

**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 2011-2013**

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**LARRY HEWITT,  
Plaintiff-Appellee,**

**-vs-**

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

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**ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY, CASE NO. 96138**

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**MEMORANDUM OPPOSING JURISDICTION OF  
PLAINTIFF-APPELLEE, LARRY HEWITT**

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## EXPLANATION OF LACK OF PUBLIC OR GREAT GENERAL INTEREST

The Memorandum in Support of Jurisdiction that was submitted by Defendant-Appellant, The L.E. Myers Co., glosses over a number of critical aspects of this workplace intentional tort case, but one stands out in particular. A jury was dutifully instructed upon the new standards imposed by R.C. §2745.01 and concluded that Plaintiff-Appellee, Larry Hewitt, had successfully established his entitlement to the statutory presumption of liability. A deliberate intent to injure thus did not need be shown. Defendant has never disputed during this appeal, and does not dispute now, that the court's carefully crafted charge tracked the new statute word-for-word. Although they have attempted to create the illusion that an intriguing "issue of law" is now ripe for this Court's consideration, that is hardly the case. The employer is simply seeking to undermine a properly instructed jury's application of the facts to the law.

Noticeably absent from Defendant's analysis is any suggestion that there is some reason to believe that the jury had been misled or overwhelmed during the course of the trial. The employer has not even asserted, let alone established, that the court committed some sort of evidentiary or trial management error that skewed the proceedings. The undeniable verity is that the jurors rejected the fanciful factual scenario that the employer has continued to champion throughout this appeal. Based upon their own assessment of the witnesses and evidence that had been presented, the jury simply concluded that sufficient proof had been submitted to invoke the presumption set forth in R.C. §2745.01(C).

In an effort to avoid the monetary judgment that has been imposed, Defendant would have this Court engraft a new "point-of-operation barrier" requirement into R.C. §2745.01(C). When the phrase "equipment safety guard" was left undefined in the statute, the legislators undoubtedly envisioned that juries would be quite capable of supplying a common sense meaning based upon their collective experiences and the

particular facts of each case. That is precisely what occurred in the proceedings below. While Defendant's dissatisfaction with the trial's outcome is evident, their concerns with the absence of restrictive and inflexible definitions should be directed to the General Assembly.

Because this workplace intentional tort case was tried to a properly instructed jury, the purported conflict amongst various Ohio appellate courts is purely illusory. The rulings that Defendant is touting were based upon undisputed facts that permitted judgments to be rendered as a matter of law. Here, conflicting evidence was presented upon virtually every aspect of the workplace intentional tort claim. Thus far in these proceedings, Defendant has been unable to convince a single judge that the resulting verdict is somehow untenable, even in part. The jury's determination that Plaintiff's presentation was more credible should not have been surprising, and hardly produces any issues of public or great general significance.

### **STATEMENT OF THE CASE AND FACTS**

Defendant's "Statement of Facts" differs little from the far-fetched closing argument that had been presented to the jurors in the proceedings below. *Defendant's Memorandum in Support of Jurisdiction, pp. 7-11.* The employer continues to rely heavily upon the highly suspect claims of its own foremen and supervisors while ignoring the damaging admissions that had been elicited from these same witnesses during the trial. Despite the overwhelming evidence in the record confirming that deliberate decisions had been made to forego bothersome safety requirements that threatened to impede operations and impair company profits, Defendant has continued to insist that nothing at all had been amiss during the hours leading up to the electrocution incident. Indeed, Plaintiff has been berated for having the temerity to actually follow his superiors' instructions and recommendations. When all of the testimony is properly considered and evaluated in the manner required for this appeal, a

far more disturbing scenario emerges.

On January 14, 2006, Plaintiff was a 39 year old resident of Cleveland. *Trial Tr. Vol. I, pp. 131-132.* In 2005 he attended an American Line Builders Apprenticeship Training (ALBAT) program. *Id., p. 135.* He joined the local union and was soon hired by Defendant as an apprentice. *Id., p. 136.* He was assigned to help the lineman install new electrical wires along Route 60. *Id., pp. 136-137.* In the process, the apprentices were supposed to learn the trade. *Id., pp. 137-138.* Plaintiff was only at the “second step,” which meant that he was just getting started in the profession. *Id., Vol. II, pp. 223-224.*

Because the crew was allowed to show up late in the mornings, Plaintiff missed a “safety meeting” that was held. *Trial Tr. Vol. I, pp. 139-140; Vol. II, p. 227.* As they were driving out to the worksite in a bucket truck, Lineman Dennis Law (“Law”) informed him that he was going to be replacing the wiring on the poles. *Id., pp. 140-141.* Plaintiff would have to work in the elevated bucket by himself, which he had never done before. *Id., p. 141.* When Plaintiff expressed his concerns about this assignment, Law told him that he would be “okay.” *Id., p. 141.*

The linemen were supposed to be reminding the apprentices about their safety equipment and helping with their training. *Trial Tr. Vol. I, p. 83.* When they arrived at the worksite, however, Law instructed Plaintiff that he did not need to wear the rubber gloves and sleeves that were supposed to protect his hands and arms. *Id., pp. 141-143 & 199.* Plaintiff was nervous about the assignment, but the lineman assured him that he would not come into contact with anything dangerous. *Id., pp. 143-144.*

Plaintiff was led to believe that all of the lines would be de-energized at the top of the pole. *Trial Tr. Vol. I, pp. 142 & 186-187.* As one would expect, he was trusting his supervisors to keep him safe. *Id., p. 202.* But he was never told that two wires continued to carry current. *Id., p. 142.*

Foreman Julian Cromity (“Cromity”) was one of the other linemen on the crew. *Trial Tr. Vol. II, pp. 222-223*. He confirmed that another foreman had stated that the weather was expected to be “hot” that day and the apprentices “wouldn’t have to wear their rubber gloves and sleeves because the primary [line] was de-energized[.]” *Id., p. 229 & 252-253*. The Foreman thus verified that Plaintiff’s testimony in this regard was correct. *Id., p. 230*.

As the company management understood, ALBAT regulations prohibited second step apprentices from working alone and unsupervised near currents of 500 volts. *Trial Tr. Vol., pp. 81-84, 101 & 107-108; Vol. II, p. 251*. Yet the energized lines at the top of the pole were carrying about 7200 volts. *Id., p. 81*. Superintendent Jack Ehrle (“Ehrle”) appreciated that Plaintiff could have contacted the hot wires merely by reaching his arm out, which is always a risk. *Id., pp. 82-83 & 126*. This was also Foreman Cromity’s understanding. *Id., Vol. II, p. 255*. There is always the prospect, moreover, that de-energized lines can become energized during any number of mishaps. *Id., Vol. I, pp. 66-70*. For that reason, rubber gloves and sleeves are required even when the current has purportedly been disconnected. *Id., p. 66*.

Law understood that because some of the lines were still “hot,” Plaintiff would be working in “a primary zone[.]” *Trial Tr. Vol. I, pp. 125-126*. Superintendent Ehrle did not mince words in describing the grave dangers that were posed. During his deposition, he had acknowledged that working with a primary without rubber gloves and sleeves “would be like committing suicide.” *Id., pp. 70-71*.

Another fundamental safety requirement was that second step apprentices were supposed to be closely supervised while they were alone in the elevated buckets. *Trial Tr. Vol. I, p. 101; Vol. II, p. 231*. This vital task had been assigned to Law. *Id., Vol. I, p. 64*. He should have made sure Plaintiff was wearing the protective equipment before he stepped into the bucket. *Id., Vol. II, p. 257*.

But because the crew was short on manpower, Law was also required to stand by the road and waive a flag for oncoming traffic. *Trial Tr. Vol. I. p. 64 & 97.* By his own acknowledgment, the apprentice was not properly supervised. *Id., p. 101.* Foreman Cromity was in full agreement. *Id., Vol. II, p. 234.* Plaintiff was the only apprentice who did not have a lineman working with him. *Id., Vol. I, p. 109.*

Plaintiff remained uncertain about what he was supposed to do that day. *Trial Tr. Vol. I, pp. 142-143.* He certainly would have worn his personal protective equipment if he had been told to do so. *Id., p. 143.* Instead, he just wore his leather gloves. *Id., p. 144.* That should have been observed by Law. *Id., pp. 74-75 & 144.*

At the top of the pole, Plaintiff had to use his hands to pry and remove the neutral wire. *Trial Tr. Vol. I, p. 146.* Anyone watching him would have seen that he was not wearing personal protective equipment. *Id.* Law was standing in the ditch about 35 to 40 feet away flagging traffic. *Id., p. 99.* According to Foreman Cromity, the Lineman simply yelled "hey" up to Plaintiff. *Id., Vol. II, pp. 248-249.* That was a bad idea, given Plaintiff's proximity to the primary line. *Id., pp. 233-234 & 236.*

All too predictably, Plaintiff turned and his left arm was electrocuted by the energized wires. *Trial Tr. Vol. I, p. 152.* He was still able to maneuver himself to the ground with his right hand and throw himself out of the bucket. *Id., pp. 153-154.* When his co-workers pulled up his sleeve, his left arm looked like a burnt cigarette. *Id., p. 156.* Burns also ran up and down his back. *Id., pp. 158-159.* The apprentice had to be life-flighted to MetroHealth Hospital where he was admitted to the facility's burn unit. *Id., pp. 156-157.*

Law has acknowledged that he would have been in the bucket with Plaintiff if he had not been required to flag traffic. *Tr. Vol. I, p. 99.* He would have noticed that the apprentice was not wearing his protective gloves and sleeves and the electrocution incident never would have happened. *Id., pp. 98, 102-103 & 108.* An insulated blanket

also could have been thrown over the hot lines that also would have prevented the catastrophe. *Id.*, pp. 123-124.

For his part, Superintendent Ehrle admitted that he was supposed to be making sure that the electrical workers were safe. *Tr. Vol. I, p. 55*. He conceded that if he had been monitoring the crew prior to June 14, 2006 he would have been aware of their “lapses in judgment and safety[.]” *Id.*, p. 52. He could have taken corrective action to make sure that the electrocution did not occur. *Id.*, p. 52. Unfortunately, Defendant’s re-dedication to workplace safety came too late for Plaintiff.

### **ARGUMENT**

The two Propositions of Law that had been devised to pique this Court’s interest in this otherwise unremarkable workplace intentional tort action will be separately addressed. Neither of them possesses merit.

#### **PROPOSITION OF LAW NO. I: 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**

In contrast to the majority of Defendant’s authorities, Plaintiff was not obligated to show under the relatively unique facts of this case that his employer deliberately intended to electrocute him. There is no dancing around the reality that the jurors had been appropriately charged with regard to the presumption provided in R.C. §2745.01(C) for deliberate removals of equipment safety guards. *Trial Tr. Vol. III, pp. 470-471*. Ohio law is well-settled that they are presumed to have dutifully followed the instructions that have been furnished by the court. *Pang v. Minch* (1990), 53 Ohio St. 3d 186, 195, 559 N.E. 2d 1313, 1322; *State v. Ahmed*, 103 Ohio St. 3d 27, 51, 2004-Ohio-4190, 813 N.E. 2d 637, 663-664.

Noticeably absent from Defendant’s Motion is any suggestion that the jurors had been distracted or lost their way during deliberations. To its credit, the employer has

not attempted to establish that misconduct by counsel, an error by the court, or some other irregularity during the proceeding could have lead them astray. The inescapable conclusion is that they had been properly instructed, and fully appreciated, the requirements imposed by R.C. §2745.01. As was their prerogative, they simply disagreed with Defendant that Plaintiff had failed to sustain his burden of proof in this regard. Four jurists (the trial judge and appellate panel) have now scrutinized the record and have unanimously rejected all of the employer's challenges to the verdict.

This Court has been assured that Plaintiff "stipulated that the incident was an 'accident[.]'" *Defendant's Memorandum in Support of Jurisdiction*, p. 1. In truth, the parties had merely agreed that "as a direct and proximate result of the accident, [Plaintiff] was caused to suffer an injury \*\*\*." *Trial Tr. Vol. III*, p. 465. While Plaintiff's contact with the energized power line was indeed both unintentional and accidental from his perspective, that was not the case with regard to each of the fateful decisions that management had deliberately made that morning. It was no "accident" that the apprentice had been required to work alone without OSHA mandated safety equipment in close proximity to lines that he had been mislead into believing were de-energized.

Defendant has continued to advocate an unduly narrow construction of the phrase "equipment safety guard." *Defendant's Memorandum in Support of Jurisdiction*, pp. 11-14. Having no interest in the actual terms selected by the legislature, the employer insists that this phrase "is limited to those devices that shield an employee from injury by guarding the point of operation of machine." *Id.*, p. 12. According to this twisted logic, an employer could pry-off the face shields from the helmets that welders are required to wear in order to improve their vision and production, and yet remain impervious to any civil claims for the inevitable injuries that are suffered. Likewise, there would be no liability against an employer that disassembled all of the safety railings from platforms and catwalks where laborers were

expected to work at great heights. There can be no serious disagreement that such protective devices fall within a sensible understanding of the phrase “equipment safety guard.”

Had the General Assembly envisioned that the presumption would be constrained to exclude most types of guards that protect workers from hazardous equipment and dangerous situations, then such language surely would have been included in the enactment. But a point of operation barrier requirement is strikingly absent from R.C. §2745.01(C). Even if the legislature may have intended a different result (which is unlikely), a statute must be enforced in accordance with its plain and ordinary meaning. *Hubbard v. Canton City Schools*, 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E. 2d 543, ¶ 14-17.

There can be no serious dispute that the federally mandated rubber gloves and sleeves qualified as “equipment” under a common-sense understanding of the term. Defendant’s attorneys themselves have acknowledged that: “What we have is personal protective equipment.” *R. 101, Defendant’s Motion for Judgment Notwithstanding the Verdict, Exhibit D, p. 13* (emphasis added). The company’s own internal documentation also described the rubber gloves and sleeves as “personal protective equipment,” the only purpose of which was to ensure the worker’s safety. *Trial Tr. Vol. I, pp. 174-175 & 177-178; Vol. II, p. 246* (emphasis added). The notion that “equipment” can mean only “devices” or “machines” that are operated by employees is patently illogical.

In an effort to manufacture a conflict where none exists, Defendant has simply misconstrued *Fickle v. Conversion Tech. Intern. Inc.*, 6<sup>th</sup> Dist. No. WM-10-016, 2011-Ohio-2960, 2011 W.L. 2436750. The Eighth District had quoted extensively from the Sixth District’s opinion in determining that reasonable minds could find that OSHA mandated rubber gloves and sleeves qualify as an “equipment safety guard” within the meaning of R.C. §2745.10(C). *Hewitt v. L.E. Myers Co.*, 8<sup>th</sup> Dist. No. 96138, 2011-Ohio-

5413, 2011 W.L. 5009758 ¶24-27. In *Fickle*, the appellate court had adopted a broad, common-sense interpretation of the statutory phrase, but ultimately concluded that the “jog control” and “emergency stop cable” on an adhesive coating machine did not meet the loose requirements. *Fickle*, 2011-Ohio-2960 ¶29-43. Significantly, the Sixth District refused to accept the employer’s argument that the terms could only mean a “barrier guard” affixed to machinery. *Id.*, ¶33. Precisely the same contention is being strenuously asserted by Defendant in the instant appeal.

After rejecting the employer’s unduly strict interpretation of R.C. §2745.01(C), the *Fickle* court concluded that: “ \*\*\* [a]n ‘equipment safety guard’ would be commonly understood to mean a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.” *Id.*, 2011-Ohio-2960 ¶43. As the Eighth District justifiably concluded in the instant case, rubber gloves and sleeves are also intended to protect the worker from exposure to dangerous contact with electrical apparatus and equipment. *Hewitt*, 2011-Ohio-5413 ¶30. The Sixth District’s holding is thus entirely consistent with the jury’s finding.

None of the other allegedly “conflicting” authorities that Defendant has identified examined an analogous setting involving personal protective equipment and energized power lines. Over and over, the employer has cited cases dealing with industrial machinery and devices and leapt to the conclusion that the courts must have meant that any other type of equipment (such as that found at the top of an electrical pole) must be excluded from the definition of “equipment.” *Defendant’s Memorandum in Support of Jurisdiction*, pp. 5 & 11-13.

A prime example of this specious reasoning is found in the representation that in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St. 3d 115, 570 N.E. 2d 1108, “this Court analyzed identical language in a predecessor to current R.C. 2745.01(C) and held that the ‘deliberate removal by the employer of an equipment safety guard’ means ‘that the

employer has deliberately removed a safety guard *from equipment* which employers are required to operate[.]” *Defendant’s Memorandum in Support of Jurisdiction*, p. 4 (emphasis original). The reality is that the *Fyffe* majority was simply determining whether the presumption could be applied retrospectively and concluded as follows:

Accordingly, we hold that where the facts in a given case show that the employer has deliberately removed a safety guard from equipment which employees are required to operate, trial courts may in their determination of motions for summary judgment pursuant to Civ.R.56, and in the application of our common-law pronouncements of what may constitute an “intentional tort,” consider this evidence, along with the other evidence in support of, and contra to, such motion for summary judgment. [emphasis added]

*Id.*, 59 Ohio St. 3d at 119. *Fyffe* had involved the removal of a safety guard from a conveyor system, and thus it is hardly surprising that the holding was focused upon equipment that employees are required to operate. In no sense did the Court even remotely suggest that the decidedly broad term “equipment” must be artificially constrained to machinery that requires human control.

Defendant has resorted to baseless criticisms, such as “the Eighth District confused a ‘hot’ line with ‘hot’ weather, and erroneously described the de-energized line as a ‘primary’ \*\*\*.” *Defendant’s Memorandum in Opposition to Jurisdiction*, p. 7, *fn. 2*. There was no confusion at all. Forman Cromity had testified that the weather was expected to be “hot” that day. *Trial Tr. Vol. II*, p. 229. It also had been openly conceded that there were “hot” power lines connected to the pole that Plaintiff was directed to service, although Defendant’s management insisted both that the hazard was too far away to be reached and that the apprentice should have appreciated the non-existent danger that eventually took his arm. *Trial Tr. Vol. I*, pp. 116-117 & 186. The term “primary” means simply that the line was energized. *Id.*, p. 126. Defendant’s reasoning is premised upon nothing more than petty bickering over disputed facts, which has no place in this Court.

Based upon their collective experiences and common sense, the jurors could reasonably conclude that the rubber gloves, sleeves, and insulating blankets qualified as “equipment safety guard[s]” consistent with the court’s instructions. Just like the “equipment” worn by a firefighter furnishes protection against flames, these items of personal protection would have acted as a shield between Plaintiff’s skin and the energized wires and electrical apparatus at the top of the pole. Defendant’s counsel took full advantage of the opportunity to argue to the jurors that the terms of the statute meant something else, but was evidently unsuccessful.

Curiously, Defendant has complained that: “It is impossible for an Ohio employer to determine a priori what particular items a court may later deem ‘equipment safety guards’ when examining the ‘nature’ of an employee’s profession.” *Defendant’s Memorandum in Support of Jurisdiction*, p. 6. Apparently, this Court is expected to come to the aid of disreputable business that intend to deprive their workforce of vital safety guards and protective equipment, but only if they can be assured that no lawsuit will follow. Had the General Assembly desired to furnish a “safe harbor” to facilitate such alarming practices, a narrow definition of “equipment safety guard” could have easily been added to the statute. But as long as the phrase remains undefined, employers should not be heard to complain when a properly instructed jury finds at the conclusion of an error-free trial that the presumption set forth in R.C. §2745.01(C) applies.

**PROPOSITION OF LAW NO. II: 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**

The second Proposition of Law is no more meritorious than the first, as the jurors could justifiably find that Defendant’s management effectively “removed” Plaintiff’s

access to, and incentive to utilize, the personal protective equipment that was mandatory under federal law. Based upon the language set forth in this Proposition of Law, the parties appear to be in agreement that the terms “removal” and “eliminate” are synonymous. *Defendant’s Memorandum in Support of Jurisdiction*, p. 14. By all accounts, rubber gloves, sleeves, and insulated blankets had been required and utilized on previous projects involving energized equipment. The jurors were certainly entitled to conclude that such life-saving protections were effectively eliminated, and thus removed, from the particular work-site where Plaintiff was expected to perform his job duties. Each of these items would have acted as a protective barrier and “guarded” Plaintiff from electrocution by the electrical equipment at the top of the pole.

The decidedly broad term “remove” (which is not defined in R.C. §2745.01) encompasses far more than just “physical” takings from another person. Merriam-Webster defines the term as follows:

- 1 a : to change the location, position, station, or residence of *<remove soldiers to the front>*.
- b : to transfer (a legal proceeding) from one court to another
- 2 : to move by lifting, pushing aside, or taking away or off *<remove your hat>*
- 3 : to dismiss from office
- 4 : to get rid of : ELIMINATE *<remove a tumor surgically>*  
[emphasis added]

This latter definition, in particular, could be found to be applicable to the facts of this case. By instructing the apprentice that he was not to wear the rubber gloves and sleeves, management “got rid of” the federally mandatory safety equipment. Just like one can “remove” another’s incentives or “remove” one’s options, the term plainly does not always require a “physical” component.

Even Defendant’s own loyal representative agreed with this common-sense

understanding of the term “removal.” During his deposition, Superintendent Ehrle had acknowledged that telling the apprentices not wear their protective equipment was tantamount to “removing a critical piece of safety” for them. *Trial Tr. Vol. I, p. 80*. By the time of trial he had decided to change his answer, but the jury could certainly opt to accept his earlier, unrehearsed testimony. *Id.*, pp. 80-81. When the cross-examination questioning turned to the company’s failure to ensure that the apprentice was being closely monitored while he was working alone in the elevated bucket within proximity to 7500 volts of current, the following exchange took place:

Q. And it removes that layer of safety that’s specifically there that’s within your policies and procedures to make sure that those apprentices are safe, isn’t it?

MR. McCARTHY: Objection.

THE COURT: Overruled.

A. Yes. [emphasis added]

*Id.*, p. 86.

Despite Defendant’s protests to the contrary, Ohio courts have continued to recognize that legitimate factual disputes must be submitted to a jury notwithstanding the enactment of R.C. §2745.01. For example, in *McKinney v. CSP of Ohio, LLC*, (June 24, 2011), 6<sup>th</sup> Dist. No. WD-10-070, 2011-Ohio-3116, 2011 W.L. 2535606, an employee sustained injury to her hand when she attempted to remove a fender from a molding press. Safety devices on the machine did not activate on the day of the employee’s accident because the press was improperly programmed. The lower court granted summary judgment in favor of the employer. Of relevance to the issue of requisite intent, the court held that reasonable minds could only conclude that the employer lacked deliberate intent to injure the employee by requiring the employee to continue to use the press, which was not operating properly. *Id.* at p. \*2. Further, the court held that the improperly programming did not amount to deliberate removal of a safety

guard, giving rise to a presumption of intent. *Id.*

The appellate court reversed. The *McKinney* court concluded that given the undisputed facts that: (1) the press was not programmed properly, and (2) if the press had been properly programmed, safety devices would have been operable and the injury would not have occurred. *Id.* at p. \*4. Thus, the court held that the improperly programming amounted to “removal” of a safety guard. *Id.* The *McKinney* court continued that there was evidence that a supervisor had been informed of the problem with the press, but he either ignored it or failed to appreciate the seriousness of it and required the workers to continue using it. *Id.* at p. \*5. Thus, the court held that a rebuttable presumption of intent to injure had been established and summary judgment was improvidently granted in favor of the employer.

In another Sixth District opinion, *Dudley v. Powers & Sons, Inc.* (Apr. 22, 2011), 6th Dist. No. WM-10-015, 2011-Ohio-1975, 2011 W.L. 1590252, the court also reversed summary judgment in favor of an employer in an intentional tort case. That lawsuit also involved the statutory presumption of deliberate intent from removal of a safety guard. The employee alleged that removal of a dual button control on a press was the cause of his injuries and gave rise to the rebuttable presumption of intent on the part of the employer. The appellate court agreed, overruling the trial court’s grant of summary judgment to the employer. Of particular relevance to the court’s decision was the conflicting evidence concerning the direct cause of the employee’s injury. The employer had argued that placement of the proximity switch – not removal of the dual button control – was the direct cause of the accident. The *Dudley* court concluded that this conflict created a genuine issue of material fact that could not be disposed of via summary judgment. *Id.* at p. \*3.

This same broad view of the term “removal” was followed in the Stark County Court of Common Pleas. *Wilson v. Martin Pallet, Inc.* (August 24, 2010), Stark C.P.

Case No. 2009CV00908. The plaintiff had been injured on a sawing machine. *Id.*, p. 2. In order to speed up operations, a supervisor had taped over a safety switch that would have disengaged the machinery and prevented the incident. *Id.*, p. 3. In denying the employer's demand for summary judgment, the trial judge concluded that "[b]ypassing or disabling this critical safety feature is tantamount to 'removing' it." *Id.*, p. 4. The plaintiff was therefore entitled to the rebuttable presumption set forth in subsection (C). *Id.* Ample authority therefore supports the unerring rulings that were rendered below.

### CONCLUSION

Because this workplace intentional tort action revolved around contested issues of fact that were ultimately resolved in Plaintiff's favor, the unanimous decisions that were rendered below upholding the jury's verdict are easily distinguished from the supposedly "conflicting" authorities that Defendant is now citing. There is no dispute that the triers-of-fact had been properly instructed as to the current legal standards and simply concluded that the presumption provided in R.C. §2745.01(c) was available. Consequently, no issues of public or great general importance require this Court's attention. The jury's sensible verdict should be left undisturbed.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Memorandum** has been sent by regular U.S. Mail, on this 29<sup>th</sup> day of December, 2011 to:

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