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Gallagher Sharp Newsflash: Ohio Supreme Court Holds Employer Intentional Tort Requires Deliberate Intent

Today, December 6, 2012, the Supreme Court of Ohio upheld the mandates of R.C. 2745.01, Ohio's Employer Intentional Tort Statute, by reaffirming that "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system."

While the Court's recent decision in *Hewitt v. L.E. Myers Co.*, Slip Opinion No. 2012-Ohio-5317 (decided on November 20, 2012), addressed the meanings of the terms "equipment safety guard" and "deliberate removal" in R.C. 2745.01(C), in today's decision, *Houdek v. ThyssenKrupp Materials*, Slip Opinion No. 2012-Ohio-5685, the Court has addressed the definition of the term "substantially certain" in R.C. 2745.01(B). The statute defines "substantially certain" as acting "with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." In *Houdek*, the Supreme Court of Ohio reversed the controversial decision of the Eighth Appellate District which rejected the statutory definition of "substantially certain" and concluded that the definition in R.C. 2745.01(B) resulted from a "scrivener's error."

Bruce R. Houdek brought his employer intentional tort claim against ThyssenKrupp for the injuries he sustained when he was struck by a sideloading forklift. Mr. Houdek asserted that his employer had knowledge that injury would be substantially certain to occur when his supervisor directed him to work in a warehouse aisle where a co-worker was operating the sideloader. Mr. Houdek also claimed that the failure to use proper lighting, safety cones and other protective gear created a presumption of intent to injure him under R.C. 2745.01(C). The court of appeals deviated from the intent-to-injure standard by applying an objective test—what a reasonably prudent employer would believe—rather than a subjective test—what the employer actually believed. The appellate court reversed summary judgment that had been granted by the trial court in favor of the employer.

In reversing the appellate court, the Supreme Court of Ohio found that R.C. 2745.01(C) was inapplicable. *Id.* at ¶27. With respect to the "substantially certain" issue, the Court explained "Houdek's injuries are the result of a tragic *accident*, and at most, the evidence shows that this accident may have been avoided had certain precautions been taken. However, because this evidence does not show that ThyssenKrupp deliberately intended to injure Houdek, pursuant to R.C. 2745.01, ThyssenKrupp is not liable for damages resulting from an intentional tort." *Id.* at ¶28. In its strongly worded conclusion, the Court admonished the Eighth District Court of Appeals, stating "The Ohio Constitution vests the General Assembly, not the courts, with the legislative powers of government. Our role, in exercise of the judicial power granted to us by the Constitution, is to interpret and apply the law enacted by the General Assembly, not to rewrite it." *Id.* at ¶29.

The Eighth Appellate District's decision had liberally adopted a previous dissent written by Justice Pfeifer. Justice Pfeifer, the lone dissenter here, raised concerns that R.C.2745.01 and the

majority's decision will result in "the extinguishment of injured workers' right to a remedy for workplace intentional torts." Id. at ¶35.

A copy of the full opinion can be found at:

<http://www.sconet.state.oh.us/rod/docs/pdf/0/2012/2012-Ohio-5685.pdf>

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