ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2011-1076

On Appeal from the Eighth Appellate District
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 REPLY BRIEF

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I. PROPOSITION OF LAW NO. I

AN INTENTIONAL TORT CLAIM UNDER R.C. 2745.01 (A) OR (B) IS LIMITED TO THOSE SITUATIONS WHERE AN EMPLOYER ACTS WITH SPECIFIC INTENT TO INJURE THE EMPLOYEE.

A. Response to Appellee's Proposed Reliance on R.C. 2745.01(C).

In the argument set forth in Section I(A) of Houdek's brief, he insinuates that his brief filed with the Eighth District Court of Appeals only sought to establish liability against ThyssenKrupp under R.C. 2745.01(C). However, a review of Houdek's Merit Brief filed with the court of appeals demonstrates the following statement of issue:

> I. First issue presented for review: whether under Ohio Rev. Code § 2745.01(A) and (B), a Plaintiff must show either "intent to injure" or deliberate intent to injure" on the part of the employer.
>
> II. Second issue presented for review: whether intentional failure to use a safety guard already in the possession of the employer equates to the deliberate "removal" of the safety guard.

In reversing the summary judgment granted on behalf of ThyssenKrupp, the Eighth District Court of Appeals *only* addressed Houdek's issues raised under R.C. 2745.01(A) and (B). (See Court of Appeals' Decision, p. 13). After concluding that the legislative definition of "substantially certain" under R.C. 2745.01(B) was the product of an unintended scrivener's error and that the appropriate test to determine whether an employer believed that injury was substantially certain to occur was the objective standard of "what would a reasonably prudent employer believe" the underlying appellate court held:

> In this case, there are genuine issues of material fact, particularly this specific supervisory directives to both Houdek and the side load operator and the side loader operator's warning to the warehouse manager, *that Krupp objectively believed that the injury to Houdek was substantially certain to occur.* (Emphasis added.) (Court of Appeals' Decision, p. 15).

Based on this finding, the appellate court reversed the trial court's grant of summary judgment and remanded the case "for proceedings consistent with this opinion." (Court of Appeals' Decision, p. 15).

In light of the foregoing, it is clear that the Eighth District Court of Appeals disregarded Houdek's arguments seeking to establish liability under R.C. 2745.01(C), and premised its reversal of the trial court's summary judgment ruling solely on Houdek's liability arguments under R.C. 2745.01(A) and (B). It is a general rule that this court will presume that the court of appeals has passed on all errors designated in the assignment of errors in the brief. *Peer v. Industrial Com.*, 134 Ohio St. 61, 66; 15 N.E.2d 772, 775 (1938); *DEPASs v. Highland Local School Dist.*, 52 Ohio St. 2d 193, 195, 370 N.E.2d 744, 745 (1977). Accordingly, it must be presumed that the Eighth District Court of Appeals reviewed and rejected Houdek's arguments seeking to establish liability against ThyssenKrupp under R.C. 2745.01(C). ThyssenKrupp will further respond to Houdek's arguments under subsection (C) in Section III (A) herein.

B. Neither Houdek nor the Opposing Amici Seek to Defend the Appellate Court's Determination of Scrivener's Error in R.C. 2745.01(B).

In reviewing the opposition arguments to ThyssenKrupp's first proposition of law, it is noteworthy that not one party has sought directly to defend the Eighth District's determination that the statutory definition of the term "substantially certain" in R.C. 2745.01(B) was a "legislative scrivener's error." Houdek candidly acknowledges that the appellate court's recognition of a scrivener's error was "unnecessary," but nevertheless asserts that "even if the reasoning behind the court of appeals decision is viewed as flawed in some respects, the fact remains that the evidence in this case was sufficient to have overcome a motion for summary judgment . . . " (Appellee's Brief, p. 14, 19). Amici Ohio Association for Justice similarly comments "[i]t hardly matters whether the confounding incongruity is attributable to a

scrivener's error, as the Eighth District suggested . . . " (Amici Brief, p. 7). The briefs filed by Amici Ohio Conference of Teamsters and Teamsters Local 20 and AFL-CIO do not even mention the appellate court's suggestion of a scrivener's error.

The fact that Houdek and their proxies have not sought to defend the appellate court's finding of a scrivener's error is understandable. For the reasons set forth in ThyssenKrupp's Merit Brief, the underlying panel's recognition of R.C. 2745.01(B) as a scrivener's error is inconsistent with this court's findings in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066 and *Stetter v. R.J. Corman Derailment Servs.*, L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ignores the historical development of R.C. 2745.01, and is contrary to longstanding principles of statutory construction.

C. There are not Two Separate and Distinct Standards of Establishing an Employer Intentional Tort under R.C. 2745.01(A) and (B).

Rather than defend the appellate court's finding of a scrivener's error, Houdek and their supporting amici assert the position that R.C. 2745.01(A) contains two separate and distinct levels of intent upon which a claimant may establish an intentional tort claim: 1) proof of intent to injure another, or 2) proof of substantially certain/deliberate intent. They seek to support this position by citing to the fact that the terms "intent to injure another" and "with the belief that injury was substantially certain to occur" as outlined in R.C. 2745.01(A) are separated by the disjunctive term "or." They additionally contend that the terms "intent" and "deliberate intent" have distinctly different meanings, although the parties differ as to the claimed meanings of these terms.

Amici Ohio Association for Justice suggests that the "deliberate intent" standard is synonymous with the concepts of "deliberate indifference" (where one knows of and disregards an excessive risk) or "deliberate ignorance" (where knowledge can be imputed to a party who

knows of a high probability of illegal and purposely contrives to avoid learning of it).[1] In contrast, Houdek argues that an intentional tort under R.C. 2745.01(A) is limited to those situations where the employer acts with either an "intent to injure" as that term is used in subsection (C), or "with the belief the injury was substantially certain to occur" under subsection (B).

These positions should not be well-taken. Amici Ohio Association for Justice's suggestion that "deliberate intent" is the functional equivalent of "deliberate indifference" or "deliberate ignoring" is a transparent effort to resurrect the old "substantially certain/inferred intent" common law standard, which standard was explicitly rejected by the General Assembly's adaptation of the restrictive definition of "substantially certain" in R.C. 2745.01(B). Along the same line, Houdek's suggestion that subsection (C) somehow defines the scope of "intent to injure" in subsection (A) is similarly without foundation. R.C. 2745.01(C) does not define the meaning of "intent to injure" as that term is used in subsection (A). Subsection (C) permits the recognition of a rebuttable presumption of "intent to injure" where the employer is shown to have deliberately removed an equipment safety guard or deliberately misrepresented a toxic or hazardous substance. Houdek's attempt to use subsection (C) as a means of defining "intent to injure" in subsection (A) makes no sense from a statutory construction point of view and ignores this Court's holdings in *Kaminski* and *Stetter* wherein this Court held:

> As an initial matter, we agree with the court of appeals that the General Assembly's intent in enacting R.C. 2745.01, as expressly particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D) (Emphasis added.) *Kaminski*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927

[1] Amici AFL-CIO and the Teamsters do not attempt to define the difference between "intent to injure" and "deliberate intent," but argue instead that these standards of intent may be established by circumstantial evidence. This argument will be addressed in Section II (B) of the Reply Brief.

N.E.2d 1066, at ¶ 56; *Stetter*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, at ¶ 26.

Simply put, subsection (C) does not define "intent to injure," it creates a limited exception where the need to establish an intent to injure is replaced by a rebuttable presumption.

The argument that two separate and distinct levels of intent exist under R.C. 2745.01(A) is not supported by the express language of R.C. 2745.01, the underlying history behind the promulgation of this legislation nor the holdings and analysis of this Court's decisions in *Kaminski* and *Stetter*. Although subsection (A) indicates that a claimant must establish that the employer committed a tortious act with "the intent to injure another" or "with belief that the injury was substantially certain to occur," subsection (B) goes on to define the term "substantially certain" to mean "that an employer acts with deliberate intent to cause an employer to suffer an injury, a disease, as condition, or death." Again, in *Kaminski* and *Stetter* this Court noted that despite the reference in subsection (A) to "committing the tortious act with intent to injure" or "with the belief that the injury was substantially certain to occur" there was only one way to prove an intentional tort: i.e., proof that the employer acts with specific intent to cause an injury, subject to subsection (C) and (D). *Kaminski* at ¶ 56; *Stetter* at ¶ 26.

The fact that the General Assembly referred the terminology "intent to injure" and "with the belief that injury is substantially certain to occur" in R.C. 2745.01(A), is understandable when one takes note of the fact that both of these standards had been discussed in this Court's prior decisions involving the common law employer intentional tort. For example, in *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90, 94-95, 472 N.E.2d 1046, 1051 (1984), this Court, citing Prosser and Keeton, *Law of Torts*, Section 8 at 35-36 (5th Ed.1984), and 15 Restatement of Law 2d, Torts, Section 8A (1965), held that an employer's intentional tort may not only be established when the employer desires the special consequences of his act (intent to injure), but also where

the employer acts with the belief that consequences of its conduct were substantially certain to occur (the old substantially certain standard). See also discussion of these separate means of establishing a common law intentional tort in *Harasyn v. Normandy Metals*, 49 Ohio St. 3d 173, 175, 551 N.E.2d 962, 964 (1990).

In enacting R.C. 2745.01, the Ohio General Assembly took notice of the various common law decisions previously defining the common law employee intentional tort standard, and sought to "completely and solely control all causes of action not governed by Section 35, Article II of the Ohio Constitution, for physical or psychological conditions, or death, brought by employers or the survivors of deceased employees against employees." See, R.C. 2745.01 Section 3. In *Stetter*, this Court described the General Assembly's primary goal in enacting R.C. 2745.01 as follows:

> Instead, we find that R.C. 2745.01 embodies *the General Assembly's intent to significantly curtail an employee's access to common-law damages for what we will call a "substantially certain" employer intentional tort.* We do not view the statute as a codification of this court's decisions in *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624, 576 N.E.2d 722 and *Johnson v. BP Chems., Inc.*, 85 Ohio St.3d 298, 1999 Ohio 267, 707 N.E.2d 1107. *Stetter* at ¶ 27. (Emphasis added.)

In sum, by defining the term "substantially certain" in subsection (B) to mean "deliberate intent to cause an employee to suffer injury," the Legislature curtailed the scope of the common law "substantially certain" employer's intentional standard to apply **only** where the claimant could establish that the employer acted with "specific intent to cause an injury." *Kaminski* at ¶56; *Stetter* at ¶26. It would defy both logic and common sense to construe the Legislature's effort to limit the scope of the "substantially certain" employer's intentional tort standard as somehow lessening an employee's evidentiary burden required to establish an "intent to injure" tort. Again, as noted in *Kaminski* and *Stetter*, with respect to a claim under subsection (A) or

(B), there is only one means of stating a prima facie claim for an employer intentional tort: i.e., proof that the employer acted with specific intent to cause injury to the employee.

II. PROPOSITION OF LAW NO. 2

A PLAINTIFF MAY NOT ESTABLISH AN EMPLOYER'S SPECIFIC INTENT TO INJURE AN EMPLOYEE UNDER R.C. 2745.01(B) BY PROOF OF WHAT A REASONABLE EMPLOYER MAY BELIEVE.

A. There is no Legitimate Basis for the Recognition of an Objective "Reasonable Employer" Standard.

In responding to ThyssenKrupp's second proposition of law, Houdek concedes that the "reasonable employer" test adopted by the appellate panel "admittedly failed to address the subjective intent or mindset of the specific employer – something R.C. § 2745.01 provides." (Appellee's Brief, p. 21). Nevertheless, Amici Ohio Association for Justice attempts to argue otherwise. The Ohio Association for Justice speculates that the Ohio Legislature "must have" appreciated that injured workers have always been allowed to establish the *mens rea* element of an employer's intentional tort with circumstantial evidence "through which the employer's actual knowledge of the hazard may be inferred." (Ohio Association Brief, p. 10). Accordingly, Amici proposes that this Court accept the objective standard recognized by the Eighth District because the "common law workplace intentional tort standard has furnished compensation to deserving injured workers for several decades, while insuring that those employers that knowingly expose their employees to unacceptably dangerous conditions will not escape with impunity (sic)." (Ohio Association of Justice Brief, p. 10)

Amici Ohio Association for Justice has essentially made the same point asserted in Appellant's Merit Brief: that the objective "reasonable employer" test resurrects the common law "substantially certain" concept of inferred intent. This is the very concept that the legislature sought to "significantly curtail" through the enactment of R.C. 2745.01. See, e.g., *Stetter* at ¶ 27.

B. An Employer's Subjective Mindset under R.C. 2745.01 may be established by Circumstantial Evidence.

Both Houdek and their supporting Amici contend that it is ThyssenKrupp's position that the subjective mindset of the employer may only be established through the confession of the employer. This is simply not the case. ThyssenKrupp agrees that the subjective mindset of the employer may be established through circumstantial evidence, such as the nature of the act causing the injury. Nevertheless, the appropriate focus of an inquiry under R.C. 2745.01 is on whether the employer intended to cause the injury, not on whether a reasonably prudent employer would believe that injury may result from the employer's conduct. To conclude otherwise would effectively give rise to the "substantially certain" standard of inferred intent that was rejected by the General Assembly in promulgating R.C. 2745.01.

This Court recently analyzed the appropriate circumstance when a court may infer a party's intent to cause injury in the context of a civil action in *Allstate Ins. Co. v. Campbell*, 128 Ohio St. 3d 186, 2010-Ohio-6312, 942 N.E.2d 1090. Therein, this Court held that in the context of establishing whether a party's conduct fell within the purview of an insurance policy's intentional act exclusion, a party's intent to cause injury may be inferred where the intentional act and the harm caused by that act are so intrinsically tied so that the harm necessarily results from the act. *Allstate* at ¶ 61. ThyssenKrupp respectfully submits that this same concept should govern a claimant's reliance on circumstantial evidence as a means of establishing an employer's specific intent to cause injury under R.C. 2745.01(A).

III. PROPOSITION OF LAW NO. III

THERE ARE NO GENUINE ISSUES OF FACT AND HOUDEK CANNOT ESTABLISH THAT THYSSENKRUPP HAD SPECIFIC INTENT TO CAUSE HOUDEK'S INJURY.

A. Houdek Cannot, as a Matter of Law, Present a Claim under R.C. 2745.01(C).

Houdek argues that ThyssenKrupp's failure to utilize bright orange warning cones or some other type of warning device or barricade in its possession to prevent side loader operators from entering the aisles where Houdek was working, satisfies the requirements of R.C. 2745.01(C). Thus, Houdek claims there is a genuine issue of material fact as to whether he is entitled to the rebuttable presumption of an intent to injure which arises under Subsection (C).[2] This position is not supported by the record of this case nor the various court decisions which have analyzed R.C. 2745.01(C). This subsection provides:

> 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 word "deliberate" as utilized in subsection (C) has been held to mean "characterized by or resulting from careful or thorough consideration – a deliberate decision." *Forwerck v. Principle Bus. Enters.*, No. WD-10-040, 2011-Ohio-489, 2011 Ohio App. LEXIS 426, ¶ 21 (6th Dist.). The term "equipment safety guard" has been interpreted as "a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." *Fickle v. Conversion Techs. Int'l, Inc.*, No. WM-10-016, 2011-Ohio-2960, Ohio App. LEXIS 2485, ¶ 42 (6th Dist.); *Barton v. G.E. Baker Constr.*, No. 10CA009929, 2011-Ohio-5704, Ohio App. 4674, ¶ 11 (9th Dist.). Finally, the word "deliberate removal" has been interpreted to mean "a considered decision to take away or off, disable, bypass, or eliminate or to render inoperable or unavailable for use. *Fickle* at ¶ 31.

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[2] The argument was not one of the propositions of law accepted for review when this Court accepted jurisdiction of this case.

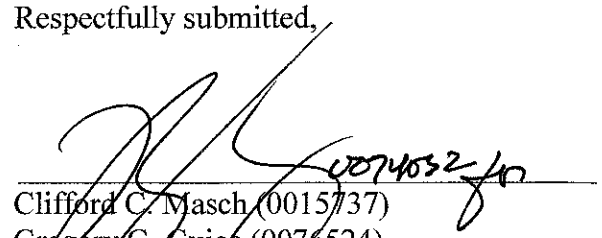
Simply put, there is no evidence in the record of this case that ThyssenKrupp "deliberately removed" any in place "equipment safety guard" prior to Houdek's unfortunate workplace injury. The rebuttable presumption of intent to injure in R.C. 2745.01(C) is limited to those cases involving the deliberate removal of existing or in place equipment safety guards, not to situations where a claimant believes the placement of additional safety equipment may have been useful. The trial court and the court of appeals agreed that Houdek did not present a viable claim under R.C. 2745.01(C). This Court should not expand the scope of subsection (C) to a situation not contemplated by the statute.

For the reasons outlined in ThyssenKrupp's Merit Brief, this accident was the result of side-loader operator George Krajacic forgetting a previous warning that Houdek would be working in the area where Krajacic was operating. (Krajacic Deposition, p. 101-102). There is simply no evidence in this record that anyone expected Houdek's accident, much less that anyone harbored a specific intent to cause his injury.

CONCLUSION

Despite the laments of Houdek and his supporting Amici, this Court has found the R.C. 2745.01 restricts the common law employer intentional tort in a constitutionally sound manner. This statute harmonizes the law of Ohio with the majority of jurisdictions and strikes a rational balance between the exclusivity of the workers compensation remedy and the limited remedy when an employer's act with a specific intent to injure. As the record of this case does not implicate a viable claim under R.C. 2745.01(A), (B), or (C), this Court should reverse the Eighth District's decision and reaffirm its prior holdings in *Kaminski* and *Stetter*.

Respectfully submitted,



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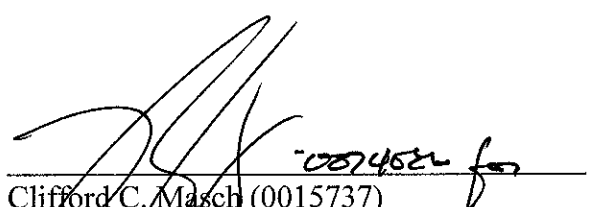

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