

IN THE SUPREME COURT OF OHIO

LARRY HEWITT, :
 :
 Plaintiff-Appellee, : Case No. 11-2013
 :
 v. :
 :
 THE L.E. MYERS COMPANY, : On Appeal from the Cuyahoga County
 : Court of Appeals, Eighth Appellate
 Defendant-Appellant. : District (C.A. No. 10-96138)
 :
 :

**MERIT BRIEF OF AMICI CURIAE OHIO INSURANCE INSTITUTE,
 NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,
 PROPERTY CASUALTY INSURANCE ASSOCIATION OF AMERICA,
 AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF APPELLANT**

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STATEMENT OF INTEREST OF AMICI CURIAE

The issue presented by this appeal is extremely important to the members of amici curiae Ohio Insurance Institute (“OII”), National Association of Mutual Insurance Companies (“NAMIC”), Property Casualty Insurance Association of America (“PCI”), and American Insurance Association (“AIA”), and they urge the Court to reverse the ruling below.

The Court of Appeals found sufficient evidence that appellant, the L.E. Myers Company, intended to injure its employee, appellee Larry Hewitt, even though the parties had stipulated that his injuries were the result of an accident. The Court of Appeals’ finding was based solely upon a statutory presumption that applies when an employer “deliberate[ly] remov[es]” an “equipment safety guard.” R.C. 2745.01(C). However, no safety guards were removed from any equipment in this case. Instead, the Court of Appeals applied this statutory presumption based on Hewitt’s testimony that he was told at work that he “shouldn’t need” to wear rubber gloves to tie-in a new, de-energized power line to utility poles. Hewitt was later injured while performing that work without his rubber gloves, when he held a tie bar that came into contact with an energized line several feet away. He received workers’ compensation benefits and a VSSR settlement for his injuries, and he then filed this intentional tort lawsuit against appellant seeking damages for the same injuries.

The ruling below is very troubling to amici curiae OII, NAMIC, PCI, AIA, and their members. It expands the “intent to injure” statutory presumption enacted by the General Assembly – and, thus, the scope of employer intentional torts in Ohio – by interpreting statutory language that is clear on its face and needs no interpretation. Simply stated, telling someone he does not need to wear rubber gloves while he ties-in a de-energized power line is not a “deliberate removal... of an equipment safety guard” under R.C. 2745.01(C). The Court of

Appeals' interpretation of this statutory language to include a workplace injury that involved neither an "equipment safety guard" (Proposition of Law No. 1) nor the "removal" of anything (Proposition of Law No. 2) usurps the limits that the General Assembly chose to place, as a matter of public policy, on employer intentional torts. This Court has previously upheld the constitutionality of R.C. 2745.01, and the legislature alone has the prerogative to make this policy choice.

Although the Court of Appeals found that the facts of the present case fall within the statutory presumption, it provided no objective standard for determining whether different facts in future cases will also be subject to the presumption. In the absence of any articulated standards for determining whether something that is not commonly considered an equipment safety guard nevertheless constitutes an "equipment safety guard" under the statute, and whether conduct that does not remove anything nevertheless constitutes "deliberate removal" under the statute, the ruling below will lead to the same uncertainty and utterly unpredictable verdicts that plagued employer-intentional-tort litigation in Ohio for almost three decades. This is the uncertainty that the General Assembly thought it had eliminated by using clear and simple language in R.C. 2745.01(C) to specify the narrow factual circumstances that warrant a legal presumption of an intent to injure.

Protective clothing allows workers in many professions to minimize various types of risks. The General Assembly's statutory presumption is limited by its terms to the "[d]eliberate removal by an employer of an equipment safety guard," R.C. 2745.01(C), and does not mention articles of clothing. The Court of Appeals' interpretation of this statutory language invites its extension to situations in which a construction worker removes a hard hat, a crossing guard fails to wear a reflective vest, or a plumber wears boots that lack non-skid treads. Each of the amici

curiae who join in this brief believe that the ruling below will encourage a new era of uncertainty in Ohio law with respect to intentional tort liability and damages for workplace injuries. They urge the Court to enforce the plain language that the General Assembly used in R.C. 2745.01(C) to describe and limit the circumstances in which an employer's intent to deliberately injure an employee can be presumed.

Ohio businesses need a stable and reliable legal environment to prosper and grow. At a minimum, they must be able to count on the certainty and exclusivity of the workers' compensation system to quantify expected costs and avoid trial expenses when accidental injuries occur. In the present case, the parties stipulated that Hewitt's injuries were the result of an "accident." The certainty that R.C. 2745.01 was intended to provide Ohio employers will disappear if the General Assembly's statutory presumption applicable to the deliberate removal of an equipment safety guard is judicially interpreted to include accidents in which no equipment safety guard was removed, deliberately or otherwise.

Similarly, insurance makes modern life possible for individuals and businesses by spreading risks of loss, based on a calculus that reflects the anticipated amount of the losses. But insurers cannot provide this protection unless their legal obligations are clear and calculable. Judicial rulings that adopt novel legal theories or define common words in uncommon ways make those legal obligations unpredictable and undermine the stability of the insurance marketplace.

Amicus curiae OII is a professional trade association representing many property and casualty insurance companies and reinsurers that do business in Ohio. OII provides a wide range of insurance-related services to its members, the public, media, and government officials. Among other activities, OII closely monitors litigation in Ohio courts that raises important issues

of insurance law, and it has participated as amicus curiae in several landmark insurance cases previously decided by this Court.

Amicus curiae NAMIC is the largest property and casualty insurance trade and advocacy association in the United States, and it has been active in promoting sensible and fair insurance laws since its inception in 1895. Its 1,400 members include mutual insurance companies, stock insurance companies, and reinsurers that provide insurance coverage to Ohio residents. NAMIC also participates as an amicus curiae in significant cases before appellate courts, including this Court and the United States Supreme Court, to promote a stable legal environment that allows the insurance industry to meet the needs of individuals and businesses.

Amicus curiae PCI is a national trade organization consisting of over 1,000 property and casualty insurers that furnish insurance coverage throughout the country. It, too, has a very diverse membership, ranging from large national insurance companies and mid-size regional insurers, to single-state insurers and specialty companies that serve specific niche markets. PCI's members are a cross-section of the entire United States property and casualty insurance industry, and they collectively write 43 percent of the nation's automobile insurance, 31 percent of all homeowner's policies, and 42 percent of private workers' compensation insurance.

Amicus curiae AIA is a national trade association representing over 300 major property and casualty insurance companies, based in Ohio and most other states, that collectively wrote more than \$117 billion in insurance premiums in 2008, including more than 25 percent of the commercial insurance market in this State and more than 28 percent of the private workers' compensation market nationwide. AIA members range in size from small companies to the largest insurers, and they underwrite virtually all lines of property and casualty insurance.

The members of OII, NAMIC, PCI, and AIA believe that this appeal has particularly important ramifications for every employer and insurer doing business in Ohio, and they support appellant in asking this Court to reverse the ruling below. Amici curiae are uniquely qualified to provide this Court with a broad perspective on the impact of that ruling on insurance law generally, as well as practical insights into the specific problems it creates.

STATEMENT OF FACTS

Amici curiae OII, NAMIC, PCI, and AIA adopt and incorporate the Statement of Facts in the Brief of Appellant, the L.E. Myers Company. There is no dispute between the parties as to any factual issue that is determinative of this appeal; the record establishes that appellee Larry Hewitt, an employee of appellant, was told that he “shouldn’t need” to wear rubber gloves and then sustained an electric shock in a workplace accident. Amici curiae submit that no equipment safety guard (as those words are commonly understood) was removed (as that word is commonly understood) at any time prior to this accident.

ARGUMENT

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....

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.

The two propositions of law advanced in this appeal by appellant, the L.E. Myers Company, are specific applications of the same general legal principle: in construing a statute, “the court first looks to the language in the statute and the purpose to be accomplished,” and the “[w]ords used in a statute must be taken in their usual, normal, or customary meaning.” *State ex rel. Richard v. Bd. of Trustees of the Police & Fireman’s Disability & Pension Fund*, 69 Ohio St.3d 409, 411-12, 1994-Ohio-126 (citations omitted). “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory construction.” *Cline v. Ohio Bureau of Motor Vehicles*, 61 Ohio St.3d 93, 96 (1991). The Court of Appeals recognized this legal principle, 2011-Ohio-5413, at ¶ 22, but failed to apply it literally.

The Court of Appeals ruled that there was sufficient evidence to hold appellant liable for an intentional tort for injuries sustained by its employee, appellee Larry Hewitt. However, this ruling was not based on any evidence that appellant actually intended to injure Hewitt. In fact, the parties stipulated at trial that this was an “accident,” and the trial court found that appellant did not act with specific intent to injure Hewitt under either R.C. 2745.01(A) or R.C. 2745.01(B).

See 2011-Ohio-5413, at ¶ 11. Instead, the ruling below was based solely on the language of R.C. 2745.01(C), which creates a rebuttable legal presumption that an employer intends to injure an employee in two specific situations:

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 any injury or industrial disease or condition occurs as a direct result.

R.C. 2745.01(C).

The only evidence that Hewitt presented at trial to support this statutory presumption was his testimony that he was told he “shouldn’t need” to wear rubber gloves when he tied-in a new, de-energized electric line. (*Id.*, 2011-Ohio-5413, at ¶ 31.) The Court of Appeals concluded that this statement “amounted to the deliberate removal of an equipment safety guard.” (*Id.*, 2011-Ohio-5413, at ¶ 34.) Accordingly, it held that the statutory presumption of R.C. 2745.01(C) applied and furnished the requisite evidence that appellant intended to injure Hewitt. As a result of that ruling, Hewitt can receive compensation for the same injury through workers’ compensation payments and a VSSR award, and through damages for an intentional tort, because he was told that he didn’t have to wear gloves.

The Court should reverse that ruling for the reasons described in Appellant’s Brief. On a more fundamental level, amici curiae OII, NAMIC, PCI, and AIA do not believe that this case should require extensive legal analysis. The words that the General Assembly used in R.C. 2745.01(C) to describe the scope of the statutory presumption must be given their “usual, normal, or customary meaning.” *State ex rel. Richard, supra*, 69 Ohio St.3d at 412. An ordinary person engaged in an ordinary conversation would never describe the act of telling someone he “shouldn’t need” to wear gloves as the “deliberate removal ... of an equipment safety guard.” It

is patently obvious to everyone except lawyers that no “safety guard” was “removed” from any “equipment” in this case according to the usual, normal, and customary meanings of those words.

There is no need to interpret, characterize, or redefine words that have ordinary accepted meanings. For example, there was no need for the detailed analysis in *Mayor v. Wedding*, 11th App. Dist. No. 2003-P-0011, 2003-Ohio-6695, where the Court resorted to a dictionary definition of “motor vehicle” – *i.e.*, “[a] self-propelled, wheeled conveyance that does not run on rails” – to find that a cow is not a motor vehicle: “[a] cow is self-propelled, does not run on rails, and could be used as a conveyance; however, there is no indication in the record that this particular cow had wheels.” 2003-Ohio-6695, at ¶ 35. Courts are not required to suspend common sense and engage in linguistic gymnastics. No complicated analysis of law or language is necessary to conclude that a cow is not a motor vehicle, or to conclude that telling someone he does not need to wear gloves is not a deliberate removal of an equipment safety guard.

Not surprisingly, Ohio courts have repeatedly recognized that the language the General Assembly enacted in R.C. 2745.01(C) means what it says. In *Fyffe v. Jenos, Inc.*, 59 Ohio St.3d 115, 119 (1991), this Court considered identical language in the predecessor of that statute and found that the presumption that arises from a “deliberate removal by the employer of an equipment safety guard” applies when “the employer has deliberately removed a safety guard from equipment.” The General Assembly was aware of that literal reading of the plain terms of the statute when it retained the same wording in the current version of the statute.

Ohio courts of appeals have similarly concluded that this statutory presumption does not apply unless an equipment safety guard is removed or disconnected. See *Fickle v. Conversion Technologies International, Inc.*, 6th App. Dist. No. WM-10-016, 2011-Ohio-2960, at ¶50; *Beary*

v. Larry Murphy Dump Truck Service, Inc., 5th App. Dist. No. 2011-CA-48, 2011-Ohio-4977, at ¶¶21-22, *appeal allowed*, 131 Ohio St.3d 1456, 2012-Ohio-648; *Barton v. G.E. Baker Construction Co.*, 9th App. Dist. No. 10CA9929, 2011-Ohio-5704, at ¶11. Other jurisdictions that recognize a statutory exception to workers' compensation exclusivity when an equipment safety guard is removed have also limited this exception to situations in which an equipment safety guard is actually removed; it does not apply generally to "the removal or omission of any safety device from any workplace." *Namislo v. Akzo Chemical Co.*, 671 So.2d 1380, 1387 (Ala. 1995). *See also Mora v. Hollywood Bed & Spring*, 79 Cal. Rptr.3d 640, 644, 164 Cal. App. 4th 1061, *review denied*, 2008 Cal. LEXIS 10872.

"In the absence of clear legislative intent to the contrary, words and phrases in a statute shall be read in context and construed according to their plain, ordinary meaning." *Kunckler v. Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135, 137 (1988). Here, no one contends that there was a "clear legislative intent" on the part of the General Assembly to give the words it used in R.C. 2745.01(C) some special meaning, different from their commonly understood meaning, in order to expand the intentional-tort exception to workers' compensation exclusivity. *See Stetter v. R.J. Corman Derailment Services*, 125 Ohio St.3d 280, 284, 2010-Ohio-1029, at ¶ 27 ("we find that R.C. 2745.01 embodies the General Assembly's intent to significantly curtail an employee's access to common-law damages for ... employer intentional tort"). In fact, the General Assembly repeatedly and consistently acted to restrict the scope of intentional tort suits against employers in the three decades since *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608 (1982) was decided, as described in *Kaminski v. Metal & Wine Products Co.*, 125 Ohio St.3d 250, 255-262, 2010-Ohio-1027, at ¶¶ 21-46.

Courts are properly and necessarily authorized to interpret statutes that use ambiguous, unusual, or uncertain language, but judicial interpretation is improper when the intent of the General Assembly is expressed in plain and ordinary language. In the present case, the Court of Appeals rejected appellant's seemingly tautological contention that R.C. 2745.01(C), which references the "[d]eliberate removal...of an equipment safety guard," is "limited to cases involving the deliberate removal of a safety guard from equipment." 2011-Ohio-5413, at ¶ 18. This violates "Justice Frankfurter's timeless advice on statutory interpretation: '(1) Read the statute; (2) read the statute; (3) read the statute.'" *Sierra Club v. Environmental Protection Agency*, 536 F. 3d 673, 678 (D.C. Cir. 2008), quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, Benchmarks, 196, 202 (1967).

The failure of the Court of Appeals to apply the plain language of R.C. 2745.01 in the present case will have significant negative effects on Ohio jurisprudence if it is not reversed by this Court. On a practical level, the complete lack of any objective judicial standards for determining if an "equipment safety guard" has been "removed", under the Court of Appeals' expansive interpretation of those words, means that the applicability of the statutory presumption must be considered and determined on a case-by-case basis, particularly in cases like this one that do not involve an equipment safety guard and in which the employer did not remove anything. Employers and insurers cannot reasonably anticipate whether conduct constitutes an "intentional tort," or whether it is subject to workers' compensation exclusivity, in these circumstances.

This Court knows well the problems that this kind of uncertainty creates for businesses, workers, and the court system, because it happened in Ohio before, when the bench and bar had no objective standards for determining whether an employer had acted despite a "substantial

certainty of injury.” The Court of Appeals’ ruling in the present case does not merely create a “slippery slope”; it is an Olympic-scale ski-jump for personal injury attorneys that would impose unknown and unknowable tort liability on Ohio businesses, large and small. Among other things, an employee’s failure to wear gloves or other protective clothing could lead to liability for an intentional tort, including punitive damages, in addition to workers’ compensation benefits.

This is not what the General Assembly intended. Indeed, it can be prevented by merely enforcing the ordinary meaning of the plain language that the General Assembly used in R.C. 2745.01(C): an intent to injure an employee is not presumed unless an equipment safety guard is deliberately removed or a toxic substance is deliberately misrepresented. Sir Thomas More understood this principle almost 500 years ago:

All laws are promulgated for this end: that every man may know his duty, and therefore the plainest and most obvious sense of the words is that which must be put on them.

Utopia (1516). The “plainest and most obvious sense” of the words that the General Assembly used in R.C. 2745.01(C) encompasses only situations that involve the removal of equipment safety guards.

The Court of Appeals’ decision runs directly counter to the separation-of-powers doctrine. If the statutory presumption that results from the “deliberate removal...of an equipment safety guard” can arise even though no equipment safety guard has been removed, as those words are commonly understood, then the courts rather than the General Assembly will ultimately make the public policy choices that broadly define the scope of the presumption and, thus, the scope of workers’ compensation exclusivity.

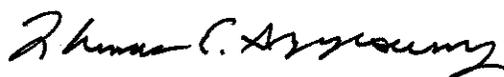
“The General Assembly, not the judiciary, is vested with the State’s legislative power.” *Stetter, supra*, 125 Ohio St.3d at 285, 296, 2010-Ohio-1029, at ¶¶ 36, 88. “[I]t is not the role of

the courts to establish their own legislative policies or to second-guess the policy choices made by the General Assembly.” *Kaminksi, supra*, 125 Ohio St.3d at 264, 2010-Ohio-1027, at ¶ 61. The General Assembly conveyed its public policy choice about the scope of workers’ compensation exclusivity in clear and unambiguous language by enacting R.C. 2745.01(C), and its legislative prerogative must be enforced by Ohio courts.

CONCLUSION

For the reasons set forth above, amici curiae OII, NAMIC, PCI, and AIA ask this Court to reverse the ruling by the Court of Appeals below. The presumption of a deliberate intent to injure, as created and defined by the General Assembly in R.C. 2745.01(C), is limited by its plain terms to the “[d]eliberate removal...of an equipment safety guard,” and in the present case there was no equipment safety guard, as explained in Appellant’s Proposition of Law No. 1, and nothing was ever removed from any equipment, as explained in Appellant’s Proposition of Law No. 2. The General Assembly has attempted to end a very long and difficult period of uncertainty about the scope of Ohio intentional torts against employers, by using common and ordinary language to define the scope of this statutory presumption, and its public policy determination should be respected by this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Merit Brief of Amici Curiae Ohio Insurance Institute, National Association of Mutual Insurance Companies, Property Casualty Insurance Association of America, and American Insurance Association in Support of Appellant* was served by U.S. mail this 14th day of May, 2012, on the following:

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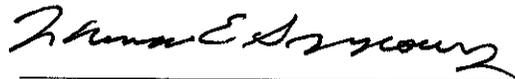
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