

IN THE SUPREME COURT OF OHIO

CASE NO. 2011-2013

**LARRY HEWITT,
Plaintiff-Appellee,**

-vs-

**THE L.E. MYERS COMPANY,
Defendant-Appellant.**

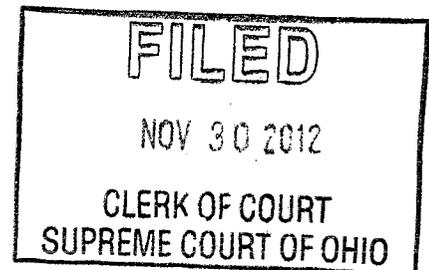
**ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY, CASE NO. 96138**

PLAINTIFF-APPELLEE'S MOTION FOR RECONSIDERATION

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MOTION

Plaintiff-Appellee, Larry Hewitt, requests that this Court reconsider the opinion that was issued on November 20, 2012, a copy of which is attached as Exhibit A. Consistent with Sup. Ct. Prac. R. 11.2(B), no attempt will be made to reargue the positions that had been advanced earlier in these proceedings. However, the analysis that was adopted in the majority opinion differs in several significant respects from the reasoning that had been asserted by Defendant-Appellant, The L.E. Myers Company. Plaintiff seeks only a brief opportunity to respond to these contentions, which has produced an untenable result.

At the outset, it should be observed that Plaintiff has not been challenging the constitutionality of the workplace intentional tort statute, *R. C. 2745.01*. That issue was settled in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, 927 N.E. 2d 1066, and *Stetter v. R. J. Corman Derailment Servs., L.L.C.*, 125 Ohio St. 3d 280, 2010-Ohio-1029, 927 N.E. 2d 1092. Rather, Plaintiff's position consistently has been that once the jury was supplied with the terms of the statute, they could reasonably conclude from the facts in the record that each element of the claim had been satisfied.

The two theories of statutory liability that had been raised in these proceedings will be separately addressed in the remainder of this Motion.

I. THE SUBSTANTIAL CERTAINTY TEST

Throughout this appeal, Plaintiff has been arguing that the jury verdict that was rendered in his favor can be justified under both the new definition of "substantially certain" set forth in R.C. 2745.01(B) and the equipment safety guard presumption provided in R.C. 2745.01(C). *Eighth District Brief of Plaintiff-Appellee*, pp. 21-31; *Plaintiff-Appellee's Merit Brief dated July 3, 2012*, pp. 13-15. Because no jury interrogatories were submitted, there is no way of knowing whether the finding of liability was based on one section or the other – or both. Although Defendant has been

unable to muster a plausible explanation for this Court for how the verdict can be justifiably overturned under the first test, Plaintiff has yet to receive an adjudication upon that issue. The Eighth District was not required to do so, since the trial court was affirmed on the latter basis. *Hewitt v. L.E. Myers Co.*, 8th Dist. No. 96138, 2011-Ohio-5413, 2011 W.L. 5009758, ¶20-36. There was no need to determine whether the “substantial certainty” definition could also be satisfied once the equipment safety guard presumption was found to be available under the facts of the case.

In an attempt to preclude any consideration of Plaintiff’s arguments under R.C. 2745.01(B), Defendant furnished this Court with two Propositions of Law that focused solely upon subsection (C). This Court proceeded to confine its analysis accordingly, with the explanation that the trial judge had granted a directed verdict upon the “substantially certain” test. *Hewitt v. L.E. Myers Co.*, ___ Ohio St. 3d ___, 2012-Ohio-5317, ___ N.E. 2d ___, ¶15 & fn. 2.

But regardless of the reasoning behind a trial court’s rulings, an appellee is always entitled in Ohio to advance alternative theories for upholding the final order. *Plaintiff-Appellee’s Merit Brief*, p. 14, citing *Joyce v. General Motors Corp.*, 49 Ohio St. 3d 93, 96, 551 N.E. 2d 172 (1990); *Taylor v. Yale & Towne Mfg. Co.*, 36 Ohio App. 3d 62, 63, 520 N.E. 2d 1375 (9th Dist. 1987). A notice of cross-appeal was unnecessary, since Plaintiff was defending “a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order[.]” *App. R. 3(C)(2)*. An appellant should not be permitted to override this fundamental tenet of appellate procedure through creative fashioning of the Propositions of Law.

The trial judge’s entry of a directed verdict, whether erroneous or not, is actually immaterial. Following that ruling, both parties tacitly agreed that the jury should be instructed upon both the “substantially certain” and “equipment safety guard” tests.

Trial Tr. Vol. III, pp. 470-471. No objections were ever raised in this regard. *Id.*, pp. 402-404 & 484. The jurors were never advised of the directed verdict, and are presumed to have followed the charge as furnished. *Pang v. Minch*, 53 Ohio St. 3d 186, 195, 559 N.E. 2d 1313, 1322 (1990); *State v. Ahmed*, 103 Ohio St. 3d 27, 51, 2004-Ohio-4190, 813 N.E. 2d 637, 663-664. They were thus free to enter a verdict in favor of Plaintiff upon either or both standards, and any objection that Defendant possessed has been conclusively waived. *Schade v. Carnegie Body Co.*, 70 Ohio St. 2d 207, 210-211, 436 N.E. 2d 1001, 1004 (1982).

In all fairness, Plaintiff remains entitled to an adjudication of his alternative justification for affirming the award of damages that was imposed in his favor. At a minimum, this appeal should be remanded to the Eighth District for a careful consideration of the argument that was timely and properly raised. *Eighth District Brief of Plaintiff-Appellee*, pp. 21-31. Such a disposition is particularly appropriate given that a decision is expected soon from this Court in *Houdek v. ThyssenKrupp Materials N.A. Inc.*, Sup. Ct. No. 2011-1076, that will bear directly upon the “substantially certain” test. This appeal should not be prematurely terminated without the benefit of that ruling.

II. THE EQUIPMENT SAFETY GUARD PRESUMPTION

A. The Equipment Safety Guard Definition

Both the trial judge and appellate court had determined that sufficient evidence had been furnished during the course of the trial to allow the jurors to find that the presumption of a deliberate intent to injure existed as afforded by R.C. 2745.01(C), which provides 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.

Although a majority of the appellate courts have followed a sensible construction of the phrase “equipment safety guard,” which has not been defined by the General Assembly, this Court adopted the extreme view that had first appeared in *Fickle v. Conversion Tech. Intel., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, 2011 W.L. 2436750. While that decision does offer sound analysis for the most part, the Sixth District strayed too far by intimating that only a guard that was attached to machinery and prevented contact with the “danger zone” could suffice. *Id.*, at ¶38-43. This misstep was recognized several months later in *Beyer v. Reiter Auto. N. Am., Inc.*, 6th Dist. No. L-11-1110, 2012-Ohio-2807, 973 N.E. 2d 318, ¶13 (June 22, 2012).

Apart from *Fickle*, no other Ohio courts have adopted the unduly narrow view that the “guard” must be a device attached to dangerous machinery in order to support the presumption. Rather obviously, no such limitation was included in R.C. 2745.01(C).

The three cases that this Court cited in support of the contention that “[o]ther appellate districts in this state have similarly construed this phrase” never actually went so far. *Hewitt*, 2012-Ohio-5317, ¶21. In *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 5th Dist. No. 2011-CA-0048, 2011-Ohio-4977, 2011 W.L. 4496655, ¶21 (Sept. 26, 2011), the Fifth District followed *Fickle’s* conclusion 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” without suggesting that a physical attachment was indispensable. A backup alarm on a skid steer thus did not qualify. This was also the case in *Roberts v. RMB Ents., Inc.*, 197 Ohio App. 3d 435, 445-446, 2011-Ohio-6223, 967 N.E. 2d 1263, 1271 (12th Dist. 2011), which approved the same definition and held that a tire bead and bead taper were excluded. *Id.*, ¶22-23. Likewise, *Fickle’s* “commonly understood” definition was invoked in *Barton v. G.E. Baker Constr., Inc.*, 9th Dist. No. 10CA009929, 2011-Ohio-5704, 2011 W.L. 5345400 (Nov. 7, 2011), to support the determination that the presumption did not

apply to the removal of a trench box that was designed to prevent injuries from trench wall collapses and not dangerous equipment. *Id.*, ¶11-12. The notion that the device must always be attached to the machinery to prevent contact with a “danger zone” has not been supported in any of these opinions.

It is not at all clear, at least to the undersigned counsel, that the *Hewitt* majority actually intended to restrict the statutory presumption to guards attached to machinery. Although the legislature stopped short of imposing such a restriction explicitly, the opinion does reference “a protective device on an implement or apparatus to make it safe and to prevent injury or loss” and criticizes those courts that adopted the position that certain “free-standing items” could suffice. *Hewitt*, 2012-Ohio-5317, ¶18-26. But the actual syllabus is broader than that, and declares in pertinent part that:

As used in R.C. 2745.01(C), “equipment safety guard” means a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment ***.

Id. The final sentence of the majority’s analysis of this issue is to the same effect:

We adopt the definition in *Fickle* and hold that as used in R.C. 2745.01(C), “equipment safety guard” means “a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.” *Fickle*, ¶43.

Id., ¶26. Unless clarification is furnished, the marked distinction between the syllabus and analysis will undoubtedly generate substantial debate and conflicting outcomes for years to come.

If the syllabus and ¶26 of *Hewitt* do indeed control, then the jury’s verdict should have been affirmed. As long as the “guard” does not need to be welded to machinery to prevent contact with a “danger zone,” then the rubber gloves and sleeves could reasonably be found to qualify as devices designed to shield the worker from dangerous equipment (*i.e.*, the apparatus and lines carrying electrical current). Precisely for this reason, the defense has doggedly insisted that a physical connection to something

mechanical has to be implied in R.C. 2745.01(C).

The Eighth District's sensible application of the phrase "guard" is actually supported by one of the appellate decisions that was cited with approval by the *Hewitt* majority. The Twelfth District has observed that the term "guard" had been "defined by Ohio Administrative Code to mean 'the covering, fencing, railing, or enclosure which shields an object from accidental contact[.]'" *Roberts*, 197 Ohio App. 3d at 446, ¶22, citing *Anders v. Pease Co.*, 12th Dist. No. CA89-11-156, 1990 W.L. 94240 (July 9, 1990). Plaintiff's personal protective equipment certainly could be viewed as a "covering" preventing "accidental contact" with electrical hazards. The jury's verdict can thus be justified on this basis.

B. The Workers Protected

Defendant may attempt to argue that the *Hewitt* syllabus now establishes that only an "operator" of machinery is entitled to invoke R.C. 2745.01(C). Such a position is nonsensical, as guards are frequently installed over blades, pinch-points, and electrical components to protect those workers who are required to service and clean the mechanisms. So too, barriers are often affixed to equipment to prevent flying debris and spraying chemicals from injuring those who happen to be passing by.

In order to preclude the *Hewitt* syllabus from being utilized to restrict R.C. 2745.01(C) in a manner that the General Assembly never authorized, this Court should clarify that any "worker" or "employee" who was supposed to be shielded by the safety device is deserving of the benefits of the statutory presumption. Plaintiff was one such individual and the jury's verdict in his favor should have been upheld.

C. The Deliberate Removal of the Safety Guards

Plaintiff has no quarrel with the definition of "deliberate removal" that was adopted by this Court, which differs little from that which he had been advocating throughout these proceedings. *Plaintiff-Appellee's Merit Brief*, pp. 28-29. The

pertinent section of the syllabus confirms that this phrase requires “a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard.” *Hewitt*, 2012-Ohio-5317.

While the definition that was approved is unobjectionable, this Court has plainly misconstrued the facts. The jury’s finding was overturned solely on the grounds that:

*** Here, the employer's failure to instruct Hewitt to wear protective items such as rubber gloves and sleeves and requiring Hewitt to work alone in an elevated bucket do not amount to the deliberate removal of an equipment safety guard within the meaning of R.C. 2745.01(C) so as to create a rebuttable presumption of intent. [emphasis added]

Hewitt, 2012-Ohio-5317, ¶ 30.

Plaintiff has never once suggested in this case that a “failure to instruct” somehow qualifies as a “removal.” Far from “failing” to furnish instructions, Plaintiff’s superiors had actively advised him that the rubber gloves and sleeves were not needed. *Trial Tr. Vol. I, pp. 141-143 & 199*. The vital protective devices thus were “eliminated” for all practical purposes, as would be the case if a novice woodworker was told that he did not need to bother with placing a safety shield over an exposed saw blade. There is no surer way to “eliminate” a safety device than to instruct a subordinate in training that it is not needed.

This sensible understanding of the term “deliberate” was appreciated by Defendant’s own management. Although not mentioned in this Court’s opinion, Superintendent Jack Ehrle had acknowledged during his deposition that telling the apprentices not to wear their protective equipment was tantamount to “removing a critical piece of safety” for them. *Trial Tr. Vol. I, p. 80*.

This Court’s opinion leaves the impression that a dispute existed over whether Plaintiff had been instructed that he did not need his protective equipment. *Hewitt*, 2012-Ohio-5317, ¶6. It appears to have been overlooked that Defendant’s management had actually admitted that a deliberate decision had been made in this regard. Foreman

Julian Cromity (“Cromity”) had confirmed during the trial that due to the hot weather and the fact that some (but not all) of the lines were de-energized, they determined that the apprentices would not need to wear their rubber gloves and sleeves. *Tr. Vol. II, p. 229 & 252-253.* While Lineman Dennis Law (“Law”) has denied that he was the messenger (as this Court observed), Cromity verified that these instructions were indeed conveyed to Plaintiff. *Id., pp. 241-242.* Plaintiff’s testimony, which must be accepted as true under the controlling standard of review, was that he had been led to believe that all of the lines at the top of the pole would be de-energized. *Id., Vol. I, pp. 141-143 & 186-187.* The catastrophe that ensued as a direct result of management’s deliberate decisions was completely predictable.

The significance of this startling testimony was not lost upon the Eighth District, which found that the “deliberate removal” requirement had been satisfied in large part by the following evidence:

Cromity confirmed that he and crew foreman Dowdy discussed that the weather was expected to be hot that day and made the decision to instruct the apprentices not to wear their rubber gloves and sleeves since the primary line was de-energized. As a result of this incident, L.E. Myers terminated three employees, Law, Dowdy, and Erman. [emphasis added]

Hewitt, 2011-Ohio-5413. After observing that the company’s management fully appreciated the grave dangers posed by high voltage electricity, the safety regulations that required protective equipment, and that working on primary lines without rubber gloves “would be like committing suicide[,]” the unanimous panel concluded that:

*** L.E. Myers' actions cannot be described as reckless. Rather, after thorough consideration, L.E. Myers' supervisors made a deliberate decision to place Hewitt in close proximity to energized wires without wearing protective rubber gloves or sleeves. Their actions amounted to the deliberate removal of an equipment safety guard when they instructed Hewitt, a second-step apprentice lineman, not to wear his protective gloves and sleeves and by sending him alone and unsupervised up in the bucket to work with

excessive amounts of electricity, despite the known safety measures and risks.

Id., ¶34. Once proper consideration is afforded to the testimony of all the witnesses, and not just Plaintiff and Law, it becomes evident that both the trial judge and appellate court properly analyzed the “deliberate removal” requirement consistent with the plain language of R.C. 2745.01(C).

CONCLUSION

For the foregoing reasons, this Court should reconsider the decision that was rendered on November 20, 2012 and either affirm the Eighth Judicial District or remand this appeal for consideration of Plaintiff-Appellee’s alternative justifications for affirming the damage award under R.C. 2745.01(B).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Motion** has been sent by regular U.S. Mail, on this 30th day of November, 2012 to:

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--- N.E.2d ---, 2012 WL 5852384 (Ohio), 2012 -Ohio- 5317
 (Cite as: 2012 WL 5852384 (Ohio))

H

Supreme Court of Ohio.

HEWITT, Appellee,

v.

L.E. MYERS COMPANY, Appellant, et al.

No. 2011-2013.

Submitted Sept. 25, 2012.

Decided Nov. 20, 2012.

HEWITT, APPELLEE, v. L.E. MYERS COMPANY, APPELLANT, ET AL.

Background: Electrical worker brought action against employer, alleging intent to injure associated with employer's purported deliberate removal of equipment safety guard. The Court of Common Pleas, Cuyahoga County, No. CV-711717, denied employer's motion for directed verdict and entered judgment on a jury verdict in favor of worker. Employer appealed. The Court of Appeals, 2011 WL 5009758, affirmed. Employer sought discretionary appeal.

Holdings: The Supreme Court, Lundberg Stratton, J., held that:

- (1) for purposes of employer intentional tort statute's provision stating that employer's deliberate removal of equipment safety guard creates rebuttable presumption of intent to injure, free-standing items that serve as physical barriers between the employee and potential exposure to injury, such as rubber gloves and sleeves, do not constitute an "equipment safety guard";
- (2) for purposes of employer intentional tort statute, "equipment safety guard" is a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment; abrogating *Beyer v. Rieter Automotive N. Am., Inc.*, — Ohio App.3d —, 973 N.E.2d 318;
- (3) employer's failure to instruct worker to wear protective items such as rubber gloves and sleeves and requiring worker to work alone in elevated bucket did not amount to "deliberate removal" of

equipment safety guard; and
 (4) "deliberate removal" of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine.

Judgment of Court of Appeals reversed.

O'Connor, C.J., and McGee Brown, J., concurred in judgment only.

Pfeifer, J., filed dissenting opinion.

West Headnotes

[1] Statutes 361 ↪181(1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In General. Most

Cited Cases

When construing a statute, the Supreme Court's primary goal is to ascertain and give effect to the intent of the General Assembly.

[2] Statutes 361 ↪188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

When construing a statute, the Supreme Court begins with the plain language and applies it as written in the statute.

[3] Constitutional Law 92 ↪2488

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 (Cite as: 2012 WL 5852384 (Ohio))

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2485 Inquiry Into Legislative Judgment
 92k2488 k. Policy. Most Cited Cases

It is not the Supreme Court's role to second-guess the policy matters set by the General Assembly.

[4] Workers' Compensation 413 ↻2095

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(A) Between Employer and Employee

413XX(A)1 Exclusiveness of Remedies Afforded by Acts

413k2095 k. Failure to Install or Maintain Safety Devices. Most Cited Cases

For purposes of employer intentional tort statute's provision stating that employer's deliberate removal of equipment safety guard creates rebuttable presumption of intent to injure, free-standing items that serve as physical barriers between the employee and potential exposure to injury, such as rubber gloves and sleeves, do not constitute an "equipment safety guard." R.C. § 2745.01(C).

[5] Workers' Compensation 413 ↻2095

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(A) Between Employer and Employee

413XX(A)1 Exclusiveness of Remedies Afforded by Acts

413k2095 k. Failure to Install or Maintain Safety Devices. Most Cited Cases

For purposes of employer intentional tort statute's provision stating that employer's deliberate removal of equipment safety guard creates rebuttable

presumption of intent to injure, "equipment safety guard" is a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment; abrogating *Beyer v. Rieter Automotive N. Am., Inc.*, — Ohio App.3d —, 973 N.E.2d 318..

[6] Workers' Compensation 413 ↻2095

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(A) Between Employer and Employee

413XX(A)1 Exclusiveness of Remedies Afforded by Acts

413k2095 k. Failure to Install or Maintain Safety Devices. Most Cited Cases

For purposes of employer intentional tort statute's provision stating that employer's deliberate removal of equipment safety guard creates rebuttable presumption of intent to injure, employer's failure to instruct employee, who was electrical worker who had completed only two of seven steps in apprenticeship program, to wear protective items such as rubber gloves and sleeves and requiring employee to work alone in elevated bucket did not amount to "deliberate removal" of equipment safety guard. R.C. § 2745.01(C).

[7] Workers' Compensation 413 ↻2095

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(A) Between Employer and Employee

413XX(A)1 Exclusiveness of Remedies Afforded by Acts

413k2095 k. Failure to Install or Maintain Safety Devices. Most Cited Cases

For purposes of employer intentional tort statute's provision stating that employer's deliberate removal of equipment safety guard creates rebuttable presumption of intent to injure, although "removal" may encompass more than physically removing a

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guard from equipment and making it unavailable, such as bypassing or disabling the guard, an employer's failure to train or instruct an employee on a safety procedure does not constitute the "deliberate removal" of an equipment safety guard. R.C. § 2745.01(C).

[8] Workers' Compensation 413 ↻2095

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(A) Between Employer and Employee

413XX(A)1 Exclusiveness of Remedies Afforded by Acts

413k2095 k. Failure to Install or Maintain Safety Devices. Most Cited Cases

For purposes of employer intentional tort statute's provision stating that employer's deliberate removal of equipment safety guard creates rebuttable presumption of intent to injure, "deliberate removal" of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine. R.C. § 2745.01(C).

[9] Workers' Compensation 413 ↻2095

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(A) Between Employer and Employee

413XX(A)1 Exclusiveness of Remedies Afforded by Acts

413k2095 k. Failure to Install or Maintain Safety Devices. Most Cited Cases

Meaning of terms "deliberate removal" and "equipment safety guard" in employer intentional tort statute's provision stating that employer's deliberate removal of equipment safety guard creates rebuttable presumption of intent to injure was question of law, and thus interpretation of terms was for court, not jury, in employer intentional tort action. R.C. § 2745.01(C).

[10] Statutes 361 ↻176

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k176 k. Judicial Authority and Duty.

Most Cited Cases

Interpretation of undefined terms within a statute is a question of law for the court.

APPEAL from the Court of Appeals for Cuyahoga County, No. 96138, 2011-Ohio-5413.

SYLLABUS OF THE COURT

*1 As used in R.C. 2745.01(C), "equipment safety guard" means a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment, and the "deliberate removal" of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard. Plevin & Gallucci Co., L.P.A., Frank L. Gallucci III, and Michael D. Shroge; and Paul W. Flowers Co., L.P.A., and Paul W. Flowers, Cleveland, for appellee.

Tucker, Ellis & West, L.L.P., and Benjamin C. Sassé, Cleveland, for appellant.

The Mismas Law Firm, L.L.C., and John D. Mismas, Boston Heights, urging affirmance for amicus curiae Ohio Association for Justice.

Reminger Co., L.P.A., and Brian D. Sullivan, Cleveland, urging reversal for amicus curiae Ohio Association of Civil Trial Attorneys.

Roetzel & Andress, Denise M. Hasbrook, and Emily Ciecka Wilcheck, Toledo, urging reversal for amicus curiae FirstEnergy Corporation.

Garvin & Hickey, L.L.C., Preston J. Garvin, and Michael J. Hickey, Columbus, urging reversal for amicus curiae Ohio Chamber of Commerce.

Bricker & Eckler, L.P.A., and Robert R. Sant, urging reversal for amicus curiae Ohio Chapter of the

--- N.E.2d ----, 2012 WL 5852384 (Ohio), 2012 -Ohio- 5317
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National Federation of Independent Business.

Licata & Toerek and Elizabeth A. Crosby, Independence, urging reversal for amicus curiae Council of Smaller Enterprises.

LUNDBERG STRATTON, J.

LUNDBERG STRATTON, J.

{¶ 1} We are asked to decide whether “equipment safety guard” for purposes of 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 and whether 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 the machine.

{¶ 2} For the reasons that follow, we hold that as used in R.C. 2745.01(C), “equipment safety guard” means a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment, and the “deliberate removal” of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard.

{¶ 3} Protective rubber gloves and sleeves are personal items that an employee controls and do not constitute “an equipment safety guard” for purposes of R.C. 2745.01(C). An employee's failure to use them, or an employer's failure to require an employee to use them, does not constitute the deliberate removal by an employer of an equipment safety guard. Consequently, the plaintiff failed to establish a rebuttable presumption of intent pursuant to R.C. 2745.01(C), and the defendant was entitled to judgment as a matter of law. We reverse the judgment of the court of appeals and enter judgment in favor of appellant.

Facts and Procedural History

*2 {¶ 4} Appellee, Larry Hewitt, was working as an apprentice lineman for appellant, the L.E.

Myers Company, an electrical-utility construction contractor. Hewitt was a second-step apprentice, meaning that he had completed the first two steps in a seven-step program, and he was now working in the field.

{¶ 5} On June 14, 2006, Hewitt was assigned to an L.E. Myers crew that was replacing old electrical power lines along Route 60 near New London, Ohio. The crew met that morning for a short daily job briefing. Workers who attended the briefing signed a daily job-briefing log. Hewitt claimed that he was late and missed the meeting that morning; nevertheless, his signature appeared on the log.

{¶ 6} Hewitt's job that day was to tie in the new power line, which was de-energized. Because the crew was short one person, Hewitt had to work by himself in an elevated bucket even though he was only an apprentice. According to the daily job-briefing log, workers were required to use protective rubber gloves and sleeves that day, which was consistent with L.E. Myers's policy, in case the lines became energized. Hewitt admitted that gloves were available, but he claimed that Dennis Law, a lineman on the job, told him that he shouldn't need the protective rubber gloves and sleeves because the line was de-energized. Law disputed the conversation. Hewitt did not wear them.

{¶ 7} Law was directing traffic and supervising Hewitt's work from the ground that day. At some point, Law yelled to Hewitt from the ground. When Hewitt turned in Law's direction, the wire in his right hand came in contact with an energized line and he received an electric shock, which caused severe burns.

{¶ 8} Hewitt applied for and received workers' compensation benefits. He also filed a claim alleging a violation of a specific safety requirement, and the parties settled that case.

{¶ 9} Hewitt filed this action against L.E. Myers alleging a workplace intentional tort in violation of R.C. 2745.01 and common law. He alleged that

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L.E. Myers knew with substantial certainty that he would be injured when working alone in an elevated lift bucket near energized high-voltage power lines without the use of protective rubber gloves and sleeves. Hewitt alleged that L.E. Myers in effect removed the protective rubber gloves and sleeves that were safety guards creating a barrier between him and the electrical current.^{FN1}

{¶ 10} The case proceeded to a jury trial. At the conclusion of the plaintiff's case, L.E. Myers moved for a directed verdict as to liability under R.C. 2745.01. The trial court concluded that there was insufficient evidence to demonstrate a direct intent to harm as required by R.C. 2745.01(A) and (B). So the court limited the plaintiff's theory of recovery to R.C. 2745.01(C), according to which the employer's deliberate removal of an equipment safety guard creates a rebuttable presumption of an intent to injure.

{¶ 11} The jury returned a verdict in favor of Hewitt. The court overruled L.E. Myers's motion for judgment notwithstanding the verdict.

*3 {¶ 12} L.E. Myers appealed the court's denial of a directed verdict and judgment notwithstanding the verdict. The court of appeals affirmed. The court reasoned that the protective rubber gloves and sleeves were equipment safety guards within the meaning of R.C. 2745.01(C) and that the decision by Hewitt's supervisor to place Hewitt alone in an elevated bucket close to energized wires without requiring him to wear protective rubber groves or sleeves amounted to the deliberate removal of an equipment safety guard. Thus, the appellate court concluded, this established a rebuttable presumption under R.C. 2745.01(C) of an intent to injure Hewitt, and L.E. Myers had presented no evidence to rebut the presumption.

{¶ 13} The cause is before this court upon the acceptance of a discretionary appeal. 131 Ohio St.3d 1456, 2012-Ohio-648, 961 N.E.2d 1135.

Analysis

{¶ 14} A cause of action for an employer intentional tort is governed by R.C. 2745.01, which provides:

(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.

{¶ 15} Today, we review the phrase "deliberate removal by an employer of an equipment safety guard" in R.C. 2745.01(C).^{FN2} L.E. Myers argues that "an equipment safety guard" means a safety device attached to a machine that is intended to guard an employee from injury and that "deliberate removal" occurs when an employer makes a deliberate decision to eliminate that guard from the machine.

[1][2] {¶ 16} When construing a statute, our primary goal is to ascertain and give effect to the intent of the General Assembly. *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 11. We begin with the plain language and apply it as written in the statute. *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d

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1234, ¶ 17. In doing so, we read words and phrases in context and according to the rules of grammar and common usage, and they must be given a technical or particular meaning if appropriate. R.C. 1.42.

A. Definition of “An Equipment Safety Guard”

*4 {¶ 17} R.C. 2745.01(C) does not define these terms, so we look to the plain and ordinary meaning of the words. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 103, 522 N.E.2d 489 (1988). The court of appeals used the following definitions:

“ ‘Guard’ is defined as ‘a protective or safety device; *specif*: a device for protecting a machine part or the operator of a machine.’ Merriam–Webster’s Collegiate Dictionary [516 (10th Ed. 1996)]. ‘Safety’ means ‘the condition of being safe from undergoing or causing hurt, injury, or loss.’ [*Id.* at 1027.] And ‘equipment’ is defined as ‘the implements used in an operation or activity: APPARATUS.’ [*Id.* at 392.]”

2011-Ohio-5413, 2011 WL 5009758, ¶ 24, quoting *Fickle v. Conversion Technologies, Internatl., Inc.*, 6th Dist., No. WM–10–016, 2011-Ohio-2960, 2011 WL 2436750, ¶ 38.

{¶ 18} The word “guard,” a noun, is modified by the adjectives “equipment” and “safety.” Reading the words in context and according to the rules of grammar as we must, R.C. 1.42, we determine that the phrase “an equipment safety guard” means a protective device on an implement or apparatus to make it safe and to prevent injury or loss.

{¶ 19} The Sixth District Court of Appeals so interpreted the phrase in *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. No. WM–10–016, 2011-Ohio-2960, 2011 WL 2436750, modified by *Beyer v. Rieter Automotive N. Am., Inc.*, — Ohio.App.3d —, 2012-Ohio-2807, 973 N.E.2d 318. In that case, the plaintiff’s hand and

arm were caught in a roller on an adhesive-coating machine. She alleged that her employer had failed to train her to use a jog switch that would stop the roller when not depressed and also had disconnected an emergency stop cable. The *Fickle* court concluded that these devices were not “equipment safety guards,” because they did not prevent the plaintiff’s hands from being exposed to the dangerous point of operation of the machinery she had been operating. *Id.* at ¶ 42. Thus, the court concluded that these facts did not demonstrate a “[d]eliberate removal by an employer of an equipment safety guard” to establish a presumption of intent under R.C. 2745.01(C).

{¶ 20} *Fickle* rejected the argument that “equipment safety guard” included “ ‘any device designed to prevent injury or to reduce the seriousness of injury.’ ” *Id.* at ¶ 39. “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.” *Id.* at ¶ 42. Thus, *Fickle* defined “equipment safety guard” as a “device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.” *Id.* at ¶ 43.

{¶ 21} Other appellate districts in this state have similarly construed this phrase. See *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 5th Dist. No. 2011–CA–00048, 2011-Ohio-4977, 2011 WL 4496655, ¶ 21 (“equipment safety guard” commonly means a device designed to shield the operator of equipment from exposure to injury by a dangerous aspect of the equipment; a vehicle’s backup alarm does not guard anything); *Barton v. G.E. Baker Constr.*, 9th Dist. No. 10CA009929, 2011-Ohio-5704, 2011 WL 5345400 (a trench box to secure the sides of a trench from collapse is not “an equipment safety guard” because it is not a piece of equipment designed to protect an operator of equipment); *Roberts v. RMB Ents., Inc.*, 197 Ohio App.3d 435, 2011-Ohio-6223, 967 N.E.2d

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1263, ¶ 24 (12th Dist.) (a tire bead and bead taper, alleged safety features of a wheel-assembly unit, do not constitute “equipment safety guards,” because they are not devices designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment).

*5 {¶ 22} The court below did not agree that the “safety guard” must be attached to machinery. The court reasoned that that interpretation would limit recovery for injured employees who did not work with equipment. 2011-Ohio-5413, 2011 WL 5009758, ¶ 20. Likewise, Hewitt advocates that the phrase should apply broadly to *any* safety-related item that may serve as a barrier between the employee and danger, citing *Beyer v. Rieter Automotive N. Am., Inc.*, —Ohio App.3d —, 2012-Ohio-2807, 973 N.E.2d 318 (6th Dist.), in support.

{¶ 23} In *Beyer*, the Sixth District Court of Appeals agreed with the Eighth District’s expanded interpretation in *Hewitt* and concluded that even “personal protection equipment” such as face masks at a manufacturing plant was “equipment safety guards” because the masks were used to prevent the employee’s exposure to toxic dust. *Beyer* modified *Fickle* and held that “equipment safety guard” as used in R.C. 2745.01(C) may also include free-standing equipment. *Id.* at ¶ 12–13.

{¶ 24} We do not agree. To construe “equipment safety guard” to include any generic safety-related item ignores not only the meaning of the words used but also the General Assembly’s intent to restrict liability for intentional torts. As the Ninth District observed in *Barton v. G.E. Baker Constr.*, 2011-Ohio-5704, 2011 WL 5345400, ¶ 11, “[f]rom these common dictionary definitions, it becomes apparent that not all workplace safety devices are ‘equipment safety guards’ as that term is used in Section 2745.01.”

[3] {¶ 25} A broad interpretation of the phrase does not comport with the General Assembly’s efforts to restrict liability for intentional tort by au-

thorizing recovery “*only* when an employer acts with specific intent.” *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 26; *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 56. As we explained in *Kaminski*, the statutory restriction of intentional-tort liability “is supported by the history of employer intentional-tort litigation in Ohio and by a comparison of the current statute to previous statutory attempts.” *Id.*, ¶ 57. It is not our role to second-guess the policy matters set by the General Assembly. *Stetter* at ¶ 35. Consequently, we refrain from expanding the scope of the rebuttable presumption of intent in R.C. 2745.01(C).

[4][5] {¶ 26} Free-standing items that serve as physical barriers between the employee and potential exposure to injury, such as rubber gloves and sleeves, are not “an equipment safety guard” for purposes of R.C. 2745.01(C). Instead, rubber gloves and sleeves are personal protective items that the employee controls. We adopt the definition in *Fickle* and hold that as used in R.C. 2745.01(C), “equipment safety guard” means “a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.” *Fickle*, ¶ 43.

B. Definition of “Deliberate Removal”

*6 [6] {¶ 27} The court of appeals concluded that the employer’s decision to place Hewitt close to energized wires without requiring him to wear protective rubber gloves or sleeves amounted to the deliberate removal of an equipment safety guard. We disagree.

{¶ 28} The court below defined the words as follows: “deliberate” means “ ‘characterized by or resulting from careful and thorough consideration—a deliberate decision,’ ” and “remove” means “ ‘to move by lifting, pushing aside, or taking away or off’; also ‘to get rid of: ELIMINATE.’ ” 2011-Ohio-5413, 2011 WL 5009758 at ¶ 24, quoting *Fickle*, 2011-Ohio-2960, 2011 WL 2436750, at ¶ 30–31.

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[7] {¶ 29} Thus, the “deliberate removal” referred to in R.C. 2745.01(C) may be described as a careful and thorough decision to get rid of or eliminate an equipment safety guard. Hewitt argues that “removal” is a broad term that encompasses more than just a physical removal. Although “removal” may encompass more than physically removing a guard from equipment and making it unavailable, such as bypassing or disabling the guard, an employer's failure to train or instruct an employee on a safety procedure does not constitute the deliberate removal of an equipment safety guard. *Fickle*, 2011-Ohio-2960, 2011 WL 2436750, at ¶ 45. See also *Wineberry v. N. Star Painting Co.*, 7th Dist. No. 11MA103, — Ohio App.3d —, 2012-Ohio-4212, — N.E.2d — (employer's failure to place guardrails around a perch and scaffolding was not a deliberate removal when the guardrails were never in place).

[8] {¶ 30} Consequently, we hold that the “deliberate removal” of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine. Here, the employer's failure to instruct Hewitt to wear protective items such as rubber gloves and sleeves and requiring Hewitt to work alone in an elevated bucket do not amount to the deliberate removal of an equipment safety guard within the meaning of R.C. 2745.01(C) so as to create a rebuttable presumption of intent.

[9][10] {¶ 31} Finally, Hewitt argues that the meaning of the terms in R.C. 2745.01(C) is a question for the trier of fact to determine. According to Hewitt, jurors could reasonably conclude that the protective rubber gloves and sleeves qualified under R.C. 2745.01(C) as “equipment safety guard[s]” that were “effectively eliminated” when Hewitt was told he did not have to wear them. Because the interpretation of undefined terms within a statute is a question of law for the court, we reject this argument. *Akron Centre Plaza, L.L.C. v. Summit Cty. Bd. of Revision*, 128 Ohio St.3d 145,

2010-Ohio-5035, 942 N.E.2d 1054.

Conclusion

*7 {¶ 32} The protective rubber gloves and sleeves in this case do not, as a matter of law, constitute an equipment safety guard within the meaning of R.C. 2745.01(C). Consequently, we reverse the judgment of the court of appeals and order judgment in favor of the appellant.

Judgment reversed.

O'DONNELL, LANZINGER, and CUPP, JJ., concur.

O'CONNOR, C.J., and MCGEE BROWN, J., concur in judgment only.

PFEIFER, J., dissents.

O'DONNELL, LANZINGER, AND CUPP, JJ.,
 CONCUR.O'CONNOR, C.J., AND MCGEE
 BROWN, J., CONCUR IN JUDGMENT
 ONLY.PFEIFER, J., DISSENTS.

PFEIFER, J., dissenting.

PFEIFER, J., dissenting.

{¶ 33} One of these days a company is going to surprise me and act honorably and with compassion. They are going to acknowledge their complicity in the grievous injuries suffered by their employee, they are going to adequately compensate their employee for his or her injuries, and they are going to do so without resorting to every countervailing stratagem that their high-priced counsel can devise. Today is not that day. Even though L.E. Myers has implicitly acknowledged its complicity by firing every person involved in the incident that caused Larry Hewitt's injuries, even though L.E. Myers knows that, through its employees, it acted irresponsibly, L.E. Myers does not have to suffer the consequences; only its apprentice does.

I

{¶ 34} The majority opinion ultimately concludes that “ ‘an equipment safety guard’ means a protective device on an implement or apparatus to make it safe and to prevent injury or loss.” This is a

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plausible, though not the best, conclusion. For one thing, it reads words into the statute, something courts are not supposed to do. *See Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969), where we stated that this court has a duty “to give effect to the words used [in a statute], not to delete words used or to insert words not used.”

{¶ 35} R.C. 2745.01(C) refers to “[d]eliberate removal by an employer of an equipment safety guard.” The definition that the majority opinion has chosen to favor could have easily been written into the statute by changing three words: deliberate removal by an employer of a safety guard *attached* to equipment. That is the definition the majority opinion prefers, but it is not the statute that was enacted.

{¶ 36} Instead of adding words to the statute that the General Assembly could have easily added, instead of attempting to divine what the General Assembly intended, the better course is to read the statute as enacted and consider “equipment safety guard” as a unitary term. Viewed in that light, “equipment safety guard” has a simple meaning: equipment that is used as a safety guard. There is no need to add words to the statute. There is no need to divine intent. There is only a conclusion that the majority opinion does not want to countenance.

{¶ 37} The General Assembly chose not to define “equipment safety guard.” In my opinion, that is because they did not want an unduly restrictive meaning, one that they surely would have enacted had they chosen to. There are many “equipment safety guards” that absent the majority opinion's new constrictive interpretation would give rise to a rebuttable presumption of intent to injure. Remember, the presumption is rebuttable, whereas the absence of the presumption is often, as in this case, dispositive.

*8 {¶ 38} One example of an “equipment safety guard” the removal of which should give rise to a presumption to injure is a kill switch. Most

dangerous machines have them. Hitherto, most reasonable people would have thought that removing a kill switch would give rise to a rebuttable presumption of intent to injure. Not anymore. Employers are now free to remove kill switches without troubling over R.C. 2745.01(C). Helmets, facemasks, and visors are other examples of equipment used as a safety guard, the removal of which will no longer lead to a rebuttable presumption of intent to injure. Governors, which prevent certain machines from operating too quickly, may now be removed without concern that injuries that result will give rise to a rebuttable presumption pursuant to R.C. 2745.01(C). None of these equipment safety guards fit within the majority opinion's draconian interpretation of R.C. 2745.01(C). The scope of the majority opinion is staggering and dangerous for employees.

{¶ 39} The short-term consequences of affirming the court of appeals' decision would be de minimis. True, the employer would have to pay some money to its injured apprentice. But this is an employer whose experienced supervisors told an apprentice that he shouldn't wear gloves and sleeves, equipment safety guards designed specifically to prevent the type of injury that occurred. Everyone involved with this case knows that the use of the equipment safety guards at issue would have prevented the apprentice's injuries.

{¶ 40} For the injured apprentice, the damages are a considerable amount of money, but for the employer, the sums involved are not significant. L.E. Myers's parent company, MYR Group, has a market capitalization of over \$450 million and earned over \$18 million in profits in 2011. The long-term consequences of reversing the court of appeals and imposing an unduly restrictive interpretation of “equipment safety guard” are potentially calamitous for Ohio's workers because companies will have less incentive to ensure that their employees operate as safely as possible.

II

{¶ 41} Larry Hewitt sought recovery based on

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three grounds: that L.E. Myers acted with the specific intent to injure him, R.C. 2745.01(A); that L.E. Myers knew that its actions were substantially certain to injure him, R.C. 2745.01(A) and (B); and that L.E. Myers was presumed to have intended to injure him, R.C. 2745.01(C). The trial court indicated that it was going to limit the claim to the statutory presumption, though the court did not memorialize that conclusion in an entry. In the event, the court instructed the jury as to the “specific intent” and “substantially certain” grounds contained in R.C. 2745.01(A) and (B). Furthermore, the interrogatories addressed the concepts of substantially certain injury and conscious disregard for worker safety and did not address the statutory presumption. There is no reason to assume that the jury confined itself to consideration of the statutory presumption. To the contrary, there is ample reason to conclude that the jury considered the totality of R.C. 2745.01 in reaching its conclusion. The majority opinion does not even mention the jury instructions or interrogatories.

{¶ 42} Even with the majority opinion's conclusion regarding R.C. 2745.01(C), the case should not be decided on the motion for a directed verdict. Instead, it should be returned to the court of appeals to consider whether the jury's conclusions with respect to R.C. 2745.01(A) and (B) are sustainable.

*9 {¶ 43} I dissent.

Plevin & Gallucci Co., L.P.A., Frank L. Gallucci III, and Michael D. Shroge; and Paul W. Flowers Co., L.P.A., and Paul W. Flowers, for appellee. Tucker, Ellis & West, L.L.P., and Benjamin C. Sassé, for appellant. The Mismas Law Firm, L.L.C., and John D. Mismas, urging affirmance for amicus curiae Ohio Association for Justice. Reminger Co., L.P.A., and Brian D. Sullivan, urging reversal for amicus curiae Ohio Association of Civil Trial Attorneys. Roetzel & Andress, Denise M. Hasbrook, and Emily Ciecka Wilcheck, urging reversal for amicus curiae FirstEnergy Corporation. Garvin & Hickey, L.L.C., Preston J. Garvin, and Michael J. Hickey, urging reversal for

amicus curiae Ohio Chamber of Commerce. Bricker & Eckler, L.P.A., and Robert R. Sant, urging reversal for amicus curiae Ohio Chapter of the National Federation of Independent Business. Licata & Toerek and Elizabeth A. Crosby, urging reversal for amicus curiae Council of Smaller Enterprises.

FN1. Hewitt also named as defendants the Bureau of Workers' Compensation to the extent of its subrogation rights and the Ohio attorney general because the complaint asserted a challenge to the constitutionality of R.C. 2721.12. They are not parties in this appeal.

FN2. The trial court ruled that Hewitt had presented insufficient evidence of a direct intent to injure necessary to recover under R.C. 2745.01(A) and (B), and the court limited the plaintiff's theory to the presumption of intent in R.C. 2745.01(C). The issue of direct intent is not before us.

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