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
Plaintiff-Appellee,
v.
THYSSENKRUPP MATERIALS NA, INC., *et al.*
Defendant-Appellant

BRIEF OF *AMICI CURIAE* OHIO CONFERENCE OF TEAMSTERS AND TEAMSTERS LOCAL 20 IN SUPPORT OF APPELLEE BRUCE R. HOUDEK

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STATEMENT OF INTEREST

Amicus curiae Ohio Conference of Teamsters is an affiliate of the International Brotherhood of Teamsters and the parent organization of thirty - seven Teamsters local unions throughout the state of Ohio. The local unions affiliated with the Ohio Conference of Teamsters represent a total of approximately 54,000 members living and working in a variety of industries in all parts of Ohio.

Amicus curiae Teamsters Local 20 is a local union headquartered in Toledo and representing approximately 5,700 working men and women employed in industry in northwestern Ohio.

As representatives of the interests of working men and women, *Amici* Ohio Conference of Teamsters and Teamsters Local 20 are vitally interested in the interpretation and application of laws touching on the protection of the lives, safety and health of their members, and in assuring that the rights of injured workers be afforded all appropriate legal protection. In furtherance of those interests, *Amici* respectfully submit this brief, in the hope that it might assist this court in its consideration of the issues before it.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici Ohio Conference of Teamsters and Teamsters Local 20 adopt the Statement of the Case and Statement of Facts as presented in the merit brief of Appellee Bruce R. Houdek.

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LAW AND ARGUMENT

INTRODUCTION

In its first two propositions of law, Appellant ThyssenKrupp Materials N.A., Inc. argues that R.C. 2745.01 (A) and (B) limit recovery in employer intentional tort claims to those situations where the employer acts with specific intent to injure the employee, and that intent to injure may not be shown by evidence of what a reasonable employer may believe. In its final proposition of law, Appellant, citing to evidence that it "actually addressed safety issues within the company and installed safety policies in place to protect its employees" and that it had experienced no prior similar incidents, asserts that Appellee Bruce Houdek cannot make the showing of intent to injure required under R.C. 2745.01.

Amici would note at the outset the paucity of attention paid by Appellant to the procedural posture of the case at bar. Appellee's intentional tort claim was disposed of by the trial court on a motion for summary judgment. It is axiomatic that summary judgment may be granted only when it is established by competent summary judgment evidence that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. Civ. R. 56(C). The Civil Rules further explicitly direct that summary judgment shall not be rendered unless it is established that, when construing the evidence in the light most favorable to the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-movant. (*Id.*).

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R.C. 2745.01 (A) permits recovery for an employer intentional tort upon a showing 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." Division (B) of the statute defines the term "substantially certain" to mean "that an employer acts with deliberate intent to cause an employee to suffer an injury ..." While much discussion has been devoted to the requirement that the plaintiff in an employer intentional tort action prove intent to injure, a proper analysis of this case under the rubric of Civ. R. 56 (C) requires careful consideration of how intent is proven, and what evidence is necessary to demonstrate the existence of a genuine issue of material fact as to the employer's intent.

The discussion below will show that courts have long recognized, in both civil and criminal cases, that intent is a mental state which is rarely provable by direct evidence, but may be established by evidence of the acts, omissions and words of the defendant and the inferences which can reasonably be drawn from such. It is likewise well-settled, in both civil and criminal cases, that a person is presumed to have intended the natural and probable consequences of his volitional acts. *Amici* respectfully suggests that where, as here, the evidence before the court on a motion for summary judgment establishes a series of intentional, volitional acts and decisions by an employer to expose an employee to a known, but readily avoidable, danger of serious physical harm, a trier of fact following well-

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settled principles concerning determination of intent could reasonably conclude that the employer acted with intent to injure. Accordingly, this court should find that summary judgment was improperly entered by the trial court, and the cause should be remanded to the trial court for further proceedings consistent with such finding.

First Proposition of Law

Intent to injure for purposes of R.C. 2745.01(A) or (B) may be found from evidence of the volitional acts and omissions of the employer in knowingly exposing an employee to the danger of serious physical harm, and may be inferred from the totality of the circumstances surrounding those acts and omissions.

A. R.C. 2745.01 requires the plaintiff in an employer intentional court case to prove that his employer committed a tortious act with intent to injure or with the belief that injury was substantially certain to occur.

R.C. 2745.01 provides, in pertinent part:

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

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

While it is clear that these provisions require a showing of "intent" or "deliberate intent" to injure, the General Assembly provided no definition of these terms. It is worth observing that, contrary to Appellant's first proposition of law, the General Assembly did not use the term

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"specific intent" at any point in the text of the statute. This phrase is hardly unknown to the legislature, as it has been in use in Ohio's criminal statutes for many years. R.C. 2901.22(A), effective January 1, 1974, provides that "A person acts purposely when it is his specific intention to cause a certain result...."

Appellant's first proposition of law argues, in essence, that the mental state which must be shown in order for the plaintiff to prevail in a civil claim for damages for bodily injury is exactly the same mental state which the prosecution must show to convict a criminal defendant of the capital offense of aggravated murder. R.C. 2903.01. It may reasonably be argued that had this been the actual intent of the legislature, it could quite readily have specified that an employer is liable in an intentional tort action only upon a showing that it "purposely" – as defined in R. C. 2901.22(A) -- caused injury to an employee.

Assuming, however, for purposes of argument that the language of R.C. 2745.01 carries the meaning attributed to it by Appellant, it follows that one can look to Ohio criminal law for guidance on the subject of what evidence is required to establish that a defendant acted with the requisite intent. While one could sensibly argue that the evidentiary burden regarding the mental state of the defendant imposed on the plaintiff in a civil action for damages arising from an employer intentional tort is somewhat less stringent than that imposed on the prosecution in a criminal case which requires proof of purposeful action, it surely could not be

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suggested that the civil plaintiff's burden is any greater. Any suggestion that evidence legally sufficient to convict a criminal defendant of a crime requiring proof of purpose might be inadequate to withstand a motion for summary judgment on the issue of intent in a civil lawsuit would be patently absurd. It follows, therefore, that proof of the sort sufficient to permit the trier of fact in a criminal prosecution to conclude that a defendant acted "purposely" is necessarily sufficient to permit a like conclusion in a civil action seeking monetary damages for an intentional tort.

It is clear that the mental state of the accused in a criminal prosecution will seldom, if ever, be proven by his admission of the purposeful nature of his acts. While the defendant in a civil action for intentional tort does not enjoy the Fifth Amendment privilege against self-incrimination, it is nevertheless apparent that a civil defendant is extremely unlikely to admit that its actions were taken with intent or purpose to injure. This does not mean, however, that prosecutor and plaintiff are reduced to reliance on the vain hope that the defendant will, by some stroke of good fortune, be moved to use the courtroom as a public confessional.

B. Proof of intent or purpose rests upon evidence of the acts, omissions and words of the actor, and other objective facts regarding the attendant circumstances. An actor is presumed to have intended the natural and probable consequences of his volitional acts, and purpose or intent may be inferred by the trier of fact from the acts, omissions, or words of the defendant considered in light of all relevant circumstances.

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It is well-settled law that the purpose or intent with which an act is done is determined from the manner and means by which it is done, along with all of the attendant facts and circumstances surrounding the act. *State v. Huffman*, 131 Ohio St. 27 (1936); *State v. Hardin*, 16 Ohio App. 3d 243 (1984). This court has long held that intent "may be inferred from words spoken, acts done, and other objective facts." *State v. Freeman*, 64 Ohio St. 2d 291 (1980). Following these authorities the jury instructions for aggravated murder state, *inter alia*, that "The purpose with which a person does an act is known only to himself/herself unless he /she expresses it to others or indicates it by his conduct." 2-CR 503 OJI CR 503.01(C). The instruction continues, stating "The purpose with which a person (does and act) (brings about a result) is determined from the manner in which it is done, the (means) (weapon) used, and all the other facts and circumstances in evidence." *Id.*, at (D).

This principle is routinely applied in civil matters requiring a determination of an actor's intent. For example, in a workers' compensation case turning on whether an injured worker had voluntarily abandoned his job so as to preclude subsequent eligibility for certain forms of compensation, this court explicitly relied on *State v. Freeman* in holding that the issue is primarily one of intent, which may be inferred from the words and acts of the injured worker, and other objective facts and circumstances existing at the time of the alleged abandonment. *State, ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St. 3d 381 (1989).

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Similarly well-settled is the proposition that a person is presumed to have intended the natural and probable consequences of his volitional acts. *State v. Johnson*, 56 Ohio St. 2d 35, (1978); *State v. Lott,* 51 Ohio St. 3d 160, (1990). Thus, it has been held that where an inherently dangerous instrumentality is used in the commission of a felony, causing death is a natural and probable consequence which the defendant is presumed to have intended. Evidence of such circumstances is therefore sufficient to permit a jury to find that the defendant purposely caused the death. *State v. Esparza*, 39 Ohio St. 2d 8, (1988).

The same presumption is regularly employed in civil cases. As this court well knows, an extensive body of law on the subject of voluntary abandonment of employment and its effect on an injured worker's eligibility for certain types of benefits under the workers' compensation act has developed over the past twenty-five years. In that connection, this court has held that a claimant who is incarcerated is considered to have voluntarily abandoned his employment. *State, ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St. 3d 42 (1987). In so holding, the *Ashcraft* court observed that while imprisonment does not fit the normal definition of a voluntary act, in that incarceration is not normally desired or consented to, "...one may be presumed to tacitly accept the consequences of his voluntary acts." *Id.*, at 44. In other words, incarceration is properly treated as a voluntary abandonment of the work force, because it is the natural and probable consequence of the claimant's volitional act.

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In *State, ex. rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St. 3d 118, (1993) the court expanded the *Ashcraft* reasoning to conclude that in some instances the termination of a claimant's employment could be deemed a voluntary abandonment because "Although not generally consented to, discharge, like incarceration, is often a consequence of behavior that the claimant willingly undertook, and may thus take on a voluntary character." *Id.*, at 121. In State, *ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St. 3d 401, (1995), this court succinctly explained the rationale underlying *Ashcraft* and *Watts*, stating "an employee must be presumed to have intended the consequences of his or her voluntary acts." While *Amici* find nothing particularly objectionable in this proposition they would respectfully suggest, at the risk of belaboring the obvious, that the same can and must be said of an employer.

In light of these authorities, it would appear that in any case – criminal or civil – which requires proof of intent or purpose in order for liability to attach, it is not necessary for the defendant to admit to a culpable mental state. Instead, the trier of fact determines the actor's intent or purpose from evidence of any statements made by the defendant, the volitional acts which were done, the manner and means by which they were done, and other objective evidence regarding the totality of the circumstances in which the acts took place.

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Second Proposition of Law

In an action for damages for an employer intentional tort evidence of conscious, deliberate and volitional acts, omissions and decisions by an employer which exposed an employee to a known danger of death or serious physical harm and from which a trier of fact could infer that the employer acted with intent to injure is sufficient to present a genuine issue of material fact as to the employer's intent.

Appellant argues, albeit very briefly and on the basis of what appears to *amici* to be a rather limited sampling of the facts in evidence, that Houdek cannot establish that it acted with the requisite intent to injure, and therefore it is entitled to summary judgment. As we have seen in the foregoing discussion, however, proof of intent is typically dependent upon direct evidence establishing particular acts, omissions or decisions of the employer in the context of all attendant facts and circumstances. Intent to injure in an intentional tort case will never be admitted, and cannot be proven through the direct testimony of persons other than the actor. *State v. Huffman, supra.* Determination of intent therefore necessarily includes examination of all pertinent facts established by direct evidence and all reasonable inferences which can be drawn therefrom by a trier of fact.

As set out in detail in Houdek's merit brief, competent evidence as required pursuant to Civ. R. 56 was before the court to show that Apellant made numerous conscious, deliberate and volitional decisions to require Houdek to work in a narrow, poorly lit dead-end aisle from which he could not escape in the event a sideloader was in the aisle. Testimony further established that the sideloaders were not equipped with

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flashing lights or audible warning devices to alert employees to their approach, that operators were instructed to operate the sideloaders at full speed, and that it was necessary to do so to maintain the pace of production.

Deposition testimony was before the trial court to show that the sideloader operator who eventually struck Houdek alerted the plant manager, days prior to Houdek's injury, to serious concerns about the danger of having sideloaders operating in aisles where employees on foot were at work re-labeling inventory, and had proposed to the plant manager steps which could be taken to avoid that inherently dangerous situation. These suggestions included scheduling inventory conversion work during non-production hours, or permitting sideloader operators to rearrange their work orders so as to avoid entering an aisle known to be occupied by someone working on inventory conversion. Testimony before the court indicated that these recommendations were rejected by the plant manager.

Deposition testimony also established that Appellant had in its possession orange safety cones which could have been used to mark the entrance to the aisle where Houdek was working, but failed use them. This simple step would have reduced the likelihood of an operator proceeding into the occupied aisle at full speed, and served as a visible reminder to the operator of the presence of a co-worker in the aisle.[1]

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[1] Failure to use such devices under the circumstances of this case appears to be in direct violation of a specific safety requirement set forth in regulations promulgated by the Bureau of Workers' Compensation pursuant to its authority under Article II,

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Evidence before the trial court in connection with the motion for summary judgment, in other words, plainly showed that Appellant ThyssenKrupp, with full knowledge of the danger of serious physical harm being caused to an employee by the working conditions which existed at the time of Houdek's injury, consciously, deliberately, and volitionally: 1) assigned Houdek to work for an extended period of time in the aisle during production hours, using a scissor lift, when sideloaders, being driven at full speed and not equipped with visual or audible means of warning employees of their approach, would be operating in that aisle; 2) refused to schedule relabeling of inventory outside of production hours; 3) refused to permit sideloader operators to pull orders in a different sequence so as to avoid entering an occupied aisle; 4) violated applicable OSHA safety standards by permitting a sideloader to be " driven up to anyone standing in front of a bench or other fixed object"; and 5) omitted the mandatory (see footnote 1) use of barriers, signs or cones to protect Houdek while working in a congested area in which he was exposed to a traffic hazard.

As noted above, it is firmly established that a person is presumed to intend the natural, reasonable and probable consequences of his volitional acts, and equally well established that a trier of fact may infer an actor's intent or purpose for his volitional acts and omissions.

Section 35 of the Ohio Constitution to adopt specific requirement[s] for the protection of the lives, health and safety of employees. OAC 4123:1-5-17(I)(10) mandates the use of barriers or effective warning devices such as, *inter alia*, barriers, signs, or cones "for the protection of employees when work is performed in congested areas and where employees are exposed to traffic hazards..."

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Because this case involves a motion for summary judgment, it is also imperative to bear in mind that Houdek, as the non-moving party, is entitled to have not only the evidence, but the inferences to be drawn from underlying facts contained therein, in the light most favorable to him. *Williams v. First United Church of Christ*, 37 Ohio St. 2d 150, (1974).

Amici recognize that while a trier of fact could infer from these facts that ThyssenKrupp's acts and omissions which caused this very easily preventable tragedy were done with intent to injure or with the belief that injury was substantially certain to occur, such an inference is not mandatory. Whether an inference is made rests entirely with the trier of fact. That is precisely why summary judgment is improper in this case. It is neither the role or the prerogative of the court in reviewing a motion for summary judgment to weigh the evidence. The court does not function as the trier of fact, and when considering all the evidence and the inferences which could be drawn from it in the light most favorable to Houdek, cannot find that reasonable minds could come to but one conclusion.

To the contrary, a reasonable trier of fact, applying firmly-established principles regarding determination of intent or purpose, could conclude from the facts established by the evidence and the inferences which could reasonably be drawn from those facts that ThyssenKrupp committed a tortious act with the intent to injure Houdek or with the belief that his injury was substantially certain to occur.

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CONCLUSION

For the reasons set forth in the foregoing discussion, Appellant is not entitled to judgment as a matter of law, and the judgment of the Eighth District Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of *Amici Curiae* Ohio Conference of Teamsters and Teamsters Local 20 in Support of Appellee Bruce Houdek was sent via regular U.S. mail to the following, this 23rd day of April 2012.

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