

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 11-2013

On Appeal from the Eighth Appellate District  
Cuyahoga County, Ohio  
Court of Appeals Case No. 10-96138

LARRY HEWITT  
*Plaintiff/Appellee,*

v.

THE L.E. MYERS COMPANY  
*Defendant/Appellant*

---

MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL  
ATTORNEYS IN SUPPORT OF APPELLANT

---

Paul W. Flowers (0046625)  
PAUL W. FLOWERS CO., L.P.A.  
50 Public Square, Suite 3500  
Cleveland, Ohio 44114  
Phone: (216) 344-9393  
Fax: (216) 344-9395-1841  
Email: [pwf@pwfco.com](mailto:pwf@pwfco.com)  
*Attorney for Plaintiff-Appellee*

Benjamin C. Sasse (0072856)  
(COUNSEL OF RECORD)  
Mark F. McCarthy (0013139)  
TUCKER ELLIS & WEST LLP  
1150 Huntington Building  
925 Euclid Avenue  
Cleveland, OH 44115-1414  
Phone: (216) 592-5000  
Fax: (216) 592-5009  
Email: [mark.mccarthy@tuckerellis.com](mailto:mark.mccarthy@tuckerellis.com)  
[benjamin.sasse@tuckerellis.com](mailto:benjamin.sasse@tuckerellis.com)  
*Attorneys for Defendant-Appellant*

Brian D. Sullivan (0063536)  
(COUNSEL OF RECORD)  
REMINGER CO., L.P.A.  
101 West Prospect Avenue  
Suite 1400  
Cleveland, Ohio 44115-1093  
Phone: (216) 687-1311  
Fax: (216) 687-1841  
Email: [bsullivan@reminger.com](mailto:bsullivan@reminger.com)

*Attorney for Amicus Curiae,  
Ohio Association of Civil Trial  
Attorneys*

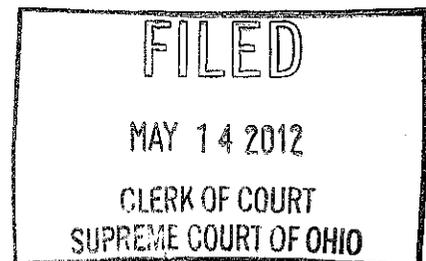


TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. INTEREST OF THE AMICUS CURIAE..... 1

II. LEGAL ANALYSIS..... 3

    PROPOSITIONS OF LAW NO. 1..... 3

    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. .... 3

    PROPOSITION OF LAW NO. 2 ..... 3

    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..... 3

III. CONCLUSION..... 8

CERTIFICATE OF SERVICE ..... 9

## TABLE OF AUTHORITIES

### Cases

<i>Arbino v. Johnson &amp; Johnson</i> , 116 Ohio St.3d 468, 2007-Ohio-6948 .....	5
<i>Baltimore Ravens v. Self-Insuring Emp. Evaluation Bd.</i> , 94 Ohio St. 3d 449, 2002-Ohio-1362, 764 N.E.2d 418.....	4
<i>Bickers v. W &amp; S Life Ins. Co.</i> , 116 Ohio St.3d 351, 2007 Ohio 6751.....	2
<i>D.A.B.E., Inc. v. Toledo-Lucas Cty Bd. of Health</i> , 96 Ohio St. 3d 250, 2002-Ohio-4172.....	4
<i>Davis v. Davis</i> , 115 Ohio St.3d 180, 2007-Ohio-5049.....	4
<i>Fickle v. Conversion Techs. Int'l, Inc.</i> , No. WM-10-016, 2011-Ohio-2960, Ohio App. LEXIS 2485 .....	6, 7
<i>Groch v. Gen. Motors Corp.</i> , 117 Ohio St.3d 192, 2008-Ohio-546 .....	5
<i>Kaminski v. Metal &amp; Wire Prods. Co.</i> , 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066.....	4, 5
<i>Kunkler v. Goodyear Tire &amp; Rubber Co.</i> , 36 Ohio St.3d 135, 137, 522 N.E.2d 477, 479 (1988).....	4
<i>Rice v. CertainTeed Corp.</i> , 84 Ohio St. 3d 417, 419, 1999-Ohio-361, 704 N.E.2d 1217, 1218 .....	4
<i>Rosette v. Countrywide Home Loans, Inc.</i> , 105 Ohio St. 3d 296, 2005-Ohio-1736, 825 N.E.2d 599.....	4
<i>S. Sur. Co. v. Standard Slag Co.</i> , 117 Ohio St. 512, 159 N.E. 559 (1927) .....	3
<i>Sec. and Exchange Comm. v. C.M. Joiner Leasing Corp.</i> , 320 U.S. 344, 350-51, 64 S. Ct. 120, 123; 88 L. Ed. 88, 93 (1943) .....	4
<i>Stetter v. R.J. Corman Derailment Servs., L.L.C.</i> , 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092.....	5
<i>Sutton v. Tomco Machining Inc.</i> , 129 Ohio St.3d 153, 2011 Ohio 2733, ¶ 34 .....	2
<i>Wehri v. Countrymark, Inc.</i> , 82 Ohio App. 3d 535, 612 N.E.2d 791 (3rd Dist.1992)..	7

**Statutes**

R.C. 1.42..... 3

R.C. 2745.01 ..... 1, 4, 5

R.C. 2745.01(C) ..... 2, 3, 5, 6, 7, 8

**Other Authorities**

*Merriam-Webster's Collegiate Dictionary* 305 (10th Ed.1996)..... 6

**Constitutional Provisions**

Section 35, Article II..... 1, 2, 3

## I. INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys (“OACTA”) is an organization of civil defense attorneys and corporate executives engaged in the defense of civil lawsuits and the management of claims against individuals, corporations and government entities. OACTA’s broad based membership provides a unique prospective within which to advocate for the continued development of Ohio jurisprudence regarding the meaning and application of Ohio’s Employment Intentional Tort Statute, R.C. 2745.01 consistent with the limitations imposed on those actions by the Ohio Constitution. OACTA has long been a voice in the ongoing effort to insure that the civil justice system is fair, efficient, and predictable.

Section 35, Article II of the Ohio Constitution provides an exclusive remedy to Ohio workers who receive compensation for injuries “occasioned in the course of” the workers’ employment. The constitutional provision resulted from a bargained for compromise establishing a statewide fund for compensation for work place injuries through compulsory employer contributions. In exchange for paying into the state workers’ compensation fund establishing an administrative mechanism by which workers can receive payment for injuries without having to demonstrate an employers’ negligence, employers were provided with immunity from tort liability for work related injuries. As this Court recognized, the workers’ compensation system “operates as a balance of mutual compromises’ between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefits coupled with the greater assurance of recovery

and employers give up their common law defenses and are protected from unlimited liability.” *Sutton v. Tomco Machining Inc.*, 129 Ohio St.3d 153, 2011 Ohio 2733, ¶ 34, quoting *Bickers v. W & S Life Ins. Co.*, 116 Ohio St.3d 351, 2007 Ohio 6751, ¶ 19. Courts and the Ohio General Assembly have repeatedly attempted to balance the protection afford employers participating in the compulsory state fund with the ability of workers to receive additional compensation for injuries that occur in the workplace but are outside the course and scope of employment.

R.C. 2745.01(C) represents the General Assembly’s latest effort to protect the exclusivity of an injured worker’s remedy while recognizing a limited avenue of recovery by establishing a rebuttable presumption of deliberate intent upon proof of the deliberate removal by an employer of an equipment safety guard or a deliberate misrepresentation of a toxic or hazardous substance. In order to insure that the exclusivity of remedy principle underlining Section 35, Article II of the Ohio Constitution is followed and to provide predictability, fairness and efficiency in the administration of the Ohio civil justice system, utilization of standard norms of statutory construction is required.

R.C. 2745.01(C) requires proof that an employer engaged in the “deliberate removal” of an “equipment safety guard.” The appellate court’s failure to properly apply traditional canons of statutory construction has resulted in a gross expansion of the legislature’s limited avenue of recovery. The expansion permits the exception of a rebuttal presumption in limited circumstance to swallow the whole statutory requirement of proof of deliberate intent. The appellate court’s determination has

destroyed the balance created by the general assembly and the constitutional protections afforded complying employers under Section 35, Article II.

## II. LEGAL ANALYSIS

### PROPOSITIONS 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.**

Adherence to canons of statutory construction provide consistency and predictability in the application of statutes to civil litigation. Predictability and consistent application of statutory mandates are critical to fostering a fair and efficient civil justice system. Expansive interpretation of R.C. 2745.01(C) ignores these precepts and undermines our civil justice system.

R.C. 1.42 specifically provides that "words and phrases should be read in context and construed according to the rules of grammar and common usage." Towards that end, the words should be given their natural meaning and construed in their usual, ordinary fashion, unless a contrary intention of the legislature is clearly noted. *S. Sur. Co. v. Standard Slag Co.*, 117 Ohio St. 512, 159 N.E. 559 (1927). Statutory text should be read in "the light on context" so the text should be interpreted "so far as the meaning of the words fairly permits so as to carry out in

particular cases the generally expressed legislative policy.” *Baltimore Ravens v. Self-Insuring Emp. Evaluation Bd.*, 94 Ohio St. 3d 449, 2002-Ohio-1362, 764 N.E.2d 418; *Sec. and Exchange Comm. v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51, 64 S. Ct. 120, 123; 88 L. Ed. 88, 93 (1943).

This Court has recognized that words used in a statute do not exist in a vacuum. *D.A.B.E., Inc. v. Toledo-Lucas Cty Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, ¶ 19. Rather, courts should presume that the General Assembly, in enacting a statute, intend for the entire statute to be effective and that all words should be given effect. In construing a statute, a court must ascertain the intent of the legislature in enacting the statute. *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St. 3d 296, 2005-Ohio-1736, 825 N.E.2d 599, ¶ 12. To determine the intent of a statute, the court must look to the language of the statute, giving effect to the words used. *Rice v. CertainTeed Corp.*, 84 Ohio St. 3d 417, 419, 1999-Ohio-361, 704 N.E.2d 1217, 1218. 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.” *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135, 137, 522 N.E.2d 477, 479 (1988). The plain, ordinary, or generally accepted meaning of an undefined statutory term is invariably ascertained by resort to common dictionary definitions. *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, ¶ 17-18.

The legislative intent behind the enactment of R.C. 2745.01 was extensively discussed by this Court in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066. R.C. 2745.01 was enacted to permit

recovery of employer intentional torts only when an employer acts with specific intent to cause injury. *Kaminski* at ¶ 56. “R.C. § 2745.01 embodies the General Assembly’s intent to significantly curtail an employee’s access to common-law damages” for employer intentional torts. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092.

In *Kaminski*, the Court concluded that its task was to determine whether the statutory pronouncement that “significantly restrict[ed] actions for employer intentional torts,” survived constitutional scrutiny. *Kaminski* at ¶ 57. In concluding that R.C. 2745.01 survived constitutional scrutiny, the Court was guided by the principle that “it 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. The General Assembly is responsible for weighing [policy] concerns and making policy decisions \* \* \*.” *Id.* at ¶ 61, quoting *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, quoting *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 113.

With the legislative intent behind R.C. 2745.01 in mind and using traditional norms of statutory construction, it is evident that the appellate court incorrectly interpreted the statute and impermissibly expanded the scope of R.C. 2745.01(C). In order to be entitled to a presumption that an employer acted with deliberate intent under R.C. 2745.01(C), an employee must demonstrate that the employer engaged in the “deliberate removal” of an “equipment safety guard.” “Deliberate” as used in the statute means “characterized by or resulting from careful and thorough consideration—a deliberate decision.” *Fickle v. Conversion Techs. Int’l, Inc.*, No.

WM-10-016, 2011-Ohio-2960, Ohio App. LEXIS 2485, ¶ 42 (6th Dist.), quoting *Merriam-Webster's Collegiate Dictionary* 305 (10th Ed.1996). The term "removal" in the statute should be construed in accordance with the relevant dictionary definition of "remove". "Remove" is defined in *Merriam-Webster's* as "to move by lifting, pushing aside, or taking away or off; also "to get rid of: ELIMINATE." *Id.* at 987. As the *Fickle* Court observed, "[c]ombining the above definitions, and considering the context in which the phrase is used in the statute," "deliberate removal' for purposes of R.C. 2745.01(C) means a considered decision to take away or off, disable, bypass, or eliminate, or to render inoperable or unavailable for use." *Id.* at ¶ 32.

The statute requires that an equipment safety guard be deliberately removed by the employer in order for a presumption of deliberate intent to cause injury to arise. Equipment is defined as "the implements used in an operation or activity: APPARATUS." *Merriam-Webster's, supra* at 392. "Safety" means "the condition of being safe from undergoing or causing hurt, injury, or loss." *Id.* at 1027. A guard is defined as "a protective or safety device; *specif*: a device for protecting a machine part or the operator of a machine." *Id.* at 516.

In turn, "device" is "a piece of equipment or a mechanism designed to serve a special purpose or perform a special function." *Id.* at 316. Protect means "to cover or shield from exposure, injury, or destruction: GUARD." *Id.* at 935. "Safe" is defined as "free from harm or risk" and "secure from threat of danger, harm, or loss." *Id.* at 1027. One court defined equipment safety guard under a prior version of Ohio's employment intentional tort statute as meaning "a device placed on equipment to

prevent an employee from being drawn into or injured by that equipment. As examples we think of screens over moving belts or over moving gears and pulleys, and of presses which can only be activated by an employee by pressing one or more switches positioned so that no part of the employee will be in the path of the presses action when the employee activates the switches." *Wehri v. Countrymark, Inc.*, 82 Ohio App. 3d 535, 612 N.E.2d 791 (3rd Dist.1992). According to the plain meaning of the words used in R.C. 2745.01(C) and the legislative intent behind the statute, an "equipment safety guard" must mean a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment. See *Fickle*, 2011-Ohio-2960, Ohio App. LEXIS 2485, at ¶ 42.

In this case, the Court is required to interpret the legislature's intent through the meaning of the words used creating a rebuttable presumption of deliberate intent where an employer engages in the "deliberate removal" of an "equipment safety guard." There can be no question that, when applying the plain and ordinary meaning of the words "deliberate removal" and "equipment safety guard" in conjunction with the statutory framework and context of employer intentional tort litigation, evidence of a careful, thoughtful decision made by an employer to eliminate a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment that prevents an employer from contacting the point of operation of a machine is necessary to trigger the rebuttable presumption under R.C. 2745.01(C). An employee is not entitled to a presumption of deliberate intent absent evidence of such conduct.

Applying this statutory framework to the facts of this case lead to the inescapable conclusion that plaintiff's employer did not engaged in the deliberate removal of an equipment safety guard. To the contrary, plaintiff was injured while working on a de-energized power line when he turned in response to a safety warning yelled from the ground and accidentally contact a live power line with a tie wire held in his hand. The fact that plaintiff was advised by a co-worker that he "shouldn't need" personal rubber gloves and sleeves which were available does not constitute the "deliberate removal" of an "equipment safety guard," triggering application of the presumption of deliberate intent to cause injury under R.C. 2745.01(C).

### III. CONCLUSION

The appellate court failed to properly construe the requirement of R.C. 2745.01(C). For the foregoing reasons, this Court should reverse the judgment of the Eighth District and enter judgment as a matter of law in favor of the employer on the employees' claim for an employer intentional tort.

Respectfully submitted,



---

BRIAN D. SULLIVAN, ESQ. (#0063536)  
REMINGER CO., L.P.A  
101 West Prospect Avenue, Suite 1400  
Cleveland, Ohio 44114  
Phone: (216) 687-1311  
Fax: (216) 687-1841  
Email: [bsullivan@reminger.com](mailto:bsullivan@reminger.com)  
*Attorney for Amicus Curiae,*  
*Ohio Association of Civil Trial Attorneys*

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Appellant been forwarded by regular U.S. Mail on this 14 day of May, 2012 to:

Frank L. Gallucci, III  
Michael D. Shroge  
David E. Gray, II  
PLEVIN & GALLUCCI CO., L.P.A.  
55 Public Square, Suite 2222  
Cleveland, Ohio 44113

*Attorneys for Plaintiff-Appellee Larry Hewitt*

Elizabeth A. Crosby  
LICATA & TOERЕК  
6480 Rockside Woods Blvd., Sough  
Suite 180  
Independence, Ohio 44131

*Attorney for Amicus Curiae Cleveland Partnership, Counsel of Smaller Enterprises (COSE)*

Robert A. Minor  
VORYS, SATER, SEYMOUR AND  
PEASE LLP  
42 E. Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008

*Attorney for Amicus Curiae Ohio Self-Insurers Association*

Preston J. Garvin  
Michael Hickey  
GARVIN & HICKEY, LLC  
181 E. Livingston Ave.  
Columbus, Ohio 43215

*Attorneys for Amicus Curiae Ohio Chamber of Commerce*

Thomas R. Sant  
BRICKER & ECKLER, LLP  
100 S. Third Street  
Columbus, Ohio 43215-4291

*Attorney for Amicus Curiae Ohio Chapter of the National Federation of Independent Business*

*Brian D. Sullivan* (59949)  
\_\_\_\_\_  
BRIAN D. SULLIVAN, ESQ. (#0063536)  
*Attorney for Amicus Curiae  
Ohio Association of Civil Trial Attorneys*