpose of R.C. 2745.01 is to take away the right of Ohio workers to seek damages for their employers' intentional acts. As set forth by this court in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraphs one and two of the syllabus, to recover damages for a workplace intentional tort, a plaintiff must prove that an employer knew of a dangerous situation in the workplace but forced an employee to encounter **[**3]** that danger knowing that an injury to the employee was substantially certain to result. The ability to successfully prosecute a workplace intentional-tort claim was dependent upon an extraordinary set of facts that took the employer-employee relationship outside the norm contemplated by

Ohio's workers' compensation statutes. Now, an employee no longer has a remedy for such an injury."

[*P5] "The majority acknowledges that this court found fault with former R.C. 2745.01 in *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, 1999 Ohio 267, 707 N.E.2d 1107, but asserts that the current version of R.C. 2745.01 'eliminate[s] many of the features identified by this court as unreasonable, onerous, and excessive.' The central fact is that both versions render a workplace intentional-tort claim illusory. Both versions eliminate a meaningful remedy for injured workers in egregious cases. Both eliminate an employee's right to seek damages, including punitive damages, in a court of law. And both remove an important check on employer behavior. Former R.C. 2745.01 is as distinguishable from the current version as a pig with lipstick is distinguishable from a pig without; that one version is cosmetically different **[**4]** from the other is irrelevant." *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010 Ohio 1029, 927 N.E.2d 1092, ¶¶98-101 (Pfeifer, J., dissenting).

[*P6] Justice Cupp, writing for the majority, strongly disagreed with Justice Pfeifer's dire view of the future of employer tort.

[*P7] "'*Because the statute* under consideration in this case *constrains rather than abolishes an employee's cause of action* for an employer intentional tort, *we need not, and therefore do not, consider whether a statute abolishing the common-law tort would be constitutional.* Nor do we need to revisit the holding in *Blankenship* that employer intentional torts are outside the scope of employment in order to evaluate the constitutionality of the instant statute. It is clear from our foregoing analysis herein that the General Assembly is not constitutionally proscribed from legislating in this area of law under Sections 34 and 35, Article II.' *Kaminski*, supra at ¶98 (emphasis added).

[*P8] "It does not necessarily follow, however, that R.C. 2745.01 does away with the common-law cause of action for employer intentional tort, which is the query posed by the eighth certified question. Although the statute significantly **[**5]** limits lawsuits for employer workplace intentional torts, it does not abolish the tort entirely. See *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008 Ohio 937, 885 N.E.2d 204, ¶17 ('The General Assembly modified the common-law definition of an employer intentional tort by enacting R.C. 2745.01'). Accordingly, we answer the eighth certified question by holding that HN1 R.C. 2745.01 does not eliminate the common-law cause of action for an employer intentional tort." *Stetter*, supra at ¶28.

[*P9] *Kaminski*, and to a much lesser extent, *Johnson v. BP Chems., Inc.*, 85 Ohio St.3d 298, 1999 Ohio 267, 707 N.E.2d 1107, inform our decision. Justice Lanzinger concurred in part in *Kaminski* because the Court did not overrule *Johnson*. What vitality *Johnson* has left remains to be seen.

[*P10] "Although I agree that R.C. 2745.01 does not violate Section 34 or 35, Article II of the Ohio Constitution, I respectfully concur only in part because I would overrule *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, 1999 Ohio 267, 707 N.E.2d 1107, rather than artificially limiting it." *Kaminski*, supra at ¶106 (Lanzinger, J., concurring in part).

[*P11] Taking the majority at its written word, we proceed on the basis that HN2 employer **[**6]** tort has not been abolished, but rather constrained. Whether an employer tort occurs in the workplace depends on the facts and circumstances of each case. *Stetter* is of no particular help in this regard as the facts and circumstances of Stetter's workplace injuries are not contained in the opinion.

[*P12] We begin by comparing the facts in *Kaminski* with the facts in the case we are asked to decide in this appeal.

The *Kaminski* Facts

[*P13] "On June 30, 2005, plaintiff-appellee, Rose Kaminski, was working as a press operator at the Salem, Ohio metal fabrication manufacturing facility of defendant-appellant, Metal & Wire Products Company ('Metal & Wire'). The automatic press that Kaminski operated used a coil of rolled steel fed into the press to produce stamped, flat pieces. In operating the press, Kaminski's job was to ensure that the coil feed ran smoothly, shut the press down if it jammed, and verify that the stamped pieces met required specifications. *When the coil of steel was used up, she would summon a supervisor, who would load a new coil into place with a forklift.*"

[*P14] "*When Kaminski's press ran out of steel on June 30, she searched for her shift's supervisor to load another coil, but she was* **[**7]** *unable to find him.* Kaminski enlisted a co-worker who had loaded coils in the past to load the new coil. The co-worker used the right fork of a forklift to lift a coil, which was about five feet tall and weighed about 800 pounds."

[*P15] "To properly load the coil onto Kaminski's press, the coil had to be switched from the right fork to the left fork. To accomplish the switch, the co-worker had to lower the coil to the floor, back the forklift away from it, and then pull forward again with the left fork positioned to pick up the coil."

[*P16] "When the coil is off the fork, it can become unsteady. The co-worker was at first reluctant to have Kaminski, a small woman who was about the same height as the coil, steady the coil in an upright position while he backed away from it and repositioned. However, the two eventually agreed that Kaminski would hold the coil because the supervisor was not there and because the co-worker believed that Kaminski wanted to do it."

[*P17] "With Kaminski steadying the coil, the co-worker backed the forklift away and then pulled forward. Rather than going cleanly into the coil's opening, the fork bumped the coil. Kaminski was unable to control the coil. It wobbled and then fell **[**8]** onto Kaminski's legs and feet, injuring her." *Kaminski*, supra at ¶¶3-7 (emphasis added).

The *Houdek* Facts

[*P18] Plaintiff-appellant, Bruce R. **Houdek,** was employed at the warehouse of **ThyssenKrupp** Materials N.A., Inc. ("Krupp"). At the time of his workplace catastrophe, **Houdek's** mobility was limited as a consequence of a prior injury. The same day he returned to the Krupp warehouse with light-duty restriction, Krupp nevertheless ordered him to work on a scissors-lift tagging inventory in Aisle A of the warehouse.

[*P19] Aisle A has materials stored in racks 25 to 30 feet high on both sides of the aisle. It dead ends at a wall so the ingress to Aisle A is also its egress. Materials in Aisle A are retrieved by a side-loading forklift known as "the Raymond." The forklifts of the Raymond extend toward the racks. The operator of the Raymond faces the rack, rather than its direction of movement, as it motors to and fro in warehouse aisles. Aisle A is particularly narrow with only three or four inches of space between each side of the Raymond and the two racks.

[*P20] Krupp ordered the Raymond operator to travel at the forklift's maximum speed when retrieving materials from the warehouse aisles.

[*P21] Krupp ordered **[**9]** the Raymond operator to retrieve materials from Aisle A at the very same time Krupp ordered **Houdek** to tag inventory in Aisle A on a scissors-lift.

[*P22] The Raymond operator entered Aisle A and, not able to see **Houdek** as he faced the racks and operated the forklift at maximum speed as ordered by Krupp, crushed **Houdek** against the racks.

[*P23] Just prior to the horrendous injury to **Houdek,** the Raymond operator warned Krupp about the dangers of operating the Raymond in a warehouse aisle when another employee was afoot working in the same aisle.

Procedure in Trial Court

[*P24] On June 5, 2009, **Houdek** instituted this action against Krupp and the Ohio Bureau of Workers' Compensation ("BWC") seeking damages for his injuries. The BWC moved to realign the parties to make it a new party plaintiff in the case on August 6, 2009. This motion was granted and on August 21, 2009, the BWC filed its complaint for subrogation.

[*P25] Following discovery, Krupp filed a motion for summary judgment on the claims of both **Houdek** and the BWC on March 8, 2010. The trial court granted Krupp summary judgment on June 23, 2010, finding **Houdek** was unable to demonstrate the requisite intent to injure. On July 8, 2010, the trial court filed **[**10]** a journal entry clarifying its previous order and granting summary judgment also in favor of Krupp on the claims of the BWC.

[*P26] **Houdek** now appeals, arguing summary judgment was improper. The BWC filed a cross-appeal requesting reversal on the same grounds asserted by **Houdek.**

Law and Analysis

[*P27] The common-law test for employer intention tort was set out in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108. In *Fyffe*, the Ohio Supreme Court set out the controlling test for employer intentional tort as follows:

[*P28] *HN3*"[I]n order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous **[**11]** task. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)" Id. at paragraph one of the syllabus.

[*P29] *Kaminski* was an unfortunate choice of appellate cases on which to interpret the most recent version of R.C. 2745.01. There was a stark absence of employer directives to Rose Kaminski. Indeed, she could not prove any of the elements of common law employer tort established in *Fyffe.*

[*P30] "*When Kaminski's press ran out of steel on June 30, she searched for her shift's supervisor to load another coil, but she was unable to find him. Kaminski enlisted a co-worker who had loaded coils in the past to load the new coil.*" *Kaminski*, supra at ¶4 (emphasis added). "*However, the two eventually agreed that Kaminski would hold the coil because the supervisor was not there and because the co-worker believed that Kaminski wanted to do it. Kaminski was unable to control the coil.*" Id. at ¶6 (emphasis added). "It *wobbled and then fell onto Kaminski's legs and feet, injuring her.*" Id. at ¶7 (emphasis added).

[*P31] By contrast, **Houdek** and the side-loading forklift operator acted in accordance with a series of direct **[**12]** orders that resulted in **Houdek's** catastrophic workplace injuries. Krupp's direct order placed **Houdek** in harm's way with no chance to avoid the oncoming sideloader. Perhaps, a twenty-year-old with the speed, agility, and strength of a Force Recon Marine, Army Ranger, Navy Seal, or Olympic gymnast could have effected an escape from the oncoming sideloader. **Houdek,** however, as a middle-aged man whose mobility was limited by his prior physical injury and by being directed by Krupp to work a scissors-lift, could not.

[*P32] The fingerprints of Krupp's specific directives were all over **Houdek's** workplace injuries. Whereas in *Kaminski*, the workplace injuries resulted in the absence of any specific

directives of employer.

[*P33] R.C. 2745.01 reads as follows:

[*P34] HN4"(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur."

[*P35] "(B) As used in this **[**13]** section, 'substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death."

[*P36] "(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result."

[*P37] "(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation."

[*P38] Does this section constrain common law employer tort as the *Kaminski* majority holds, or does it, as Justice Pfeifer predicts, abolish it? Taking the majority at its written word, we find merit to **Houdek's** appeal and reverse the trial court's judgment granting summary judgment in favor of Krupp and against both **Houdek** and the BWC. If the facts and circumstances **[**14]** of this case do not present genuine issues of material fact as to the existence of an employer tort, then none shall.

[*P39] As a cautionary note, if Justice Pfeifer is correct, Ohio employees who are sent in harm's way and conduct themselves in accordance with the specific directives of their employers, if injured, may be discarded as if they were broken machinery to then become wards of the Workers' Compensation Fund. Such a policy would spread the risk of such employer conduct to all of Ohio's employers, those for whom worker safety is a paramount concern and those for whom it is not. So much for "personal responsibility" in the brave, new world of corporations are real persons.

[*P40] As a procedural matter, we first note that HN5appellate review of a trial court's grant of summary judgment is de novo and is governed by the standard proffered in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005 Ohio 4559, 833 N.E.2d 712, ¶8; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 1996 Ohio 336, 671 N.E.2d 241. Consequently, we provide no deference to the trial court's conclusion, and instead, independently review the record to determine the appropriateness of summary judgment. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009 Ohio 2136, 912 N.E.2d 637, ¶12. **[**15]** Thus, pursuant to Civ.R. 56(C), after reviewing all relevant materials, we will only affirm a grant of summary judgment when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

[*P41] In this appeal, **Houdek** first argues that R.C. 2745.01(A) and (B) mandate that a plaintiff must show that the employer possessed either, but not both, "intent to injure" or "deliberate intent to injure."

[*P42] In its judgment entry, the trial court granted Krupp summary judgment, finding that

Houdek is unable to establish the "requisite intent" on the part of Krupp. HN6According to R.C. 2745.01(A), the "requisite intent" is described as either the "intent to injure" or "the belief that the injury was substantially certain to occur." Then in an about-face the statute defines "substantially certain" as the "deliberate intent" to injure. R.C. 2745.01(B). These terms are not synonymous. We are left to interpret two terms that are in a state of harmonic dissonance. We **[**16]** cannot harmonize (A) and (B) as is our charge. Our preference is to believe that dissonant paragraph (B) is a scrivener's error, perhaps contained in an early draft of legislation but later wisely marked out as dissonant. Although, Justice Pfeifer appears to believe that paragraph (B) is an act of legislative legerdemain.

[*P43] There is a considerable difference between the terms "absolute" and "substantial." The Webster's Dictionary defines absolute as "having no restriction, exception, or qualification." Webster's also defines substantially as "being largely but not wholly that which is specified." With regard to Ohio case law, one need not look beyond the several hundred reported Ohio opinions on Crim.R. 11 plea colloquies to see the difference between the two terms. See *State v. Singleton*, 169 Ohio App.3d 585, 2006 Ohio 6314, 863 N.E.2d 1114, ¶69 ("strict or absolute compliance with Crim.R. 11 is not required; 'the test is whether the trial court exercised "substantial compliance" with Crim.R. 11 * * *' ").

[*P44] "The parties agree that absolute compliance is not demanded, only 'substantial compliance.' *Mullins v. Whiteway Mfg. Co.* (1984), 15 Ohio St.3d 18, 20-21, 15 OBR 15, 471 N.E.2d 1383; **[**17]** *Kaiser v. Ameritemps, Inc.* (1999), 84 Ohio St.3d 411, 413, 1999 Ohio 360, 704 N.E.2d 1212 (specifically applying 'substantive compliance' standard to R.C. 4123.511 (F)). 'Substantial compliance' occurs 'when a timely notice of appeal * * * includes sufficient information, in intelligible form, to place on notice all parties to a proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities.' *Fisher* [*v. Mayfield* (1987)], 30 Ohio St.3d 8, 30 OBR 16, 505 N.E.2d 975, paragraph two of the syllabus." *State ex rel. Lapp Roofing & Sheet Metal Co., Inc. v. Indus. Comm. of Ohio*, 117 Ohio St.3d 179, 2008 Ohio 850, 882 N.E.2d 911, ¶14.

[*P45] Krupp defends asserting there is no evidence that Krupp believed that the injury was substantially certain to occur. Krupp would have us interpret "belief" subjectively. Such an interpretation would place a premium on willful ignorance or deceit. Rather, we must interpret "belief" objectively. Thus, HN7the test is, given the facts and circumstances of the case, what would a reasonable prudent employer believe. See *Ballard v. Community Support Network*, Franklin App. No. 10AP-104, 2010 Ohio 4742, citing **[**18]** *Oncale v. Sundowner Offshore Servs., Inc.* (1998), 523 U.S. 75, 80-81, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201.

[*P46] In this case, there are genuine issues of material fact, particularly given the specific supervisory directives to both **Houdek** and the sideloader operator and the sideloader operator's warning to the warehouse manager, that Krupp objectively believed the injury to **Houdek** was substantially certain to occur.

[*P47] We reverse the trial court's grant of summary judgment in favor of Krupp and remand for proceedings consistent with this opinion.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE ▼, A.J., and
LARRY A. JONES ▼, J., CONCUR

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EXHIBIT B

Gerald E. Fuerst, Clerk of Courts
Court of Common Pleas - Cuyahoga County, Ohio

Printer Friendly Version

Case Category	Case Year	Case Number
APPEALS	10	95399

Case Number: CA-10-095399

Case Title: BRUCE R. HOUDEK vs. THYSEENKRUPP MATERIALS NA, INC. - ET AL.

Case Summary

Case Number:	CA-10-095399
Case Title:	BRUCE R. HOUDEK vs. THYSEENKRUPP MATERIALS NA, INC. - ET AL.
Case Designation:	N/A
Filing Date:	07/12/2010
Judge:	N/A
Magistrate:	N/A
Room:	N/A
Next Action:	N/A
File Location:	DF-ROOM 45
Last Status:	INACTIVE
Last Status Date:	07/12/2010
Last Disposition:	DECISION RELEASED
Last Disposition Date:	04/08/2011
Prayer Amount:	$.00

Service

Party Role	Name	Service Date	Response Date
E(1)	THYSSENKRUPP MATERIALS NA, INC. ET AL.	N/A	
E(2)	OHIO BUREAU OF WORKERS COMPENSATION	N/A	
A(1)	BRUCE R. HOUDEK	N/A	

Case Parties

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		ATTORNEY	GREGORY G GUICE (0076524)

EXHIBIT
B

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		ATTORNEY	JEFFREY H FRIEDMAN (0018563) 55 PUBLIC SQUARE SUITE 1055 CLEVELAND, OH 44113-0000 Ph: 216-621-0070 Answer Filed: N/A
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Docket Information

Date	Side	Type	Description	Image
06/01/2011	A1	EV	ORIGINAL PAPERS RETURNED TO TRIAL COURT.	
05/16/2011	N/A	JE	MOTION BY APPELLEE TO CERTIFY CONFLICT IS DENIED. VOL. 730 PG. 198. NOTICE ISSUED.	
05/12/2011	N/A	JE	APPLICATION BY APPELLEE FOR EN BANC CONSIDERATION IS DENIED (SEE SEPARATE JOURNAL ENTRY OF SAME DATE). VOL. 730 PG. 163. NOTICE ISSUED.	
05/04/2011	N/A	MO	REPLY BRIEF BY APPELLEE, THYSSENKRUPP MATERIALS NA., INC. IN SUPPORT OF THE MOTION FOR APPLICATION FOR EN BANC	
05/04/2011	N/A	MO	REPLY BRIEF BY APPELLEE THYSSENKRUPP MATERIALS, INC. IN SUPPORT OF THE MOTION FOR CERTIFICATION OF CONFLICT	
04/27/2011	N/A	MO	APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO CERTIFY A CONFLICT	
04/27/2011	N/A	MO	APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S APPLICATION FOR CONSIDERATION EN BANC	
04/18/2011	N/A	MO	APPLICATION BY APPELLEE FOR EN BANC CONSIDERATION	
04/18/2011	N/A	MO	MOTION BY APPELLEE TO CERTIFY CONFLICT	
04/07/2011	N/A	JE	REVERSED AND REMANDED. VOL. 727 PG. 749. NOTICE ISSUED.	
04/07/2011	N/A	BL	REVERSED AND REMANDED. VOL. 727 PG. 749. NOTICE ISSUED.	
03/14/2011	N/A	MO	APPELLEE'S BRIEF IN OPPOSITION TO APPELLANTS' NOTICE OF FILING OF SUPPLEMENTAL AUTHORITY	
03/04/2011	N/A	MO	APPELLANT'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY	
09/23/2010	A1	EV	REPLY BRIEF OF APPELLANT FILED	
09/13/2010	E1	EV	APPELLEE'S BRIEF FILED.	
08/24/2010	N/A	JE	MOTION BY APPELLEE TO EXTEND TIME TO FILE ANSWER BRIEF IS GRANTED TO SEPTEMBER 13, 2010. NO FURTHER EXTENSION WILL BE CONSIDERED PER ORDER OF THE ADMINISTRATIVE JUDGE. VOL. 711 PG. 199. NOTICE ISSUED.	
08/23/2010	N/A	MO	MOTION BY APPELLEE TO EXTEND TIME TO FILE ANSWER BRIEF	
08/16/2010	E2	EV	APPELLANT'S BRIEF FILED.	
08/09/2010	N/A	JE	SUA SPONTE, MOTION NO. 436255, WHICH ORDERED THE BRIEF OF THE OHIO BUREAU OF WORKERS COMPENSATION STRICKEN, IS VACATED. THE OHIO BUREAU OF WORKERS COMPENSATION IS AN APPELLANT IN THIS APPEAL. THE OHIO BUREAU OF WORKERS COMPENSATION IS GRANTED LEAVE TO REFILE ITS ORIGINAL BRIEF BY AUGUST 20, 2010. VOL. 710 PG. 104. NOTICE ISSUED.	
08/05/2010	A1	EV	PER COURT OF APPEALS ORDER DATED 08-04-2010, APPELLEE/CROSS-APPELLANT'S BRIEF IS RETURNED VIA REGULAR US MAIL..	
08/04/2010	N/A	JE	SUA SPONTE, APPELLEE/CROSS-APPELLANT OHIO BUREAU OF WORKERS COMPENSATION'S BRIEF FILED AUGUST 3, 2010 IS STRICKEN FOR FAILURE TO COMPLY WITH LOC.APP.R. 16 AND 18.	

		THE BRIEF SHALL BE RETURNED BY THE CLERK'S OFFICE VIA REGULAR MAIL AT APPELLEE/CROSS-APPELLANT'S COSTS. APPELLEE/CROSS-APPELLANT SHALL FILE A CONFORMING BRIEF BY AUGUST 25, 2010. VOL. 709 PG. 730. NOTICE ISSUED.
08/03/2010 E2	EV	APPELLEE'S BRIEF FILED.
08/02/2010 A1	EV	APPELLANT'S BRIEF FILED.
07/22/2010 E2	EV	NOTICE OF APPEAL FILED BY DEFT.-APPELLEE, OHIO BUREAU OF WORKERS' COMPENSATION, WITH JOURNAL ENTRY, PRAECIPE (9A) AND DOCKETING STATEMENT (REGULAR CALENDAR)
07/14/2010 A1	NT	RECORD ON APPEAL FILED AND NOTICE ISSUED TO ALL PARTIES.
07/14/2010 A1	EV	ORIGINAL PAPERS FILED BY TRIAL COURT.
07/12/2010 A1	SF	LEGAL RESEARCH
07/12/2010 A1	SF	LEGAL NEWS
07/12/2010 A1	SF	COMPUTER FEE
07/12/2010 A1	SF	CLERK'S FEE
07/12/2010 A1	SF	COURT OF APPEALS SPECIAL PROJECTS
07/12/2010 A1	SF	DEPOSIT AMOUNT PAID FRIEDMAN DOMIANO & SMITH
07/12/2010 N/A	SF	CASE INITIATED
07/12/2010 A1	EV	NOTICE OF APPEAL FILED FROM COMMON PLEAS CIVIL COURT , CASE # CP CV-695034 WITH JOURNAL ENTRIES, PRAECIPE, DOCKETING STATEMENT AND COPY OF DOCKET SHEET.

Case Cost Detail

Account	Amount
C A SPECIAL PROJECTS FUND	$25.00
CLERK'S FEES	$109.00
COMPUTER FEES	$10.00
LEGAL NEWS	$10.00
LEGAL RESEARCH - CIVIL	$3.00
TOTAL COST	$157.00

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EXHIBIT C

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

BRUCE R. HOUDEK, ET AL.

Appellants

COA NO. 95399 | LOWER COURT NO. CP CV-695034

COMMON PLEAS COURT

-vs-

THYSSENKRUPP MATERIALS NA, INC.

Appellee

MOTION NO. 443790

Date 05/12/2011

Journal Entry

This matter is before the court on appellee's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

The conflict appellee alleges between the panel's decision and *Holloway v. v. Area Temps*, Cuyahoga App. No. 93842, 2010-Ohio-2106 asserts that the panel did not apply Ohio Supreme Court precedent set forth in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066. This

alleged error is not an appropriate subject for en banc review. Accordingly, appellee's application is denied.

Mary Eileen Kilbane

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Dissenting:

COLLEEN CONWAY COONEY, J.

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MAY 12 2011
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____ DEP.