

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2011-1076

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

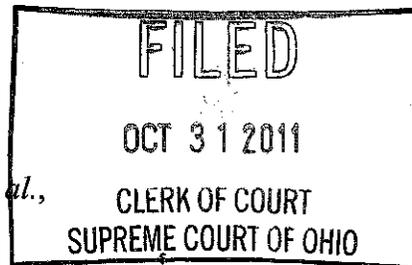
BRUCE R. HOUDEK, et al.

Plaintiffs-Appellees,

v.

THYSSENKRUPP MATERIALS NA, INC., et al.,

Defendant-Appellant



APPELLANT THYSSENKRUPP MATERIALS NA, INC.'S
MOTION FOR RECONSIDERATION

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Now comes appellant, Thyssenkrupp Materials NA, Inc., by and through counsel, and pursuant to S.Ct. PRC.R. 11.2, respectfully requests that this Court reconsider its October 19, 2011 denial of its discretionary review of the case at bar. The decision sought to be presented for this Court's review changes the nature and scope of a "substantially certain" employer intentional tort under R.C. 2745.01(B) by: (1) reading the statutory definition of "substantially certain" under R.C. 2745.01(B) which required proof of specific intent to cause injury as an unintended "Scrivener's Error;" and (2) recognizing that a claimant may establish the employer's requisite intent under a "substantially certain" tort by proof of the objective perception as to what a reasonable prudent employer would believe.

The *Houdek* court's unprecedented interpretation of R.C. 2745.01(B) is particularly disconcerting in light of the fact that this Court had recently upheld the constitutionality of Ohio's employer intentional tort statute in part by construing the same statutory language disregarded in *Houdek*. See *Kaminski v. Metal & Wire Products Co.* (2010), 125 Ohio St.3d 250, at ¶¶ 55-56 and *Stetter v. R.J. Corman Derailment Services, L.L.C.* (2010), 125 Ohio St.3d 280, at ¶ 26. In *Kaminski*, this Court concluded that the General Assembly's intent in enacting the employer intentional tort statute, "as expressed particularly [in the statute's definition of substantially certain] 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)." (Emphasis added). *Id.* at ¶ 56. Thus, the same language relied upon by this Court in *Kaminki* to discern the General Assembly's intent in enacting Ohio's intentional tort statute is now deemed an unintended Scrivener's Error in *Houdek*.

In sum, the *Houdek* court's complete disregard of the statutory definition of "substantially certain" in R.C. 2745.01(B) cannot be reconciled with this Court's specific reliance on this same language when upholding this statute in *Kaminski* and *Stetter*. The *Houdek* court replaces the statutory definition of "substantially certain" which required proof of specific intent to cause an injury with a common law definition meaning something less than absolute. Moreover, the *Houdek* court goes on to recognize the objective test of "what a reasonable prudent employer would believe" as a means of proving that the employer's conduct is sufficient to trigger liability as a "substantially certain" intentional tort.

There can be no legitimate dispute that the interpretation applied to R.C. 2745.01 in *Houdek* changes the scope of an employer intentional tort from that expressly set forth in the language of the statute. By disregarding the statutory definition of "substantial certainty" requiring proof of "deliberate intent" and replacing this term with a common law definition meaning something less than absolute, the *Houdek* court has recognized a viable employer intentional tort without proof of specific intent to cause injury. By recognizing that a claimant may prove a "substantially certain" employer intentional tort by establishing what a reasonable prudent employer believes, the *Houdek* court has shifted the focus of what the employer knew and/or expected to that of what a reasonable employer would know or expect.

In light of the novel interpretation of R.C. 2745.01 applied in the *Houdek* decision and its dramatic impact on the scope of an employer intentional tort in Ohio, this Court should accept jurisdiction of this matter to provide explicit guidance to the courts and citizens of this state as to the nature of this statutorily defined cause of action. The *Houdek* court's interpretation of R.C.

2745.01 ignores traditional principles of statutory construction to discern legislative intent from the words of the statute and the common law fidelity to precedent to promote evenhanded, predictable, and consistent development of legal principles. See *State Ex Rel. Hamilton County Bd. of Commissioners v. Hamilton County Court of Common Pleas*, (2010) 126 Ohio St.3d 111, at ¶ 26 and *Citizens United v. FEL* (2010) 130 S.Ct. 876, 920.

I. THE *HOUDEK* DECISION EXPANDS THE SCOPE OF AN EMPLOYER INTENTIONAL TORT UNDER R.C. 2745.01(B).

In *Kaminski* and *Stetter*, this Court discussed in great detail the longstanding conflict between the Ohio General Assembly and the Ohio courts in seeking to define the scope of an employer intentional tort under Ohio law. This conflict appeared to reach an end with the General Assembly's passage of R.C. 2745.01 and this Court's subsequent upholding of this legislation in *Kaminski* and *Stetter*. The legislative's intent to supersede prior Ohio common law regarding the scope and definition of a "substantially certain" intentional tort is expressly set forth in the following enacting provision of this legislation:

Section III. The General Assembly hereby declares its intent in enacting Sections 2305.112 and 2745.01 of the Revised Code to supersede the effect of the Ohio Supreme Court decisions in *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 681 (decided March 3, 1982); *Jones v. VIP Developments Co.* (1982), 15 Ohio St.3d 90 (decided Dec. 31, 1981); *Fossen v. Babcock & Wilcox* (1988), 37 Ohio St.3d 100 (decided Apr. 14, 1988); *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124 (decided Apr. 13, 1988); *Hunter v. Shenago Vernis Co.* (1988), 38 Ohio St.3d 235 (decided Aug. 24, 1988); and *Fyffe v. Juno's, Inc.* (1991), 59 Ohio St.3d 115 (decided May 1, 1991), to the extent that the provisions of Sections 2305.112 and 2745.01 of the Revised Code are to completely and solely control all causes of action not governed by Section 35 of Article 2 of the Ohio Constitution for physical or psychological conditions, or death, brought by employees of the survivors of deceased employees against employers.

The General Assembly sought to restrict the nature and scope of an employer

“substantially certain” tort through the restrictive statutory definition ascribed the term “substantially certain” in R.C. 2745.01(B). This fact is evidenced by the bill analysis of Am.H.B. § 498 provided by the Legislative Service Commission. This analysis contained the following partial excerpt describing the proposed operation of the act:

The act repeals a statute declared unconstitutional by the Ohio Supreme Court and creates a new statutory cause of action for intentional torts in employment (*Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298). It also specifies the burden of proof of an injured employee. *Under the act, an employer is not liable in an action brought against the 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 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. Under the act “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). (A copy of this bill analysis is attached as Exhibit A to Appendix).

The *Houdek* court decision defeats the legislature’s carefully crafted effort to restrict the scope of an employer intentional tort by simply declaring the statutory definition of “substantially certain” an unintended product of a “Scrivener’s error.” The impact of this conclusion cannot be overstated. Under *Houdek*, a claimant may now seek to establish a “substantially certain” tort without proof of specific intent to cause injury. This aspect of the *Houdek* court holding cannot be reconciled with this Court’s construction of the same language in *Kaminski* and *Stetter*.

II. THE HOUDEK DECISION SHIFTS THE FOCUS OF A SUBSTANTIALLY CERTAIN EMPLOYER INTENTIONAL TORT AWAY FROM THE MINDSET OF THE ACTING EMPLOYER TO THAT OF THE MINDSET OF THE “REASONABLY PRUDENT EMPLOYER.”

Under this new standard, an employer “substantially certain” tort may now be established by proof of the objective mindset of the reasonably prudent employer. The only authority cited

in justification of the new standard of proof is *Ballard v. Community Support Network*, 2010-Ohio-4742, which recognized the use of an objective test to determine if conduct was sufficiently severe to merit a sexual harassment and retaliation action under R.C. 4112.02(A) and (I). The objective standard of proof recognized by the *Houdek* court is not only contrary to the stricken “substantially certain” definition set forth in R.C. 2745.01(B), but effectively creates a lesser standard of proof than had previously existed under this Court’s superseded decisions in *Blankenship*, *Jones*, *Fossen* and *Fyffe*. Under these superseded holdings, a claimant could establish the “intent” necessary to support an employer intentional tort claim by demonstrating: (1) knowledge by the employer of the existence of a dangerous process, procedure in 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. This old common law standard focused on the knowledge and mindset of the accused employer. The new standard set forth in the *Houdek* case actually creates a lesser standard by shifting the focus from the mindset of the employer to the objective mindset of a “reasonable prudent employer.” This new standard expands the scope of a substantially certain tort beyond that which had existed even before the General Assembly’s efforts to restrict this cause of action through the enactment of R.C. 2745.01.

III. CONCLUSION

There can be no question that the *Houdek* case dramatically changes the scope and

parameters of an intentional tort under Ohio law. Under *Houdek*, Ohio employers can no longer rely upon the legislative definition of “substantially certain” in defending against an Ohio intentional tort claim. Under *Houdek*, a claimant may now seek to establish the existence of “substantial certainty” through application of an objective “what the reasonable employer would believe” test. This ruling, if left to stand, dramatically weakens the strict standard sought to be in place in defining an intentional tort by the Ohio General Assembly. As the highest court in this state, this Court must accept jurisdiction of this matter in order to provide clarity to the courts of Ohio when presented with an intentional tort claim and, more importantly, a sense of understanding to the citizens of this state regarding the scope of this remedy under Ohio law.

Although the *Houdek* decision is fairly recent, it has already been cited by other litigants in other matters involving intentional tort claims under Ohio law. In the case of *Hewitt v. L.E. Myers*, Eighth District Court of Appeals Case No. 96-13A, the employee/appellee was defending an appeal involving an intentional tort claim under R.C. 2745.01. In the brief filed before the appellate court, the employee/appellee cited approvingly to the *Houdek* decision for its finding that the legislature’s use of the terms ‘substantially certain’ and ‘deliberate intent’ in R.C. 2745.01(B) was inherently contradictory.” See appellee’s brief in *Hewitt*, Appendix B, pg. 18. The appellee in *Hewitt* further cited the *Houdek* court holding for the establishment of the objective “what a reasonable prudent employer believes” in standing to prove “substantial certainty.” *Hewitt* appellee brief, pgs. 18-19.

In sum, appellant’s concerns about the impact of the *Houdek* case on future litigation is already manifesting itself. This Court should accept jurisdiction of this matter in order to ensure

that the courts of this state are applying a uniform interpretation of Ohio's employer intentional tort statute which is commensurate with the statutory language, legislative history, and traditional rules of statutory construction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

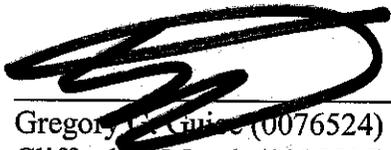
A copy of the foregoing *Appellant ThyssenKrupp Materials NA, Inc.'s Motion for Reconsideration* was sent by regular U.S. mail this 31st day of October, 2011 to:

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APPENDIX

APPENDIX

PDF version of this analysis
Fiscal Note for this version of analysis
Text of latest version of this bill



Bill Analysis

Legislative Service Commission

Am. H.B. 498

125th General Assembly
(As Passed by the General Assembly)

Reps. Faber, Buehrer, Young, Gibbs, Wagner, Seitz, Brinkman, Aslanides, Setzer, Reinhard, Combs, Hagan, Niehaus, Collier, Clancy, D. Evans, Schaffer, Fessler, Webster, Cates, Blasdel, Calvert, Carmichael, Core, Daniels, DeWine, C. Evans, Flowers, Gilb, Hollister, Hoops, Kearns, Martin, Peterson, Reidelbach, Schlichter, Schmidt, Schneider, Taylor, Widowfield, Wolpert Sens. Mumper, Wachtmann, Amstutz, Hottinger, Jordan, Spada

Effective date: *

ACT SUMMARY

- Creates a statutory cause of action for an employment intentional tort.

CONTENT AND OPERATION

Operation of the act

The act repeals a statute declared unconstitutional by the Ohio Supreme Court and creates a new statutory cause of action for intentional torts in employment (*Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298). It also specifies the burden of proof of an injured employee. Under the act, an employer is not liable in an action brought against the 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 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. Under the act "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death. This burden of proof differs from the burden established by the previous statute that required the employee to prove, by clear and convincing evidence, that the employer deliberately committed all of the elements

of an intentional tort (sec. 2745.01(B), as repealed by the act). An employment intentional tort was defined by that statute to mean "an act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee."

The act specifies that the 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. The act also specifies that its provisions do 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. (Sec. 2745.01.)

The act eliminates the requirement, declared "null and void" by the Court (*Funk v. Rent-All Mart, Inc.* (2001), 91 Ohio St.3d 78, 79, citing *Mullins v. Rio Algom* (1999), 85 Ohio St.3d 361), that a cause of action for an intentional tort be brought within one year of the employee's death or the date on which the employee knew or through the exercise of reasonable diligence should have known of the injury, condition, or disease (sec. 2305.112, repealed by the act). The act does not specify a time limit to file a cause of action. It appears, then, that the statute of limitations for an employment intentional tort is two years, unless a battery or any other enumerated intentional tort occurs (sec. 2305.10, not in the act, and *Funk* at 81).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-13-04	p. 1931
Reported, H. Commerce & Labor	11-09-04	p. 2202
Passed House (60-34)	11-10-04	pp. 2250-2253
Reported, S. Insurance, Commerce & Labor	12-07-04	p. 2383
Passed Senate (18-10)	12-07-04	pp. 2415-2416
House concurred in Senate amendments (70-24)	12-08-04	p. 2390

04-hb498-125.doc/kl

* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.*

IN THE OHIO COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY

CASE NOS. 96138

LARRY HEWITT
Plaintiff-Appellee

-vs-

THE L.E. MYERS CO
Defendant-Appellant

ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
CASE NO. 711717

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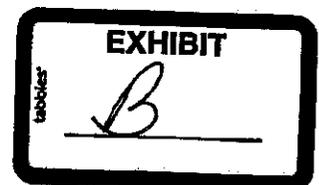


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STATEMENT OF THE ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR I: THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT (TR. 393-97) AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (R. 111) AS TO LIABILITY.

ASSIGNMENT OF ERROR II: THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT A DIRECTED VERDICT (TR. 396-97) OR JNOV (R. 111) AS TO THOSE PORTIONS OF THE COMPENSATORY DAMAGE AWARD THAT WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE.

STATEMENT OF THE ISSUES

1. When the evidence that was presented at trial is viewed most favorably to Plaintiff-Appellee, and all reasonable inferences are drawn in his favor, could reasonable minds conclude that Defendant-Appellant had deliberately removed an equipment safety guard as necessary to secure the presumption afforded by R.C. §2745.01(C)?

2. Is there some competent, credible evidence in the record that would allow reasonable minds to conclude that a reasonable employer would have appreciated the "substantial certainty" of injury within the meaning of R.C. §2745.01(B) when Plaintiff-Appellee was required to work in close proximity to energized electrical lines without mandatory protective equipment and devices?

3. Given the lay and expert testimony that was presented during the trial, could the jury reasonably conclude that Plaintiff-Appellant was reasonably certain to experience future damages?

STATEMENT OF THE CASE

This workplace intentional tort action was commenced on December 2, 2009.¹ The Complaint alleged that Plaintiff-Appellee, Larry Hewitt, had been severely electrocuted while working as an apprentice lineman for Defendant-Appellant, The L.E. Myers Co. on June 14, 2006. *R. 1.* Plaintiff's superiors had required him to work alone, and without federally mandated personal protective equipment, in an elevated lift bucket within close proximity to energized power lines. All too predictably, he inadvertently contacted the electrical apparatus and suffered severe burns to his right arm and torso.

Defendant filed an Answer on January 28, 2010 denying liability and interposing various affirmative defenses. *R. 14.* Defendant, Ohio Bureau of Workers' Compensation ("Bureau"), also submitted an Answer and Counterclaim on December 31, 2009. *R. 11.* The agency maintained that, pursuant to statutory rights of subrogation, Plaintiff was required to repay the workers' compensation benefits he had received from any intentional tort recovery he received.

Following a case management conference, Judge Nancy Margaret Russo scheduled the jury trial to commence on September 20, 2010. *R. 15, Journal Entry dated February 3, 2010.* The parties then proceeded with discovery. Defendant sought leave to file a motion for summary judgment on July 1, 2010. *R. 30.* This request was denied with the explanation that "insufficient time exists before trial date[.]" *R. 31, Journal Entry dated July 12, 2010.* Defendant immediately sought reconsideration, which was granted in an entry dated July 15, 2010. *R. 32 & 33.*

In accordance with the court's ruling, Defendant's Motion for Summary Judgment was submitted on July 19, 2010. *R. 34*. The employer argued that Plaintiff was unable, as a matter of law, to establish "deliberate intent" as required by the new workplace intentional tort statute. *R.C. §2745.01*. Defendants refused, however, to accommodate Plaintiff's discovery efforts and submitted a Motion for Protective Order on July 29, 2010. *R. 38*. In an entry which was issued on August 3, 2010, Judge Russo denied the application and ordered defense counsel to cooperatively schedule the remaining depositions with Plaintiff's counsel. *R. 41*. In a separate entry which was issued in the same day, the court announced that:

As the Defendant has failed to comply with the court's discovery orders and Plaintiff has been unable to secure needed depositions, the summary judgment motion is stricken. Case to proceed to trial. ***

R. 42, Journal Entry dated August 3, 2010.

On September 13, 2010, Defendant filed no less than five motions seeking, for the most part, to preclude Plaintiff from offering the most damaging evidence that had been obtained during discovery. *R. 60-64*. Each of these requests was opposed in a timely manner and all of them were promptly denied by Judge Russo. *R. 84-88, Journal Entries dated September 17, 2010.*

The jury trial then commenced on September 21, 2010 before Visiting Judge Thomas J. Pokorny. *Trial Tr. Vol. I, p. 4*. Over the course of the next several days, numerous witnesses were presented establishing that the apprentice lineman had been required to work under circumstances which were destined to result in a catastrophe.

(..continued)

¹ Plaintiff had previously filed his workplace intentional tort claim against Defendant on June 10, 2008. *Case No. 661865*. He was represented by different counsel at the time. His former attorney voluntarily dismissed the lawsuit, without prejudice, on December 16, 2008.

Notably, no witnesses were called by the defense. *Id.*, Vol. III, p. 398.

Prior to resting their case, defense counsel offered a lengthy motion for directed verdict. *Trial Tr. Vol. III, pp. 353-393*. The employer maintained that (1) no genuine issues of material fact existed upon the "deliberate intent" standard which had been imposed in R.C. §2745.01, (2) Plaintiff's future damages were too subjective, and (3) any award of non-economic damages were capped by R.C. §2315.18(B)(3)(a), and (4) no punitive damages were warranted as a matter of law. *Id.*, pp. 353-375. Plaintiff refuted each of these contentions. *Id.*, pp. 375-386. In ruling upon the motion, the trial court acknowledged that all the evidence had to be construed most strongly in favor of Plaintiff. *Id.*, p. 393-394. It was explained that:

I'll comment just briefly on the issues that have been raised by the defense in the case. In construing the evidence in the most favorable light to the non-movant here, I have to assume true the fact that instructions were given by people who were in a supervisory capacity on behalf of the company that the use of rubber gloves and sleeves was not necessary for the apprentices to use on that morning.

And then also I have to assume that the plaintiff in this instance, an apprentice, was sent up in a bucket without them, with full knowledge of the people who were supervising him. That I assume is true. And that is not something that ultimately that is going to be assumed true. The jury is going to make that determination itself, so -- if it's going to find for the plaintiff in the case.

Id., pp. 394-395. After further discussion, the trial judge concluded that sufficient evidence had been presented to satisfy the presumption set forth in R.C. §2745.01(C), which pertains to deliberate removal of equipment safety guards. *Id.*, pp. 395-396. Evidence was cited, moreover, which would permit a determination that future damages were reasonably certain under the circumstances. *Id.*, pp. 396-397. Finally, the request for a directed verdict upon the claim of punitive damages was denied. *Id.*, pp. 397-398.

The next day, the jurors returned a verdict for Plaintiff and found that he had proven "by a preponderance of the evidence that [Defendant] committed an act with the requisite intent to injure [him], as defined by the Court[.]" *Trial Tr. Vol. III, pp. 501-502*. Compensatory damages totaling \$597,785.00 were then awarded and apportioned as follows:

\$224,285	Compensatory damages representing past economic loss (including lost wages & medical expenses);
\$283,500	Compensatory damages representing future economic loss (including lost wages and medical expenses);
\$25,000	Compensatory damages representing past loss of life's enjoyment;
\$50,000	Compensatory damages representing other past non-economic loss;
\$0	Compensatory damages representing future loss of life's enjoyment;
\$15,000	Compensatory damages representing other future non-economic loss (including pain and suffering)

Trial Tr. Vol. III, p. 502. Punitive damages were found to be unwarranted. *Id., p. 503*.

The verdict was journalized by this Court on October 1, 2010. *R. 97*.

Three days later, Plaintiff filed his Motion for Taxation of Costs which Defendant opposed. The request was nevertheless granted on October 18, 2010 and additional costs were imposed totaling \$2,905.00. *R. 104*.

Defendant's Motion for Judgment Notwithstanding the Verdict was filed on October 15, 2010. *R. 103*. With few exceptions, the employer simply repeated all of the same arguments which had been raised – and rejected – during the directed verdict stage of the proceedings. Plaintiff's timely Memorandum in Opposition followed on November 4, 2010 ("Plaintiff's Memorandum"). *R. 110*. He maintained that sufficient evidence had been produced during the trial that would allow (and did allow) reasonable jurors to conclude both that he was entitled to the presumption afforded by R.C.

§2745.01(C) and had sufficiently established the “substantial certainty” of injury as required by R.C. §2745.01(B). *Id.*, pp. 7-17. Trial testimony was also cited that permitted a finding that he was reasonably certain to suffer future damages. *Id.*, pp. 17-20.

On November 10, 2010, the trial judge issued a final order declaring that R.C. §2745.01 is constitutional and overruling Defendant’s Motion for Judgment Notwithstanding the Verdict. *R. 111*. Defendant responded by commencing the instant appeal on December 7, 2010. *R. 114*.

STATEMENT OF THE FACTS

Defendant's "Statement of Facts" differs little from the far-fetched closing argument that had been presented in the proceedings below. *Opening Brief of Appellant*, pp. 9-12. The employer continues to rely heavily upon the highly suspect claims of its own foremen and supervisors while ignoring the damaging admissions that had been elicited from these same witnesses during the trial. Despite the overwhelming evidence in the record confirming that deliberate decisions had been made to forego bothersome safety requirements that threatened to impede operations and impair company profits, Defendant has continued to insist that nothing at all had been amiss during the hours leading up to the electrocution incident. Indeed, Plaintiff has been berated for having the temerity to actually follow his superiors' instructions and recommendations. When all of the testimony is properly considered and evaluated in the manner required for this appeal, a far more disturbing scenario emerges.

On January 14, 2006, Plaintiff was a 39 year old resident of Cleveland. *Trial Tr. Vol. I*, pp. 131-132. In 2005 he attended an American Line Builders Apprenticeship Training (ALBAT) program. *Id.*, p. 135. He joined the local union and was soon hired by Defendant as an apprentice. *Id.*, p. 136. He was assigned to help the lineman install new electrical wires along Route 60. *Id.*, pp. 136-137. In the process, the apprentices were supposed to learn the trade. *Id.*, pp. 137-138. Plaintiff was only at the "second step," which meant that he was just getting started in the profession. *Id.*, *Vol. II*, pp. 223-224.

Because the crew was allowed to show up late in the mornings, Plaintiff missed a "safety meeting" that was held. *Trial Tr. Vol. I*, pp. 139-140; *Vol. II*, p. 227. As they were driving out to the worksite in a bucket truck, Lineman Dennis Law ("Law")

informed him that he was going to be replacing the wiring on the poles. *Id.*, pp. 140-141. Plaintiff would have to work in the elevated bucket by himself, which he had never done before. *Id.*, p. 141. When Plaintiff expresses his concerns about this assignment, Law told him that he would be "okay." *Id.*, p. 141.

The linemen were supposed to be reminding the apprentices about their safety equipment and helping with their training. *Trial Tr. Vol. I*, p. 83. When they arrived at the worksite, however, Law instructed Plaintiff that he did not need to wear the rubber gloves and sleeves that were supposed to protect his hands and arms. *Id.*, pp. 141-143 & 199. Plaintiff was nervous about the assignment, but the linemen assured him that he would not come into contact with anything dangerous. *Id.*, pp. 143-144.

Plaintiff was led to believe that all of the lines would be de-energized at the top of the pole. *Trial Tr. Vol. I*, pp. 142 & 186-187. As one would expect, he was trusting his supervisors to keep him safe. *Id.*, p. 202. But he was never told that two wires continued to carry current. *Id.*, p. 142.

Foreman Julian Cromity ("Cromity") was one of the other linemen on the crew. *Trial Tr. Vol. II*, pp. 222-223. He confirmed that another foreman had stated that the weather was expected to be "hot" that day and the apprentices "wouldn't have to wear their rubber gloves and sleeves because the primary [line] was de-energized[.]" *Id.*, p. 229 & 252-253. The Foreman thus verified that Plaintiff's testimony in this regard was correct. *Id.*, p. 230.

As the company management understood, ALBAT regulations prohibited second step apprentices from working alone and unsupervised near currents of 500 volts. *Trial Tr. Vol.*, pp. 81-84, 101 & 107-108; *Vol. II*, p. 251. Yet the energized lines at the top of the pole were carrying about 7200 volts. *Id.*, p. 81. Superintendent Jack Ehrle ("Ehrle")

appreciated that Plaintiff could have contacted the hot wires merely by reaching his arm out, which is always a risk. *Id.*, pp. 82-83 & 126. This was also Foreman Cromity's understanding. *Id.*, Vol. II, p. 255. There is always the prospect, moreover, that de-energized lines can become energized during any number of mishaps. *Id.*, Vol. I, pp. 66-70. For that reason, rubber gloves and sleeves are required even when the current has purportedly been disconnected. *Id.*, p. 66.

Law understood that because some of the lines were still "hot," Plaintiff would be working in "a primary zone[.]" *Trial Tr. Vol. I, pp. 125-126*. Superintendent Ehrle did not mince words in describing the grave dangers that were posed. During his deposition, he had acknowledged that working with a primary without rubber gloves and sleeves "would be like committing suicide." *Id.*, pp. 70-71.

Another fundamental safety requirement was that second step apprentices were supposed to be closely supervised while they were alone in the elevated buckets. *Trial Tr. Vol. I, p. 101; Vol. II, p. 231*. This vital task had been assigned to Law. *Id.*, Vol. I, p. 64. He should have made sure Plaintiff was wearing the protective equipment before he stepped into the bucket. *Id.*, Vol. II, p. 257.

But because the crew was short on manpower, Law was also required to stand by the road and waive a flag for oncoming traffic. *Trial Tr. Vol. I, p. 64 & 97*. By his own acknowledgment, the apprentice was not properly supervised. *Id.*, p. 101. Foreman Cromity was in full agreement. *Id.*, Vol. II, p. 234. Plaintiff was the only apprentice who did not have a lineman working with him. *Id.*, Vol. I, p. 109.

Plaintiff remained uncertain about what he was supposed to do that day. *Trial Tr. Vol. I, pp. 142-143*. He certainly would have worn his personal protective equipment if he had been told to do so. *Id.*, p. 143. Instead, he just wore his leather gloves. *Id.*, p.

144. That should have been observed by Law. *Id.*, pp. 74-75 & 144.

At the top of the pole, Plaintiff had to use his hands to pry and remove the neutral wire. *Trial Tr. Vol. I, p. 146*. Anyone watching him would have seen that he was not wearing personal protective equipment. *Id.* Law was standing in the ditch about 35 to 40 feet away flagging traffic. *Id.*, p. 99. According to Foreman Cromity, the Lineman simply yelled "hey" up to Plaintiff. *Id.*, Vol. II, pp. 248-249. That was a bad idea, given Plaintiff's proximity to the primary line. *Id.*, pp. 233-234 & 236.

All too predictably, Plaintiff turned and his left arm was electrocuted by the energized wires. *Trial Tr. Vol. I, p. 152*. He was still able to maneuver himself to the ground with his right hand and throw himself out of the bucket. *Id.*, pp. 153-154. When his co-workers pulled up his sleeve, his left arm looked like a burnt cigarette. *Id.*, p. 156. Burns also ran up and down his back. *Id.*, pp. 158-159. The apprentice had to be life-flighted to MetroHealth Hospital where he was admitted to the facility's burn unit. *Id.*, pp. 156-157.

Law has acknowledged that he would have been in the bucket with Plaintiff if he had not been required to flag traffic. *Tr. Vol. I, p. 99*. He would have noticed that the apprentice was not wearing his protective gloves and sleeves and the electrocution incident never would have happened. *Id.*, pp. 98, 102-103 & 108. An insulated blanket also could have been thrown over the hot lines that also would have prevented the catastrophe. *Id.*, pp. 123-124.

For his part, Superintendent Ehrle admitted that he was supposed to be making sure that the electrical workers were safe. *Tr. Vol. I, p. 55*. He conceded that if he had been monitoring the crew prior to June 14, 2006 he would have been aware of their "lapses in judgment and safety[.] *Id.*, p. 52. He could have taken corrective action to

make sure that the electrocution did not occur. *Id.*, p. 52. Unfortunately, Defendant's re-dedication to workplace safety came too late for Plaintiff.

Plaintiff proceeded to file a workers' compensation claim, that was allowed for a number of conditions including second degree burns to his hand, forearm, and median nerve as well as "[p]rolonged posttraumatic stress disorder." *Trial Tr. Vol. III, p. 326*. Medical and wage loss benefits totaling approximately \$183,000.00 have been paid, and the figure is expected to grow. *Id.*, pp. 331-333.

ARGUMENT

Defendant has fashioned two Assignments of Error for this Court's consideration, neither of which possess merit. They will be separately addressed in the remainder of this Brief.

ASSIGNMENT OF ERROR I: THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT (TR. 393-97) AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (R. 111) AS TO LIABILITY.

A. STANDARD OF REVIEW

This initial Assignment of Error challenges the denials of both the motion for directed verdict that had been raised during the trial and the motion for judgment notwithstanding the verdict that followed afterward. The applicable standards of review are largely identical.

1. Motion for Directed Verdict

Defendant had moved for a directed verdict both at the close of Plaintiff's case-in-chief and at the conclusion of the evidentiary phase of the proceedings. *Trial Tr. Vol. III, pp. 353-375 & 399*. Civ. R. 50(A)(4) provides that:

When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

The trial judge is therefore obligated to construe the evidence most strongly in favor of the responding party. *Driscoll vs. NorProp, Inc.* (8th Dist. 1998), 129 Ohio App.3d 757, 762, 719 N.E.2d 48, 51. The motion must be denied if reasonable minds can reach different conclusions from the testimony. *Kraft Constr. Co. vs. Cuyahoga County Bd. of*

Commr., (8th Dist. 1998), 128 Ohio App.3d 33, 41, 713 N.E.2d 1075, 1080. Civ. R. 50(A) merely provide a means for testing the legal sufficiency of the evidence. *Duncan vs. Ohio Blow Pipe Co.* (8th Dist. 1998), 130 Ohio App.3d 228, 233, 719 N.E.2d 1029, 1032.

Rulings upon motions for directed verdict are reviewed *de novo* on appeal. *Wilson v. Harvey* (8th Dist. 2005, 164 Ohio App. 3d 278, 283-284, 2005-Ohio-5722, 842 N.E. 2d 83, 87 ¶10.

2. Motion for Judgment Notwithstanding the Verdict

The second subpart of this Assignment of Error also references the court's denial of a judgment notwithstanding the verdict (JNOV). *Civ.R. 50(B)*. This extraordinary remedy is preserved for only "extremely rare cases" involving "exceptional circumstances." *Jones v. Huntington Loc. Sch. Dist.* (Feb. 8, 2001), 4th Dist. No. 00CA2548, 2001-Ohio-2359, 2001 W.L. 243293. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *The C.E. Morris Co. v. Foley Constr. Co.* (1978) 54 Ohio St. 2d 279, 376 N. E. 2d 578; *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St. 3d 77, 461 N.E. 2d 1273.

The testimony furnished by the nonmoving party must be accepted as true and all reasonable inferences must be drawn in his/her favor. *Miller v. Paulson* (10th Dist. 1994), 97 Ohio App. 3d 217, 221, 646 N.E. 2d 521, 523. No weighing of the evidence or assessment of the credibility of the witnesses is permitted. *White v. Center Mfg. Co.* (6th Dist. 1998), 126 Ohio App. 3d 715, 723, 711 N.E. 2d 281, 286. So long as some evidence upon which reasonable minds could disagree supports each element of the plaintiff's claim for relief, such a motion must be denied. *Osler v. City of Lorain* (1986), 28 Ohio St. 3d 345, 347, 504 N.E. 2d 19, 21; *Ayers v. Woodard* (1957), 166 Ohio St. 138, 142, 140

N.E. 2d 401, 404.

On appeal, such determinations are reviewed *de novo*. *Orbit Elect., Inc. v. Helm Instr. Co., Inc.* (8th Dist. 2006), 167 Ohio App.3d 301, 312, 2006-Ohio-2317, 855 N.E.2d 91, 99; *Carabotta v. Mitchell* (Jan. 10, 2002), 8th Dist. No. 79165, 2002-Ohio-8, 2002 W.L. 42948, p. *7.

B. OVERVIEW

Defendant is correct that R.C. §2745.01 applies to this action, which was upheld in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066.² *Opening Brief of Appellant*, pp. 1-2. Nevertheless, that enactment left the “substantial certainty” test intact, and simply furnished a new definition of the phrase. Even under this somewhat heightened standard, Defendant has failed to carry its burden of establishing that a defense verdict was required as a matter of law.

It is evident that Defendant has no interest in abiding by the standards governing motions which have been brought under Civ. R. 50(A) and (B). Instead of construing all evidence and inferences most strongly in Plaintiff's favor, the employer has relied heavily upon the highly suspect testimony of its own loyal managers and employees. For example, the Motion furnishes an explanation of how Foreman Steve Dowdy had conferred with lineman Julian Cromity and benevolently determined that Plaintiff “did not need to wear rubber gloves and sleeves because they were working on deenergized lines.” *Opening Brief of Appellant*, p. 10. In a thinly-failed attempt to blame the apprentice for his own electrocution, Defendant has insisted that he should not have

made contact with the energized lines that were "located more than 40 inches away from the de-energized conductor on which [he] was working." *Id.*, p. 20.

Defendant's dubious claims certainly could be rejected by rational fact-finders as more compelling evidence establish that the senior workers and managers fully appreciated that the energized lines and equipments were within dangerously close proximity to the ill-prepared apprentice. Indeed, Defendant even contends that Lineman Law "yelled up to him" from the ground to put on his rubber gloves and sleeves, which is odd given the earlier claim that there had been no need for such personal protective equipment. *Opening Brief of Appellant*, pp. 5 & 12. Foreman Cromity only heard him shout "hey." *Trial Tr. Vol. III*, pp. 248-249. There is no avoiding the reality that many key facts were hotly disputed, and the jury simply concluded that Plaintiff's case was more credible.

Contrary to Defendant's protests, reasonable minds certainly could conclude from the evidence that the requirements of the new workplace intentional tort statute, R.C. §2745.01, had been satisfied in this instance. The jurors had been furnished with detailed instructions with regard to the new definition of "substantial certainty" and the need for either an intentional or deliberate injury. *Trial Tr. Vol. III*, pp. 470-471. Notably, no challenges to the charge have been raised in this appeal. Ohio law is well-settled that the jurors will be presumed to have dutifully followed the instructions which have been furnished by this Court. *Pang v. Minch* (1990), 53 Ohio St. 3d 186, 195, 559 N.E. 2d 1313, 1322; *State v. Ahmed*, 103 Ohio St. 3d 27, 51, 2004-Ohio-4190, 813 N.E.

(..continued)

² Despite the ruling in *Kaminski*, Plaintiff's position is that R.C. §2745.01 is unenforceable for the reasons stated in *Johnson v. B.P. Chems., Inc.*, 85 Ohio St.3d 298, 1999-Ohio-267, 707 N.E.2d 1107, and *Brady v. Saftey-Kleen, Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722. These issues will not be developed in detail, however, since this Court is bound by *Kaminski*, 125 Ohio St.3d 250, as well as *Stetter v. R.J. Corman*

2d 637, 663-664.

Noticeably absent from Defendant's Motion is any suggestion that the jurors had been distracted or lost their way during deliberations. To its credit, the employer has not attempted to establish that misconduct by counsel, an error by the court, or some other irregularity during the proceeding could have lead them astray. The inescapable conclusion is that they had been properly instructed, and fully appreciated, the requirements imposed by R.C. §2745.01. As was their prerogative, they simply disagreed with Defendant that Plaintiff had failed to sustain his burden of proof in this regard.

C. NECESSITY OF A CRIMINAL INTENT TO INJURE

As was the case with the motions for directed verdict and for judgment notwithstanding the verdict, Defendant's argument under this Assignment of Error rests upon a single flawed assumption. The employer has always appeared to be under the impression that liability can be imposed under R.C. §2745.01 only when the injured worker establishes that his superiors possessed a specific and premeditated intent to inflict bodily harm upon him. *Opening Brief of Appellant, pp. 2-6 & 15-17*. In other words, employers who knowingly expose their workers to grave and unacceptable risks of injury are impervious to an award of compensatory and punitive damages as long as they stop short of committing a criminal assault.

Fortunately for the workers of this state, the Cuyahoga County Court of Appeals has recently rejected this same dangerous interpretation of R.C. §2745.01. *Houdek v. ThyssenKrupp Mat. N.A., Inc.*, 8th Dist. No. 95399, 2011-Ohio-1694, 2011 W.L. 1326374. After examining *Kaminski*, 125 Ohio St. 3d 250, Judge Kenneth A. Rocco observed for

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Derailment Servs., L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092.

the unanimous panel that the “employer tort has not been abolished, but rather constrained.” *Houdek*, 2011-Ohio-1694 ¶11. In that instance, a warehouse worker had been crushed by a forklift. *Id.*, ¶18-23. The forklift operator had been ordered to proceed at maximum speed. *Id.*, ¶20. Management had been warned of the dangers that were posed to the employees who were walking the aisles. *Id.*, ¶23. In reversing the trial court’s entry of summary judgment in favor of the employer, the Eighth District observed that the use of the terms “substantially certain” and “deliberate intent” in R.C. §2745.01(B) was inherently contradictory. *Houdek*, 2011-Ohio-1694. The opinion then reasoned that:

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; ¶169 (“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 ****”).

Id., ¶43. The appellate court then turned to the question of how a “substantial certainty” was to be established under the new statute.

*** [The Employer] 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, the 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 *Oncala v. Sundowner Offshore Servs., Inc.* (1998), 523 U.S. 75, 80-81, 118 S. Ct. 998, 1003, 140 L. Ed. 2d 201.

Id., ¶45. The Eighth District then held that genuine issues of material fact existed over

whether liability should be imposed under R.C. §2745.01, particularly in light of the “specific supervisory directives” and the “warning” that had been furnished to management. *Id.*, ¶46.

The eminently sensible ruling that was issued in *Houdek*, 2011-Ohio-1694, forcefully dispels the notion that liability will be imposed under R.C. §2745.01 only when the employer possess a criminal intent to inflict harm upon the workers. There would have been no need to include the phrase “substantially certain” in the new statute if that had been the legislature’s intention. The enactment could have easily included language confirming that a specific and deliberate intent to cause harm had to be shown if that had been their objective. “In matters of construction, it is the duty of [the] court to give effect to the words used, not to delete words used or to insert words not used.” *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St. 3d 50, 524 N.E. 2d 441, paragraph three of the syllabus (citation omitted).

D. PUBLIC POLICY CONSIDERATIONS

The *Houdek* opinion also lays another misconception to rest. As is typically the practice in workplace intentional tort actions, the employer has complained bitterly that the injured worker is being unfairly granted a “‘third bite’ at the apple.” *Opening Brief of Appellant*, p. 1. Defendant is attempting to create the illusion that Plaintiff is being triple-compensated by his successful workers compensation claim, the additional recovery for a violation of a specific safety regulation (VSSR), and the jury’s award of intentional tort damages. *Id.*

Defendant fully appreciates that there is no truth to this criticism of the current system for compensating injured workers. As plainly reflected in the Certificate of Service to the Opening Brief of Appellant, the Bureau of Workers’ Compensation

remains as a party to these proceedings. Defense counsel was present in the courtroom when one of the Bureau's attorneys testified that statutory subrogation rights are being asserted that will require Plaintiff to repay up to \$183,000.00 from any intentional tort recovery that is received. *Trial Tr. III, pp. 330-333*. The lien continued to grow, of course, as additional benefits are paid in the future. *Id., pp. 333-334*. Consequently, there is no risk of any inappropriate triple, or even double, recoveries.

Defendant's failure to account for the Bureau's subrogation rights turns its public policy arguments on their head. If the employer has its way in this appeal, then the state will be rarely – if ever – reimbursed for the workers compensation benefits that have to be paid as a result of injuries and fatalities attributable to an employer's deliberate indifference to workplace safety. The considerable costs incurred by such deplorable, yet highly profitable, practices will have to be borne by the administrative system.

This disturbing reality was not lost upon the Eighth District, as the Court sagely observed that:

As a cautionary note, if Justice Pfeifer is correct [in his dissent in *Kaminski*], 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 [as] real persons. [emphasis added]

Houdek, 2011-Ohio-1694, ¶139. In accordance with this sound precedent, the public policy in Cuyahoga County is now that the modifications imposed upon the workplace intentional tort theory of recovery by R.C. §2745.01 are to be strictly construed.

E. ESTABLISHMENT OF A SUBSTANTIAL CERTAINTY OF INJURY

Defendant maintains that “the Trial Court correctly concluded that [Plaintiff] failed to present sufficient evidence to support a finding that [the employer] acted with a ‘direct’ or ‘deliberate’ intent to harm him[.]” *Opening Brief of Appellant*, p. 13 (citation omitted). The trial judge can be forgiven for reaching this untenable conclusion, however, because he did not have the benefit of the decision that had been rendered a few months later in *Houdek*, 2011-Ohio-1694. In this appeal, this Court is certainly entitled to conclude that a “substantial certainty” of injury had been established within the meaning of R.C. §2745.01(B) and the jury could thus reasonably find that the employer’s actions had been sufficiently deliberate to permit a recovery. It is axiomatic that the trial court’s judgment will be affirmed if any valid grounds are found to support it. *Joyce v. General Motors Corp.* (1990), 49 Ohio St. 3d 93, 96, 551 N.E. 2d 172; *Taylor v. Yale & Towne Mfg. Co.* (9th Dist. 1987), 36 Ohio App. 3d 62, 63, 520 N.E. 2d 1375.

Here, the testimony of the company’s own managers and employees permitted a determination that all of the decisions which had been made which produced the electrocution injury were “deliberate” in every sense of the term. Ohio courts have long recognized that the employer’s intent does not need to be proven directly, but can be inferred through circumstantial evidence. *Burkey v. Teledyne Farris* (June 30, 2000), 5th Dist. No. 1999 APO30015, 2000 W.L. 968695, p. *5; *Yarnell v. Klema Bldgs., Inc.* (Dec. 24, 1998), 10th Dist. No. 98AP-178, 1998 W.L. 894596, p. *4; *Croft v. Fluor Daniel Eng’g., Inc.* (June 28, 2002), 1st Dist. No. C-010409, 2002-Ohio-3288, 2002 W.L. 1390611, p. *2; *Adams v. Aluchem, Inc.* (1st Dist. 1992), 78 Ohio App.3d 261, 604 N.E.2d 254. There is no reason to believe that R.C. §2745.01 altered these time-tested standards.

Ample evidence supports the jury's determination that the requirements of R.C. §2745.01 have been satisfied. The new statute "imposes liability where the conduct is intentional or deliberate." *Smith v. Inland Paperboard & Packaging, Inc.*, 11th Dist. No. 2008-P-0072, 2009-Ohio-3148, 2009 W.L. 1847618 ¶ 25. Accordingly, the employer's actions do not need to be "deliberate" as long as there is an "intent to injure." *Estate of Diaz v. Superior Envir. Sol., Inc.* (February 16, 2011), Lorain C.P. Case No. 09CV160223, p. 5; *Apx. 0009*.

The terms "intentional" and "deliberate" are not defined in the enactment. R.C. §2745.01. Accordingly, the common meaning of the words will control. *Cincinnati City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.*, 122 Ohio St. 3d 557, 2009-Ohio-3628, 913 N.E. 2d 421, 424 ¶ 15-16; *Sharp v. Union Carbide Corp.* (1988), 38 Ohio St. 3d 69, 70, 525 N.E. 2d 1386, 1387.

The term "intent" focuses upon the actor's state of mind and has been defined in the Merriam-Webster Dictionary as follows:

1 a : the act or fact of intending : PURPOSE; *especially* : the design or purpose to commit a wrongful or criminal act <admitted wounding him with *intent*>

b : the state of mind with which an act is done : VIOLATION

2 : a usually clearly formulated or planned intention : AIM <the director's *intent*> ***

"Deliberate" typically refers to the nature of the decision-making process, as the following definition from Merriam-Webster indicates:

1 : characterized by or resulting from careful and thorough consideration <a *deliberate* decision>

2 : characterized by awareness of the consequences

<deliberate falsehood>

3 : slow, unhurried, and steady as though allowing time for decision on each individual action involved <a *deliberate* pace>

While there appears to be few Ohio decisions examining the concept “deliberate or intentional,” federal courts have reasoned in the bankruptcy context that:

An injury is deliberate or intentional “if the actor purposefully inflicted the injury or acted with [knowledge that there was] substantial certainty that injury would result.” *In re Conte*, 33 F. 3d 303, 305 & 307-09 (3rd Cir. 1994); *Geiger v. Kawaauhau (In re Geiger)*, 113 F. 3d 848, 852-54 (8th Cir. 1997), *aff’d*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998); *In re Slosbery*, 225 B.R. 9, 18-19 (Bankr. D. Me.1998) (citing, at n. 12, *State of Texas v. Walker*, 142 F. 3d 813, 823-24 (5th Cir. 1998); *In re Kidd*, 219 B.R. 278, 285 (Bankr. D. Mont. 1998); *In re Dziuk*, 218 B.R. 485, 487 (Bankr. D. Minn. 1998)); *In re Grover Huges Phillippi*, Bankr No. 98-21819-MBM, Adv. No. 98-2256-MBM (Bankr. W. D. Pa 7/20/99), at 7-11 & n. 4.

In re Kartman (Bankr. W. D. Pa. 2008), 391 B.R. 281, 284. Accordingly, a “deliberate indifference” can be shown when the actor “knows of and disregards an excessive risk” to another’s health or safety. *Farmer v. Brennan* (1994), 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811. Under the doctrine of “deliberate ignorance,” moreover, “knowledge can be imputed to a party who knows of a high probability of illegal conduct and purposely contrives to avoid learning of it.” *Williams v. Obstfeld* (11th Cir. 2002), 314 F. 3d 1270, 1278 (citation omitted).

During the jury trial, Defendant’s management level employees acknowledged that the electrocution hazard had been fully appreciated. Working from an elevated bucket on a primary field without proper protective equipment was even described as “committing suicide.” The employer’s actions therefore cannot be described as just “rash” or “reckless,” as a deliberate decision had been made to place the step two

apprentice in close proximity to energized wires and conductors without the vital rubber gloves, sleeves, or insulated blanket.

It should not be overlooked, moreover, that “an employer’s failure to comply with safety regulations is a relevant consideration in determining the employer’s knowledge of substantial certainty of injury.” *Logan v. Birmingham Steel Corp.* (Aug. 7, 2003), 8th Dist. No. 80472, 2003-Ohio-4171, 2003 W.L. 21805631, p. *4, citing *Anderson v. Zavarella Bros. Constr. Co.* (Dec. 5, 1996), 8th Dist. No. 70657, 1996 W.L. 695585, p.*4.

Indeed, the workplace intentional tort theory is most easily established when the employer has broken the law. *Estate of Merrell*, 2007 W.L. 1776357, p. *8; *Maynard v. Eaton Corp.* (June 14, 2004), 3rd Dist. No. 9-03-48, 2004 W.L. 1302314, at p. *3; *Slack v. Henry* (4th Dist. 2000), No. 00CA2704, 2000-Ohio-1945, 2000 W.L. 33226197, p. *5.

An analogous situation had been examined in *Ross v. William E. Platten Contracting Co.* (Oct. 25, 2007), 8th Dist. No. 88749, 2007-Ohio-5733, 2007 W.L. 3105411. An experienced excavation worker had been seriously injured when part of a trench wall collapsed on him. *Id.* at p.*1. None of the OSHA-mandated protective features had been afforded. *Id.* at p. *4. This Court reasoned that:

Where an employer has failed to install a safety device that might have prevented an injury, courts may consider that fact in determining a motion for summary judgment on employee intentional tort claims. [citation omitted].

Id. The panel concluded that genuine issues of material fact existed upon the claim since the employer had appreciated the existence of the regulations, knew that compliance was necessary to prevent injury, but nevertheless proceeded to disregard them. *Id.*

For over three decades, federal law has required that employers undertake

necessary safety measures and precautions to protect their employees from known hazards. Section 5 of the Occupational Safety and Health Administration Act has directed that:

Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter. *** [emphasis added].

29 U. S. C. §654(a).

Requiring a mere apprentice to work alone in an elevated bucket in close proximity to 7,500 volts of electricity violated numerous regulations which had been promulgated by the federal Occupational Safety and Health Administration ("OSHA").

Examples include 29 C.F.R. §1910.333(c)(3), which specified that:

Overhead lines. If work is to be performed near overhead lines, the lines shall be deenergized and grounded, or other protective measures shall be provided before work is started. If the line are to be deenergized, arrangements shall be made with the person or organization that operates or controls the electric circuits involved to deenergize and ground them. If protective measures, such as guarding, isolating, or insulating are provided, these precautions shall prevent employees from contacting such lines directly with any part of their body or indirectly through conductive materials, tools, or equipment. [emphasis added]

Apx. 00014-15. In similar fashion, 29 C.F.R. §1910.335(a)(1)(i) required that:

Employees working in areas where there are potential electrical hazards shall be provided with, and shall use, electrical protective equipment that is appropriate for the specific parts of the body to be protected and for the work to be performed.

Apx. 00018. No exceptions had been provided that permitted Defendant to expose the

apprentice to live overhead wires and energized equipment which were "more than 40 inches away" from him. *Opening Brief of Appellant, p. 20*. Based upon the precedent that has been established in *Houdek*, 2011-Ohio-1694, this Court should conclude that the jury could justifiably determine that a reasonable employer would have understood the "substantial certainty" of injury within the meaning of R.C. §2745.01(B) and impose an appropriate award of damages.

F. THE PRESUMPTION OF A DELIBERATE INTENT

The existence of triable issues of fact is even more apparent in the instant action than was the case in *Houdek*, given that there had been no evidence in that instance of a deliberate removal of an equipment safety guard. In the proceedings below, the jurors were asked to consider whether the exception set forth in R.C. §1745.01(C) applied, which provides that:

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 occupational disease or condition occurs as a direct result.

The trial judge justifiably determined that reasonably intelligent jurors could find that Defendant's management effectively "removed" Plaintiff's access to, and incentive to utilize, the personal protective equipment which was mandatory under federal law. *Defendant's Motion, Exhibit D, pp. 43-44*. By all accounts, rubber gloves, sleeves, and insulated blankets had been required and utilized on previous projects involving energized equipment. The jurors were certainly entitled to conclude that such life-saving protections were effectively removed from the particular work-site where Plaintiff was expected to perform his job duties. Each of these items would have acted as a protective barrier and "guarded" Plaintiff from electrocution.

As during the argument at trial, Defendant continues to insist that "there is no evidence that any L.E. Myers employee physically took [Plaintiff's] rubber gloves and sleeves away from him." *Defendant's Motion, p. 17*. The decidedly broad term "remove" (which is not defined in R.C., §2745.01) encompasses far more than just "physical" takings from another person. Merriam-Webster defines the term as follows:

1 a : to change the location, position, station, or residence of <remove soldiers to the front>.

b : to transfer (a legal proceeding) from one court to another

2 : to move by lifting, pushing aside, or taking away or off <remove your hat>

3 : to dismiss from office

4 : to get rid of : ELIMINATE <remove a tumor surgically> [emphasis added]

This latter definition, in particular, could be found to be applicable to the facts of this case. By instructing the apprentice that he was not to wear the rubber gloves and sleeves, management "got rid of" the federally mandatory safety equipment. Just like one can "remove" another's incentives or "remove" one's options, the term plainly does not always require a "physical" component.

Even Defendant's own loyal representative agrees with this common-sense understanding of the term "removal." During his deposition, Superintendent Ehrle had acknowledged that telling the apprentices not wear their protective equipment was tantamount to "removing a critical piece of safety" for them. *Trial Tr. Vol. I, p. 80*. By the time of trial he had decided to change his answer, but the jury could certainly opt to accept his earlier, unrehearsed testimony. *Id., pp. 80-81*. When the cross-examination questioning turned to the company's failure to ensure that the apprentice was being

closely monitored while he was working alone in the elevated bucket within proximity to 7500 volts of current, the following exchange took place:

Q. And it removes that layer of safety that's specifically there that's within your policies and procedures to make sure that those apprentices are safe, isn't it?

MR. McCARTHY: Objection.

THE COURT: Overruled.

A. Yes. [emphasis added]

Id., p. 86.

This same broad view of the term "removal" was recently followed in the Stark County Court of Common Pleas. *Wilson v. Martin Pallet, Inc.* (August 24, 2010), Stark C.P. Case No. 2009CV00908; Apx. 0001. The Plaintiff had been injured on a sawing machine. *Id.*, 0002. In order to speed up operations, a supervisor had taped over a safety switch that would have disengaged the machinery and prevented the incident. *Id.*, 0002-3. In denying the employer's demand for summary judgment, the trial judge concluded that "[b]ypassing or disabling this critical safety feature is tantamount to 'removing' it." *Id.*, 0004. The Plaintiff was therefore entitled to the rebuttable presumption set forth in subsection (C). *Id.*

The presumption that has been furnished in Ohio's new workplace intentional tort statute appears to be based upon a similar provision that was adopted in Alabama quite some time ago. That state has permitted claims against employers which are based upon:

The willful and intentional removal from a machine of a safety guard or safety device provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from such removal; ***

Ala. Code 1975 §25-5-11(c)(2); Apx. 00021. Although the Alabama exception is limited

to "machine[s]" instead of "equipment," the provision is otherwise similar in all meaningful respects to Ohio's presumption.

Not surprisingly, Alabama courts have afforded the term "removal" its common usage and understanding. *Moore v. Reeves* (Ala. 1991), 589 So. 2d 173, 177-179; *Apx. 00024*. (recognizing that a failure to maintain and/or repair a safety guard or a device was tantamount to a removal); *Bailey v. Hogg* (Ala. 1989), 547 So. 2d 498, 499-500; *Apx. 00033*. (equating a removal with a failure to install a safety guard); *Harris v. Gill* (Ala. 1991), 585 So. 2d 831, 836-839, *Apx. 00037*. (holding that bypassing a safety device could qualify as a removal). While the pronunciations may differ, the term "removal" means precisely the same in Ohio as in Alabama. These opinions from that state's highest court therefore thoroughly discredit the contrived and unprecedented definition that Defendant has devised.

In similar fashion, Defendant has continued to advocate an unduly narrow understanding of the phrase "equipment safety guard." *Opening Brief of Appellant*, pp. 19-20. Citing no authorities at all, the employer has insisted that this phrase can only mean "a device of affixed to equipment which employees are required to operate." *Id.*, p. 19. Had the General Assembly envisioned that the presumption would be limited to injuries attributable to a "device" that should have been attached to machinery "which employees are required to operate[,] " then such terms surely would have been included in the enactment. But they are strikingly absent from R.C. §2745.01(C). Even if the General Assembly may have intended a different result, a statute must be enforced in accordance with its plain and ordinary meaning. *Hubbard v. Canton City Schools*, 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E. 2d 543, ¶ 14-17.

There can be no serious dispute that the federally mandated rubber gloves and

sleeves qualified as "equipment" under a common-sense understanding of the term. Defendant's attorneys themselves have acknowledged that: "What we have is personal protective equipment." *R. 101, Defendant's Motion for Judgment Notwithstanding the Verdict, Exhibit D, p. 13* (emphasis added). The notion that "equipment" can mean only "devices" or "machines" is patently illogical.

For similar reasons, the phrase "safety guard" is not limited to shields and barriers. In *Moore*, 589 So. 2d 173 (Apx. 00024), the Supreme Court of Alabama was called upon to examine a claim which had been brought by a security guard who had been injured when he was required to operate a dilapidated automobile during his patrol around a college campus. He had fallen out of the car because the side door would not latch properly. *Id.*, at 175. As previously noted, the Alabama Workmen's Compensation Act, Ala. Code 1975 §25-5-11(c)(2), permitted such claims against employers when safety guards or devices had been willfully and intentionally removed from machinery. *Id.*, at 176.

After observing that the phrases "safety device" and "safety guard" had not been defined in the statute (which is also true in Ohio), the high court examined several reputable dictionary definitions. *Id.*, at 177. They then reasoned that:

Thus, combining the above definitions of the above terms- "device," "guard," and "safety" - we conclude that the terms "safety device" and "safety guard" mean an invention or contrivance intended to protect against injury, damage, or loss that insures or gives security that an accident will be prevented. Therefore, for purposes of construing these terms within §25-5-11(c)(2), we hold that a "safety device" or "safety guard" is that which is provided, principally, but not exclusively, as protection to an employee, which provides some shield between the employee and danger so as to prevent the employee from incurring injury while he is engaged in the performance of the service required of him by the employer: it is not something that is a component part of the machine whose principle purpose is to facilitate or

expedite the work. [emphasis added]

Id., at 177. The Court then held that the door closure mechanism that had malfunctioned met this definition because “it constituted a shield between [the security guard] and danger so as to protect him from the injuries he sustained while he was patrolling the campus in performance of the services required of him by the college.” *Id.* at 177 (footnote omitted).

Based upon their collective experiences and common sense, the jurors could reasonably conclude that the rubber gloves, sleeves, and insulating blankets qualified as “equipment safety guard[s]” consistent with the court’s instructions. Just like the “equipment” worn by a firefighter furnishes protection against flames, these items of personal protection would have acted as a shield between Plaintiff’s skin and the energized wires and electrical apparatus at the top of the pole. Defendant’s counsel took full advantage of the opportunity to argue to the jurors that the terms of the statute meant something else, but was evidently unsuccessful. Defendant’s disagreement with the trier-of-fact does not justify the entry of a defense verdict as a matter of law.

ASSIGNMENT OF ERROR II: THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT A DIRECTED VERDICT (TR. 396-97) OR JNOV (R. 111) AS TO THOSE PORTIONS OF THE COMPENSATORY DAMAGE AWARD THAT WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE.

A. STANDARD OF REVIEW

The second Assignment of Error seeks to overturn the jury’s award of future damages. *Opening Brief of Appellant*, pp. 21-24. These arguments had been raised below in the motions for directed verdict and judgment notwithstanding the verdict.

Accordingly, the same standards of review apply as in the First Assignment of Error.

B. NECESSITY OF A PERMANENT INJURY

This Assignment of Error targets the jury's award of compensation for the post-trial losses and damages that Plaintiff is expected to suffer as a result of the electrocution incident. It is well-settled that in the American system of justice it is the function of the trier of fact to assess damages. *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St. 3d 431, 438, 715 N.E. 2d 546, 533. Indeed, the Ohio Constitution guarantees "the right to have a jury determine all questions of fact, including the amount of damages to which the plaintiff is entitled." *Galayda v. Lake Hosp. Sys., Inc.* (1994), 71 Ohio St. 3d 421, 425, 644 N.E. 2d 298, 301 (citation omitted).

Ohio courts have consistently held that a verdict that is supported by competent and credible evidence cannot be disturbed. *Schwartz v. Wells* (12 Dist. 1982), 5 Ohio App. 3d 1, 449 N.E. 2d 9, 12-14. When substantial testimony supports a jury's decision, an abuse of discretion is committed when a new trial is ordered. *Verbon v. Pennese* (6th Dist. 1982), 7 Ohio App. 3d 182, 454 N.E. 2d 976; *Davis v. Cincinnati, Inc.* (9th Dist. 1991), 81 Ohio App. 3d 116, 121, 610 N.E. 2d 496, 499. Such drastic relief is not warranted simply by a difference of opinion. *Youssef v. Parr, Inc.* (8th Dist. 1990), 69 Ohio App. 3d 679, 693, 591 N.E. 2d 762, 771. In *Toledo, Columbus & Ohio River R.R. Co. vs. Miller* (1923), 108 Ohio St. 388, 140 N.E. 617, the Supreme Court cautioned in paragraph three of the syllabus that:

In an action for damages for personal injury, a verdict should not be set aside unless the damages awarded are so excessive as to appear to have been awarded as a result of passion or prejudice, or unless it is so manifestly against the weight of the evidence as to show a misconception by the jury of its duties in the premises.

Defendant appears to be under the impression that no future damages can ever be recovered, as a matter of law, unless a "permanent" and "objective" injury is

established through expert testimony. *Opening Brief of Appellant*, pp. 21-24. This has never been the rule in Ohio as only reasonable certainty of prospective injuries or losses is necessary. *Pennsylvania Co. v. Files* (1901), 65 Ohio St. 403, 62 N.E. 1047, paragraph two of the syllabus; *Johnson v. English* (10th Dist. 1966), 5 Ohio App. 2d 109, 116, 214 N.E. 2d 254, 259. If Defendant's ill-conceived view of the law were correct, then a seriously injured plaintiff who was expected to make a full recovery, but only years after the trial, would be limited to recovering past damages.

While arguing for a directed verdict at trial, and later through the motion for judgment notwithstanding the verdict, Defendant has repeatedly cited *Day v. Gulley* (1963), 175 Ohio St. 83, 191 N.E. 2d 732. The Court had recognized in that instance merely that an instruction upon future damages should not be furnished when "the plaintiff's injuries are subjective in character and there is no expert medical evidence as to future pain, suffering, permanency of injuries or lasting impairment of health[.] *Id.*, syllabus. Expert testimony on "permanency" is thus just one method of justifying future damages, and is hardly indispensable.

The trial court justifiably concluded during the proceedings below that sufficient evidence had been presented to support an award of future damages. *Trial Tr. Vol. III*, p. 396. Kevin L. Trangle, M.D. ("Dr. Trangle") had originally been retained by Defendant to evaluate Plaintiff's condition. R. 89, *Trial Deposition of Kevin Trangle taken September 17, 2010 ("Trangle Depo.")*, p. 7-8. He had reviewed numerous records and reports which had been prepared by a number of other physicians and specialists, all of which had been supplied to him by the employer's counsel. *Id.*, pp. 11-12. He was also able to conduct an examination of Plaintiff on September 15, 2008. *Id.*, p. 14. Dr. Trangle confirmed that the Bureau had approved the claim for several serious

second and third degree burns, major depression, and moderate post-traumatic stress disorder. *Id.*, p. 8. As Dr. Trangle had explained to defense counsel during cross-examination, his opinions were not based solely upon “subjective findings that came from [Plaintiff].” *Id.*, pp. 34-36.

Dr. Trangle further determined (as the Bureau had) that Plaintiff had developed Reflex Sympathetic Dystrophy (RSD) as a result of the electrocution incident. *R. 89, Trangle Depo.*, pp. 7, 31 & 37-38. This disabling condition is typically caused by a traumatic injury and produces a “feedback loop” in the nervous system. *Id.*, pp. 23-25. The victim can suffer intractable pain which “doesn’t respond easily to medication or other methods of treatment.” *Id.*, pp. 27-28. Patients experience swelling, atrophy, and other “kinds of abnormalities over time that will develop.” *Id.*, pp. 26-27.

Rehabilitation counselor Paula Zinmeister (“Zinmeister”) had also testified during the trial. *Trial Tr. Vol. III*, p. 275. She had reviewed all the pertinent records and information, conducted her standard investigation, and prepared an assessment of Plaintiff’s condition. *Id.*, pp. 279-280. She likely overstated the obvious when she confirmed that significant physical injuries seriously affect a person’s entire life. *Id.*, p. 285. Zinmeister concluded that Plaintiff was no longer able to perform many typical functions with his left arm, and was unable to return to work as a lineman. *Id.*, pp. 290-295. She also established his potential wage income in that occupation. *Id.*, pp. 298-299. Like Dr. Trangle, these determinations were objectively verified. *Id.*, pp. 288-290.

At the end of this Assignment of Error, Defendant seems to be arguing that permanency could not be established in this case since the experts were unable to verify Plaintiff’s condition as of the moment of their “trial testimony[.]” *Opening Brief of Appellant*, pp. 22-23. No authorities have been cited, however, even remotely

supporting this dubious theory. The expert would have to examine the plaintiff while the proceedings were ongoing in order to meet that unrealistic expectation.

Reasonably intelligent jurors could find that it was sufficient that Dr. Trangle had examined the apprentice more than two years after the electrocution incident and was able to observe the after-effects of the second and third degree burns that remained and confirm that he was still suffering from RSD. *R. 89, Tangle Depo., pp. 21-23 & 30-31*. And each of the diagnoses had been approved by the Bureau of Workers' Compensation, which continues to pay for the ongoing treatment. *Trial Tr. Vol. III, pp. 326-333*. Plaintiff's other expert, Zinmeister, further explained that the lasting effects of the electrocution incident will continue to disable Plaintiff and preclude him from returning to work as a lineman. *Trial Tr. Vol. II, pp. 290-299*. This conclusion is fully supported by Plaintiff's own testimony, which verified that he was still scared from the episode and was suffering from regular pain, discomfort, and immobility. *Id., Vol. I, pp. 161-163 & 200*. He continues to be prescribed Methadone. *Id., p. 161*. No justification therefore exists for interfering with the jury's award of future damages.

CONCLUSION

Since reasonable minds could justifiably conclude from the evidence in the record that Plaintiff was entitled to the presumption of a deliberate intent afforded by R.C. §2745.01(C), the definition of "substantially certain" set forth in R.C. §2745.01(B) had been met, and Plaintiff was reasonably certain to suffer future harm, the final order of the Cuyahoga County Court of Common Pleas should be affirmed in all respects.

Respectfully Submitted,

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