ORIGINAL

IN THE SUPREME COURT OF OHIO

Larry Hewitt, Plaintiff-Appellee, v. The L.E. Meyers Co., Defendant-Appellant.	) Case No. 2011-2013)) On Appeal from the) Cuyahoga County Court of Appeals,) Eighth Appellate District)) Court of Appeals) Case No.: CA 10-96138

MERIT BRIEF OF *AMICUS CURIAE* FIRSTENERGY CORP. IN SUPPORT OF APPELLANT THE L.E. MEYERS CO.

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I. STATEMENT OF INTEREST

FirstEnergy Corp. ("FirstEnergy") is one of the nation's largest investor-owned electric systems with utilities operating in Ohio, Pennsylvania, New Jersey, West Virginia, Maryland, and Virginia. Its operating companies participate in the Workers' Compensation system and employ thousands of Ohio citizens. Many of FirstEnergy's employees encounter dangerous conditions on a daily basis. FirstEnergy has a significant interest in preserving the proper balance between workers and employers in resolving workplace-injury claims.

As this Court has recognized, "[t]he General Assembly permissibly modified the common law of employer intentional torts through R.C. 2745.01 by establishing that an employee who cannot demonstrate the deliberate intent of his employer to injure him is situated similarly to other employees who recover within the workers' compensation system." *Stetter v. R.J. Corman Derailment Services, LLC*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶84. If the decision of the Eighth District Court of Appeals in the instant case is permitted to stand, then the immunity afforded to FirstEnergy and other complying employers under the Workers' Compensation Act would be merely illusory. By broadening the scope of the presumption in R.C. 2745.01(C) well beyond its intended application, the Eighth District Court of Appeals has rendered the phrase "deliberate removal of an equipment safety guard" meaningless. If this interpretation stands, virtually all workplace injuries involving the use of personal protective equipment will fall under this provision. This is clearly not what the General Assembly intended.

Undoubtedly, there is always a safety measure that, in retrospect, could have been used to minimize the danger or prevent a workplace accident. Employers, like FirstEnergy, must have a clear pronouncement from this Court as to the standard for the narrow class of claims that fall under R.C. 2745.01(C) in order to prevent an endless litany of lawsuits couched in strained

interpretations of this law. Just as importantly, employers need assurance that R.C. 2745.01 will be enforced as written when applied by the Courts.

This Court should eliminate any doubt that the term "equipment safety guard" as used in R.C. 2745.01(C) is exactly what it is commonly understood to mean – a device or guard on a piece of equipment that shields the operator from a dangerous aspect of that piece of equipment. If the Eighth District Court of Appeals decision in this case is allowed to stand, a plethora of safety measures could be interpreted as "equipment safety guards," even where those devices are not in any way shielding the operator or related to a piece of equipment. Without a uniform understanding and application of "deliberate removal" and "equipment safety guard" as used in R.C. 2745.01(C), employers in this state have no predictability as to what protective measures fall under this section.

II. STATEMENT OF THE CASE AND FACTS

FirstEnergy adopts the statement of the case and facts as set forth in Appellant, L.E. Myers' Merit Brief.

III. ARGUMENT

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

A. The Presumption of Deliberate Intent in R.C. 2745.01(C) Only Applies To The Deliberate Removal of An Equipment Safety Guard, Not Any Safety-Related Device.

R.C. 2745.01(C) provides as follows:

> 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.

"Equipment safety guard" is not defined in R.C. 2745.01. It is well established that, in the absence of clear legislative intent to the contrary, words and phrases used in a statute are given their plain and ordinary meaning unless otherwise indicated. *Ohio Assn. of Pub. School Emp. v. Twin Valley Local School Dist Bd. of Edn.*, 6 Ohio St.3d 178, 181 (1983)(internal citations omitted); *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135, 137 (1988)(citing *Youngstown Club v. Porterfield*, 21 Ohio St.2d 83 (1970)). Pursuant to R.C. 1.42, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." The plain, ordinary, or generally accepted meaning of an undefined statutory term is ascertained by looking to common dictionary definitions. *McKinney v. CSP of Ohio, LLC*, 6th Dist. No. WD-10-070, 2011-Ohio-3116, ¶15 (6th Dist.June 24, 2011)(internal citations omitted).

The baseline definitions of the terms utilized in R.C. 2745.01(C) make it clear that in this context, the legislature carefully chose terminology to describe a guard that protects the machine's operator. Use of the word "equipment" in R.C. 2745.01(C) to describe the type of the safety guard applicable to R.C. 2745.01(C) is critical. "Equipment" is defined as "the implements used in an operation or activity: APPARATUS." *Fickle v. Conversion Technologies International Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, ¶38 (6th Dist. June 17, 2011) (quoting Merriam-Webster's Collegiate Dictionary (10 Ed.1996) 392). "Safety" means "the condition of being safe from undergoing or causing hurt, injury, or loss." Id. (quoting Merriam-Webster's Collegiate Dictionary (10 Ed.1996) 1027). "Guard" is defined as "a protective or safety device," specifically "a device for **protecting a machine part** or the ***operator of a machine***." (Emphasis added). Id. (quoting Merriam-Webster's Collegiate Dictionary (10 Ed.1996) 516). "Device" is "a piece of equipment or mechanism designed to serve a special purpose or perform a special function." Id. (quoting Merriam-Webster's Collegiate Dictionary

(10 Ed.1996) 316). Taking these definitions into account, the only reasonable interpretation for this phrase is that it applies when a "machine" is present and the safety guard protecting the operator of the machine is deliberately removed.

Consistent with this interpretation, the Sixth District soundly reasoned in *Fickle v. Conversion Technologies International, Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960 (6th Dist.June 17, 2011), that "[t]he General Assembly did not make the presumption [of deliberate intent in R.C. 2745.01(C)] applicable upon the deliberate removal of *any* safety-related device, but *only* of an *equipment safety guard*, and we may not add words to an unambiguous statute under the guise of interpretation." (Emphasis added). Id. at ¶42 (internal citations omitted). Based upon the plain and ordinary meaning of these terms, the Sixth District concluded that the phrase, "equipment safety guard," as used in R.C. 2745.01(C) means "a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." Id. at ¶43.

On the contrary, the Eighth District Court of Appeals strayed far from the plain and ordinary meaning of "equipment safety guard" in holding that protective rubber gloves and sleeves are "equipment safety guards" under R.C. 2745.01(C). The Eighth District Court of Appeals reasoned that "[p]rotective rubber gloves and sleeves are ***equipment*** designed to be a physical barrier, shielding the operator from exposure to injury by electrocution (the danger)." (Emphasis added). *Hewitt v. L.E. Myers Co.*, 8th Dist. No. 96138, 2011-Ohio-5413, ¶30 (8th Dist.Oct. 20, 2011). However, the Eighth District's focus on the term "equipment" in isolation to include personal protective gear (such as protective gloves and sleeves) fails to give meaning to the entire phrase utilized in R.C. 2745.01(C) of "equipment safety guard." Without considering or referring to the other key terms "safety" and "guard," the Eighth District fails to

give deference to the plain and ordinary meaning of the entire phrase "equipment safety guard," which necessarily contemplates operation of some machine.

Not only does the Eighth District's overly broad construction of the phrase "equipment safety guard" misconstrue the plain and ordinary meaning of the words in the statute, but it also erodes the important balance of interests long established under the Ohio workers' compensation system. As this Court recognized in *Setter,* supra, workers' compensation is a "no-fault" system as to the employer and the employee. *Stetter*, 2010-Ohio-1029 at ¶75. The workers' compensation laws, therefore, strike "a unique compromise between employees and employers, in which employees give up their common-law remedy and accept possibly lower monetary recovery, but with greater assurance that they will receive reasonable compensation for their injury." Id. at ¶54. In turn, employers give up common-law defenses, but are protected from unlimited liability. Id.

Also inherent in this balance is the policy that employees should expect to receive compensation even when they are injured as a result of their own misconduct. Id. at ¶75 (citing 6 Larson's Workers' Compensation Law, Section 103.03). As a trade off, employers should expect that liability for most injuries will be limited to the claimant's recovery of workers' compensation benefits. Id. As this Court observed in *Stetter,* "[t]he General Assembly [through R.C. 2745.01] has in effect determined that injuries to an employee resulting from an employer's actions that fall short of deliberate intent *do* arise from employment." (Emphasis in original). Id. at ¶66. Thus, employees who are unable to demonstrate deliberate intent under R.C. 2745.01 must seek recovery pursuant to Ohio workers' compensation statute. Id.

It is not difficult to imagine that, if the Eighth District's analysis is upheld, a litany of lawsuits will be pursued under R.C. 2745.01(C) for injuries that do not involve machinery or

equipment guards for such machinery. In the electric utility industry, it could be predicted that plaintiffs will argue that any type of protective equipment utilized by line workers (such as hard hats, boots, and harnesses) constitute "equipment safety guards" because they provide protection to employees from exposure to a dangerous aspect of their profession. Taking the argument a step further, it may be argued that all forms of insulation separating the line worker from contact with an energized power line such as air space required under OSHA's 10 foot rule, rubberized coatings on the line itself, or de-energizing the line protect the employee from danger in the profession. Such an analysis would yield absurd results and totally erode the effect of R.C. 2745.01(C). While rubber gloves, hard hats, safety harnesses and insulation undoubtedly shield workers from a danger inherent in performing line work on energized electric lines, such safety measures are clearly not "equipment safety guards" as that phrase is commonly understood.

B. The Eighth District's Ad Hoc Interpretation of the Phrase "Equipment Safety Guard" Leaves Employers of Persons Acting Within a Dangerous Profession Without Any Ability to Predict the Type of Conduct That Will Fall Within the Presumption Created by R.C. 2745.01(C).

The Eighth District's broad interpretation of "equipment safety guard" creates an amorphous standard for the presumption of deliberate intent that will only serve to maximize litigation and confuse employers. Many professions are dangerous. If the Eighth District's analysis stands, employers would need to litigate cases in which the injured party maintains that the profession is dangerous and suggests a safety device that *could* have been used by the employer to prevent the injury. This type of argument improperly reverts to a negligence standard.

Other appellate districts have failed to carve out an exception for safety equipment when dangerous professions were involved. In sharp contrast to the conclusion reached by the Eighth District below, the Sixth District Court of Appeals has explicitly rejected the argument that the

term "equipment safety guard" encompasses any safety-related device. *Fickle*, 2011-Ohio-2960, at ¶42. Instead, the Sixth District appropriately defined the phrase, "equipment safety guard" to be "a device that is designed to shield the operator from exposure to injury ***by a dangerous aspect of the equipment***." (Emphasis added). Id. at ¶43.

The Sixth District Court of Appeals in *Fickle*, supra, analyzed 2745.01(C) in the context of a worker performing the dangerous task of running a machine with a pinch point capable of causing serious injury. The Court found that an emergency stop cable at the plaintiff's work station was not designed to prevent the operator from encountering the pinch point on the specific machine she was using and, therefore, did not constitute an "equipment safety guard" for purposes of R.C. 2745.01(C). Id. at ¶44. Although the Sixth District recognized that the emergency stop cable and accompanying jog control were "devices [that] are designed or may operate to reduce the seriousness of injury to an operator whose hands or fingers are inadvertently drawn into the in-running rewind roller," it nonetheless held that it was not within its power "to inquire into whether the General Assembly should have provided for a presumption of intent to injure where these types of safety devices or features are deliberately removed by the employer." Id. Rather, the Sixth District recognized that it was "not empowered to override or second-guess the public policy determinations of the General Assembly, but must follow the plain language of the statute." Id. (internal citations omitted).

Reviewing a dangerous profession in which the risk of trench collapse was inherent, the Ninth District Court of Appeals in *Barton v. G.E. Baker Construction*, 9th Dist. No. 10CA009929, 2011-Ohio-5704 (9th Dist. Nov. 7, 2011) likewise looked to the common dictionary definitions of "equipment," "safety," and "guard" and held that "not all workplace safety devices are 'equipment safety guards.'" Id. at ¶11 (citing *Fickle*, 2011-Ohio-5704, at

¶42). The Ninth District rejected the plaintiff's argument that his employer's failure to use a trench box created a rebuttable presumption of intent to injure under R.C. 2745.01(C). Id. at ¶9. In so holding, the Ninth District soundly reasoned as follows:

> "[T]he trench box is not an 'equipment safety guard' under Section 2745.01(C) because it is designed to protect workers from trench collapse. ***A trench is not a piece of equipment and the trench box is not designed to protect the operator of any piece of equipment.*** Therefore, Section 2745.01(C) does not apply, and [the employer's] failure to use a trench box to protect its workers from the danger of trench collapse does not create a rebuttable presumption of intent to injure under the employer intentional tort statute." (Emphasis added). Id. at ¶11.

The Fifth District Court of Appeals in *Beary v. Larry Murphy Dump Truck Service*, 5th Dist. No. 2011-CA-00048, 2011-Ohio-4977 (5th Dist. Sept. 26, 2011) held that a back-up alarm on a Bobcat does not constitute an equipment safety guard under R.C. 2745.01(C). The plaintiff in *Beary* was injured when he was struck from behind by a Bobcat that was operating in reverse. Id. at ¶5. This created a dangerous situation because the Bobcat did not have a working backup alarm that would have warned the plaintiff that the machine was approaching because the wires had been disconnected. Id. at ¶¶5, 13. Although the Fifth District Court of Appeals agreed that the backup alarm could be considered a "safety-related device," it held that the alarm was not an "equipment safety guard" for purposes of R.C. 2745.01(C). Id. at ¶¶16, 22.

If the Eighth District's decision is not vacated, employers who participate in the workers' compensation system with the expectation of immunity from ordinary negligence claims will suddenly face the risk of liability for intentional tort arising from accidents involving conduct that falls far short of the deliberate intent to injure standard. Moreover, employers of workers in a dangerous profession will be judged under a different standard simply because of the nature of their employee's tasks. This was not the intent of R.C. 2745.01.

<u>Proposition of Law No. II:</u> The "deliberate removal" of 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 Legislature clearly intended that liability must be limited to deliberate, intentional acts of employers. Under 2745.01(C), removal of a safety guard must necessarily be "deliberate" for it to be actionable. In *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, this Court explained the distinction between deliberate intent and conduct that falls short of deliberate intent as follows:

> "[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, willful, 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***." (Emphasis added). Id. at ¶100. (quoting 6 Larson's Workers' Compensation Law (2008), Section 103.03).

The Court in *Forwerck v. Principle Business Enterprises, Inc.*, 6th Dist. No. WD-10-040, 2011-Ohio-489, held that, in order for the plaintiff to sustain his claim under R.C. §2745.01(C), he must at least create a question of fact that the employer acted deliberately with "a conscious, careful consideration" of the injuries that could occur by requiring employees to nullify the safety measure, in this case a guard wall. Id. at ¶21. Such interpretation follows the common and ordinary meaning of the terms "deliberate" and "removal" used in the statute. Indeed, "deliberate" is defined as "characterized by or resulting from careful and thorough consideration – a deliberate decision." Id. (quoting Merriam-Webster's Collegiate Dictionary (10 Ed. 1996) 305). Moreover, something cannot be "removed" as that term is commonly understood unless it was present in the first place.

Here, Mr. Hewitt's injury, although unfortunate, did not result from the deliberate removal of any safety guard. Even if this Court stretched the definition of "equipment" to include electric lines, the fact remains that no "guard" on the lines that was "removed," let alone

deliberately removed with a "conscious, careful consideration of the injuries that could result from such removal."

As this Court recognized, "[i]t was the General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in R.C. 2745.01(B), to permit recovery for employer intentional tort *only* when an employer acts with specific intent to cause an injury." (Emphasis in original). *Stetter*, 2010-Ohio-1029 at ¶26. In order to respect this public policy, courts of this state must require proof that if an equipment safety guard is removed, that it was done deliberately and with the intent to cause injury. This necessitates evidence that the employer made a deliberate decision to lift, push aside, take off or otherwise eliminate a guard from a piece of equipment. The Eighth District ignored this requirement, holding that the presumption of deliberate intent discussed in R.C. 2745.01(C) applied to a circumstance in which an item of personal safety gear was not used. This ignores the word "remove" and simultaneously eviscerates the deliberate intent requirement of R.C. 2745.01.

IV. CONCLUSION

It is clear that the Eighth District Court of Appeals does not agree with the General Assembly's policy decision to limit employer liability to workers' compensation benefits except in where there is deliberate intent to cause injury. However, it is not the lower court's role to establish legislative policies or "second-guess" the General Assembly's policy choices. *Stetter*, 2010-Ohio-1029 at ¶93; *Kaminski*, 2010-Ohio-1027 at ¶61.

This Court has made clear that "[i]t is within the prerogative and authority of the General Assembly to make [choices] when determining policy in the workers' compensation arena and in balancing, in that forum, employers' and employees' competing interests." *Kaminski*, 2010-Ohio-1027 at ¶74 (quoting *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751). "[I]t would be inappropriate for the judiciary to presume the superiority of its policy

preference and supplant the policy choice of the legislature. For it is the legislature, and not the courts, to which the Ohio Constitution commits the determination of the policy compromises necessary to balance the obligations and rights of the employer and employee in the workers' compensation system." Id. at ¶75 (quoting *Bickers*, 2007-Ohio-6751 at ¶23-24).

The Eighth District's expansion of R.C. 2745.01(C) to include failure to provide an employee with a specific item of personal safety gear runs contrary to the plain and ordinary meaning of the language used by the General Assembly. This leaves employers without assurance that the immunity principles will be applied as the legislature intended. This Court should reverse and vacate the decision of the Eighth District Court of Appeals below and hold that the deliberate removal of an equipment safety guard under R.C. 2745.01(C) relates only to 1) removal of a guard or device on a piece of equipment or machine that is designed to shield the operator from injury by a dangerous point of operation of that equipment or machine and 2) removal of equipment safety guards after the employer makes a deliberate, conscious and careful consideration of the injuries that would occur as a result of such removal.

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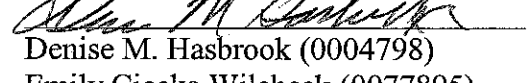

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