ORIGINAL

SUPREME COURT OF OHIO

CASE NO. 12-1283

THOMAS H. BEYER, ET AL.

PLAINTIFFS-APPELLEES

VS.

RIETER AUTOMOTIVE NORTH AMERICAN, INC. ET AL.

DEFENDANT APPELLANTS

ON APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
LUCAS COUNTY, OHIO
CASE NO. CL2011-1110

MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents the identical question this Court has already accepted for review in *Hewitt v. L.E. Myers Co.*, Case No.: 11-2013 and *Beary v. Larry Murphy Dump Truck Service, Inc.*, Case No.: 11-1899. In both of those matters, this Court is considering whether the phrase "equipment safety guard" as set forth in R.C.§2745.01(C) includes only those types of devices or mechanisms physically located on a workplace machine or equipment which shield an employee from injury by guarding and/or protecting the point of operation of that machine. In this matter, the Sixth District in issuing its decision specifically agreed with and adopted the *Hewitt, supra* analysis and holding that R.C.§2745.01(C) and its language "equipment safety guard" applied to any "personal protection equipment":

> 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.
>
> In this case, like the protective rubber gloves in *Hewitt*, the facemasks at the plant were personal protection equipment used in conjunction with other machinery or work and were necessary to prevent exposure to injury. According to Beyer, Appellee knew that those masks were locked up at certain times, preventing their use, but still required employees to perform jobs under conditions in which breathing in silica dust was certain to occur. The unavailability of the masks allegedly caused Appellant, still required to perform his job, to be directly exposed to toxic dust and chemicals.
>
> 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."

Beyer v. Rieter Auto. N.A., 2012-Ohio-2807 (6th Dist.) at ¶¶11-13.

Additionally, the Sixth District Court of Appeals decision in this matter conflicts with the following decision on the same identical issue of whether the phrase "equipment safety guard" encompasses workplace safety concerns in general:

* *Barton v. G.E. Baker Constr., Inc.*, 2011-Ohio-504 (9th Dist.) ("Trench box" is not an "equipment safety guard" because "a trench is not a piece of equipment and a trench box is not designed to protect the operator with any piece of equipment");

* *Robert v. RMB Ents., Inc.*, 2011-Ohio-6223 (12th Dist.) ("Equipment safety guard" is "a device that is designed to shield the operator from exposure to or from injury by a dangerous aspect of the equipment.");

* *Beary v. Larry Murphy Dump Truck Serv. Inc.*, 2011-Ohio-4977 (5th Dist.) (An "equipment safety guard" is "a device designed to shield the operator of the equipment from exposure to or from injury by a dangerous aspect of the equipment.").

It is likewise noteworthy that the Sixth District's decision in this matter has now created an intra-district conflict as the appellate court diverted from its previous analysis of the term "equipment safety guard" set forth in *Fickle v. Conversion Techs Int'l Inc.*, 2011-Ohio-2960 (6th Dist.). In *Fickle*, the Sixth District held that "equipment safety guard" as used in R.C. §2745.01 was "a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment. The jog control and emergency stop cable in this case were not designed to prevent an operator from encountering the pinch point on the rewind roller and, therefore, are not equipment safety guards for purposes of the presumption in R.C. §2745.01(C)." *Id.* at ¶¶43-44.

Now, a separate panel for the Sixth District in the case *sub judice*, has expressly modified its earlier opinion in *Fickle* to adopt the Eighth District Court of Appeals reasoning in *Hewitt, supra,* and held that "we more broadly construe R.C. §2745.01(C) to include free

standing equipment such as facemasks, within the scope of an "equipment safety guard". *Beayer, supra* at ¶13.

Accordingly, as the case law in the Sixth District is internally in flux and because the instant decision surrounds and involves principles of law and statutory interpretation which this Court is currently considering in *Hewitt* and *Beayer,* this Court should accept jurisdiction of this matter.

STATEMENT OF THE CASE AND FACTS

On or about March 3, 2008, Plaintiff-Appellees, Thomas Beyer and Sherry Beyer ("Appellee" and/or "Beyer"), filed their original Complaint in the Lucas County Court of Common Pleas alleging a workplace intentional tort against Defendant-Appellant, Rieter Automotive North American, Inc. ("Appellant" and/or "Rieter") and Globe Industries ("Globe"). Appellee voluntarily dismissed his original Complaint on December 9, 2008. On or about December 9, 2009, Appellee re-filed his Complaint alleging a workplace intentional tort against Rieter and Globe.

The trial court granted summary judgment to Rieter. The facts clearly demonstrated that the Rieter 's actions did not rise to the level necessary to prove an employer intentional tort under R.C. §2745.01. On June 22, 2012, the Sixth District reversed this decision.

Beyer was hired by Defendant Globe on September 14, 1974 and worked at the facility in Lucas County, Ohio, until he was terminated on May 27, 2010[1]. Beyer claims that as part of his employment with Globe or Rieter he was directed to work with silica and/or silica containing materials. Beyer likewise alleges that while he was exposed to the materials, Globe or Rieter intentionally failed to provide protective clothing and respiration devices.

Contradicting his own allegations, Beyer admitted that he was never refused protective safety equipment if and when he requested it:

---

[1] Rieter Acquisition acquired Globe Acquisition Corporation in June 1995, and was merged into Rieter Acquisition Corporation and eventually Rieter Automotive North American, Inc. (See Defendant Rieter Automotive North American, Inc.'s Answers to Plaintiff's First Set of Interrogatories and First Request for Production of Documents, No. 3).

Q. Do you remember making any written requests for any kind of safety equipment?

A. Not written, I don't believe

Q. Do you remember specific times or places when you asked for a different kind of mask that you were refused?

A. **I don't think I was refused**. I think they said they would check into it.

(Exhibit C, Deposition of Thomas Beyer, p. 84 lines 7-15). (emphasis added).

Beyer reiterated this when he testified:

Q. Is there any other protective clothing that you claim to have requested that you were not provided?

A. **I don't believe so.**

(Exhibit D, Deposition of Thomas Beyer, p. 95 lines 4-7). (emphasis added).

Indeed, to ensure Beyer's safety Rieter always made masks available to him even though the company was not required to do so:

A. To my knowledge, masks were always available.

Q. So the company denies that they were locked in a safe?

A. To my knowledge, yes.

Q. And the company denies that they were out of masks during weekend cleanups?

A. To my knowledge, yes.

(Deposition of Phillip Williamson, p. 47 lines 8-13).

A. I believe so. It's our policy that we make dust masks available for employees. But we are below all OSHA limits that they do not require. They are there for employees, if they request one.

(Deposition of Phillip Williamson, p. 57 lines 3-6).

Moreover, Rieter never locked the dust masks in a safe as Beyer contended:

> Q. If dust masks were locked away and unavailable for use by reason of being locked up, would that be a violation of Rieter's policy?
>
> A. It is our position that they were not locked up.

(Deposition of Phillip Williamson, p. 55 lines 17-23).

In sum, Beyer failed at the trial court level because the undisputed facts above clearly demonstrate that there was no evidence that Rieter ever deliberately intended to injure Beyer. Rieter always provided dust masks to Beyer, even when not required to do so.

LAW AND ARGUMENT

I. PROPOSITION OF LAW: 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

The Ohio General Assembly through the promulgation of R.C. §2745.01 has stated that remedies afforded to an employee's injury in the workplace will be limited to those provided by the Ohio Workmen's Compensation system unless a plaintiff is able to prove that the employer acted with deliberate intent to cause the employee an injury, a disease, condition, or death. R.C. §2745.10(A) and (B); *Kamanski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027; *Stetter v. R.J. Corman Derailment Servs., L.L.C.,* 125 Ohio St.3d 280, 2010-Ohio-1029.

Against this backdrop, which mandates that an employee prove a specific, deliberate intent that the employer intended to cause injury, the General Assembly concluded that if the employer had deliberately removed an "equipment safety guard" or deliberately misrepresented the hazardousness of a substance the employee was dealing with, under those limited circumstances, a rebuttable presumption that the deliberate intent definition was met arises:

> Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentations of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injury another if an injury or an occupational disease or condition occurs as a direct result.

R.C. §2745.01(C).

The Sixth District in this matter as well as other appellate courts, have improperly and without justification, expanded the General Assembly's very limited circumstances by

which a rebuttable presumption would arise for either misrepresentation of a hazardous substance or the removal of a equipment guard. Ohio Law has set forth various rules which provide courts the framework to be utilized when reviewing a statute.

First, the Ohio Supreme Court has stated that the words and phrases chosen by the Legislature shall be read in context and given their plain and ordinary meaning unless the words have been specifically defined. *D.A.B.E, Inc v. Toledo Lucas Cty. Bd. Of Health,* 96 Ohio St. 3d 250, 255, 2002-Ohio-4172. The Supreme Court has also directed that statutes must be applied according to their plain meaning: "Courts do not have the authority to ignore the plain and unambiguous language in a statute in the guise of statutory interpretation." *State v. Krutz,* 28 Ohio St.3d 36, 38, 28 (1986); and "It is axiomatic that an unambiguous statute means what it says." *Hakim v. Kosydar* (1977), 49 Ohio St.2d 161, 164. Likewise, separate provisions within a single statute are to be read in context and harmoniously. *State ex rel. Thurn v. Cuyahoga County Bd. of Elections*, 72 Ohio St.3d 289, 294 (1995); *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372. Finally, a court must give effect to the General Assembly's intent. *Colbert v. City of Cleveland*, 99 Ohio St. 3d 215, 2003-Ohio-3319 at 12.

The term "guard" while undefined in the statute, must be read in accordance with these salient rules of construction. "Guard" is basically understood and commonly defined as "a protective or safety device; *Specif.* a device for protecting a machine part or the operator of a machine." See, *Fickel v. Conversion Tech. Int., Inc.*, 2011-Ohio-2960 (6th Dist.) at ¶38 *quoting Merriam-Websters Collegiate Dictionary*, 516 (10th Ed. 2000).

As indicated in the above enumerated law, statutes are to be given their plain and ordinary reading and a statute's wording "may not be restricted, constricted, qualified,

narrowed, enlarged or bridged * * *". *In Re Estate of Centorbi*, 129 Ohio St.3d 78, 2011-Ohio-2267 at ¶13. R.C. §2745.01(C) use of the phrase "equipment safety guard" understood in its common verbiage and usage was aptly noted to be defined under a prior General Assembly's promulgation of the phrase as:

> An equipment safety guard is a device placed on equipment to prevent an employee form being drawn into or injured by that equipment. As examples, we think of screens over moving belts or over moving gears and pulleys, and 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 press's action when the employee activates the switches.

Webri v. Country Mark, Inc., 1990 Ohio App. LEXIS 1957, 3rd Dist. Nos.: 1-89-13, 1-89-14 (May 21, 1990)(Interpreting R.C. §4121.80(G)(1) which similarly used the phrase "equipment safety guard")

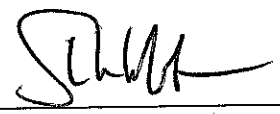
Moreover, as the Sixth District Court of Appeals had originally and properly concluded in *Fickel, supra*: "The General Assembly did not make the presumption applicable upon the deliberate removal of any safety-related device, but only of an equipment safety guard, and we may not add words to an unambiguous statute under the guise of interpretation." *Fickel, supra* at ¶42 *citing Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, ¶15, 20; *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶15; *State Ex Rel Purdy v. Clermont Cty. Bd. Of Elections*, 77 Ohio St.3d 338, 340, 1997-Ohio-278.

Consequently, the alleged failure by the employer to have dust masks available does not equivocate to removal of an "equipment safety guard" and therefore no rebuttable presumption arises under the statute.

CONCLUSION

As this Court is currently considering the same statutory language and proposition of law in the matters of *Hewitt v. L.E. Myers Co.*, Case No.: 11-2013 and *Beary v. Larry Murphy Dump Truck Service, Inc.*, Case No.: 11-1899, and because the Sixth District's decision in this matter is based entirely on *Hewitt, supra,* jurisdiction would be warranted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing true and correct copies thereof, in sealed envelopes, postage fully prepaid and by depositing same in the U.S. mail on this 27th of July, 2012, to the following:

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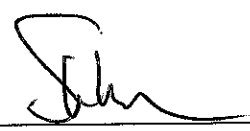

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MANDATE

THE STATE OF OHIO, LUCAS COUNTY, ss

I, BERNIE QUILTER, Clerk of Common Pleas Court and Court of Appeals, hereby certify this document to be a true and accurate copy of entry from the Journal of the proceedings of said Court filed 6/22/12 on case number L11-1110.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name officially and affixed the seal of said court at the Courthouse in Toledo, Ohio, in said County, this 22 day of June A.D., 2012

BERNIE QUILTER, Clerk

SEAL By Deputy

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BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Thomas H. Beyer, et al.

Appellants

v.

Rieter Automotive North American, Inc., et al.

Appellee

Court of Appeals No. L-11-1110

Trial Court No. CI0200908668

DECISION AND JUDGMENT

Decided: JUN 22 2012

* * * * *

Marc G. Williams-Young and Elaine B. Szuch, for appellants.

Jeffrey L. Tasse and Brandon M. Fairless, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a summary judgment issued by the Lucas County Court of Common Pleas, granted in favor of appellee regarding appellants' claims related to exposure to silica-containing substances. Because we conclude that the trial court erred in its interpretation of the definition of "equipment safety guard," we reverse and remand.

E-JOURNALIZED
JUN 22 2012

{¶ 2} Appellants, Thomas H. Beyer ("Beyer") and his wife, Sherry Beyer, filed a complaint against appellee, Rieter Automotive North America, Inc., formerly known as Globe Industries, in Oregon, Ohio, for alleged injuries sustained by Beyer while working in appellee's manufacturing plant. Appellants alleged a claim of employer intentional tort based upon a medical diagnosis that Beyer suffers from silicosis, a progressive lung disease, which allegedly developed as a result of breathing in dust particles of silica while working in appellee's plant for over 30 years.

{¶ 3} Appellee eventually filed a motion for summary judgment, claiming that appellants had failed to establish a claim under the requirements of R.C. 2745.01, either under the rebuttable presumption section or the specific intent to cause injury sections. Appellants opposed the motion. The trial court granted summary judgment, ruling that the face masks, which were allegedly not always provided or available to prevent Beyer from breathing in silica dust, were not "equipment safety guards" as referenced in R.C. 2745.01(A). The court further determined that appellants had also failed to demonstrated the specific intent to injure under R.C. 2745.01(B) and (C).

{¶ 4} Appellants now appeal from that judgment, arguing the following six assignments of error:

Assignment of Error 1: The trial court erred in granting summary judgment to Appellee Rieter Automotive North American, Inc.

Assignment of Error 2: The new intentional tort statute is in derogation of the common law and should be strictly construed.

Assignment of Error 3: The trial court erred in concluding that a face mask is not an "equipment safety guard" under R.C. 2745.01(C).

SCANNED

Assignment of Error 4: The trial court erred in concluding that Appellant Thomas Beyer did not show "specific intent" under R.C. 2745.01(A), (B).

Assignment of Error 5: The trial court erred in applying the "specific intent" standard.

Assignment of Error 6: The trial court abused its discretion in failing to permit Appellant Thomas Beyer to submit a Surreply.

I.

{¶ 5} We will address appellants' first, second, and third assignments of error together. Appellants assert in their first assignment of error that the trial court erred in granting summary judgment to appellee on their claim for employer intentional tort. In their second and third assignments of error, appellants argue that the trial court erred in its interpretation of "equipment safety guard" under R.C. 2724.01.

{¶ 6} The standard of review of a grant or denial of summary judgment is the same for both a trial court and an appellate court. Civ.R. 56(C); *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of facts, if any, * * * show that there is no genuine issue as to any material

fact" and, "construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C).

{¶ 7} R.C. 2745.01, the employer intentional tort statute, provides in pertinent part:

> (A) In an action brought against an employer by an employee * * * for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
>
> (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.
>
> (C) 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.

{¶ 8} The legislative intent behind R.C. 2745.01 is to permit recovery for employer intentional torts when an employer acts with specific intent to cause an injury, a

disease, a condition, or death, subject to the rebuttable presumption and exclusions in subsections (C) and (D) of that section. *See Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, 885 N.E.2d 204, ¶ 17; *Laminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 56. Nevertheless, R.C. 2745.01 does not wholly eliminate the common-law cause of action for an employer intentional tort. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, paragraph three of the syllabus. The statute does, however, "significantly [limit] lawsuits for employer workplace intentional torts." *Id.* at ¶ 28, citing *Talik, supra.*

{¶ 9} We have previously discussed the possible interpretation of the term "equipment safety guard" as used in R.C. 2745.01. *See Fickle v. Conversion Techs. Int'l Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960. Since the General Assembly did not define this term, "'[i]n 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.'" *Id.* at ¶ 29 (quoting *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135, 137, 522 N.E.2d 477 (1988)). Addressing the scope of this statutory term, we determined in *Fickle* that a "jog control and emergency stop cable" were not equipment safety guards for the purposes of the presumption in R.C. 2745.01(C). *Id.* Thus, in *Fickle*, we determined that the failure to provide proper training or safety instructions did not constitute the removal of a safety guard. *Id.* We also concluded that there was no evidence that the failure to reconnect an emergency stop cable, after

maintenance, was deliberate, and therefore, did not constitute an intentional or "deliberate" action by the employer. *Id.* Therefore, 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.

{¶ 10} We now again interpret the meaning of the vague term "equipment safety guard." "[E]quipment" is defined as "the implements (as machinery or tools) used in an operation or activity[.]" *Barton v. G.E. Baker Constr., Inc.*, 9th Dist. No. 10CA009929, 2011-Ohio-5704, ¶ 10, citing Webster's Third New International Dictionary 768 (1993). "[S]afety" is defined as "the condition of being safe: freedom from exposure to danger: exemption from hurt, injury, or loss [.]" *Barton, supra*, citing Webster's Third New International Dictionary at 1998. As we stated in *Fickle*, "guard" may be defined as "a protective or safety device; *specif*: a device for protecting a machine part or the operator of a machine." (Emphasis added.) Merriam-Webster's Collegiate Dictionary 516 (10th Ed.2000). A "guard" may also be "a fixture or attachment designed to protect or secure against injury * * *." *Barton, supra*, citing Webster's Third New International Dictionary at 1007.

{¶ 11} Subsequent to our decision in *Fickle*, the term "equipment safety guard" has been interpreted more broadly in an Ohio appellate court. In *Hewitt v. L. E. Myers Co.*, the Eighth District Court of Appeals determined that protective rubber gloves and sleeves to be worn by electrical workers were equipment safety guards. *Hewitt*, 8th Dist.

No. 96138, 2011-Ohio-5413, ¶ 30. The *Hewitt* court reasoned that the gloves and sleeves "are equipment designed to be a physical barrier, shielding the operator from exposure to or injury by electrocution (the danger)." *Id.* The *Hewitt* court further stated:

> Had the General Assembly envisioned that the presumption would be limited to injuries attributable to a "safety guard" that should have been attached to machinery "which employees are required to operate," then such terms would have been included in R.C. 2745.01(C). A reading reveals that these terms are absent from the statute. If we accept L.E. Myers' interpretation, then employees who, by the very nature of their profession, work with equipment other than a machine or press would be barred from recovery under R.C. 2745.01(C). Hewitt points out this court's recent decision in *Houdek v. ThyssenKrupp Materials N.A., Inc.*, Cuyahoga App. No. 95399, 2011-Ohio-1694, where we stated that the "employer tort has not been abolished, but rather constrained. Whether an employer tort occurs in the workplace depends on the facts and circumstances of each case." Id. ¶ 11. For the following reasons, we find that there was substantial evidence that L.E. Myers deliberately removed an equipment safety guard.

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.

{¶ 12} In this case, like the protective rubber gloves in *Hewitt*, the face masks at the plant were personal protection equipment used in conjunction with other machinery or work and were necessary to prevent exposure to injury. According to Beyer, appellee knew that those masks were locked up at certain times, preventing their use, but still required employees to perform jobs under conditions in which breathing in silica dust was certain to occur. The unavailability of the masks allegedly caused appellant, still required to perform his job, to be directly exposed to toxic dust and chemicals.

{¶ 13} 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. Therefore, we conclude that the trial court erred in granting summary judgment as to appellants' claim for employer intentional tort.

{¶ 14} Accordingly, appellants' first, second, and third assignments of error are well-taken. Appellants' fourth, fifth, and sixth assignments of error are moot.

{¶ 15} The judgment of the Lucas County Court of Common Pleas is reversed and remanded for proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

SCANNED

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____ JUDGE

Mark L. Pietrykowski, J. _____ JUDGE

Thomas J. Osowik, J. _____ JUDGE
CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.