

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

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APPELLEE BRUCE R. HOUDEK'S
MEMORANDUM OPPOSING RECONSIDERATION

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Now comes Appellee Bruce Houdek and files his brief in opposition to Appellant ThyssenKrupp Materials NA, Inc.'s motion for reconsideration. On October 19, 2011, this Court declined jurisdiction. ThyssenKrupp has filed a motion for reconsideration of this Court's decision. ThyssenKrupp's motion provides no new or compelling reason for this Court to reconsider its prior decision and, therefore, ThyssenKrupp's motion for reconsideration should be denied.

Memorandum

ThyssenKrupp goes to great lengths to argue that the Eighth District's decision in this case makes grand changes to the state of the law post-*Kaminski*. Despite ThyssenKrupp's citation to *obiter dicta* in the Eighth District's opinion, the basis for the appellate court's decision rests upon sound legal reasoning that is both in line with this Court's decision in *Kaminski* and true to the application of the statutory requirements of R.C. §2745.01.

ThyssenKrupp's motion adds nothing new to the arguments that it previously advanced in support of jurisdiction. With this Court's decision in *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027 upholding the constitutionality of R.C. §2745.01, trial courts are left with the task of applying the statute to the individual facts of each case that comes before them. This Court was clear in *Kaminski* that the legislature constrained rather than abolished employer intentional tort claims. *Kaminski*, at ¶98. The Eighth District correctly observed that "[w]hether an employer tort occurs in the workplace depends upon the facts and circumstances of each case." *Houdek*, 2011-Ohio-1694, at ¶11.

ThyssenKrupp's alleged parade of horrors is nothing more than the lower courts doing precisely what this Court's decision in *Kaminski* requires them to do – apply the facts of a

particular case to the statute's requirements. The appellate court discussed the facts in *Houdek* in depth and came to the conclusion that "[i]f the facts and circumstances of this case do not present genuine issues of material fact as to the existence of an employer tort, then none shall." *Houdek*, at ¶38. This finding is at the core of the Eighth District's decision.

1. THE HOUDEK DECISION DOES NOT EXPAND THE SCOPE OF AN EMPLOYER INTENTIONAL TORT UNDER R.C. §2745.01(B).

The Eighth District did not deny that proof of a specific intent on the part of the employer is required under R.C. §2745.01. The court was also correct in its statement that "a plaintiff must show that the employer possessed either, but not both, "intent to injure" or "deliberate intent to injure." *Houdek*, at ¶41. On the facts before it, the appellate court determined that genuine issues of material fact existed "particularly given the specific supervisory directives to both Houdek and the sideloader operator and the sideloader operator's warning to the warehouse manager * * *." *Houdek*, at ¶46. On this basis, the appellate court reversed the trial court's finding that Houdek "was unable to demonstrate the requisite intent to injure." *Houdek*, at ¶25. The appellate court did not specify under which of the statute's separate standards such question of fact existed, but it was clear that the facts of the case were sufficiently egregious that a question of fact as to the requisite intent was evidenced in the record before it. ThyssenKrupp's argument that the appellate court expanded the scope of an employer intentional tort is hollow. *Houdek* does not stand for the proposition that an employee may prove an employer intentional tort without proof of a specific intent to cause injury. ThyssenKrupp misstates the *Houdek* court's decision.

The *Houdek* court was also extremely clear in its review of the facts in *Kaminski* that

there were absolutely no employer directives in that case -- in fact, it was clear from this Court's recitation of the facts that Rose Kaminski voluntarily chose to hold the coil of steel that eventually fell on top of her. The Eighth District noted that it was evident that Kaminski "could not prove any of the elements of common law employer tort established in *Fyffe*." *Houdek*, at ¶29. Since the statute *raised* the standard of proof, a fact the Eighth District recognized, Kaminski's claim could not have survived since she was unable to meet the burden imposed by the lower *Fyffe* standard. The facts at issue in this case are far different. As the Eighth District noted, Houdek was acting upon ThyssenKrupp's specific directives -- directives given *after* ThyssenKrupp had been warned about the specific workplace danger and despite ThyssenKrupp's clear knowledge of Houdek's medical restrictions.

II. THE *HOUDEK* DECISION DOES NOT SHIFT 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."

ThyssenKrupp argues that under the *Houdek* decision, an "employer 'substantially certain' tort may not be established by proof of the objective mindset of the reasonably prudent employer." *See*, ThyssenKrupp Motion at 4. In its Appellee's Brief before the Eighth District, ThyssenKrupp argued that there was "no evidence demonstrating that anyone in management at ThyssenKrupp intended Houdek to be injured on the day of the accident." The Eighth District had this to say concerning ThyssenKrupp's argument:

{¶45} Krupp defends asserting that there is no evidence that Krupp believed that the injury was substantially certain to occur. Krupp would have us interpret "belief" subjectively. Such an interpretation would place a premium on willful ignorance or deceit. Rather, we must interpret "belief" objectively.

How else, other than from an objective standpoint, would the plaintiff ever be able to prove intent? No employer will make this voluntary admission. Therefore, the evidence of “intent” must be proven through circumstantial evidence and the trier of fact must determine whether or not the evidence shows either “intent to injure” or “deliberate intent to injure.” While the court is attempting to determine subjective intent, an objective standard is the yardstick against which such a finding is made. The Eighth District was rightly concerned that application of a purely subjective standard was both too easily defensible and ultimately unprovable from the plaintiff’s standpoint.

It is clear that in *Houdek* the Eighth District was wrestling with the statute’s interpretation and how to apply the employer’s “belief.” However, R.C. §2745.01(A) only requires “belief” on the part of the employer in connection with the “substantially certain” standard, *i.e.*, “deliberate intent to injure.” The employer’s “belief” is immaterial under the “intent to injure” standard in the statute. *See*, R.C. §2745.01(A) and (C).

Nevertheless, the Eighth District raised valid and important concerns with regard to ThyssenKrupp’s position that “belief” was subjective. An employer will never admit that they intended to harm an employee. There is no way to get “inside the head” of the employer, particularly when the defendant is a corporation. Therefore, when it comes to proving the employer’s “belief” circumstantial evidence is always necessary. In *Bickel v. Moyer*, (September 29, 1994), Third Dist. App. No. 50-94-14, unreported, a dram shop case, the court recognized that requiring liability to be conditioned upon such an admission would not make sense since a bar and its employees will likely never make such admissions against their interest. In that case

the court stated:

[I]t is logical to presume that a liquor permit holder, or its employee(s), may never make the admission that they continued to serve a person after that person exhibited signs of intoxication. For a liquor permit holder to make such an admission would be to concede liability on his behalf. Thus, the only way for a third party injured by an intoxicated person to substantiate his claim against the liquor permit holder would be by use of circumstantial evidence. The Ohio Supreme Court has stated that circumstantial evidence is not less probative than direct evidence, and, in some cases, is even more reliable. *State v. Jenks* (1991), 61 Ohio St.3d 259, 272. In fact, ‘in some instances certain facts can only be established by circumstantial evidence.’ *Jenks, supra*.

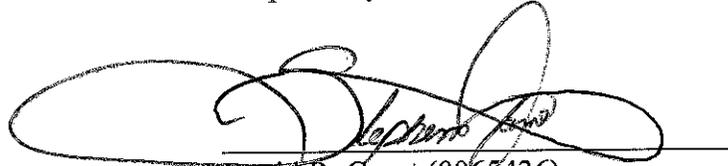
So it is with employer intentional tort cases. Objective circumstantial evidence must be utilized to prove the employer’s belief. What the Eighth District stated then is that the test for “belief” (not intent) is what a reasonable prudent employer would have believed – and whether or not that belief would have shown deliberate intent on the part of ThyssenKrupp. The Eighth District’s decision did not lower the burden of proof below deliberate intent (*or*, “intent to injure”).

ThyssenKrupp is wrong that *Houdek* stands for a lesser burden of proof. ThyssenKrupp argues that “[t]he 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.’” *See*, Brief at 5. Not true. The focus is and must be the specific mindset of the employer, but the employer’s “belief” must be judged against an objective standard – and the proof must still be that the employer committed the tortious act with deliberate intent to cause the employee injury. Again, this analysis applies only under the deliberate intent standard in the statute; the statute does not address the employer’s “belief” under the “intent to injure” standard. *Houdek* takes the statute and correctly applies it to the specific facts of the case.

Conclusion

ThyssenKrupp takes *obiter dicta* from the Eighth District's opinion and advances arguments that leap frog over the appellate court's true holding. The Eighth District was careful to thoroughly discuss the evidence upon which its decision was based (*i.e.*, specific employer directives), and was careful to explain why it ultimately reversed the trial court (*i.e.*, genuine issues of material fact regarding the employer's subjective intent). The Eighth District also took great pains to discuss the facts in *Kaminski* and the facts in this case and address how they were opposite ends of the spectrum. *Houdek* does not change the law as set forth in R.C. §2745.01, nor does it break any precedential ground. The decision in *Houdek* merely does what other courts are now required to do, that is, apply the statute to the specific facts of each employer intentional tort case. For these reasons, and the reasons set forth in Appellee's Memorandum Opposing Jurisdiction, this Honorable Court should deny Appellant ThyssenKrupp's motion for reconsideration.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read "David R. Grant", is written over a horizontal line.

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A copy of the foregoing was served via regular U.S. Mail this 7th day of November, 2011

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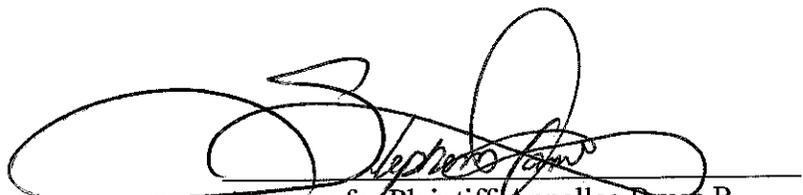
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