ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2011-1076

BRUCE R. HOUDEK
Plaintiff-Appellee,

-vs-

THYSSENKRUPP MATERIALS N.A., INC., *et al.*
Defendant-Appellants.

ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS
CASE NO. 95399

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLEE, BRUCE R. HOUDEK

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INTRODUCTION OF *AMICUS CURIAE*

The *Amicus Curiae* now appearing before this Court is the Ohio Association for Justice ("OAJ"). The OAJ is comprised of over a thousand attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

No attempt will be made by the OAJ to challenge this Court's prior determination that the workplace intentional tort statute, R.C. §2745.01, survives constitutional muster under the scenarios that were presented 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. There can be no doubt, moreover, that the General Assembly intended to restrict the scope of the cause of action that has long served as an important incentive for furnishing safe working conditions in Ohio.

The OAJ is submitting this Brief solely to address the dangerous, not to mention legally indefensible, view that 2004 H.B. 498 now precludes any civil recovery at all save for those instances where the injured worker is able to prove the perpetration of a criminal battery. Faced with contradictory statutory language that appears to be the contorted by-product of some legislative compromise, the Eighth District properly adopted a sensible construction that remains true to this Court's controlling precedents. *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 8th Dist. No. 95399, 2011-Ohio-1694, 2011 W.L. 1326374. Accordingly, the OAJ urges this Court to affirm the unanimous appellate court decision in all respects.

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ARGUMENT

There is little that the OAJ can add to the compelling reasoning that has been furnished by the Eighth Judicial District Court of Appeals. *Houdek*, 2011-Ohio-1694. The unanimous opinion that was authored by Judge Kenneth A. Rocco affords positive meaning and effect to each and every aspect of R.C. §2745.01, consistent with *Kaminski*, 125 Ohio St. 3d 250, and *Stetter*, 125 Ohio St. 3d 280. Both of these Supreme Court precedents had acknowledged that a more limited form of the workplace intentional tort cause of action remains viable in Ohio, which is completely inconsistent with the unrealistic interpretation that has been championed by the employer and its *amici* in these proceedings. For the reasons that follow, each of the Propositions of Law that have been accepted for review should be rejected by this Court.

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. DEVELOPMENT OF THE COMMON LAW STANDARD

At the outset, it is important to remember that the workplace intentional tort theory of recovery had emerged in Ohio through a series of well-reasoned judicial opinions. After reviewing the statutes providing immunity to employers for most workplace accidents, this Court held in *Blankenship v. Cincinnati Milacron Chems., Inc.* (1982), 69 Ohio St.2d 608, 433 N.E. 2d 572, that:

> Since an employer's intentional tort conduct does not arise out of employment, R.C. §4123.74 does not bestow upon employers immunity from civil liability for their intentional tort and an employee may resort to a civil suit for damages. [citations omitted].

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Blankenship, 69 Ohio St.2d at 613, 433 N.E. 2d at 576. The majority recognized that a prohibition of intentional tort claims "would be tantamount to encouraging such conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act." *Id.*, 69 St.2d at 614, 433 N.E. 2d at 577.

Blankenship left open the question of how an intentional tort was to be defined. An answer was thereafter supplied in *Jones v. VIP Develop. Co.* (1984), 15 Ohio St. 3d 90, 472 N.E. 2d 1046. The Supreme Court of Ohio based its ruling upon traditional common-law principles. This Court observed that an act could be "intentional," even if the actor does not specifically desire to do the specific harm that results. *Id.*, 15 Ohio St. 3d at 95, 472 N.E.2d at 1051.

The common-law standard for intentional torts took another turn in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489. In that case, the majority emphasized that "knowledge on the part of the employer [is] a vital element of the requisite intent." *Id.*, 36 Ohio St.3d at 116, 522 N.E.2d at 504. In response to the substantial confusion that arose from this ruling, this Court modified *Van Fossen* in *Fyffe v. Jeno's Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108. Citing Section 8(A) of the Restatement of The Law 2d, Torts, and Section 8 of Prosser & Keeton On Torts (5 Ed. 1984), the Court held that:

> ***[I]n order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, 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

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> employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

Id., 59 Ohio St.3d at 118.

B. THE REQUIREMENT OF INTENTIONAL OR DELIBERATE MISCONDUCT

The first Proposition of Law that has been fashioned by Defendant-Appellant, ThyssenKrupp Materials N.A., Inc., cannot be reconciled with the actual terms that were adopted by 2004 H.B. 498. As a result of that enactment, R.C. §2745.01 now directs that:

> (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. ***

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. As one court recently recognized, 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. Ultimately the trier of fact must determine whether the defendant possessed the requisite knowledge but proceeded along the dangerous course anyway. *Blair v. Cleveland* (N.D. Ohio 2000), 148 F. Supp. 2d 894, 916-917.

The terms "intentional" and "deliberate" are not defined in the enactment. *R.C.*

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§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>

Generally speaking, one can display a "deliberate indifference" by knowingly disregarding a substantial risk of serious harm. *Saunders v. McFaul* (8th Dist. 1990), 71 Ohio App.3d 46, 593 N.E.2d 24, 27-28; *Spears v. Ruth* (6th Cir. 2009), 589 F.3d 249, 254.

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

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> 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).

C. THE PROPOSED STATUTORY REWRITE

In its effort to reach the desired result, Defendant would have this Court obliterate the statute's distinction between "the intent to injure another or with the belief that the injury was substantially certain to occur" and replace the decidedly disjunctive two-part test with an uncompromising "specific intent" requirement. Had that been the intention of the legislative majority, a substantially simpler bill undoubtedly would have been passed utilizing precisely those terms. But that is not what happened. "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. City of Cleveland* (1988), 37 Ohio St. 3d 50, 524 N.E. 2d 441,

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paragraph three of the syllabus (citation omitted).

While the adoption of a single "specific intent" standard would undoubtedly be applauded by Defendant and its *amici*, longstanding rules of statutory construction would be violated in the process. R.C. 1.47(B) creates a presumption that the entire statute is "intended to be effective" and courts are thus required to afford positive meaning to each and every term. *State ex rel. Semetko v. Bd of Commrs.* (6th Dist. 1971), 30 Ohio App. 2d 130, 283 N.E. 2d 648,651. A law should never be interpreted in a manner which renders it a nullity. *Montalto v. Yeckley* (1941), 138 Ohio St. 314, 34 N.E. 2d 765, 768. In *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.* (1st Dist. 1964), 4 Ohio App. 2d 4, 6, 211 N.E. 2d 57, 59, the court reasoned that: "It is the duty of a court called upon to interpret a statute to breathe sense and meaning into it; to give effect to all its terms and provision; and to render it compatible with other and related enactments whenever and wherever possible."

For whatever reasons, a majority of the General Assembly determined that a recovery should be permitted in Ohio when an injured worker is able to establish an "intent to injure" or "the belief that the injury was substantially certain to occur." *R.C. §2745.01(A).* Subpart (B) defines "substantially certain" to require a "deliberate intent," which is akin to redefining "almost" to mean "completely" or "nearly" to mean "absolutely." It hardly matters whether the confounding incongruity is attributable to a scrivener's error, as the Eighth District suggested, or the haggling and compromise that is unavoidable in legislative proceedings. The duty of the judicial branch is to construe ambiguous statutory language "to effect a just and reasonable result." *Gulf Oil Corp. v. Kosydar* (1975), 44 Ohio St. 2d 208, 339 N.E. 2d 820, paragraph two of the syllabus. As enticing as Defendant's overly-simplistic solution to the conundrum

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may be, there is no justification for effectively nullifying important segments of the statute. Instead of imposing an absolute "specific intent" requirement, a disjunctive two-part standard was enacted that cannot be ignored. Defendant and its *amici* are seeking, in essence, for this Court to rewrite R.C. §2745.01 to their liking through judicial fiat. This Proposition of Law therefore should be rejected as incompatible with the terms that were actually incorporated into the workplace intentional tort statue.

PROPOSITION OF LAW NO. II: 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.

Rather than overhaul R.C. §2745.01 in the manner that Defendant has been advocating, the Cuyahoga County Court of Appeals approved a more sensible interpretation of the confounding statutory language. After examining *Kaminski*, 125 Ohio St. 3d 250, Judge Rocco observed for the unanimous panel that the "employer tort has not been abolished, but rather constrained." *Houdek*, 2011-Ohio-1694 ¶11. In reversing the trial court's entry of summary judgment in favor of the employer, the opinion 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 court 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, ¶69 ("strict or absolute compliance with Crim. R. 11 is not required; 'the test is whether the trial

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> 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 *Oncale 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 *Houdek* opinion recognizes that the workplace intentional tort theory has been legislatively constricted, but is by no means extinct. *Id.,* 2011-Ohio-1694, ¶7, quoting *Kaminski,* 125 Ohio St. 3d 250, ¶98. It is axiomatic that to effect a change in a rule of law announced by the Supreme Court, the General Assembly must clearly state such an intention. *Lynn v. Supple* (1957), 166 Ohio St. 154, 159. This high court has explained that:

> Not every statute is to be read as an abrogation of the common law. "Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presume or held, to have intended a repeal of the settled rules of the common law *unless the language employed by it clearly expresses or imports such intention.*" (Emphasis added.) *State v. Sullivan* (1909), 81 Ohio St. 79, 90 N.E.

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146, paragraph three of the syllabus.

Bresnick v. Beulah Park Ltd. Ptnrp., Inc., 67 Ohio St. 3d 302, 304, 1993-Ohio-19, 617 N.E. 2d 1096, 1098 (emphasis original). Given that the legislative majority stopped well short of imposing a rigid "specific intent" standard in all instances, this Court should hold that the familiar common law test remains intact so far as consistent with the "intent to injure" and "substantially certain" language that was actually adopted in R.C. §2745.01.

And since the General Assembly furnished no indication of whether a subjective or objective analysis is now required, the appellate court justifiably chose the latter. *Houdek*, 2011-Ohio-1694, ¶45. As the legislature must have appreciated, injured workers have always been allowed to establish the *mens rea* element of the *Fyffe* test with circumstantial evidence through which the employer's actual knowledge of the hazard may be inferred. *Burkey v. Teledyne Farris* (June 30, 2000), 5th Dist. No. 1999 AP030015, 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. The same approach is followed in the criminal realm, where a defendant's state of mind usually must be discerned from the circumstances surrounding the alleged crime. *State v. Hardin* (10th Dist. 1984), 16 Ohio App. 3d 243, 245, 475 N.E. 2d 483. A purely subjective test would allow every employer to escape liability under R.C. §2745.01 simply by submitting an affidavit disclaiming any intention to injure the employee.

The Eighth District's unerring logic is in accord with R.C. §1.47(C), which establishes a strong presumption against any construction that produces unreasonable

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or absurd consequences. *Canton vs. Imperial Bowling Lanes, Inc.* (1968), 16 Ohio St.2d 47, 242 N.E.2d 566, paragraph four of the syllabus; *State ex rel. Belknap vs. Lavelle* (1985), 18 Ohio St.3d 180, 181-182, 480 N.E.2d 758. Rather than embrace the extreme position that Defendant is championing, but the General Assembly never approved, this Court should leave the appellate court's pragmatic solution undisturbed. The common law workplace intentional tort standard has furnished compensation to deserving injured workers for several decades, while ensuring that those employers that knowingly expose their employees to unacceptably dangerous conditions will not escape with impunity. And beyond that, the Ohio Bureau of Workers Compensation has been able to shift much of the cost of the workers' compensation system to those same employers through its statutory subrogation rights. *Houdek*, 2011-Ohio-1694, ¶39. Defendant, on the other hand, has yet to furnish a plausible explanation for why a virtually impenetrable immunity from suit should be afforded to companies that intentionally violate safety rules and standards in a manner that is substantially certain to produce an injury or fatality. This Court should therefore decline to adopt this ill-conceived Proposition of Law.

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.

The final Proposition of Law addresses whether the Eighth District justifiably analyzed the facts of the case under the appropriate legal standard. The OAJ simply submits that the appellate court's opinion is unassailable in this regard. *Houdek*, 2011-Ohio-1694, ¶27-46.

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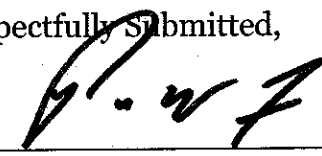
CONCLUSION

Consistent with the established judicial precedents, the OAJ encourages this Court to promote workplace safety in Ohio by affirming the opinion of the Eighth Judicial District Court of Appeals in all respects.

Respectfully Submitted,



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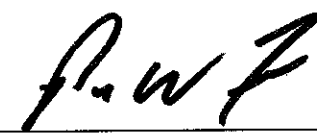

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