

ORIGINAL

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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MERIT BRIEF OF  
PLAINTIFF-APPELLEE, LARRY HEWITT

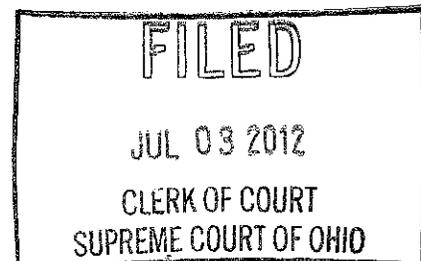
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**TABLE OF CONTENTS**

TABLE OF CONTENTS .....ii

TABLE OF AUTHORITIES.....iii

INTRODUCTION..... 1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....7

ARGUMENT ..... 12

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..... 15

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 .....27

CONCLUSION .....33

CERTIFICATE OF SERVICE.....34

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Arbino v. Johnson &amp; Johnson</i> , 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 ¶ 53-55, 68-69.....	25
<i>Baker v. Aetna Cas. &amp; Sur. Co.</i> (10th Dist. 1995), 107 Ohio App.3d 835, 669 N.E.2d 553 .....	26
<i>Beyer v. Rieter Auto. North American</i> , 6th Dist. No. L-11-1110, 2012-Ohio-2807, 2012 W.L. 2366683 .....	20-21, 29
<i>Dudley v. Powers &amp; Sons, Inc.</i> (Apr. 22, 2011), 6th Dist. No. WM-10-015, 2011-Ohio-1975, 2011 W.L. 1590252 .....	31
<i>Fickle v. Conversion Tech. Intern. Inc.</i> , 6th Dist. No. WM-10-016, 2011-Ohio-2960, 2011 W.L. 2436750 .....	19-21, 29
<i>Fyffe v. Jenos, Inc.</i> (1991), 59 Ohio St. 3d 115, 570 N.E. 2d 1108 .....	22
<i>Hallowell v. County of Athens</i> (Aug. 10, 2004), 4 <sup>th</sup> Dist. No. 03CA29, 2004-Ohio-4257, 2004 W.L. 1802042.....	15
<i>Harmon Grp. Corp. Fin., Inc. v. Academy of Med. of Columbus &amp; Franklin Cty.</i> (10 <sup>th</sup> Dist. 1994), 94 Ohio App.3d 712, 641 N.E.2d 785.....	18
<i>Hewitt v. L.E. Myers, Co.</i> , 131 Ohio St. 3d 1456, 2012-Ohio-648, 961 N.E. 2d 1135 .....	passim
<i>Hewitt v. L.E. Myers Co.</i> , 8 <sup>th</sup> Dist. No. 96138, 2011-Ohio-5413, 2011 W.L. 5009758 .....	passim
<i>Hubbard v. Canton City Schools</i> , 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E. 2d 543, ¶ 14-17 .....	16
<i>Joyce v. General Motors Corp.</i> (1990), 49 Ohio St. 3d 93, 96, 551 N.E. 2d 172 .....	14
<i>McKinney v. CSP of Ohio, LLC</i> , (June 24, 2011), 6th Dist. No. WD-10-070, 2011-Ohio-3116, 2011 W.L. 2535606.....	30, 31
<i>Mills v. Tekni-Plex</i> (September 9, 2011), U.S. Dist. Ct., N.D. Ohio 1:10CV1354, 2011 W.L. 4899977.....	13
<i>Neal-Pettit v. Lahman</i> , 125 Ohio St.3d 327, 331, 2010-Ohio-1829, 928 N.E.2d 421, 425, ¶22 .....	16

<i>Pang v. Minch</i> (1990), 53 Ohio St. 3d 186, 195, 559 N.E. 2d 1313, 1322 .....	13
<i>Presrite Corp. v. Commercial Union Ins. Co.</i> (8th Dist. 1996), 113 Ohio App.3d 38, 680 N.E.2d 216 .....	26
<i>Roberts v. RMB Ents., Inc.</i> (12th Dist. 2011), 197 Ohio App.3d 435, 446, 2011-Ohio-6223, 967 N.E.2d 1263, 1271 ¶22-24 .....	22
<i>State ex rel. Indust. Commn. v. Day</i> (1940), 136 Ohio St. 477, 26 N.E.2d 1014 .....	13
<i>State of Ohio v. Chandler</i> (Aug. 13, 2001), 8 <sup>th</sup> Dist. No. 59764, 2001 W.L. 931661 .....	18
<i>State of Ohio v. Golden</i> (Dec. 20, 1993), 5 <sup>th</sup> Dist. No. CA-6727, 1993 W.L. 544280 .....	18
<i>State of Ohio v. Jones</i> (Mar. 1, 1978), 2 <sup>nd</sup> Dist. No. 5745, 1978 W.L. 216208 .....	17, 18
<i>State of Ohio v. Risner</i> (Aug. 4, 1992), 3 <sup>rd</sup> Dist. No. 6-91-21, 1992 W.L. 195311 .....	18
<i>State of Ohio v. Taylor</i> (June 7, 2001), 8 <sup>th</sup> Dist. No. 78363, 2001 W.L. 637561 .....	18
<i>State of Ohio v. Wood</i> (Mar. 9, 2007), 2 <sup>nd</sup> Dist. No. 2006 CA 1, 2007-Ohio-1027, 2007 W.L. 706807 .....	18
<i>State v. Ahmed,</i> 103 Ohio St. 3d 27, 51, 2004-Ohio-4190, 813 N.E. 2d 637, 663-664 .....	13
<i>Taylor v. Yale &amp; Towne Mfg. Co.</i> (9 <sup>th</sup> Dist. 1987), 36 Ohio App. 3d 62, 63, 520 N.E. 2d 1375 .....	14
<i>Wilson v. Martin Pallet, Inc.</i> (August 24, 2010), Stark C.P. Case No. 2009CV00908 .....	31

**STATUTES**

R.C. §2315.18(B).....	3, 4
R.C. §2745.01 .....	passim
R.C. §2745.01(B) .....	6, 15
R.C. §2745.01(C) .....	passim

**OTHER AUTHORITIES**

29 C.F.R. §1910.333(c)(3) ..... 9  
29 C.F.R. §1910.335(a)(1)(i) ..... 10  
Civ. R. 56(E) ..... 1

## INTRODUCTION

Defendant-Appellant, The L.E. Myers Company, and its *amici* are dancing around the inconvenient fact that this case was tried to a properly instructed jury without error. Plaintiff-Appellee, Larry Hewitt, had successfully established each of the essential elements of his statutory workplace intentional tort claim in the view of the trier-of-fact. No one disputes that, at the employer's insistence, all of the new requirements imposed by R.C. §2745.01 were fully explained in the court's unerring charge. As has long been the practice in Ohio courtrooms, the jurors were entrusted to afford a common sense meaning to the terms and apply the controlling law to the facts that had been demonstrated.

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 blunder that skewed the proceedings. The undeniable verity is that the jurors rejected the fanciful factual scenario that the employer has continued to press 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 satisfy the tests for employer liability set forth in R.C. §2745.01.

None of the authorities that Defendant and its small army of *amici* are now touting address such a situation. In nearly every instance, the employee had been unable to submit evidence in compliance with Civ. R. 56(E) sufficient to overcome summary judgment. This is not such a case. Defendant simply disagrees with the jury's determinations of fact and application of the new statute, nothing more. The unanimous appellate decision upholding the eminently sensible verdict should be left intact.

## STATEMENT OF THE CASE

This workplace intentional tort action was commenced on December 2, 2009.<sup>1</sup> The Complaint alleged that Plaintiff had been severely electrocuted while working as an apprentice lineman for Defendant on June 14, 2006. *R. 1.* Plaintiff's superiors had required him to work alone, and after instructing him not to use federally mandated personal protective equipment, in an elevated lift bucket within close proximity to energized power lines. All too predictably, he inadvertently contacted the electrical equipment and suffered severe burns to his right arm and torso.

Defendant filed an Answer on January 28, 2010 denying liability and interposing various affirmative defenses. *R. 14.* Defendant, Ohio Bureau of Workers' Compensation ("Bureau"), also submitted an Answer and Counterclaim on December 31, 2009. *R. 11.* The agency maintained that, pursuant to statutory rights of subrogation, Plaintiff was required to repay the workers' compensation benefits he had received from any intentional tort recovery he received.

Following a case management conference, Judge Nancy Margaret Russo scheduled the jury trial to commence on September 20, 2010. *R. 15, Journal Entry dated February 3, 2010.* The parties then proceeded with discovery.

On September 13, 2010, Defendant filed no less than five motions seeking, for the most part, to preclude Plaintiff from offering the most damaging evidence that had been obtained during discovery. *R. 60-64.* Each of these requests was opposed in a timely manner and all of them were promptly denied by Judge Russo. *R. 84-88, Journal Entries dated September 17, 2010.*

The jury trial then commenced on September 21, 2010 before Visiting Judge

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<sup>1</sup> Plaintiff had previously filed his workplace intentional tort claim against Defendant on June 10, 2008. *Case No. 661865.* He was represented by different counsel at the time. His former attorney voluntarily dismissed the lawsuit, without prejudice, on December 16, 2008.

Thomas J. Pokorny. *Trial Tr. Vol. I, p. 4.* Over the course of the next several days, numerous witnesses were presented establishing that the apprentice lineman had been required to work under circumstances which were destined to result in a catastrophe. Notably, no witnesses were called by the defense. *Id., Vol. III, p. 398.*

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 accidental from his perspective, that was not the case with regard to each of the fateful decisions that management had deliberately made that morning. His position remained that it was no “accident” that an apprentice had been required to work alone following the removal of OSHA mandated safety equipment and in close proximity to lines that he had been misled into believing were deenergized.

Prior to resting their case, defense counsel offered a lengthy motion for directed verdict. *Trial Tr. Vol. III, pp. 353-393.* The employer maintained that (1) no genuine issues of material fact existed upon the “deliberate intent” standard which had been imposed in R.C. §2745.01, (2) Plaintiff’s future damages were too subjective, and (3) any award of non-economic damages were capped by R.C. §2315.18(B)(3)(a), and (4) no punitive damages were warranted as a matter of law. *Id., pp. 353-375.* Plaintiff refuted each of these contentions. *Id., pp. 375-386.* In ruling upon the motion, the trial court acknowledged that all the evidence had to be construed most strongly in favor of Plaintiff. *Id., p. 393-394.* It was explained that:

I’ll comment just briefly on the issues that have been raised by the defense in the case. In construing the evidence in the most favorable light to the non-movant here, I have to assume true the fact that instructions were given by people who were in a supervisory capacity on behalf of the company

that the use of rubber gloves and sleeves was not necessary for the apprentices to use on that morning.

And then also I have to assume that the plaintiff in this instance, an apprentice, was sent up in a bucket without them, with full knowledge of the people who were supervising him. That I assume is true. And that is not something that ultimately that is going to be assumed true. The jury is going to make that determination itself, so -- if it's going to find for the plaintiff in the case.

*Id.*, pp. 394-395. After further discussion, the trial judge concluded that sufficient evidence had been presented to satisfy the presumption set forth in R.C. §2745.01(C), which pertains to deliberate removal of equipment safety guards. *Id.*, pp. 395-396. Evidence was cited, moreover, which would permit a determination that future damages were reasonably certain under the circumstances. *Id.*, pp. 396-397. Finally, the request for a directed verdict upon the claim of punitive damages was denied. *Id.*, pp. 397-398.

Defendant's has persisted in belittling the trial judge for failing to immediately recognize that Plaintiff's counsel had misplaced a comma during their discussion of the workplace intentional tort statute. *Defendant's Merit Brief*, pp. 10-11. The mistake evidently escaped defense counsel's detection as well. *Trial Tr. Vol. III*, pp. 395-404. They are neglecting to mention that the misplaced comma was brought to the judge's attention shortly thereafter. *Id.*, p. 407. His ruling did not change.

With the tacit agreement of the parties, Judge Pokorny instructed the jurors as follow:

Before you can find for the plaintiff, you must find by the greater weight of the evidence that the plaintiff was an employee of the defendant acting in the course of his employment the defendant committed an act with the intent to injure another, or that the injury to the plaintiff was substantially certain to occur and that the plaintiff's injury was proximately caused by the defendant's conduct.

You must find for the defendant if the plaintiff failed to prove any of these elements by the greater weight of the evidence or if you determine that the evidence is evenly balanced.

Substantial certainty. In order to establish that the defendant committed an act with the belief that the injury to the plaintiff was substantially certain to occur, the plaintiff must show by a greater weight of the evidence that the defendant acted with deliberate intent to cause plaintiff's injury or condition.

If you find a deliberate removal by the employer of an equipment safety guard, then the law creates a rebuttable presumption that the removal was committed with the intent to injure another if the injury or condition occurs as a direct result.

*Trial Tr. Vol. III, pp. 470-471.* No objections were raised to this aspect of the charge. *Id., p. 484.*

The next day, the jurors returned a verdict for Plaintiff and found that he had proven "by a preponderance of the evidence that [Defendant] committed an act with the requisite intent to injure [him] as defined by the Court[.]" *Trial Tr. Vol. III, pp. 501-502.* Compensatory damages totaling \$597,785.00 were then awarded and apportioned as follows:

\$224,285	Compensatory damages representing past economic loss (including lost wages & medical expenses);
\$283,500	Compensatory damages representing future economic loss (including lost wages and medical expenses);
\$25,000	Compensatory damages representing past loss of life's enjoyment;
\$50,000	Compensatory damages representing other past non-economic loss (including pain and suffering);
\$0	Compensatory damages representing future loss of life's enjoyment;
\$15,000	Compensatory damages representing other future non-economic loss (including pain and suffering)

*Trial Tr. Vol. III, p. 502.* Punitive damages were found to be unwarranted. *Id., p. 503.* The verdict was journalized by the Court on October 1, 2010. *R. 97.*

Three days later, Plaintiff filed his Motion for Taxation of Costs which Defendant opposed. The request was nevertheless granted on October 18, 2010 and additional costs were imposed totaling \$2,905.00. *R. 104.*

Defendant's Motion for Judgment Notwithstanding the Verdict was filed on October 15, 2010. *R. 103*. With few exceptions, the employer simply repeated all of the same arguments which had been raised – and rejected – during the directed verdict stage of the proceedings. Plaintiff's timely Memorandum in Opposition followed on November 4, 2010 ("Plaintiff's Memorandum"). *R. 110*. He maintained that sufficient evidence had been produced during the trial that would allow reasonable jurors to conclude both that he was entitled to the presumption afforded by R.C. §2745.01(C) and had sufficiently established the "substantial certainty" of injury as required by R.C. §2745.01(B). *Id.*, pp. 7-17. Trial testimony was also cited that permitted a finding that he was reasonably certain to suffer future damages. *Id.*, pp. 17-20.

On November 10, 2010, the trial judge issued a final order declaring that R.C. §2745.01 is constitutional and overruling Defendant's Motion for Judgment Notwithstanding the Verdict. *R. 111*. Defendant responded with a Notice of Appeal on December 7, 2010. *R. 114*.

A unanimous panel of the Eighth Judicial District affirmed the jury's verdict on October 20, 2011. *Hewitt v. L.E. Myers Co.*, 8<sup>th</sup> Dist. No. 96138, 2011-Ohio-5413, 2011 W.L. 5009758. After carefully examining the terms of R.C. §2745.01, the Court concluded that reasonable minds could (and did) find that Plaintiff's supervisors had made a deliberate decision to place him in close proximity to energized wires after removing federally mandated safety equipment. *Id.*, ¶34. The presumption that was afforded by subsection (C) could thus be found to be applicable, which was never rebutted. *Id.* The panel also rejected Defendant's challenge to the future damages that had been imposed. *Id.*, ¶37-47.

At the request of Defendant and *amici* representing business and insurance interests, this Court accepted jurisdiction over these proceedings on February 22, 2012. *Hewitt v. L.E. Myers, Co.*, 131 Ohio St. 3d 1456, 2012-Ohio-648, 961 N.E. 2d 1135.

## STATEMENT OF THE FACTS

### I. OVERVIEW

Defendant's "Statement of Facts" differs little from the far-fetched closing argument that had been presented in the proceedings below. *Merit Brief of Appellant*, pp. 3-12. 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 follow his superiors' instructions. When all of the testimony is properly considered and evaluated in the manner required for this appeal, a far more disturbing scenario emerges.

### II. PLAINTIFF'S VERSION OF THE EVENTS

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.

Defendant has acknowledged that a "policy" had been in place requiring the electrical workers to wear rubber gloves and sleeves. *Defendant's Merit Brief*, p. 4. Superintendent Jack Ehrle ("Ehrle") explained that this rule was supposed to be

followed even when deenergized lines were being serviced. *Trial Tr. Vol. I, p. 66*. The safety precaution existed not only out of concern for static electricity and the possibility that the lines could be energized, but also because the workers could inadvertently contact a hot wire with their equipment. *Id., pp. 66-67 & 82-83*. There is always the potential for electrocution. *Id., p. 77*.

According to an independent witness, management made a conscious decision to violate this sound safety policy. Defendant is now acknowledging the testimony that Forman Steve Dowdy (Dowdy) decided that "the use of rubber gloves and sleeves was unnecessary, since the line was deenergized." *Id., p. 5* (citations omitted). Dowdy was supposed to be in charge of the crew that day. *Trial Tr. Vol. I, p.94 & 95*.

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*. Superintended Ehrle fully appreciated that this policy was not being followed by the workers. *Id., p. 72*.

As they were driving out to the worksite in a bucket truck, Lineman Dennis Law ("Law") informed Plaintiff that he was going to be replacing the wiring on the poles. *Trial Tr. Vol. I, pp. 140-141*. The apprentice would have to work in the elevated bucket by himself, which he had never done before. *Id., p. 141*. When Plaintiff expresses his concerns about this assignment, Law told him that he would be "okay." *Id., p. 141*.

The lineman were supposed to be reminding the apprentices about the safety equipment and helping with their training. *Trial Tr. Vol. I, p. 83*. When they arrived at the worksite, however, Law instructed Plaintiff not to wear the rubber gloves and sleeves that were supposed to protect his hands and arms. *Id., pp. 141-143 & 199*. The apprentice therefore left his personal protective equipment in the truck. *Id., p. 144*. 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*. Law conceded that

Plaintiff would have been justified in following these instructions. *Id.*, p. 125. He also knew that the equipment was necessary because of the prospect of inadvertent contact with energized lines. *Id.*, p. 126.

Plaintiff was lead to believe that all of the lines would be deenergized 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. He and Dowdy conveyed this instruction to Plaintiff. *Id.*, pp. 241-242. The Foreman thus verified that Plaintiff's testimony in this regard was correct. *Id.*, p. 230.

As the company 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. Defense counsel had made much ado over the claim that the "hot arm" was supposedly "more than 40 inches away from the deenergized line." *Defendant's Merit Brief, p. 5*. It seems to have been forgotten that 40 inches is just over 3 feet, and within a normal adult's wingspan.

Requiring a mere apprentice to work alone in an elevated bucket in close proximity to 7,500 volts of electricity violated numerous regulations which had been promulgated by the federal Occupational Safety and Health Administration ("OSHA"). Examples include 29 C.F.R. §1910.333(c)(3), which specified that:

Overhead lines. If work is to be performed near overhead

lines, the lines shall be deenergized and grounded, or other protective measures shall be provided before work is started. If the line are to be deenergized, arrangements shall be made with the person or organization that operates or controls the electric circuits involved to deenergize and ground them. If protective measures, such as guarding, isolating, or insulating are provided, these precautions shall prevent employees from contacting such lines directly with any part of their body or indirectly through conductive materials, tools, or equipment. [emphasis added]

In similar fashion, 29 C.F.R. §1910.335(a)(1)(i) required that:

Employees working in areas where there are potential electrical hazards shall be provided with, and shall use, electrical protective equipment that is appropriate for the specific parts of the body to be protected and for the work to be performed.

No exceptions had been provided that permitted Defendant to expose the apprentice to live overhead wires and energized equipment which were “more than 40 inches away” from him. *Defendant’s Merit Brief*, p. 5.

Superintendent Ehrle appreciated that Plaintiff could have contacted the hot wires merely by reaching his arm out, which is always a risk. *Trial Tr. Vol. I*, pp. 82-83 & 126. This was also Foreman Cromity’s understanding. *Id.*, Vol. II, p. 255. Plaintiff could have reached the energized lines, and thus needed the rubber gloves and sleeves. *Id.*

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 leather gloves as instructed, which do not furnish any protection against electrocution. *Id.*, pp. 78 & 144. That should have been observed by Law. *Id.*, pp. 74-75 & 144.

Reasonable jurors were under no obligation to accept Defendant's representation that Plaintiff "elected not to wear his rubber gloves and sleeves." *Defendant's Merit Brief, p. 6.* According to Plaintiff, his superior, Law, had actually instructed him not to wear the protective equipment. *Trial Tr. Vol. I, p. 180.* Laws' patently self-serving protests to the contrary are hardly relevant at this stage of the proceedings.

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.* As Superintendent Ehrle conceded, this was one of the known hazards that had prompted the requirement for rubber gloves and sleeves.

*Id.*, pp. 66-67. Plaintiff 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.

Plaintiff proceeded to file a workers' compensation claim, that was allowed for a number of conditions including second degree burns to his hand, forearm, and median nerve as well as "[p]rolonged posttraumatic stress disorder." *Trial Tr. Vol. III*, p. 326. Medical and wage loss benefits totaling approximately \$183,000.00 have been paid, and the figure is expected to grow. *Id.*, pp. 331-333.

### ARGUMENT

At the outset, it is important to observe that Plaintiff's ability to recover in this case is not dependent upon the equipment safety guard presumption set forth in R.C.

§2745.01(C). The General Assembly has furnished three approaches for imposing liability against an employer: specific intent, substantial certainty, and the statutory presumption. *Mills v. Tekni-Plex* (September 9, 2011), U.S. Dist. Ct., N.D. Ohio 1:10CV1354, 2011 W.L. 4899977, \*2. Plaintiff has steadfastly maintained throughout these proceedings that reasonable could find that both of the latter two tests have been satisfied under the egregious facts that have been established. *R. 121, First Amended Complaint, paragraphs 9-12 & 17; Court of Appeals Brief of Plaintiff-Appellee, pp. 21-26.*

In his discussion of Defendant's Motion for Directed Verdict, the trial judge did indicate that he was going to limit the claim to the statutory presumption. *Trial Tr. Vol. III, p. 395-396.* As far as Plaintiff's counsel has been able to determine, that ruling was never journalized in a written entry. *State ex rel. Indust. Commn. v. Day* (1940), 136 Ohio St. 477, 26 N.E.2d 1014 (recognizing that courts of record only speak through their journal entries).

But more significantly than that, the court's charge had informed the jurors of both the deliberate intent and substantially certain tests set forth in Subsections (A) and (B), as well as the presumption provided in subsection (C). *Id., pp. 470-471.* They were never instructed to consider only the presumption. *Id.* As previously noted, no objections were raised to the inclusion of all the statutory tests in the charge. *Id., pp. 402-404 & 484.* Ohio law is well-settled that the jurors 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.

Because of the limited nature of the interrogatories that were submitted to the jury, there is no way of knowing whether the verdict was the product of a finding that one of the two tests preserved in Subsection (A) had been met (deliberate intent or

substantially certain) or Subsection (C)'s presumption applied (equipment safety guard). All that the jurors indicated in this regard was that they had found that Defendant "committed an act with the requisite intent to injure the plaintiff as defined by the Court[.]" *Trial Tr. Vol. III, p. 501-502*. While no "malice" had been found sufficient to warrant punitive damages, that is an entirely different standard. *Id., p. 503*.

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, each of the tests for liability available under 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.

It is a familiar maxim that a trial court's final order will be affirmed if any grounds are found to support it. *Joyce v. General Motors Corp.* (1990), 49 Ohio St. 3d 93, 96, 551 N.E. 2d 172; *Taylor v. Yale & Towne Mfg. Co.* (9<sup>th</sup> Dist. 1987), 36 Ohio App. 3d 62, 63, 520 N.E. 2d 1375. Accordingly, the Eighth District simply affirmed on the basis that the statutory presumption was enough to support a finding of liability against Defendant. *Hewitt*, 2012-Ohio-5413, ¶13-36. While the appellate court justifiably focused on Subsection (C), the panel did observe that reasonable jurors could find that Defendant's misconduct went well beyond "reckless[.]" and involved "deliberate" decisions to expose apprentices to the virtual certainty of injury. *Hewitt*, 2011-Ohio-5413, ¶34.

Neither of the two Propositions of Law that have been accepted for review address Plaintiff's contention that the jury's verdict can be affirmed on the basis of the

“substantial certainty” test that has been codified in R.C. §2745.01(B). This Court should reject any attempt by Defendant to argue this aspect of the claim for the first time in a Reply, since Plaintiff will effectively be denied an opportunity to respond. *Hallowell v. County of Athens* (Aug. 10, 2004), 4<sup>th</sup> Dist. No. 03CA29, 2004-Ohio-4257, 2004 W.L. 1802042, ¶20. In the event that Proposition is approved by this Court, a remand should be ordered to the Eighth District for a determination of whether the verdict may be affirmed on the basis of the statutory “substantial certainty” standard alone.

The two Propositions of Law that had been devised by Defendant will be separately addressed in the remainder of this Brief. Neither possesses merit.

**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**

**A. THE PROPOSED JUDICIAL RE-WRITE OF THE STATUTE**

Both the trial judge and the unanimous appellate court had concluded that the presumption that has been provided by the legislature in R.C. §2745.01(C) could be found to be applicable by the jurors, which states that:

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.

The Eighth District further observed that no attempt had been made in the defense case-in-chief to rebut this statutory presumption. *Hewitt*, 2011-Ohio-5413, ¶135.

Claiming to be privy to what a majority of the General Assembly really had in mind, Defendant has continued to advocate an unduly narrow construction of the phrase “equipment safety guard.” *Defendant’s Merit Brief*, pp. 12-26. Having no

interest in the actual terms approved by the legislature, the employer insists that this phrase “includes only devices that prevent an employee from contacting 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.”

The General Assembly elected not to define the phrase “equipment safety guard,” and left that task for the trier-of-fact to resolve based upon the particular circumstances of each case. Defense counsel had been afforded an unfettered opportunity to convince the jurors that this seemingly uncomplicated phrase meant only those barriers and devices that are actually attached to some sort of machinery. They evidently failed to do so, and substantial deference should be afforded to the verdict that was rendered.

Had the General Assembly envisioned that the presumption would be constrained in every instance 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). “In construing a statute, it is the duty of the court to give effect to the words used in [the] statute, not to insert words not used.” *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 331, 2010-Ohio-1829, 928 N.E.2d 421, 425, ¶122, quoting *State of Ohio v. S.R.* (1992), 63 Ohio St.3d 590, 595, 589 N.E.2d 1319. 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.

In rejecting the employer's pleas for a substantial embellishment of the statute, the Eighth District adhered closely to sound principles of statutory construction and should be commended for its admirable judicial restraint. *Hewitt*, 2012-Ohio-5413, ¶20-23. The will of the General Assembly, as expressed in the actual terms of the enactment, was dutifully respected. *Id.* Defendant and its *amici* would be well advised to direct their policy arguments to their legislative representatives instead of the courts.

## **B. THE JURORS' SENSIBLE INTERPRETATION OF THE STATUTE**

### **1. THE JURORS' APPLICATION OF UNDEFINED TERMS**

Because specific definitions of key terms had not been furnished in R.C. §2745.01, the legislature is presumed to have envisioned that the trier-of-fact would supply a plain and ordinary meaning based upon the particular facts of each case. An instructive case is *State of Ohio v. Jones* (Mar. 1, 1978), 2<sup>nd</sup> Dist. No. 5745, 1978 W.L. 216208. There, a defendant convicted of unauthorized use of a motor vehicle appealed the judgment, arguing that he should have received a special jury instruction that the statutory term "use," did not include being a passenger in the subject vehicle. The trial judge had wisely instructed the jury, instead, as follows:

[T]he word "use" does not have any particular legal definition; that the jury address the word use in the same way you would in your every day utilization of the word. The jury was instructed to apply the ordinary, every day meaning which each of you in your collective experience ascribe to that word. It has no special definition in the context of this case.

*Id.* at p. \*1. In agreeing that the judge's instruction was correct, the appellate court reasoned, in part:

There is no rule of law that requires the trial judge to define every word that is used in his instruction. Any attempt by the judge to be a talking dictionary of common words leads to an unnecessary multiplication of words and confusion that implies special legal significance -- that does not exist -- and

obscures rather than clarifies the true, simple meaning. The jurors must be credited with common sense and an understanding of simple English. Jurors are presumed to know the meaning of common words. It is never necessary to explain ordinary words or expressions when they are used in the sense in which they are commonly understood. [emphasis added]

*Id.* at p. \*2.

Similarly, in *State of Ohio v. Risner* (Aug. 4, 1992), 3<sup>rd</sup> Dist. No. 6-91-21, 1992 W.L. 195311, the court concluded that there had been no error in permitting a jury to apply the ordinary, common meaning of undefined terms “stealth” and “deception.” “In the absence of definitions in Title 29 of stealth and deception that applied to the elements of aggravated burglary, these terms are to be given their ordinary and common meaning by the jury in the context that they are used. Juries are presumed to know the meaning of ordinary and common words.” *Id.* at p. \*5, citing *Baker v. Powhatan Mining Co.* (1946), 146 Ohio St. 600, 67 N.E.2d 714, paragraph three of the syllabus; see also *State of Ohio v. Taylor* (June 7, 2001), 8<sup>th</sup> Dist. No. 78363, 2001 W.L. 637561, p. \*3 (“Words of ordinary or common usage need not be defined for the jury.”); *State of Ohio v. Chandler* (Aug. 13, 2001), 8<sup>th</sup> Dist. No. 59764, 2001 W.L. 931661, p. \*3 (stating same).

In *Harmon Grp. Corp. Fin., Inc. v. Academy of Med. of Columbus & Franklin Cty.* (10<sup>th</sup> Dist. 1994), 94 Ohio App.3d 712, 641 N.E.2d 785, the court upheld a jury verdict rendered for violation of a broker-dealer statute. One of the statutory terms, “effect”, was undefined in the statute. The court held that it was not error for the trial court to fail to define the term for the jury. Because the statute did not define the term, “the jury court give it its plain and ordinary meaning.” *Id.*, 94 Ohio App.3d at 722. See, e.g., *State of Ohio v. Wood* (Mar. 9, 2007), 2<sup>nd</sup> Dist. No. 2006 CA 1, 2007-Ohio-1027, 2007 W.L. 706807, p. \*5 (“jury could properly determine the case by giving the words their common, ordinary meaning”); *State of Ohio v. Golden* (Dec. 20, 1993), 5<sup>th</sup> Dist.

No. CA-6727, 1993 W.L. 544280, p. \*2 (“jury was able to properly determine the case by giving the words their common, ordinary meaning”).

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” with exposed “points of operation” is patently illogical.

## 2. THE “POINT OF OPERATION” REQUIREMENT

In their advocacy of a new “point of operation” requirement, Defendant and the amici have relied heavily upon *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 could qualify as an “equipment safety guard” in appropriate instances within the meaning of R.C. §2745.01(C). *Hewitt*, 2011-Ohio-5413, ¶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.*, ¶32-33.

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 Eighth District parted with the Sixth in one respect only. The Court refused to accept *Fickle’s* requirement that the guard must prevent physical contact with the “danger zone” of the machinery. *Hewitt*, 2011-Ohio-5413 ¶27.

Not long ago, the Sixth District was presented with an opportunity to reexamine *Fickle* in light of the Eighth District’s analysis. In *Beyer v. Rieter Auto. North American*, 6<sup>th</sup> Dist. No. L-11-1110, 2012-Ohio-2807, 2012 W.L. 2366683, the plaintiff had based his workplace intentional tort claim upon his inhalation of silica dust particles while working in the defendant’s plant for over thirty years. *Id.*, ¶2. In response to the ensuing motion for summary judgment, he argued that face masks had not always been provided or available. *Id.*, ¶3. The trial judge concluded that the devices could not qualify as “equipment safety guards” under R.C. §2745.01(C). *Id.* Rather obviously, such protective equipment does not prevent physical contact with the “danger zone” of any machinery.

Writing for the unanimous panel, Judge Handwork began with a careful analysis of *Fickle*, 2011-Ohio-2960, in which he had also been in the majority. *Beyer*, 2012-Ohio-2807, ¶9-10. The Court observed that in *Fickle* “the outcome of that case did not turn particularly on whether the particular devices involved were equipment safety guards, but rather on the fact that no intent could be imputed to the employer by the evidence presented.” *Id.*, ¶9. The *Hewitt* decision was then reviewed, which the Sixth District found to be compelling. *Id.*, ¶11-12. The Court then reasoned that:

We agree with the reasoning in *Hewitt* and now conclude

that, to interpret the statutory terms so narrowly to exclude all protective equipment simply because it is not attached to a machine is to produce an absurd result. [emphasis added]

*Id.*, ¶11. The *Beyer* Court then concluded that:

Modifying our decision in *Fickle*, we more broadly construe R.C. 2745.01(C) to include free standing equipment, such as face masks, within the scope of an “equipment safety guard.” To exclude the face masks in this case, would be to permit, if not invite, an employer to escape liability for intentional tort acts by purporting to provide protective equipment which is never actually distributed or made available to their employees. Consequently, for the purposes of summary judgment, we conclude that appellant presented sufficient evidence to establish a rebuttable presumption under R.C. 2745.01(C) of the employer's deliberate intent to injure due to the removal of an equipment safety guard. [emphasis added]

The entry of summary judgment was then reversed. *Id.*, ¶14-15. Despite the unrelenting derision that has been leveled by Defendant and its loyal *amici*, it is now evident that *Hewitt* is hardly some legal abomination that is so bereft of logic that no sensible jurist could possibly find the opinion to be the least bit convincing.

Now that *Fickle* has been modified, Defendant is left without a single judicial opinion supporting the purely artificial view that equipment safety guards “include only devices that prevent an employee from contacting the point of operation of a machine.” *Defendant’s Merit Brief*, p. 12 (citation omitted). Contrary to the representations that have been made, the Fifth District just approved *Fickel* to the extent that “an equipment safety guard is commonly understood to mean a device designed to shield the operator of the equipment from exposure to or injury by a dangerous aspect of the equipment.” *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 5<sup>th</sup> Dist. No. 2011-CA-00048, 2011-Ohio-4977, 2011 W.L. 4496655, ¶21. A backup alarm on a Bobcat thus did not qualify. *Id.*, ¶22. The Ninth District adopted this same limited definition and found that a trench box would not suffice. *Barton v. G.E. Baker Constr., Inc.*, 9<sup>th</sup> Dist. No. 10CA009929, 2011-Ohio-5704, 2011 W.L. 5345400, ¶11-12. This was also the case in the

Twelfth District, where the court found that a “tire bead and bead taper” were not equipment safety guards. *Roberts v. RMB Ents., Inc.* (12<sup>th</sup> Dist. 2011), 197 Ohio App.3d 435, 446, 2011-Ohio-6223, 967 N.E.2d 1263, 1271 ¶22-24.

In each instance, these courts were unwilling to go as far (as the Sixth District once had) to hold that the guard must prevent physical contact with the point of operation of machinery. This reluctance is understandable. The common sense definition that was adopted instead requires only a shield between the worker and some dangerous aspect of the equipment he/she must encounter. Reasonable minds can find that personal protective equipment, such as dust masks and rubber gloves, qualify as equipment safety guards for purposes of R.C. §2745.01(C).

Defendant has left no stone unturned in its effort to cobble together judicial support for a contrived definition of equipment safety guard. The employer has gone so far as to insist that in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St. 3d 115, 570 N.E. 2d 1108, this Court analyzed a predecessor to current R.C. 2745.01(C) and “held that ‘equipment safety guard’ means a safety device affixed to a machine.” *Defendant’s Merit Brief*, p. 16 (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.

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 that the terms of the statute meant something else, but the jurors simply did not agree.

### **C. THE PURPORTED PUBLIC POLICY CONCERNS**

Litigants who seek to engraft additional terms and conditions into statutes that the General Assembly did not see fit to enact often resort to public policy rhetoric. Insisting that they know what is best for the people, they invariably warn that dire calamities are inevitable unless the courts rework the legislation to their liking. This case is no exception.

Defendant contends that: “establishing clear rules for the presumed intent theory at issue here is especially important to give employers the requisite notice of the types of conduct that imply intent to injure an employee.” *Defendant’s Merit Brief*, p. 25. Apparently, this Court is expected to discern some sort of societal benefit to publicly identifying those dangerous employment practices that can still be perpetrated without fear of a civil recovery under R.C. §2745.01. 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.

In like fashion, Defendant's *amici* have clamored that Ohio's economic future depends upon this Court imposing the strictest of all possible meanings upon the statute's undefined terms. In their zeal to free themselves of the bothersome responsibility of having to fully compensate those who have been injured or killed by deliberately dangerous decisions, they appear to have forgotten that this State enjoyed long periods of productivity and growth while the common law "substantial certainty" test for liability remained in force.

While this Court is being lead to believe that the cost of defending workplace intentional tort claims is too great a burden for legitimate businesses to bear, these same employers and insurers are spending millions, if not billions, of dollars in the aggressive pursuit of lawsuits that have been brought against regulatory agencies, competitors, former officers and employees, and others who are believed to have wronged them. If the "economic vitality" theory is indeed valid, countless jobs can be created by prohibiting all such civil recoveries and allowing corporations and insurers only partial redress for their losses through an administrative claims process. Although many large law firms will immediately collapse (several of which are advocating the effective elimination of civil recoveries for injured workers in their *amici* filings), the displaced attorneys should have no trouble finding work operating dilapidated and unguarded machinery in the revitalized job market.

But the reality is that no objective evidence whatsoever has been offered even remotely establishing that the workplace intentional tort theory of recovery must be defined into oblivion in order to ensure economic vitality. Unlike prior "tort reform" measures, 2004 H.B. 498 contains no mention of any legislative findings to this effect. The Bill is noticeably bereft of any citations to impartial and verifiable studies, statistics, or data confirming that there is indeed a meaningful causal connection between the availability of a civil recovery in limited instances and economic growth.

2004 Am. Sub. S.B. 80, on the other hand, was replete with legislative “findings” and specific references to a variety of studies, polls of business officials, and the testimony of numerous witnesses who appeared before the General Assembly. *Id.*, Section 3(A). This Court was specifically urged in the uncodified portion of the “tort reform” enactment to reconsider several decisions interpreting the Ohio Constitution. *Id.*, Section 3(E). In rendering the ensuing decision in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 ¶ 53-55, 68-69 & 100-101, a majority of this Court repeatedly emphasized that an evidentiary record had been developed by the legislature before caps were imposed upon noneconomic and punitive damages in tort actions. Indeed, the late Chief Justice Moyer’s opinion specifically observed that:

Unlike the record in *Morris [v. Savoy]* (1991), 61 Ohio St.3d 684, 576 N.E.2d 765] and *Sorrell [v. Thevenir]*, 69 Ohio St.3d 415, 1994-Ohio-38, 633 N.E.2d 504], which we criticized as lacking evidence demonstrating a rational connection between the tort reforms taken and the public good to be achieved, the record here draws a clear connection between limiting certain and potentially tainted noneconomic-damages awards and the economic problems demonstrated in the evidence. \*\*\*

*Id.*, 116 Ohio St.3d at 479-480 ¶ 56. It would therefore seem that, in accordance with this logic, this Court should refuse to accommodate promises of a bright economic future that are unsupported with reliable studies and statistics.

There is a simple explanation for why no evidentiary record accompanies H.B. 498: there is no legitimate reason to believe that a complete eradication of the workplace intentional tort theory is necessary for economic prosperity. If one has faith in the jury system, then it must be acknowledged that liability is being imposed only against those employers that have purposefully engaged in policies and practices that were substantially certain to cause harm. Insurance coverage is available to provide indemnity and a defense against such lawsuits, except where the misconduct was truly

malicious. See *e.g.*, *Presrite Corp. v. Commercial Union Ins. Co.* (8<sup>th</sup> Dist. 1996), 113 Ohio App.3d 38, 680 N.E.2d 216; *Baker v. Aetna Cas. & Sur. Co.* (10<sup>th</sup> Dist. 1995), 107 Ohio App.3d 835, 669 N.E.2d 553. The boundless growth and productivity that will purportedly follow if Plaintiff's verdict is overturned remains unsubstantiated and should be no concern for this Court.

Taking another tact, Defendant has complained bitterly that Plaintiff is being unfairly granted "another bite at the apple." *Defendant's Merit Brief*, pp. 1 & 23. The employer is attempting to create the illusion that the disfigured worker is being triple-compensated by his successful workers' compensation claim, the additional recovery for a violation of a specific safety regulation (VSSR), and the jury's award of intentional tort damages. *Id.*

Defendant fully appreciates that there is no validity to this rebuke of the current system for compensating injured workers. The Bureau of Workers' Compensation was an active party in the proceedings below. Defense counsel was present in the courtroom when one of the Bureau's attorneys testified that statutory subrogation rights are being asserted that will require Plaintiff to repay up to \$183,000.00 from any intentional tort recovery that is received. *Trial Tr. III*, pp. 330-333. The lien continued to grow, of course, as additional benefits are paid in the future. *Id.*, pp. 333-334. Consequently, there is no risk of any triple, or even double, recoveries.

Defendant's failure to account for the Bureau's subrogation rights turns its public policy arguments on their head. If the employer and its *amici* have their way in this appeal, then the state will be rarely – if ever – reimbursed for the workers compensation benefits that have to be paid as a result of injuries and fatalities attributable to an employer's deliberate indifference to workplace safety. The considerable costs incurred by such deplorable, yet highly profitable, practices will have to be borne by the administrative system. One can only wonder whether the *amici* have really thought

through the implications of their extreme position. Reputable employers that dutifully abide by safety regulations and promote safe working practices should be appalled by the notion that those who deliberately expose their employees to the substantial certainty of injury should be allowed to foist the cost of their dereliction upon the workers compensation system, thereby boosting the premiums for all. The availability of the workplace intentional tort theory thus serves not only as a strong deterrent against unacceptably dangerous decisions, but also allows the Bureau to recoup benefits that had been paid through its subrogation rights.

This disturbing reality was not lost upon the Eighth District, as the Court sagely observed that:

As a cautionary note, if Justice Pfeifer is correct [in his dissent in *Kaminski*], Ohio employees who are sent in harm's way and conduct themselves in accordance with the specific directives of their employers, if injured, may be discarded as if they were broken machinery to then become wards of the Workers' Compensation Fund. Such a policy would spread the risk of such employer conduct to all of Ohio's employers, those for whom worker safety is a paramount concern and those for whom it is not. So much for "personal responsibility" in the brave, new world of corporations [as] real persons. [emphasis added]

*Houdek v. ThyssenKrupp*, 8<sup>th</sup> Dist. No. 95399, 2011-Ohio-1694, 2011 W.L. 1326374, ¶39.<sup>2</sup> In the end, no legitimate public policy justifications exist for judicially engraft new definitions and restrictions into R.C. §2745.01.

**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

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<sup>2</sup> The *Houdek* opinion is presently being reviewed by this Court. *Case No. 2011-1076.*

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 when Plaintiff was instructed not to wear them. 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.

In the Sixth District decision that Defendant has been lauding, the court

examined a number of definitions and concluded that:

Combining the above definitions, and considering the context in which the phrase is used in the statute, we find that “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. [emphasis added]

*Fickle*, 2011-Ohio-2960, ¶32. The panel took care to note that the employer did not necessarily need to remove the equipment safety guard with the intent of inflicting any injury. *Id.*, fn. 2. This unerring analysis was left intact when *Fickle* was later modified in *Beyer*, 2012-Ohio-2807.

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.

Defendant has grudgingly acknowledged that, depending upon which witnesses are believed, the removal of the safety equipment was deliberate in every sense of the term.

*Defendant's Merit Brief, p.5.* According to Foreman Cromity, Plaintiff was told not to wear his rubber gloves and sleeves that day. *Trial Tr. Vol. II, pp. 252-253.* Foreman Dowdy had decided that he did not have to follow the company's safety policy because it was going to be hot and the apprentice supposedly was not going to be working on energized lines. *Id, p. 229.* A more deliberate - and frightening - decision is difficult to fathom.

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), 6th 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 improper 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.

Defendant has offered no criticism of *Dudley*, but has insisted that *McKinney* is “flawed.” *Defendant's Merit Brief*, pp. 29-30. However, the definition of “removal” that was approved in *McKinney*, 2011-Ohio-3116, ¶17, was indistinguishable from that which had been adopted in *Fickle*, 2011-Ohio-2960, ¶32 (“\*\*\*”to take away or off, disable, bypass, or eliminate, or to render inoperable or unavailable for use\*\*\*.”) Noticeably absent from Defendant's analysis is a citation to any case advocating a narrower interpretation of the familiar term. *Defendant's Merit Brief*, pp. 27-31.

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.* In accordance with the overwhelming consensus of authority, the Eighth District justifiably concluded that the jury could have reasonable based their verdict on the deliberate removal of an equipment safety guard.

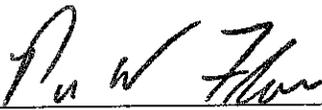
## CONCLUSION

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.

In the event that this Court disagrees and one or both Propositions of Law are approved, then the action should be remanded to the Eighth District Court of Appeals for a resolution of Plaintiff's argument that the verdict can be affirmed on the basis of the statutory "substantial certainty" test. *Court of Appeals Brief of Plaintiff-Appellee*, pp. 21-26.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

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