[Cite as *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 2011-Ohio-1694.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95399

BRUCE R. HOUDEK

PLAINTIFF-APPELLANT

vs.

THYSSENKRUPP MATERIALS N.A., INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-695034

BEFORE: Rocco, J., Kilbane, A.J., and Jones, J.

RELEASED AND JOURNALIZED: April 7, 2011

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KENNETH A. ROCCO, J.:

{¶ 1} The appellant, Bruce R. Houdek ("appellant"), lost his leg, lost his job, and will lose his right to fair recompense, if Justice Pfeiffer's prediction about the most recent version of R.C. 2745.01 is the correct one.

{¶ 2} "I dissent from the majority opinion for the reasons stated in my dissent in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066. Additionally, I would hold that R.C. 2745.01 restricts employees' constitutional rights to a remedy and to open courts. Section 16, Article I of the Ohio Constitution provides, 'All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.' "

{¶ 3} "R.C. 2745.01 purports to grant employees the right to bring intentional-tort actions against their employers, but in reality defines the cause of action into oblivion. An employee may recover damages under the statute only if his employer deliberately intends to harm him. It is difficult to conjure a scenario where such a deliberate act would not constitute a crime. Are we to believe that criminally psychotic employers are really a problem that requires legislation in Ohio?"

{¶ 4} "No, the purpose of R.C. 2745.01 is to take away the right of Ohio workers to seek damages for their employers' intentional acts. As set forth by this court in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraphs one and two of the syllabus, to recover damages for a workplace intentional tort, a plaintiff must prove that an employer knew of a dangerous situation in the workplace but forced an employee to encounter that danger knowing that an injury to the employee was substantially certain to result. The ability to successfully prosecute a workplace intentional-tort claim was dependent upon an extraordinary set of facts that took the employer-employee relationship outside the norm contemplated by Ohio's workers' compensation statutes. Now, an employee no longer has a remedy for such an injury."

{¶ 5} "The majority acknowledges that this court found fault with former R.C. 2745.01 in *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107, but asserts that the current version of R.C. 2745.01 'eliminate[s] many of the features identified by this court as unreasonable, onerous, and excessive.' The central fact is that both versions render a workplace intentional-tort claim illusory. Both versions eliminate a meaningful remedy for injured workers in egregious cases. Both eliminate an employee's right to seek damages, including punitive damages, in a court of law. And both remove an important check on employer behavior. Former R.C. 2745.01 is as distinguishable from the current version as a pig with lipstick is distinguishable from a pig without; that one version is

cosmetically different from the other is irrelevant." *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶¶98-101 (Pfeifer, J., dissenting).

{¶ 6} Justice Cupp, writing for the majority, strongly disagreed with Justice Pfeifer's dire view of the future of employer tort.

{¶ 7} "'*Because the statute* under consideration in this case *constrains rather than abolishes an employee's cause of action* for an employer intentional tort, *we need not, and therefore do not, consider whether a statute abolishing the common-law tort would be constitutional.* Nor do we need to revisit the holding in *Blankenship* that employer intentional torts are outside the scope of employment in order to evaluate the constitutionality of the instant statute. It is clear from our foregoing analysis herein that the General Assembly is not constitutionally proscribed from legislating in this area of law under Sections 34 and 35, Article II.' *Kaminski*, supra at ¶98 (emphasis added).

{¶ 8} "It does not necessarily follow, however, that R.C. 2745.01 does away with the common-law cause of action for employer intentional tort, which is the query posed by the eighth certified question. Although the statute significantly limits lawsuits for employer workplace intentional torts, it does not abolish the tort entirely. See *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, 885 N.E.2d 204, ¶17 ('The General Assembly modified the common-law definition of an employer intentional tort by enacting

R.C. 2745.01'). Accordingly, we answer the eighth certified question by holding that R.C. 2745.01 does not eliminate the common-law cause of action for an employer intentional tort." *Stetter*, supra at ¶28.

{¶ 9} *Kaminski*, and to a much lesser extent, *Johnson v. BP Chems., Inc.*, 85 Ohio St.3d 298, 1999-Ohio-267, 707 N.E.2d 1107, inform our decision. Justice Lanzinger concurred in part in *Kaminski* because the Court did not overrule *Johnson*. What vitality *Johnson* has left remains to be seen.

{¶ 10} "Although I agree that R.C. 2745.01 does not violate Section 34 or 35, Article II of the Ohio Constitution, I respectfully concur only in part because I would overrule *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107, rather than artificially limiting it." *Kaminski*, supra at ¶106 (Lanzinger, J., concurring in part).

{¶ 11} Taking the majority at its written word, we proceed on the basis that employer tort has not been abolished, but rather constrained. Whether an employer tort occurs in the workplace depends on the facts and circumstances of each case. *Stetter* is of no particular help in this regard as the facts and circumstances of Stetter's workplace injuries are not contained in the opinion.

{¶ 12} We begin by comparing the facts in *Kaminski* with the facts in the case we are asked to decide in this appeal.

The *Kaminski* Facts

{¶ 13} "On June 30, 2005, plaintiff-appellee, Rose Kaminski, was working as a press operator at the Salem, Ohio metal fabrication manufacturing facility of defendant-appellant, Metal & Wire Products Company ('Metal & Wire'). The automatic press that Kaminski operated used a coil of rolled steel fed into the press to produce stamped, flat pieces. In operating the press, Kaminski's job was to ensure that the coil feed ran smoothly, shut the press down if it jammed, and verify that the stamped pieces met required specifications. *When the coil of steel was used up, she would summon a supervisor, who would load a new coil into place with a forklift.*"

{¶ 14} "*When Kaminski's press ran out of steel on June 30, she searched for her shift's supervisor to load another coil, but she was unable to find him.* Kaminski enlisted a co-worker who had loaded coils in the past to load the new coil. The co-worker used the right fork of a forklift to lift a coil, which was about five feet tall and weighed about 800 pounds."

{¶ 15} "To properly load the coil onto Kaminski's press, the coil had to be switched from the right fork to the left fork. To accomplish the switch, the co-worker had to lower the coil to the floor, back the forklift away from it, and then pull forward again with the left fork positioned to pick up the coil."

{¶ 16} "When the coil is off the fork, it can become unsteady. The co-worker was at first reluctant to have Kaminski, a small woman who was about the same height as the coil, steady the coil in an upright position while he backed away from it and repositioned. However,

the two eventually agreed that Kaminski would hold the coil because the supervisor was not there and because the co-worker believed that Kaminski wanted to do it."

{¶ 17} "With Kaminski steadying the coil, the co-worker backed the forklift away and then pulled forward. Rather than going cleanly into the coil's opening, the fork bumped the coil. Kaminski was unable to control the coil. It wobbled and then fell onto Kaminski's legs and feet, injuring her." *Kaminski*, supra at ¶¶3-7 (emphasis added).

The *Houdek* Facts

{¶ 18} Plaintiff-appellant, Bruce R. Houdek, was employed at the warehouse of ThyssenKrupp Materials N.A., Inc. ("Krupp"). At the time of his workplace catastrophe, Houdek's mobility was limited as a consequence of a prior injury. The same day he returned to the Krupp warehouse with light-duty restriction, Krupp nevertheless ordered him to work on a scissors-lift tagging inventory in Aisle A of the warehouse.

{¶ 19} Aisle A has materials stored in racks 25 to 30 feet high on both sides of the aisle. It dead ends at a wall so the ingress to Aisle A is also its egress. Materials in Aisle A are retrieved by a side-loading forklift known as "the Raymond." The forklifts of the Raymond extend toward the racks. The operator of the Raymond faces the rack, rather than its direction of movement, as it motors to and fro in warehouse aisles. Aisle A is particularly narrow with only three or four inches of space between each side of the Raymond and the two racks.

{¶ 20} Krupp ordered the Raymond operator to travel at the forklift's maximum speed when retrieving materials from the warehouse aisles.

{¶ 21} Krupp ordered the Raymond operator to retrieve materials from Aisle A at the very same time Krupp ordered Houdek to tag inventory in Aisle A on a scissors-lift.

{¶ 22} The Raymond operator entered Aisle A and, not able to see Houdek as he faced the racks and operated the forklift at maximum speed as ordered by Krupp, crushed Houdek against the racks.

{¶ 23} Just prior to the horrendous injury to Houdek, the Raymond operator warned Krupp about the dangers of operating the Raymond in a warehouse aisle when another employee was afoot working in the same aisle.

Procedure in Trial Court

{¶ 24} On June 5, 2009, Houdek instituted this action against Krupp and the Ohio Bureau of Workers' Compensation ("BWC") seeking damages for his injuries. The BWC moved to realign the parties to make it a new party plaintiff in the case on August 6, 2009. This motion was granted and on August 21, 2009, the BWC filed its complaint for subrogation.

{¶ 25} Following discovery, Krupp filed a motion for summary judgment on the claims of both Houdek and the BWC on March 8, 2010. The trial court granted Krupp summary

judgment on June 23, 2010, finding Houdek was unable to demonstrate the requisite intent to injure. On July 8, 2010, the trial court filed a journal entry clarifying its previous order and granting summary judgment also in favor of Krupp on the claims of the BWC.

{¶ 26} Houdek now appeals, arguing summary judgment was improper. The BWC filed a cross-appeal requesting reversal on the same grounds asserted by Houdek.

Law and Analysis

{¶ 27} The common-law test for employer intention tort was set out in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108. In *Fyffe*, the Ohio Supreme Court set out the controlling test for employer intentional tort as follows:

{¶ 28} "[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 employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)" Id. at paragraph one of the syllabus.

{¶ 29} *Kaminski* was an unfortunate choice of appellate cases on which to interpret the most recent version of R.C. 2745.01. There was a stark absence of employer directives to Rose Kaminski. Indeed, she could not prove any of the elements of common law employer tort established in *Fyffe*.

{¶ 30} "*When Kaminski's press ran out of steel on June 30, she searched for her shift's supervisor to load another coil, but she was unable to find him. Kaminski enlisted a co-worker who had loaded coils in the past to load the new coil.*" *Kaminski*, supra at ¶4 (emphasis added). "*However, the two eventually agreed that Kaminski would hold the coil because the supervisor was not there and because the co-worker believed that Kaminski wanted to do it. Kaminski was unable to control the coil.*" Id. at ¶6 (emphasis added). "*It wobbled and then fell onto Kaminski's legs and feet, injuring her.*" Id. at ¶7 (emphasis added).

{¶ 31} By contrast, Houdek and the side-loading forklift operator acted in accordance with a series of direct orders that resulted in Houdek's catastrophic workplace injuries. Krupp's direct order placed Houdek in harm's way with no chance to avoid the oncoming sideloader. Perhaps, a twenty-year-old with the speed, agility, and strength of a Force Recon Marine, Army Ranger, Navy Seal, or Olympic gymnast could have effected an escape from the oncoming sideloader. Houdek, however, as a middle-aged man whose mobility was

limited by his prior physical injury and by being directed by Krupp to work a scissors-lift, could not.

{¶ 32} The fingerprints of Krupp's specific directives were all over Houdek's workplace injuries. Whereas in *Kaminski*, the workplace injuries resulted in the absence of any specific directives of employer.

{¶ 33} R.C. 2745.01 reads as follows:

{¶ 34} "(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."

{¶ 35} "(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."

{¶ 36} "(C) 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."

{¶ 37} "(D) This section does 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."

{¶ 38} Does this section constrain common law employer tort as the *Kaminski* majority holds, or does it, as Justice Pfeifer predicts, abolish it? Taking the majority at its written word, we find merit to Houdek's appeal and reverse the trial court's judgment granting summary judgment in favor of Krupp and against both Houdek and the BWC. If 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.

{¶ 39} As a cautionary note, if Justice Pfeifer is correct, 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 are real persons.

{¶ 40} As a procedural matter, we first note that appellate review of a trial court's grant of summary judgment is de novo and is governed by the standard proffered in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶8; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Consequently, we provide no deference to the trial court's conclusion, and instead, independently review the record to determine the appropriateness of summary judgment. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶12. Thus, pursuant to Civ.R. 56(C), after reviewing all relevant materials, we will only affirm a grant of summary judgment when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

{¶ 41} In this appeal, Houdek first argues that R.C. 2745.01(A) and (B) mandate that a plaintiff must show that the employer possessed either, but not both, "intent to injure" or "deliberate intent to injure."

{¶ 42} In its judgment entry, the trial court granted Krupp summary judgment, finding that Houdek is unable to establish the "requisite intent" on the part of Krupp. According to R.C. 2745.01(A), the "requisite intent" is described as either the "intent to injure" or "the belief that the injury was substantially certain to occur." Then in an about-face the statute

defines "substantially certain" as the "deliberate intent" to injure. R.C. 2745.01(B). These terms are not synonymous. We are left to interpret two terms that are in a state of harmonic dissonance. We cannot harmonize (A) and (B) as is our charge. Our preference is to believe that dissonant paragraph (B) is a scrivener's error, perhaps contained in an early draft of legislation but later wisely marked out as dissonant. Although, Justice Pfeifer appears to believe that paragraph (B) is an act of legislative legerdemain.

{¶ 43} 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 court exercised "substantial compliance" with Crim.R. 11 * * *' ").

{¶ 44} "The parties agree that absolute compliance is not demanded, only 'substantial compliance.' *Mullins v. Whiteway Mfg. Co.* (1984), 15 Ohio St.3d 18, 20-21, 15 OBR 15, 471 N.E.2d 1383; *Kaiser v. Ameritemps, Inc.* (1999), 84 Ohio St.3d 411, 413, 704 N.E.2d 1212 (specifically applying 'substantive compliance' standard to R.C. 4123.511(F)). 'Substantial compliance' occurs 'when a timely notice of appeal * * * includes sufficient

information, in intelligible form, to place on notice all parties to a proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities.' *Fisher* [*v. Mayfield* (1987)], 30 Ohio St.3d 8, 30 OBR 16, 505 N.E.2d 975, paragraph two of the syllabus." *State ex rel. Lapp Roofing & Sheet Metal Co., Inc. v. Indus. Comm. of Ohio*, 117 Ohio St.3d 179, 2008-Ohio-850, 882 N.E.2d 911, ¶14.

{¶ 45} Krupp defends asserting 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. 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.

{¶ 46} In this case, there are genuine issues of material fact, particularly given the specific supervisory directives to both Houdek and the sideloader operator and the sideloader operator's warning to the warehouse manager, that Krupp objectively believed the injury to Houdek was substantially certain to occur.

{¶ 47} We reverse the trial court's grant of summary judgment in favor of Krupp and remand for proceedings consistent with this opinion.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE, A.J., and
LARRY A. JONES, J., CONCUR