

ORIGINAL

No. 11-2013

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM THE COURT OF APPEALS  
EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO  
CASE NO. 10-96138

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LARRY HEWITT,  
Plaintiff-Appellee,

v.

THE L.E. MYERS COMPANY,  
Defendant-Appellant.

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MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICI CURIAE*, GREATER  
CLEVELAND PARTNERSHIP, COUNCIL OF SMALLER ENTERPRISES

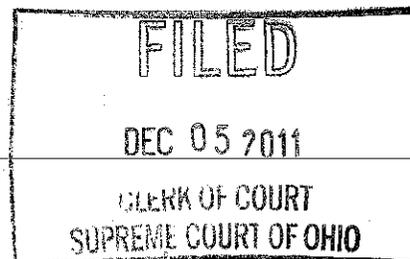
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CERTIFICATE OF SERVICE

**I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

As was stated by Appellant L.E. Myers in its Memorandum Supporting Jurisdiction, this case presents two questions of public and great general interest specifically regarding the scope and application of Ohio's intentional tort statute, R.C. 2745.01. The ruling by the Eighth Appellate District is not only in conflict with other Ohio Appellate Courts, it also serves to further erode the distinction between clearly intentional acts and those which fall short of the strict standards articulated by the Ohio Legislature and this Court's definition of "deliberate removal \*\*\* of an equipment safety guard" as set forth in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1008.

In sum, the Eighth District determined that a supervisor's suggestion to an employee, that he "shouldn't need" rubber gloves and sleeves while tying in a wire to an electrical pole, is tantamount to removing a safety guard from a machine, giving rise to inference of an intent to cause injury to that employee. It is this determination that creates the slippery slope which permits trial courts and juries to equate "intent to injure" with "reckless disregard", and will eliminate the protections contemplated and afforded by the Ohio General Assembly in its establishment of Ohio's "no-fault" Workers' Compensation Act.

This case provides this Court with an opportunity to establish the proper standards for distinguishing between a deliberate intent to injure, which forms the basis of an "intentional tort", and the careless, stupid acts of supervisors and co-workers, which constitute negligence or even recklessness, but which are subject to the exclusivity principle embodied in the Workers' Compensation Act that balances the rights of

employers and employees.

The effect of the Eighth District's liberalized construction of "intent," through its definition of "equipment safety guard" and "deliberate removal" is not consistent with the interpretation by other Ohio appellate courts. For example, the Sixth District defined "equipment safety guards" as "devices that prevent the worker from physical contact with the 'danger zone' of the machine and its operation". *Fickle v. Conversion Technologies Intern, Inc.*, 6th Dist. No. WM-10-015, 2011-Ohio-2960, ¶6. This is important for several reasons. First, if the appellate courts are not in harmony with statutory law or with this Court's decisions, it is incumbent on this Court to resolve those conflicts. More importantly, when our appellate courts cannot agree on construction of law, it becomes impossible for the trial courts, the attorneys and our juries to reach appropriate conclusions and justice cannot be served.

## **II. STATEMENT OF INTERESTS OF AMICI CURIAE**

The Council of Smaller Enterprises' ("COSE") section of the Greater Cleveland Partnership is the region's largest small business support organization. COSE boasts more than 15,000 members and is dedicated to advocating on behalf of Ohio's small business community. COSE is recognized both nationally and throughout Ohio as a respected voice for small business and a leader in attracting business and commerce to Ohio.

Workplace liability is a key component in an employer's ability to compete in the national and global marketplace. As such, it is also a critical consideration for companies looking for a location in which to establish or expand business. COSE's interests in the issues presented in this case are twofold. First, COSE believes that clear, unambiguous, and consistent definitions of workplace activities, processes and property are essential in creating an even playing field for industry. Operation of a table saw should have the same consequences in a woodworking factory as it does on a construction site or in a steel mill.

This is important for two reasons. First, an employer cannot conform its conduct to liability standards that vary depending on a court's *ad hoc* determination about which safety devices are necessary given the nature of an employee's occupation. Particularly when, as here, the liability standard is framed in terms of "intent," that standard must be phrased in a manner that clearly apprises an employer of his responsibility. Second, only when standards are uniformly applied to ALL employers is it possible for each to fairly compete.

Additionally, COSE believes that intentional tort should remain a remedy

reserved for the most egregious, quasi-criminal acts, easily distinguishable from lapses in judgment, sloppy work habits or supervisor distraction. Only by making a clear distinction between intent to injure, and everything less than that, can companies feel secure in operating and expanding business in Ohio.

### **III. STATEMENT OF THE CASE AND FACT**

*Amici Curiae* adopt the Statement of Case and Facts as set forth in L.E. Myers' Memorandum in Support of Jurisdiction as if fully set forth herein.

### **IV. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

#### **Proposition of Law No. 1**

**An equipment safety guard under R.C. 2745.01(C) includes only those devices on a machine that shield an employee from injury by guarding the point of operation of that machine.**

This proposition of law supplies this Court with an opportunity to adopt a bright-line rule that is consistent with well-established principles of federal OSHA laws contained in several sections of the Code of Federal Regulations, which define "safety guards" for purposes of the applicable OSHA regulations. See CFR 1926.303 (Guarding of tools-hand and power); CFR 1917.151 (Machine guarding); CFR 1910.243 (Guarding of portable power tools); CFR 1910.241 (Guarding of hand-held equipment). The definition of "guarding" is consistent within each code section and requires some type of device that shields or prevents an operator from coming into contact with a point of

operation of equipment.

Likewise, Ohio courts have consistently found that the term “equipment safety guard” refers to physical devices that were designed to protect operators from the risk of harm inherent in the use of machinery and industrial equipment. See *Smith v. Inland Paperboard & Packaging, Inc.*, Portage App. No. 2008-P-0072, 2009-Ohio-3148, ¶33; *Warren v. Libbey Glass, Inc.*, Lucas App. No. L-09-1040, 2009-Ohio-6686; *Shanklin v. McDonald’s USA, LLC*, Licking App. No. CA 00074, 2009- Ohio-251. Key in these definitions are the terms “physical devices”, “machinery” and “industrial equipment”.

These definitions are important for many reasons, but primarily because employers charged with abiding by safety regulations must have a common, uniform understanding of the terms used in statutory and administrative regulations. Otherwise, compliance would be based on case by case events, the personal interpretations of those charged with enforcement, the whim or political inclinations of judges and the creativity of legal counsel. This is not justice but rather anarchy. It is dangerous for our judiciary and a death knell to the Ohio business community.

It is therefore this Court’s obligation to pronounce to Ohio’s administrative agencies, its trial courts and its appellate courts, a clear, unambiguous definition of “equipment safety guard” that reflects the common, accepted application of that term, and that is consistent with OSHA usage. Most importantly, in permitting renegade definitions of specific safety terminology, the court below facilitates the erosion of our “exclusive jurisdiction” system of providing for both employer and employee workplace injury protection in favor of runaway tort litigation. More law suits, more appeals, more conflicting decisions, in sum more chaos.

**Proposition of Law No. 2**

**The “deliberate removal” of such an “equipment safety guard” occurs when an employer makes a deliberate decision to lift, push aside, take off or otherwise eliminate that guard from a machine.**

*Amici Curiae* urges this Court to define “deliberate removal” consistent with the intent of the Ohio General Assembly and this Court’s reasoning in *Kaminski v. Metal & Wire Prods. Co.*, 2010-Ohio-1027, 125 Ohio St.3d 250. In upholding the constitutionality of R.C. 2745.01, this Court articulated clear distinctions between intentional acts and those that do not reach that level. This Court included compelling language from Professor Larson’s *Workers’ Compensation Law* (2008)<sup>1</sup>:

“[T]he common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury.” *Id.*, at ¶100.

*Larson* continues, “[e]ven if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering employees to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, wilfully violating a safety statute, failing to protect employees from crime, refusing to respond to an employee’s medical needs and restrictions, or withholding information about worksite hazards, the conduct still falls short of actual intention to injure that robs the injury of accidental character.” (Footnotes

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<sup>1</sup> 6 *Larson’s Workers’ Compensation Law* (2008), Section 103.01.

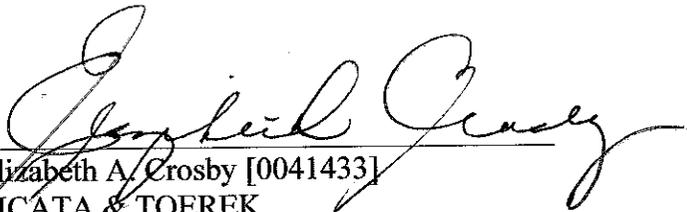
omitted.) *Larson* at Section 103.03.

THIS is the “gold-standard” in defining intentional conduct. THESE are the concepts against which each trial court should evaluate a case for summary judgment and by which each appellate court should define “intent to injure”. THIS Court has not only the power to insure for the correct and consistent application of this standard, but more importantly, it has the DUTY to do so. If the Eighth District’s decision is permitted to stand, the integrity of Ohio’s Workers’ Compensation system is jeopardized, Ohio industry is threatened, and Ohio’s workers become Ohio’s unemployed.

#### IV. CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction, reverse the judgment of the Eighth District and enter judgment as a matter of law in L.E. Myers’ favor.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing has been served this 3<sup>rd</sup> day of December 2011, by U.S.

Mail, postage prepaid, upon the following:

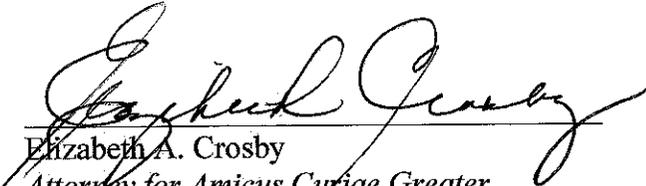
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