

Ohio Supreme Court Case No. 2011-1076

IN THE SUPREME COURT OF OHIO

BRUCE R. HOUDEK

Plaintiff-Appellee

v.

THYSSENKRUPP MATERIALS NA, INC., et al.

Defendants-Appellants

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

**APPELLEE BRUCE R. HOUDEK'S
MEMORANDUM OPPOSING JURISDICTION**

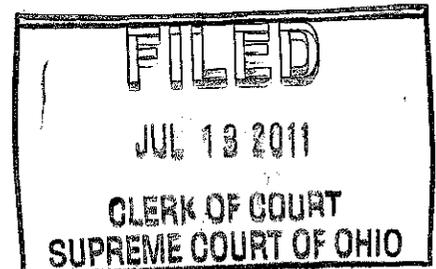
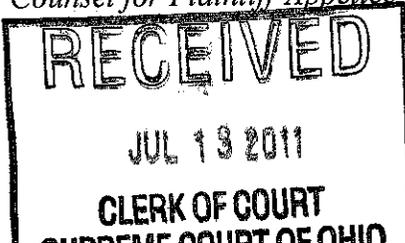
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STATEMENT OF GREAT PUBLIC INTEREST

Appellant ThyssenKrupp argues that this case is of great public interest. It is not. The Eighth District Court of Appeals opinion is a decision based upon, and limited to, the very specific facts of this particular case. The appellate court's decision was narrowly based upon a number of different factual criteria that are unique – and unlikely to be found in, or comparable to, any other employer intentional tort case. Moreover, this case fails to establish any legal precedent upon which other claimants could reasonably rely. This Court should not disturb the appellate court's decision simply because the employer disagrees with the result derived from the application of the statute to the facts of this case.

In this case, Appellee Bruce Houdek was directed to work against his light duty medical restrictions, performing an inventory re-labeling job that required him to be on foot, in a dead end aisle, that was simultaneously being used by side loaders with reduced/limited visibility to pull inventory off of the storage racks. The side loaders take up the entire width of the aisle and the side loader operator faces the racks, not the direction that the side loader is moving. Furthermore, the structure of the sideloader blocks the operator's view. Sideloaders were instructed by ThyssenKrupp to operate at maximum speed to increase production. Mere days prior to being ordered to work in the same area that Houdek was working, the side loader operator who injured Houdek had, during a safety meeting, warned ThyssenKrupp management of this exact hazard and asked if he could avoid pulling inventory from aisles that employees were working in. ThyssenKrupp advised him that employees would get out of his way. These are very case specific facts.

Judge Rocco, writing the opinion for the majority, stated “[i]f the facts and

circumstances of this case do not present genuine issues of material fact as to the existence of an employer intentional tort, then none shall.” See, Opinion at ¶38. Judge Rocco was not “disregarding the express language of R.C. 2745.01,” as ThyssenKrupp now tries to portray, but was instead simply attempting to apply the language of the statute to the facts before the court. There is a difference. In *Kaminski v. Metal & Wire Products Company*, 2010-Ohio-1027, and *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 2010-Ohio-1029, this Court upheld the constitutionality of R.C. §2745.01. In *Stetter*, this Court was abundantly clear that the statute does not eliminate the common law cause of action for employer intentional torts (“R.C. 2745.01, as enacted by Am.H.B. No. 498, effective April 7, 2005, does not eliminate the common-law cause of action for an employer intentional tort.”) See also, *Kaminski* at ¶56. Judge Rocco, writing for a unanimous court, acknowledged that the common law cause of action for an employer intentional tort survived the statute’s enactment and merely proceeded to apply it to the facts of this particular case, based on the direction provided by this Court in *Kaminski* and *Stetter*.

There will be numerous cases coming before the appellate courts that will require the court to analyze the statute and apply the statutory requirements to the facts of a particular case. That is all that has occurred in this case. It does not make this opinion one of great public interest merely because, on this egregious set of facts, there are genuine issues of material fact as to ThyssenKrupp’s intent. If this Court were to accept ThyssenKrupp’s position, every single employer intentional tort case would be one of great general public interest.

Judge Rocco took great pains in his opinion to analyze the facts in both *Kaminski* and in this case. While there was a complete lack of employer directives in *Kaminski*, in this case, the

court noted “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 (sic) employer.” Opinion at ¶32. While Judge Rocco took issue with the language of the statute, his examination of the facts of this case clearly led to the court’s finding that the disputed facts in this case were sufficient to support a finding that ThyssenKrupp acted with the requisite intent under the statute, thereby overcoming summary judgment. This is the only material finding in the case, and the opinion’s *dicta* does not transform this case into one of great general public interest.

STATEMENT OF FACTS AND FACTS

On October 14, 2008, Bruce Houdek was catastrophically injured (resulting in an above-the-knee amputation) while working at Appellee ThyssenKrupp Materials NA, Inc., in Cleveland, Ohio. Houdek was employed by ThyssenKrupp as a machinist and saw operator, but sustained an on-the-job back injury. Houdek was placed on light duty restrictions by a physician. Houdek returned to ThyssenKrupp the following Tuesday, October 14th, and despite his light duty restriction, was assigned to work re-labeling inventory as part of ThyssenKrupp’s conversion of its inventory tracking program. This job involved the physical re-tagging of ThyssenKrupp’s product, which require constant bending and stooping to reach the product on the racks in the warehouse aisle, and was in violation of his light duty restriction.

Aisle A that Houdek was assigned to work in was a dead end aisle, open only at one end. The lighting was dim in the aisle and the racks on either side were 25 to 30 feet tall. In its warehouse, ThyssenKrupp utilizes side loaders, which are forklifts that move sideways down the aisle. The driver stands facing the racks and the product is pulled off the rack by the forks of the

side loader. The side loaders take up the entire aisle, leaving only 3-4 inches clearance on either side. While employees do pull some product manually, manual pulls in the rod aisles (where this accident occurred) were done by the sideloader operators themselves, thereby completely eliminating the hazard. Hence, this danger did not exist before.

Just days earlier, the side loader operator that struck Houdek had voiced concern to management in a *safety meeting* about running the side loaders in the aisles while employees were in the aisle tagging inventory. The operator had requested permission to rearrange his inventory pulls until workers were done in the aisles. Management directed him not to do this and further advised him that employees working in the aisles would just get out of his way. The day of this accident, Houdek reminded the side loader operator that he would be working in Aisle A. About five hours into the shift, the driver forgot that Houdek was working in this aisle. The sideloaders are electric and are very quiet. Houdek thought that the side loader was in an adjacent aisle, and by the time he realized that it was, in fact, coming down Aisle A, there was no time to get out of the way. Houdek attempted to climb up the scissor lift but was trapped between the scissor lift and the side loader, crushing his leg.

The operator of the side loader testified that he was operating at full speed, which was consistent with ThyssenKrupp's directives, and was necessary in order to keep up with the orders that needed to be filled. The operator also testified that ThyssenKrupp did not utilize any type of flag or cone to mark the aisles to alert or remind side loader operators that there was an employee working in the aisle, although ThyssenKrupp had safety cones available in the facility. Following Houdek's injury, ThyssenKrupp was cited by the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), with the very violation and safety issue

raised by the operator of the side loader *before* these events unfolded.

Houdek sued ThyssenKrupp in the Cuyahoga County Court of Common Pleas alleging an employer intentional tort. ThyssenKrupp filed a motion for summary judgment, which the trial court granted. Houdek appealed to the Eighth District Court of Appeals, which reversed the trial court's decision granting summary judgment and remanded the case. The Eighth District Court of Appeals also denied a motion for hearing *en banc* and a motion to certify a conflict. ThyssenKrupp has now filed a discretionary appeal to this Court.

ARGUMENT IN RESPONSE TO APPELLANT THYSSENKRUPP'S PROPOSITIONS OF LAW

Appellant's 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.

ThyssenKrupp's first proposition of law appears to acknowledge that there are multiple prongs to the statute's intent requirements. Appellee does not disagree with ThyssenKrupp's first proposition of law, *as far as it goes*, but ThyssenKrupp either fails to mention or outright ignores, that the statute contains *two, separate intent standards (i.e., two prongs)* substantial certainty (defined as acting with deliberate intent) *or* intent to injure. R.C. §2745.01(A). The legislature's use of the disjunctive is important and signals a legislative intent there be two separate, distinct standards. If there are two standards, then there are two respective burdens of proof, that also must be different. This Court has already recognized this fact. *Kaminski*, at ¶55. ("The employee's two options of proof become: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure.") Additionally, "[a] court should give effect to the words actually employed in a statute, and should not delete words used, or insert

words not used, in the guise of interpreting the statute.” *Zumwalde v. Madeira & Indian Hill Joint Fire Distr.*, 128 Ohio St.3d 492, 946 N.E.2d 748, 2011 Ohio 1603, citing *State v. Taniguchi* (1995), 74 Ohio St.3d 154, 156, 656 N.E.2d 1286.

The second “prong” of the statute (“intent to injure”) is capable of proof by *inferred intent*, as section (C) clearly anticipates with its creation of a presumption of “intent to injure” by circumstantial evidence (*i.e.*, the removal of a safety guard or the deliberate misrepresentation of a toxic or hazardous substance). However, because ThyssenKrupp’s proposed assignment of error only focuses on the first “prong” and because it correctly states the law according to that section of the Revised Code, there is nothing that this court need clarify.

The legislative branch of government is the ultimate arbiter of public policy and is entrusted with the power to continually refine Ohio’s laws to meet the needs of its citizens. *Kaminski*, at ¶59. “It is not the role of the courts to establish their own legislative policies or second-guess the policy choices made by the General Assembly.” *Id.*, at ¶61. This court has upheld the constitutionality of R.C. §2745.01, therefore, because this proposition of law adds nothing new to the state of the law, and because the Eighth District’s opinion was merely applying the case-specific facts to the law, any further interpretation by this Court is wholly unnecessary.

Appellant’s Proposition of Law No. II: Proof of what a reasonable prudent employer believes is inconsistent with the specific intent requirements of R.C. §2745.01.

“Specific intent” is not a phrase contained within R.C. §2745.01. As set forth above, the statute clearly provides for two separate, distinct standards of proof: substantial certainty (deliberate intent) *or* intent to injure. Absent the unheard of admission of guilt, proof of the

intent of the employer, under either standard, may be proven only through circumstantial evidence from which the intent of the employer is inferred. The statute clearly contemplates this in section (C) with the creation of a statutory presumption, inferring intent (if proven) directly from the employer's deliberate removal of a safety guard or the deliberate misrepresentation of a toxic or hazardous substance. Section (C) specifically provides that the presumption goes to "intent to injure" as opposed to "deliberate intent". Hence, if section (C) is to mean anything, it must mean that "intent" can be inferred from certain circumstantial evidence.

The appellate court struggled to apply the definition of "substantial certainty" set forth in R.C. §2745.01(B). This is understandable as the General Assembly took a term previously used to define the probability of harm and contorted the definition to describe the nature of the employer's intent. Probability of harm is not mentioned in R.C. §2745.01. What the statute requires now is proof of the intent of the employer or proof of certain facts from which such intent (under the "intent to injure" prong) may be inferred.

The use of circumstantial evidence to prove intent or knowledge is commonplace in the law. In dram shop cases, for example, the use of circumstantial evidence to show that the bar owner knowingly served the intoxicated individual is often the *only* means of proving the case. As in an employer intentional tort, the owner of the bar would never make an admission of liability that was against their interest. Absent the virtually non-existent admission of guilt, as an employer will never admit they intended to harm an employee even if such a fact were true, circumstantial evidence is always necessary intent. Moreover, the use of circumstantial evidence in proving an employer intentional tort is not new. In *Emminger v. Motions Savers, Inc.* (1990), 60 Ohio App.3d 14, 17, the court held:

Proof of the employer's intent in the second category is by necessity a matter of circumstantial evidence and inferences drawn from alleged facts appearing in the depositions, affidavits and exhibits.

See also, Hannah v. Dayton Power & Light Company, 82 Ohio St. 3d 482, 696 N.E.2d 1044, 1998 Ohio 498 (“Proof of the three elements of an employer intentional tort may be made by direct or circumstantial evidence” citing, *Adams v. Aluchem, Inc.* (1992), 78 Ohio App.3d 261, 264, 604 N.E.2d 254, 256). Circumstantial evidence still has its place in employer intentional tort actions. If only the subjective statements of the employer were admissible to prove the subjective intent of the employer, then as the court of appeals observes, “[s]uch an interpretation would place a premium on willful ignorance or deceit.” Opinion at 15.

Under the *Fyffe* standard, when proof of actual knowledge was required, courts permitted proof of the employer's knowledge to be inferred from the employer's conduct and the surrounding circumstances. *Id.*, at 134, 483. Now that *intent* on the part of the employer is the test, proof of intent inferred from the employer's conduct and the surrounding circumstances is not only appropriate, but necessary. The circumstantial evidence must be viewed objectively by the jury in determining whether or not it is sufficient to show either deliberate intent or intent to injure. Either way, the Eighth District was correct that the circumstantial evidence (as well as the direct evidence) must be viewed objectively in determining whether or not it proves the requisite intent.

Appellant's Proposition of Law No. III: *Stare decisis* requires lower courts to follow established legal precedent determined by the Ohio Supreme Court.

ThyssenKrupp states that an appellate court is bound by the precedent of the Supreme Court of Ohio. Houdek does not disagree with this principle. However, this Court in *Kaminski*

only held R.C. §2745.01 constitutional, it did not delve into how R.C. §2745.01 should be applied to a unique set of facts, or how the language of 2745.01 is to be interpreted/read. This Court clearly stated that nothing in *Kaminski* implicated R.C. §2745.01 (C) or (D). *Id.*, at ¶104. Finally, this Court stated in *Kaminski* that “we find nothing in the record demonstrating that Kaminski can prove that her employer committed a tortious act with the intent to injure her or that the employer acted with deliberate intent to cause her to suffer an injury.” *Id.* The decision in *Kaminski* stands for the proposition that the statute is constitutional, but little else.

As the Eighth District noted in its opinion, “[t]here 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*.” Opinion at 9. The doctrine of *stare decisis* is simply not implicated in this case. Merely because there were sufficient facts *in this case* to support a different outcome from that in *Kaminski* does not mean that the appellate court was not following legal precedent. In truth, there is very little legal precedent actually applying particular facts to the requirements of R.C. §2745.01. The *Kaminski* opinion did not set any legal precedent that is relevant here – it merely confirmed the constitutionality of the statute in the face of a legal challenge.

Each and every employer intentional tort claim decided under R.C. §2745.01 will have different facts. In each case, courts will have the task of determining whether there is evidence of either intent to injure *or* deliberate intent to cause an employee to suffer injury or death. This Court has correctly observed that cases involving workplace intentional torts must be judged on the totality of the circumstances surrounding each incident. *Gibson v. Drainage Products, Inc.*, 2002-Ohio-2008.

Merely because the facts and evidence in this case are sufficient to raise genuine issues of material fact going to the issue of intent does not mean that Eighth District was wrong, or that it failed to follow legal precedent, by reversing the trial court. The court of appeals ultimately held that there were genuine issues of material fact “particularly given the specific supervisory directives to both Houdek and the sideloader operator and the sideloader operator’s warnings to the warehouse manager.” Opinion at 15. The Eighth District’s factual finding does not mean that it failed to follow legal precedent. The doctrine of *stare decisis* is “limited to actual determinations in respect to litigated and necessarily decided questions, and is not applicable to *dicta* or *obiter dicta*.” Black’s Law Dictionary, 5th Ed., 1979. Again, the Eighth District merely applied the facts of this specific case to the standards set forth in R.C. §2745.01. It also does not make this case one of great general public interest.

Conclusion

This Court should decline jurisdiction to hear the discretionary appeal in this case. Nothing in the Eighth District’s opinion ignores any binding precedent arising from this Court’s decision in either *Kaminski* or *Stetter*. This Court should not strike down the appellate court’s decision simply because the employer does not like the result derived from the application of the statute to the facts. Courts burdened with the application of the statute’s requirements to a myriad of factual scenarios should not be held up to scrutiny merely because on a particular, given set of facts there exists evidence to support intent under either statutory standard. If, as this Court states and the court of appeals acknowledges, employer intentional tort cases survive the changes to R.C. §2745.01, this case should be permitted to proceed to a trial on the merits to resolve the disputed issues of material fact.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served via regular U.S. Mail this 12th day of July, 2011 upon:

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