

ORIGINAL

No. 13-1405

IN THE  
**SUPREME COURT OF OHIO**

DUANE HOYLE,  
*Plaintiff-Appellee*

-and-

THE CINCINNATI INSURANCE COMPANY  
*Intervening Plaintiff-Appellant*

v.

DTJ ENTERPRISES, INC., et al.,  
*Defendants-Appellees.*

APPEAL FROM THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO  
CASE NOS. CA-26579 & CA-26587

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**MEMORANDUM OF APPELLANT THE CINCINNATI  
INSURANCE COMPANY IN SUPPORT OF JURISDICTION**

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***I. EXPLANATION OF WHY THIS CASE PRESENTS A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST.***

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This case is of public and great general interest to all Ohioans because the issues raised by the propositions of law relate, *first*, to defining and clarifying the legal standard and parameters for determining the civil liability of all Ohio employers for Employer Intentional Torts (“EIT”) pursuant to R.C. §2745.01(C) when there has been a removal of an equipment safety guard (an issue not yet directly addressed by this Court<sup>1</sup>), and, *second*, whether employers can obtain insurance coverage in order to be indemnified for EIT claims which, under current law, require proof of deliberate or direct intent to injure.

While this Court has decided cases in recent years involving claims brought pursuant to Ohio’s Employer Intentional Tort Statute, it has yet to address a case involving the specific parameters of an employer’s liability under subsection (C) of R.C. §2745.01 involving the rebuttable presumption of the employer’s intent to injure due to the deliberate removal of a safety guard.<sup>2</sup> This case presents the Court with a clear opportunity to do so. Also, the issue of insurance coverage for EIT claims has been addressed by the Court in previous cases<sup>3</sup> but those cases were decided interpreting the standard for substantial certainty before it was redefined by the General Assembly to be a direct intent tort. Now, “‘substantially certain’ means that an employer acts with *deliberate intent* to cause an employee to suffer an injury, a disease, a condition, or death.” R.C. §2745.01(B)(emphasis added). The Court is presented here with the critical and timely

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<sup>1</sup> This Court’s opinion in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795 did address and give guidance regarding the definition of the statutory phrases “equipment safety guard” and its “deliberate removal.” *Hewitt* did not touch upon the issues raised by this case.

<sup>2</sup> Revised Code Section 2745.01(C) provides that “[d]eliberate 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.

<sup>3</sup> See, e.g., *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, 951 N.E.2d 770, at ¶ 1, fn. 1; *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, 790 N.E.2d 1199, at ¶ 6; *Harasyn v. Normandy Metals, Inc.*, 49 Ohio St.3d 173, 175, 551 N.E.2d 962 (1990).

opportunity to address whether such insurance coverage is permissible under Ohio law and public policy now that liability for EIT claims is premised strictly upon an employer's intent to injure. Both of these issues are of public and great general interest.

This appeal is before this Court from the filing of an EIT case involving an accidental fall from scaffolding during the course and scope of employment. The injured employee, Plaintiff-Appellee Duane Allen Hoyle ("Mr. Hoyle"), filed suit against his employer, Defendants-Appellees DTJ Enterprises, Inc. and Cavanaugh Building Corporation ("DTJ" and "Cavanaugh" respectively), seeking compensation for his injuries. Cavanaugh and DTJ are named insureds under commercial general liability and umbrella policies of insurance issued by Intervening Plaintiff-Appellant The Cincinnati Insurance Company ("CIC"). CIC intervened and filed an intervenor's complaint seeking a declaratory judgment to determine CIC's obligations under these policies to indemnify Cavanaugh and DTJ for the EIT claims made by Mr. Hoyle.

The trial court granted summary judgment in favor of CIC declaring that there was no duty to indemnify Cavanaugh and DTJ for Mr. Hoyle's EIT claims.<sup>4</sup> The trial court held as follows:

The Court finds that the policies exclude coverage for employer liability under R.C. 2745.01. R.C. 2745.01 defines "substantially certain" as meaning "that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." The Ohio Supreme Court has held that "under R.C. 2745.01, the only way an employee can recover is if the employer acted with intent to cause an injury." "[T]he General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D). *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250 (2010)."...

(Summ. Judg. Op. II, Apx. 14a-15a) *See also*, Summ. Judg. Op. I, Apx. 23a.

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<sup>4</sup> The trial court also granted partial summary judgment in favor of DTJ and Cavanaugh on Mr. Hoyle's EIT claims, except for the claim predicated upon the rebuttable presumption provided for by R.C. §2745.01(C) and whether pins used to hold the ladder jack to the ladder constitute an "equipment safety guard." (Summ. Judg. Op. I, Apx. 22a; Summ. Judg. Op. II, Apx. 15a-16a)

On reconsideration, the trial court specifically took issue with the argument that the “rebuttable presumption” that may be created under subsection (C) of R.C. §2745.01 is not the equivalent of deliberate intent. According to the trial court, “Any possible surviving claim under R.C. 2745.01(C) would necessarily include the ‘intent to injure’ and would thus be precluded by the insurance policies.” (Summ. Judg. Op. II, Apx. 15a)

In a two-to-one decision, the Ninth District reversed the trial court’s summary judgment. *Hoyle v. DTJ Ents., Inc.*, 9<sup>th</sup> Dist. Summit Nos. 26579 & 26587, 2013-Ohio-3223 (“App. Op.”), Apx. 1a-11a. The majority held that “[b]ased upon the presumption of deliberate intent under R.C. 2745.01(C), there could exist a circumstance where an employee prevails on his claim of intentional tort without the complained action constituting ‘deliberate intent’ to injure under the terms of the policy.” (App. Op., ¶ 21, Apx. 10a). Judge Hensel, in dissent, citing *Houdek v. ThyssenKrupp Materials N. A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, at ¶ 25, came to the opposite conclusion, stating: “The policy at issue in this case specifically excludes coverage for ‘acts committed \* \* \* with the deliberate intent to injure[.]’ In light of the other provisions of the contract that specifically mirror the state of the law at the time it was created, I would find that the parties intended for the term ‘deliberate intent’ to have the same meaning under the contract as under Section 2745.01.” (App. Op., ¶ 23, Hensel, J., dissent, Apx. 11a-12a).

The 2-1 decision and opinion of the Ninth Appellate District warrants this Court’s review because: (1) it fails to adhere to this Court’s binding precedent interpreting R.C. §2745.01 to require an employee to establish the employer’s direct or deliberate intent in order to prevail ultimately on a claim for employer intentional tort; (2) it disregards the public policy of Ohio which prohibits insuring conduct and actions that involve direct intent to injure as the culpable basis for liability; and alternatively, (3) it erroneously imposes upon insurers the duty to indemnify an

insured-employer whenever an employee invokes R.C. §2745.01(C) in an effort to create a presumption of intent to injure due to the employer's deliberate removal of an equipment safety guard notwithstanding an endorsement in the insurer's policy – like the one found in CIC's policy – excluding coverage for “liability for acts committed by or at the direction of an insured with deliberate intent to injure.”

**A. EIT Liability Is Now a Specific Intent Tort Even When an Employee Relies on R.C. §2745.01(C).**

This Court's recent precedents in the area of EIT cases have held that, under Revised Code Section 2745.01, “absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system.” *Houdek*, 2012-Ohio-5685, at ¶ 25; see also, *id.*, at ¶ 29 (“R.C. 2745.01 limits claims against employers for intentional torts to circumstances demonstrating a deliberate intent to cause injury to an employee.”) As was stated in both *Kaminski* and its companion case, *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, the General Assembly intended to limit claims for employer intentional torts to situations in which an employer acts with the “specific intent” to cause an injury to another. *Kaminski* at ¶ 56; *Stetter* at ¶ 26. Yet, by failing to follow that law as recognized by this Court in cases like *Houdek* and *Stetter*, the Ninth District's decision in the case at bar, if left to stand, signals a seismic shift in the current EIT law as adopted and enacted by Ohio's General Assembly. Without intervention and correction by this Court, it will serve as legal authority leading other trial and appellate courts to stray from the General Assembly's intent in enacting R.C. §2745.01 to limit recovery for employer intentional torts to only those cases when an employer acts with specific intent to cause an injury. This Court should accept jurisdiction over this case to reverse the Ninth Appellate District and adopt the first proposition of law.

**B. There Can Be No Liability Insurance Coverage for EIT Claims Under Current Law Requiring Specific Intent to Injure.**

Pursuant to this Court's precedents, intent in employer intentional torts at common law could be proved in one of two ways: by establishing that the harm was directly intended or was substantially certain to occur. *Harasyn*, 49 Ohio St.3d at 175. Those two ways of establishing an employer intentional tort now appear in R.C. §2745.01(A) which provides that "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." The difference is that, unlike the common law definition, the substantial certainty theory has been equated with "deliberate intent." R.C. §2745.01(B) So, under current Ohio law, the employer intentional tort is now only a direct intent cause of action and specific intent to injure is the only way to prove an employer's liability.

In order for an employee to prevail in this or any other EIT case, he or she will need to establish "deliberate intent." *See, Kaminski*, ¶ 55. With that being so, the employee can prove no claim against an employer for which there would or should be insurance coverage because Ohio public policy prohibits insuring torts where there is direct intent to injure. Alternatively, even if the direct intent tort claim – which is the only remaining claim in this case – is proven ultimately to be true, coverage is clearly and explicitly excluded under the insurance policy issued by CIC because CIC's policy does not provide coverage for an employer's direct intent torts. CIC's policy exclusion expressly precludes coverage when an employer's acts are committed with "deliberate intent to injure."

Under R.C. §2745.01(C), liability for the deliberate removal of a safety guard also amounts to a direct intent tort against the employer since it creates a rebuttable presumption that the removal was "committed with intent to injure." The trial court granted summary judgment to CIC on

coverage grounds because “[a]ny possible surviving claim under RC. 2745.01(C) would necessarily include the ‘intent to injure’ and would thus be precluded by the insurance policies.” (Summ. Judg. Op. II, Apx. p. 15a). The Ninth District’s reversal of that summary judgment and its ruling in favor of coverage pursuant to R.C. §2745.01(C) amounts to an unprecedented expansion of coverage and approval of insurance for an employer’s liability for committing a direct intent tort against an employee. But it has long been against public policy in Ohio to permit insurance coverage for direct intent torts against employers. *Blankenship v. Cincinnati Milacron Chem., Inc.*, 69 Ohio St.2d 608, 615, 433 N.E.2d 572, 577 (1982); *Wedge Products, Inc. v. Hartford Equity Sales Co.*, 31 Ohio St.3d 65, 67, 509 N.E.2d 74, 76 (1987). *Accord, Doe v. Shaffer*, 90 Ohio St.3d 388, 391, 738 N.E.2d 1243 (2000); 58 Ohio Jurisprudence 3d, Insurance, Section 1014.

Finally, by adopting the propositions of law set forth here, Ohio will join with the Ohio federal courts and other jurisdictions which have refused to allow insurance coverage for direct intent EIT torts, even when there is a presumption of intent from the removal of a safety guard.

This case is a matter of public or great general interest and one which this Court should accept jurisdiction to resolve. Cases presenting issues of public or great general interest reach beyond the parties in a particular piece of litigation. *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960). The scope and impact of the legal issues presented in this case do just that. Lawyers, litigants, claims professionals, insurance agents, employers and employees statewide require settled law on the issues raised by the propositions of law presented herein as the basis for operating their businesses and making plans and choices involving selection of insurance coverage. Differing interpretations of whether R.C. §2745.01 requires proof of direct intent<sup>5</sup> and

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<sup>5</sup> See, e.g., *Johnson v. International Masonry, Inc.*, 10<sup>th</sup> Dist. Franklin No. 12AP-966, 2013-Ohio-2749. In *Johnson*, the employee fell from scaffolding, much like Mr. Hoyle did here, although the employee in *Johnson* died from his

unsettled law regarding whether insurance coverage can be secured for EIT claims involving direct intent to injure result in uncertainty, higher premiums, and a proliferation of litigation which neither Ohio businesses and citizens nor their insurers desire or can afford in these economic times.

## **II. STATEMENT OF THE CASE AND FACTS**

On March 19, 2010, Mr. Hoyle filed this action alleging that on March 24, 2008, he fell from a scaffold during the course and scope of his employment resulting in bodily injury. When the fall occurred, Mr. Hoyle was working as a carpenter on a ladder jack scaffold (two extension ladders positioned vertically with a walkway/work platform spanning the space between them) to perform work on a third-floor exterior area approximately thirteen feet off the ground at the Wyoga Place Apartments in Cuyahoga Falls, Ohio. Mr. Hoyle alleges the scaffold collapsed or otherwise failed, causing him to fall the thirteen feet to the ground where he landed on a concrete pad and sustained injuries. In his complaint, Mr. Hoyle asserts claims for employer intentional tort against Cavanaugh and DTJ.

As a result of these allegations, Cavanaugh and DTJ tendered the defense of Mr. Hoyle's complaint to and made demand upon CIC to indemnify them for any judgment on these claims pursuant to Commercial General Liability ("CGL") and Umbrella Liability policies issued by CIC naming Cavanaugh and DTJ as the named insureds. CIC had issued policy No. CPP 081 75 12 covering a policy period of March 31, 2007 to March 31, 2010. The CGL policy provided the following in regard to the coverage issue which is relevant to the propositions of law CIC is asking this Court to consider:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury". . . to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those

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injuries. In affirming summary judgment for the employer, the *Johnson* court held, consistent with this Court's recent precedent, that "R.C. 2745.01 thereby restricts recovery for employer intentional torts to cases where the worker proves that the employer deliberately intended to harm the worker." *Id.*, at ¶ 13.

damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” to which this insurance does not apply.

\* \* \*

This insurance does not apply to:

**a. Expected or Intended Injury**

“Bodily injury” . . . which may reasonably be expected to result from the intentional . . . acts of the insured . . . , even if the injury or damage is of a different degree or type than actually expected or intended.

CIC also issued an Employers Liability Coverage Form on Form GA 106 OH 01 96, which provides coverage, in relevant part, as follows:

- a. We will pay those sums that an insured becomes legally obligated to pay as damages because of “bodily injury” sustained by your “employee” in the “workplace” and caused by an “intentional act” to which this insurance applies.

...

**2. Exclusions.**

This insurance does not cover:

\* \* \*

- h. liability for acts committed by or at the direction of an insured *with the deliberate intent to injure* . . .

(Italics added).

Because paragraph 2.h of Form GA 106 OH 01 96 in the insurance policy between Cavanaugh, DTJ, and CIC states, in relevant part, that “[t]his insurance does not cover: . . . liability for acts committed by or at the direction of an insured *with the deliberate intent to injure*,” CIC has maintained that, in accordance with this Court’s *Kaminski* decision, there is no possibility under which CIC might owe a duty to indemnify Cavanaugh or DTJ for any judgment which may be rendered following the trial of this matter. In other words, either Mr. Hoyle will have failed to prove that Cavanaugh and DTJ acted with intent to injure Mr. Hoyle and a defense verdict will be rendered (in which case there will be nothing to indemnify) or Mr. Hoyle will have met this burden by proving that Cavanaugh and DTJ acted with the intent to cause his injury, and any obligation

by CIC to indemnify Cavanaugh and DTJ will be in direct contravention to paragraph 2.h. of the policy's Form GA 106 endorsement and in direct violation of Ohio public policy.

In order to resolve the questions surrounding coverage for Mr. Hoyle's claims, CIC moved the trial court for permission to intervene as an intervening plaintiff in order to secure a declaratory judgment on the issue of coverage. Permission to intervene was granted in June 2011. Thereafter, the parties filed summary judgment motions with the trial court addressing Cavanaugh and DTJ's liability to Mr. Hoyle on his EIT claims as well as CIC's duty to indemnify any judgment Mr. Hoyle might obtain in his favor on those tort claims. The trial court granted summary judgment in favor of CIC declaring that there was no duty to indemnify Cavanaugh and DTJ for Mr. Hoyle's EIT claims. (Summ. Judg. Op. I, Apx. 22a-23a; Summ Judg. Op. II, Apx. 13a-15a). In a 2-1 decision, the court of appeals reversed. (App. Op., Apx. 1a-11a).

### **III. ARGUMENT REGARDING APPELLANT'S PROPOSITIONS OF LAW**

#### **A. Proposition of Law No. I:**

**WHERE AN EMPLOYEE IS RELYING UPON R.C. §2745.01(C) TO CREATE A REBUTTABLE PRESUMPTION OF INTENT TO INJURE ARISING FROM THE EMPLOYER'S DELIBERATE REMOVAL OF AN EQUIPMENT SAFETY GUARD, THE ULTIMATE BURDEN REMAINS WITH THE EMPLOYEE TO PROVE THAT THE EMPLOYER ACTED WITH "DELIBERATE INTENT" IN ORDER TO ESTABLISH LIABILITY AGAINST THE EMPLOYER FOR AN EMPLOYER INTENTIONAL TORT.**

With respect to Proposition of Law No. I, the Court is being asked to consider whether the presumption which may be created by R.C. §2745.01(C) is sufficient to establish liability against an employer for EIT now that this Court has made it clear such liability only exists upon establishing the employer's deliberate intent to injure. *Houdek*, 2012-Ohio-5685, ¶ 25.

A presumption is not evidence, and it does not switch the burden of proof; it affects only the burden of going forward with evidence. The burden on a party to establish the material averments of his or her cause of action by a preponderance of all the evidence never shifts at any

time during the course of the trial by reason of presumptions in favor of one party or by a *prima facie* case made in his or her favor even though he or she may be aided by a rebuttable presumption. *Brunny v. Prudential Ins. Co. of America*, 151 Ohio St. 86, 93, 84 N.E.2d 504 (1949). In short, in civil actions, a presumption is not evidence and does not switch the burden of proof; it affects only the burden of going forward with evidence. *See, Horsley v. Essman*, 145 Ohio App.3d 438, 443, 763 N.E.2d 245 (4th Dist. 2001); Evid.R. 301.

In order for an employee, like Mr. Hoyle, to prevail in this or any other EIT case, he or she will still need to meet the burden to establish “deliberate intent.” *See, Kaminski*, 2010-Ohio-1027, ¶ 55; *Houdek*, 2012-Ohio-5685, ¶ 25. Any presumption which might be created by virtue of R.C. §2745.01(C) due to the deliberate removal of an equipment safety guard does not satisfy the employee’s ultimate burden to prove the employer’s specific and deliberate intent to injure.<sup>6</sup>

When the federal courts sitting in Ohio have applied this Court’s holdings from *Kaminski* and its progeny to subsection (C) cases, they have arrived at the same conclusion supporting this Court’s adoption of Proposition of Law No. I – *i.e.*, that the only “intent” standard that applies to EIT cases is specific, deliberate intent to injure. *Rudisill v. Ford Motor Company*, 709 F.3d 595, 603 (6th Cir. 2013). *See also, Irondale Industrial Contractors, Inc. v. Virginia Surety Company, Inc.*, 754 F.Supp.2d 927 (N.D. Ohio 2010).

*Rudisill* is a case which directly involves the application of subsection (C) of the employer intentional tort statute, R.C. §2745.01. After discussing what is necessary in order for an employer to rebut the presumption under subsection (C), the Sixth Circuit states the following which is relevant to the analysis of whether the employee must prove a “deliberate intent to injure” even when the employee has benefit of the presumption:

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<sup>6</sup> The employee retains the ultimate burden in other employment litigation cases. *See, e.g., Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 177-178, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009).

In sum, the evidence taken from all four factors together would not enable a reasonable jury to conclude that Ford acted with the deliberate intent to injure Rudisill. Because *such intent is an essential element of an intentional-tort claim under Ohio Revised Code Section 2745.01*, summary judgment for Ford was properly granted.

\* \* \*

Although this result might seem harsh to an injured employee like Rudisill, it is the result of reasoned public policy. The ‘social bargain’ of workers’ compensation is a two-way street: true, employees give up the ability to bring tort claims on anything less than a demanding showing of intent to injure. But in turn they obtain compensation for a variety of injuries, regardless of fault, for which the common law provided no remedy.

*Rudisill*, 709 F.3d at 612 (emphasis added). See also, *Irondale Industrial Contractors* at 933 (“Subsection (C) [of R.C. §2745.01] is not a separate tort, it merely provides a legally cognizable example of ‘intent to injure.’”)

Further, in *Kaminski*, this Court states that one of the purposes of the General Assembly’s enactment of the current version of R.C. §2745.01 is “to harmonize the law of this state with the law that governs a clear majority of jurisdictions.” *Kaminski*, at ¶ 99. With that being so, the Ninth District’s decision should be reversed since it is directly contrary to the way workplace torts are handled in other states.

For example, in our sister state of Kentucky, the Kentucky Supreme Court recently outlined the standard to be used in order to recover outside of the Kentucky Workers Compensation scheme when it stated as follows: “As provided in *Fryman v. Electric Steam Radiator Corp.*, ‘deliberate intention’ [has been interpreted to mean] that the employer must have determined to injure an employee and used some means appropriate to that end, and there must be specific intent. . . . The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.’” *Moore v. Environmental Construction Corp.*, 147 S.W.3d 13, 16-17 (Ky. 2004).

**B. Proposition of Law No. II:**

**OHIO PUBLIC POLICY PROHIBITS AN INSURER FROM INDEMNIFYING ITS INSURED/EMPLOYER FOR EMPLOYER INTENTIONAL TORT CLAIMS FILED UNDER R.C. §2745.01 BECAUSE AN INJURED EMPLOYEE MUST PROVE THAT THE EMPLOYER COMMITTED THE TORTIOUS ACT WITH DIRECT OR DELIBERATE INTENT TO INJURE IN ORDER TO ESTABLISH LIABILITY.**

With respect to Proposition of Law No. II, it has long been against public policy in Ohio to permit insurance coverage for direct intent torts. As this Court noted thirty years ago, “An insurance policy does not protect the policy holder from the consequences of his intentional tortious act. Indeed, it would be against public policy to permit insurance against the intentional tort.” *Blankenship*, 69 Ohio St.2d at 615. *See also, Wedge Products, Inc.*, 31 Ohio St.3d at 67 (“[P]ublic policy is contrary to insurance against intentional torts.” (citations omitted)). Accord, *Doe v. Shaffer*, 90 Ohio St.3d 388, 391, 738 N.E.2d 1243 (2000)(“As early as 1938, this court found that it was ‘well settled from the standpoint of public policy that the act of intentionally inflicting an injury cannot be covered by insurance in anywise protecting the person who inflicts such injury.’” (quoting *Rothman v. Metro. Cas. Ins. Co.*, 134 Ohio St. 241, 246, 16 N.E.2d 417 (1938)(other citations omitted)).

In *Harasyn*, this Court discussed the different levels of intent involved with intentional acts. “The first level, \* \* \* ‘direct intent,’ is where the actor does something which brings about the exact result desired. In the second, the actor does something which he believes is substantially certain to cause a particular result, even if the actor does not desire that result.” *Harasyn*, 49 Ohio St.3d at 175. As the *Harasyn* Court noted, “[i]n the case of a ‘direct intent’ tort, the presence of insurance would encourage those who deliberately harm another.” *Id.* at 176. The Court in *Harasyn* concluded that insurance coverage should be prohibited only for direct-intent torts. Therefore, in Ohio, “an intent to injure, not merely an intentional act, is a necessary element to

uninsurability.” *Buckeye Union Ins. Co. v. New England Ins. Co.*, 87 Ohio St.3d 280, 283, 720 N.E.2d 495 (1999).

Now that EIT liability is based upon an employer’s direct and deliberate intent to cause injury to the employee, the law in Ohio should hold that it is against public policy for an insurer to provide insurance coverage that indemnifies an employer for employer intentional tort liability pursuant to R.C. §2745.01. Insurance coverage for EIT direct-intent torts under current law is against public policy in Ohio.

**C. Proposition of Law No. III:**

**AN INSURER HAS NO DUTY TO INDEMNIFY AN EMPLOYER-INSURED FOR EMPLOYER INTENTIONAL TORT LIABILITY WHEN AN EMPLOYEE INVOKES R.C. §2745.01(C) FOR THE DELIBERATE REMOVAL OF AN EQUIPMENT SAFETY GUARD WHERE AN ENDORSEMENT TO THE INSURER’S POLICY EXCLUDES COVERAGE FOR “LIABILITY FOR ACTS COMMITTED BY OR AT THE DIRECTION OF AN INSURED WITH DELIBERATE INTENT TO INJURE.”**

With respect to Proposition of Law No. III, both the trial court’s summary judgment ruling and Judge Hensel’s dissenting opinion correctly conclude that, because any EIT claim under R.C. §2745.01(C) will necessarily require the employee to prove the employer’s direct intent to injure, there can be no indemnity coverage from CIC’s insurance policies. (App. Op., ¶ 23, Hensel, J., dissent, Apx. 11a-12a; Summ. Judg. Op. II, Apx. 15a). This is why the statement in the majority opinion that, “[a]lthough the deliberate intent to injure may be presumed *for purposes of the statute* where there is a deliberate removal of a safety guard, we conclude that this does not in itself amount to ‘deliberate intent’ *for the purposes of the insurance exclusion,*” makes no sense. (App. Op., ¶ 19, Apx. 9a (emphasis in the original)). The trial court and Judge Hensel’s views of R.C. §2745.01(C) comport with well-reasoned case law rejecting coverage for EIT claims predicated upon the presumption of intent to injure on the grounds that “there are no circumstances in this case where [the insured-employer] is entitled to coverage under the Policy.” *See, Irondale*

*Industrial Contractors*, 754 F.Supp.2d at 933.

As far as insurance coverage for employer intentional torts in other jurisdictions is concerned, the trial court and Judge Hensel's dissent are in accord. Under California law, for example, an insurance company owes no duty to defend or indemnify an employer against a California Labor Code Section 4558 claim that the plaintiff/employee's injury was proximately caused by the employer's "knowing removal of or knowing failure to install the point of operation guard" to a baler machine on which the employee was injured. *Everest National Ins. Co. v. Valley Flooring Specialties*, E.D. Cal. No. CV F 08-1695, 2009 WL 997143 (Apr. 14, 2009) at \*1.

Like Ohio's R.C. §2745.01(C), Section 4458(b) of the California Labor Code allows an employee to bring an action for damages against an employer where the employee's injury or death is "proximately caused by the employer's knowing removal of, or knowing failure to install, the point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death."

The California court found that there was no duty to defend or indemnify under the liability coverage in the employer's insurance policy because the employee's claims were subject to California's Workers Compensation law and the policy's workers compensation exclusion applied. The Court explained that an employer's liability insurance policy "is not a general liability policy providing coverage for injuries to members of the general public; instead it provides coverage to employers for those injuries to their employees not covered by workers' compensation."

Paragraph 2.h of Form GA 106 OH 01 96 setting forth the exclusion from coverage for "deliberate intent" in the CIC policy generally tracks the language of R.C. §2745.01 and coverage

is not owed “simply because the Policy does not incorporate the exact language of Subsection (C).” *Irondale Industrial Contractors*, 754 F.Supp.2d at 933. The court of appeals’ decision finding indemnity coverage should be reversed because coverage for EIT committed with “deliberate intent” is expressly excluded from coverage under the CIC CGL policy.

#### **IV. CONCLUSION**

For all of these reasons, Intervening Plaintiff-Appellant, The Cincinnati Insurance Company respectfully requests that this Court accept jurisdiction over this case. Issues of public and great general interest are clearly raised by: (1) The appellate court’s misconstruction of R.C. §2745.01(C) and erroneous reliance upon the rebuttable presumption of intent to injure to trump this Court’s binding precedent requiring an employee to establish an employer’s deliberate intent in order to prevail on a claim for employer intentional tort; and (2) The appellate court’s improper imposition upon insurers, like The Cincinnati Insurance Company, of a duty to indemnify insured-employers who intentionally injure their employees (which is against public policy) whenever an employee invokes R.C. §2745.01(C) and notwithstanding language in an insurance policy endorsement excluding coverage for “liability for acts committed by or at the direction of an insured with deliberate intent to injure.” Until these issues are resolved by this Court, insurers in Ohio face allegations, unfounded as they may be, of providing illusory coverage.<sup>7</sup>

By accepting jurisdiction over this case, the Court should reverse the legally flawed judgment and opinion of the court of appeals, thereby clarifying the law in these critically important and wide-ranging, yet still unsettled, areas of Ohio employment and insurance coverage law.

---

<sup>7</sup> See, *Irondale Industrial Contractors*, 754 F.Supp.2d at 933-934.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction* was sent by ordinary U.S. Mail, postage prepaid, this 29<sup>th</sup> day of August, 2013 to:

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## ***APPENDIX***

### **Judgment Entry & Opinion Being Appealed:**

**Decision and Journal Entry of the Ninth Appellate District, Summit County, Ohio, journalized on July 24, 2013 (2013-Ohio-3223)**

### **Other Opinions:**

**Final Order (Partial Summary Judgment) of the Court of Common Pleas, Summit County, Ohio, journalized on July 18, 2012**

**Order (Partial Summary Judgment) of the Court of Common Pleas, Summit County, Ohio, journalized on Apr. 20, 2012**

COPY

STATE OF OHIO )  
COUNTY OF SUMMIT )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT  
2013 JUL 24 AM 9

DUANE ALLEN HOYLE

Clerk of Court  
C.A. No. 26579  
26587

Appellant

v.

DTJ ENTERPRISES, INC.

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CV 2010-03-1984

Cross-Appellants

and

THE CINCINNATI INSURANCE  
COMPANIES

Appellee/Cross-Appellee

DECISION AND JOURNAL ENTRY

Dated: July 24, 2013

MOORE, Presiding Judge.

{¶1} Plaintiff, Duane Hoyle, appeals from the ruling of the Summit County Court of Common Pleas, which granted summary judgment to The Cincinnati Insurance Companies ("Cincinnati Insurance"). Defendants DTJ Enterprises, Inc. ("DTJ") and Cavanaugh Building Corporation ("Cavanaugh"), cross-appeal. For the reasons set forth below, we reverse.

I.

{¶2} In 2008, Mr. Hoyle was injured when he fell approximately thirteen feet from a scaffold while employed by DTJ and Cavanaugh. Mr. Hoyle brought a complaint against DTJ and Cavanaugh, alleging a workplace intentional tort. DTJ and Cavanaugh were insured by

Cincinnati Insurance. Cincinnati Insurance intervened in the action, seeking a declaratory judgment that it was not required to provide coverage to DTJ and Cavanaugh based upon certain exclusions contained in the insurance contract.

{¶3} DTJ and Cavanaugh filed a motion for summary judgment. Thereafter, Cincinnati Insurance filed motion for summary judgment, wherein it maintained that, although it had agreed to defend DTJ and Cavanaugh, the insurance contract excluded coverage for Mr. Hoyle's claims, and it had no duty to indemnify DTJ and Cavanaugh. The trial court granted DTJ and Cavanaugh's motion for summary judgment in part, concluding that a material question of fact remained only as to Mr. Hoyle's claim that his injuries were caused by DTJ and Cavanaugh removing a safety guard. The trial court later granted summary judgment to Cincinnati Insurance, concluding that Mr. Hoyle would have to demonstrate "deliberate intent" of DTJ or Cavanaugh to cause him injury in order to prevail on his claim. The trial court determined that the insurance contract excluded from coverage damages caused by "deliberate intent" of the insured to injure, and thus, Cincinnati Insurance was not required to indemnify DTJ or Cavanaugh for any potential resulting judgment against them. The trial court set forth in its entry that there was no just reason for delay. *See* Civ.R. 54(B). Mr. Hoyle timely appealed from the judgment of the trial court, and now presents one assignment of error for our review. DTJ and Cavanaugh cross-appealed, and they also present one assignment of error for our review. We have consolidated the assignments of error to facilitate our discussion.

## II.

### MR. HOYLE'S ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT GRANTED CINCINNATI INSURANCE[S] MOTION FOR SUMMARY JUDGMENT.

**DTJ'S AND CAVANAUGH'S ASSIGNMENT OF ERROR**

THE TRIAL COURT ERRED WHEN IT GRANTED CINCINNATI INSURANCE[']S MOTION FOR SUMMARY JUDGMENT.

{¶4} In their assignments of error, Mr. Hoyle, DTJ and Cavanaugh argue that the trial court erred in granting Cincinnati Insurance's motion for summary judgment. We agree.

{¶5} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Pursuant to Civ.R. 56(C), summary judgment is proper if:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

*Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).

{¶6} Here, Mr. Hoyle, DTJ, and Cavanaugh argue that Cincinnati Insurance was not entitled to judgment as a matter of law, because the trial court erred in its interpretation of the law concerning workplace intentional torts and in its application of the law to the insurance contract.

{¶7} In the insurance contract at issue, Cincinnati Insurance provided general commercial liability coverage to DTJ and Cavanaugh for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' \* \* \* to which this insurance applies." The general commercial liability policy expressly excluded from coverage bodily injury "which may reasonably be expected to result from the intentional \* \* \* acts of the insured or which is in fact expected or intended by the insured, even if the injury or damage is of a different degree or type than actually expected or intended."

{¶8} However, the insurance contract also contained an endorsement for “Employers Liability Coverage.” Therein, Cincinnati Insurance provided coverage for certain “intentional act[s],” as follows:

[Cincinnati Insurance] will pay those sums that an insured becomes legally obligated to pay as damages because of “bodily injury” sustained by your “employee” in the “workplace” and caused by an “intentional act” to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages.

The policy defined an “intentional act” as “an act which is substantially certain to cause ‘bodily injury,’” and required the following conditions be met for purposes of coverage:

- a. An insured knows of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
- b. An insured knows that if an “employee” is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the “employee” will be a substantial certainty; and
- c. An insured under such circumstances and with such knowledge, does act to require the “employee” to continue to perform the dangerous task.

However, the policy excluded from coverage “liability for acts committed by or at the direction of an insured with the *deliberate intent to injure*[.]” (Emphasis added.)

{¶9} Based upon the exclusion for acts committed with the deliberate intent to injure, Cincinnati Insurance argued that any potentially successful claim by Mr. Hoyle would necessarily be excluded from the insurance coverage, because Mr. Hoyle would have to establish deliberate intent in order to recover for a workplace intentional tort pursuant to R.C. 2745.01.<sup>1</sup>

{¶10} R.C. 2745.01 provides, in relevant part:

---

<sup>1</sup> Cincinnati Insurance further urged the trial court to grant it, at minimum, partial summary judgment as to its policy exclusion for punitive damages. As the trial court granted summary judgment on the basis that Cincinnati Insurance had no duty to provide coverage, the trial court did not address the argument as to coverage for punitive damages.

(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased 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.

(Emphasis added.)

{¶11} Here, Mr. Hoyle's only remaining claim is based upon his allegation that DTJ and Cavanaugh deliberately removed a safety guard, and, pursuant to R.C. 2745.01(C) their "intent to injure" is presumed. Through this method of proving the claim, Mr. Hoyle, DTJ, and Cavanaugh argue that DTJ and Cavanaugh could be held liable for Mr. Hoyle's injury without proof of deliberate intent to cause injury. Cincinnati Insurance responds that "intent to injure" and "substantially certain" to cause injury, as those phrases are used in R.C. 2745.01, both require the plaintiff to establish deliberate intent. Cincinnati Insurance maintains that the rebuttable presumption in subsection (C) of intent to injure demonstrates "deliberate intent," and, thus, if Mr. Hoyle were successful in his claim through use of the presumption, his claim would be excluded under the policy.

{¶12} Prior to the enactment of current R.C. 2745.01, to prove "intent" for purposes of an employer intentional tort, the employee was required to establish:

- (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
- (2) knowledge by the employer that if the employee is subjected by his employment

to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

*Fyffe v. Jenos, Inc.*, 59 Ohio St.3d 115 (1991), paragraph one of the syllabus. The Ohio Supreme Court further explained in *Jones v. VIP Dev. Co.* 15 Ohio St.3d 90 (1984), paragraph one of the syllabus, that “[a]n intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.” Thereafter, the General Assembly enacted several statutes to govern employer-intentional torts, and these statutes were held unconstitutional by the Ohio Supreme Court prior to the enactment of the current R.C. 2745.01. *Kaminski v. Metal & Wire Prods. Co. (Kaminski II)*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 28-33. At first glance, R.C. 2745.01(A) appears to retain the *Jones* standard for proving intent, as the statute provides that “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.” However, in R.C. 2745.01(B), “substantially certain” is defined as requiring that “an employer acts with *deliberate intent* to cause an employee to suffer an injury, a disease, a condition, or death.” (Emphasis added.) In *Kaminski v. Metal & Wire Prods. Co. (Kaminski I)*, 175 Ohio App.3d 227, 2008-Ohio-1521, ¶ 31, (7th Dist.), the Seventh District reviewed subsections (A) and (B):

When we consider the definition of “substantial certainty,” it becomes apparent that an employee *does not have two ways to prove an intentional tort claim as R.C. 2745.01(A) suggests*. The employee’s two options of proof become: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure. Thus, under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury.

(Emphasis added.)

{¶13} *Kaminski I* was appealed to the Ohio Supreme Court, which agreed with the Seventh District's interpretation of R.C. 2745.01(A) and (B) in this respect:

As an initial matter, we agree with the court of appeals that the General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D). See *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, ¶ 17 (the General Assembly in R.C. 2745.01 "modified the common-law definition of an employer intentional tort" by rejecting "the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct"). See also *Stetter [v. R.J. Corman Derailment Servs., L.L.C.]*, 125 Ohio St.3d 280, 2010-Ohio-1029, at paragraph three of the syllabus, in which we hold that R.C. 2745.01 does not eliminate the common-law cause of action for an employer intentional tort.

*Kaminski II* at ¶ 56; see also *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 3.

{¶14} Recently, in *Houdek*, the Ohio Supreme Court again reviewed the issue of intent in the context of workplace intentional torts. In *Houdek*, an employee was injured when a co-worker, who was operating a sideloader, struck him. *Id.* at ¶ 1, 8. The employee brought suit, and the trial court granted summary judgment to the employer. *Id.* at ¶ 9. The employee appealed, and the Eighth District reversed, determining that the employer could be held liable for the employee's injuries if it "objectively believed the injury to Houdek was substantially certain to occur." *Id.* at ¶ 3. The employer appealed this decision to the Supreme Court, which reversed the holding of the Eighth District. *Id.* at ¶ 29. Because there was no evidence that the employer "deliberately intended to injure" the employee, the Supreme Court concluded that it could not be liable for a workplace intentional tort. *Id.* at ¶ 4. The Court noted that R.C. 2745.01(C) was not applicable to the facts of that case. *Id.* at ¶ 27. It held that "R.C. 2745.01 limits claims against employers for intentional torts to circumstances demonstrating a *deliberate intent* to cause injury to an employee[.]" (Emphasis added.) *Id.* at ¶ 29.

{¶15} In a dissenting opinion, Justice Pfeifer concluded that “[t]he majority[ ]overstate[d] the ruthlessness of R.C. 2745.01” because subsection (C), provides a presumption of an intent to injure in certain circumstances. *Id.* at ¶ 30 (Pfeifer, J. dissenting). Therefore, in such a case:

Only the removal of the safety equipment needs to be deliberate under the statute; if the injury flows from the removal of safety equipment, an injured worker needs to prove nothing further as to the employer’s intent to successfully prosecute an intentional-tort claim against the employer. The worker need not prove that the employer was trying to hurt him—intent is presumed by the removal of safety equipment. That is, the safety equipment must be deliberately removed but the injury need not be deliberately caused for an injured worker to recover pursuant to R.C. 2745.01(C).

*Id.* (Pfeifer, J. dissenting).

{¶16} Pursuant to the Ohio Supreme Court’s decisions above, R.C. 2945.01 requires specific or deliberate intent to cause injury to recover on an employer intentional tort. *Houdek* at ¶ 29. However, “[t]he specific-intent requirement is moderated \* \* \* by subsection C of Ohio Revised Code § 2745.01, which sets up a rebuttable presumption of intent to injure when the employer deliberately removes an equipment safety guard or deliberately misrepresents a toxic or hazardous substance.” *Rudisill v. Ford Motor Co.*, 709 F.3d 595, 603 (6th Cir.2013); *Houdek* at ¶ 30 (Pfeifer, J. dissenting).

{¶17} Here, Mr. Hoyle’s only remaining claim rests upon operation of the presumption located in R.C. 2745.01(C). Therefore, unlike *Houdek*, our inquiry pertains to whether, if deliberate intent *were to be presumed* by operation of subsection (C), the claim would be excluded from coverage under the Employer Liability policy for actions taken with the “deliberate intent” intent to injure.

{¶18} The Fourth District has explained the effect of presumptions as follows:

A presumption shifts the evidentiary burden of producing evidence, i.e., the burden of going forward, to the party against whom the presumption is directed. See Weissenberger, Ohio Evidence (2001) 44. However, a rebuttable presumption does not carry forward as evidence once the opposing party has rebutted the presumed fact. *Forbes v. Midwest Air Charter, Inc.*, 86 Ohio St.3d 83, 86, 1999-Ohio-85. Thus, once the presumption is met with sufficient countervailing evidence, it fails and serves no further evidentiary purpose. The case then proceeds as if the presumption had never arisen. See *Horsley v. Essman*, 145 Ohio App.3d 438, 444 (4th Dist. 2001); *Ellis v. Miller*, Fourth Dist. Gallia No. 00CA17, 2001 WL 978868 (Aug. 16, 2001).

*Hall v. Kemper Ins. Cos.*, 4th Dist. Pickaway No. 02CA17, 2003-Ohio-5457, ¶ 92, quoting *Minor v. Nichols*, Fourth Dist. Jackson No. 01CA14, 2002-Ohio-3310, ¶ 14.

{¶19} Here, the trial court concluded that a question of fact existed as to whether Mr. Hoyle could prevail on his claim through the presumption of intent to injure contained in R.C. 2745.01(C). To do so, Mr. Hoyle would need to only prove the deliberate removal of a safety guard. The burden of proof would then shift to DTJ and Cavanaugh to rebut the presumption. *Hall* at ¶ 92. If DTJ and Cavanaugh failed to do so, Mr. Hoyle could prevail on his claim without actual proof of deliberate intent to injure. Although the deliberate intent to injure may be presumed *for purposes of the statute* where there is a deliberate removal of a safety guard, we conclude that this does not in itself amount to “deliberate intent” *for the purposes of the insurance exclusion*.

{¶20} In *Cincinnati Equitable Ins. Co. v. Sorrell*, 9th Dist. Lorain No. 05CA008703, 2006-Ohio-1906, ¶ 14, this Court explained:

The interpretation of an insurance contract is a matter of law. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995). When this Court interprets an insurance contract, we “look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11. A contract for insurance “must be given a fair and reasonable interpretation to cover the risks anticipated by the parties.” *Boxler v. Allstate Ins. Co.*, 9th Dist. Summit No. 14752, 1991 WL 24960, \*7 (Feb. 27, 1991). Furthermore, “[w]hen the intent of the parties is evident from the clear and

unambiguous language in the provision, the plain language of the provision must be applied.” *Rybacki v. Allstate Ins. Co.*, 9th Dist. Medina No. 03CA0079-M, 2004-Ohio-2116, at ¶ 9, citing *Karabin v. State Auto. Mut. Ins. Co.*, 10 Ohio St.3d 163 (1984).

{¶21} The Employer Liability policy at issue here provides coverage for “bodily injury” caused by an “intentional act,” which it defines as one where the insured (1) knows of the existence of a dangerous condition within its business operation, (2) knows that if an employee is subjected to the dangerous condition, then harm to the employee will be a “substantial certainty,” and (3) requires “the ‘employee’ to continue to perform the dangerous task.” The policy excluded from coverage “liability for acts committed by or at the direction of an insured with the deliberate intent to injure[.]” Therefore, we cannot conclude that an “intentional act” under the policy, which is specifically covered as set forth above, includes an act committed with a “deliberate intent” to injure, which is specifically excluded. Based upon the presumption of deliberate intent under R.C. 2745.01(C), there could exist a circumstance where an employee prevails on his claim of intentional tort without the complained action constituting “deliberate intent” to injure under the terms of the policy. As the trial court determined that questions of fact existed as to the viability of claim under subsection (C), we conclude that there likewise exists a question of fact as to whether such a claim falls within the policy exclusion, precluding summary judgment on the issue of coverage.

### III.

{¶22} Mr. Hoyle’s, DTJ’s and Cavanaugh’s assignments of error are sustained. The judgment of the Summit County Court of Common Pleas is reversed, and this cause is remanded for further proceedings consistent with this opinion.

Judgment reversed,  
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee/Cross-Appellee.



CARLA MOORE  
FOR THE COURT

CARR, J.  
CONCURS.

HENSAL, J.  
DISSENTING.

{¶23} I respectfully dissent. The Ohio Supreme Court has held that, under Revised Code Section 2745.01, “absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee’s exclusive remedy is within the workers’ compensation system.” *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 25. The policy at issue in this case specifically excludes

coverage for “acts committed \* \* \* with the deliberate intent to injure[.]” In light of the other provisions of the contract that specifically mirror the state of the law at the time it was created, I would find that the parties intended for the term “deliberate intent” to have the same meaning under the contract as under Section 2745.01. Accordingly, I do not agree that “there could exist a circumstance where an employee prevails on his claim of intentional tort without the complained action constituting ‘deliberate intent’ to injure under the terms of the policy.” As such, I would find that the trial court correctly granted summary judgment to Cincinnati Insurance.

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DAVID G. UTLEY, Attorney at Law, for Cross-Appellants.

DANIEL M. HERRIGAN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

2012 JUL 18 PM 2: 28

DUANE A. BLENHOVENY )  
SUMMIT COUNTY )  
CLERK OF COURTS )  
Plaintiff, )

-vs- )

DTJ ENTERPRISES, INC., et al., )  
Defendants. )

CASE NO. CV 2010-03-1984

JUDGE THOMAS A. TEODOSIO

**ORDER**

**Partial Summary Judgment**

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This matter is before the Court upon Defendants' Motion for Summary Judgment and Intervening Plaintiff's Motion for Summary Judgment, and the responses and reply briefs submitted to this Court. On April 20, 2012, this Court entered an Order for partial summary judgment. On May 15, 2012, and on motion of the Defendants, this Court vacated its judgment as to the issue of coverage to allow for additional briefing. The Court has reviewed the additional briefing provided by the parties, including the briefs filed June 1, 2012, and June 15, 2012, for which leave to file is hereby granted. Furthermore, the Court hereby incorporates its Order of partial judgment entered on April 20, 2012, as to all issues previously decided by that Order and not vacated by the Order of May 15, 2012.

Pursuant to Civ. R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 327 (1977). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record

demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St. 3d 280, 293 (1996). The movant must point to some evidence in the record of the type listed in Civ. R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ. R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.*

The Cincinnati Insurance Companies, as Intervening Plaintiff, seek summary judgment on their complaint for Declaratory Judgment. The Cincinnati Insurance Companies argue that the insurance policies in question do not provide coverage for the actions alleged by the underlying Plaintiff against the defendants.

The Commercial General Liability and Umbrella policies issued by the Cincinnati Insurance Companies provide coverage for “bodily injury” to which the insurance applies. The policy specifically excludes coverage for “bodily injury” which “may reasonably be expected to result from the intentional or criminal acts of the insured or which is in fact expected or intended by the insured, even if the injury or damage is of a different degree or type than actually expected or intended.”

The Employers Liability Coverage policy (GA 106 OH 01 96) provides coverage for “bodily injury” caused by an “intentional act.” The policy excludes “liability for acts committed by or at the direction of an insured with the deliberate intent to injure.”

The Court finds that the policies exclude coverage for employer liability under R.C. 2745.01. R.C. 2745.01 defines “substantially certain” as meaning “that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” The Ohio Supreme Court has held that “under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury.” “[T]he General Assembly’s intent in enacting R.C.

2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D).” *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St. 3d 250 (2010).

The Court notes that the policy’s “intentional act” coverage, as would-be coverage for an act which is substantially certain to cause “bodily injury,” is directly affected by the legislature’s definition of “substantially certain” in R.C. 2745.01(B) as meaning “that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” Employer torts under R.C. 2745.01(A) now fall within the exception that excludes coverage for “liability for acts committed by or at the direction of an insured with the deliberate intent to injure.”

Defendants have provided additional briefing that argues the “rebuttable presumption” that may be created under R.C. 2745.01(C) is not the equivalent of deliberate intent. This Court disagrees. Any possible surviving claim under R.C. 2745.01(C) would necessarily include the “intent to injure” and would thus be precluded by the insurance policies.

No genuine issues of material fact remain and the Cincinnati Insurance Companies are entitled to Summary Judgment as a matter of law.

With regard to Intervening Plaintiff Cincinnati Insurance Companies’ Complaint for Declaratory Judgment, Summary Judgment is GRANTED. The Intervening Plaintiff owes no indemnity to Defendants DTJ Enterprises, Inc. and Cavanaugh Building Corporation as a result of the allegations set forth in the underlying Complaint.

For the purpose of clarity, the Court reiterates its ruling of April 20, 2012. The Court finds that Plaintiff is unable to prove a claim under R.C. 2745.01(A), except as modified by the rebuttable presumption provided for under R.C. 2745.01(C). To the extent that Plaintiff’s claims rely on R.C. 2745.01(A) & (B) alone, summary judgment is GRANTED in favor of Defendants. To the extent

that Plaintiff's claims rely on the rebuttable presumption provided for by R.C. 2745.01(C), genuine issues of material fact remain and Summary Judgment is DENIED.

This is a final judgment as to all claims and parties hereby resolved and there is no just reason for delay.

IT IS SO ORDERED.



JUDGE THOMAS A. TEODOSIO

Pursuant to Civ.R. 58(B), the Clerk of Courts shall serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



JUDGE THOMAS A. TEODOSIO

cc: Attorney David R. Grant  
Attorney David G. Utley  
Attorney Mark W. Bernlohr  
Attorney Stephen J. Chuparkoff

IN THE COURT OF COMMON PLEAS  
 SUMMIT COUNTY, OHIO  
 2012 APR 20 PM 2:13

DUANE ALLEN HOYLE	)	
	)	CASE NO. CV 2010-03-1984
Plaintiff,	)	
	)	JUDGE THOMAS A. TEODOSIO
-vs-	)	
	)	
DTJ ENTERPRISES, INC., et al.,	)	<b>ORDER</b>
	)	<b><u>Partial Summary Judgment</u></b>
Defendants.	)	

This matter is before the Court upon Defendants' Motion for Summary Judgment and Intervening Plaintiff's Motion for Summary Judgment. Upon consideration of said motions, and the responses and reply briefs submitted to this Court, the Court finds as follows.

Pursuant to Civ. R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 327 (1977). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St. 3d 280, 293 (1996). The movant must point to some evidence in the record of the type listed in Civ. R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ. R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.*

This case arises out of an accident that occurred on March 24, 2008, during renovations of the Wyoga Lake Apartments in Akron, Ohio. Plaintiff Duane Alan Hoyle was an employee working as a carpenter for Defendants DTJ Enterprises, Inc. and Cavanaugh Building Corporation, who were the general contractors for the project. Plaintiff sustained injuries after falling from a ladder jack scaffold, and filed a Complaint alleging an intentional employer tort. Intervening Plaintiff Cincinnati Insurance Companies insured Defendants and filed a Complaint seeking Declaratory Judgment on the issue of coverage and indemnity. Defendants and Intervening Plaintiff filed their motions for Summary Judgment, responses and replies were filed, and the issues before this Court have been fully briefed.

#### **I. R.C. 2745.01(A)**

Defendants argue they are entitled to summary judgment because Plaintiff cannot meet the requirements for employer liability under R.C. 2745.01. R.C. 2745.01(A) provides: “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 tortuous act with the intent to injure another or with the belief that the injury was substantially certain to occur.” R.C. 2745.01(B) goes on to define “substantially certain” as meaning “that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.”

In *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St. 3d 250 (2010), the Court quotes the Seventh District’s decision in the underlying case, *Kaminski*, 175 Ohio App. 3d 227: “When we consider the definition of ‘substantial certainty,’ it becomes apparent that an employee does not have two ways to prove an intentional tort claim as R.C. 2745.01(A) suggests. The employee’s

two options of proof become: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure. Thus, under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury.” The Supreme Court goes on to state: “As an initial matter, we agree with the court of appeals that the General Assembly’s intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D).” *Id.*

Plaintiff’s deposition testimony provides evidence that Plaintiff did not believe that Defendants intended to cause him injury. (Hoyle depo. at 160 & 168). Plaintiff provides no evidence that the Defendants acted with a specific intent to injure the Plaintiff. The Court finds that Plaintiff is unable to prove a claim under R.C. 2745.01(A) and (B) because the evidence shows there was no specific intent to cause an injury. No genuine issue of material fact remains, and therefore summary judgment is granted in favor of the Defendants. This decision, however, does not apply to the cause of action to the extent that it relies upon R.C. 2745.01(C), as examined below.

## **II. R.C. 2745.01(C)**

Defendants further argue that Plaintiff cannot sustain a claim under R.C. 2745.01(C) because there has not been a “deliberate removal by an employer of an equipment safety guard.” Under R.C. 2745.01(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.”

“It is well-established that the interpretation of undefined statutory terms is not a question of fact, but a question of law for the court.” *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). “[T]he meaning of the terms “equipment safety guard” and “deliberate removal” in R.C. 2745.01(C) is to be ascertained as a matter of law by the court.” *Id.*

In *Forwerck v. Principle Business Enterprises*, 2011 Ohio 489 (6th Dist. 2011), the Sixth District Court of Appeals defined “deliberate” as it applies to R.C. 2745.01(C) as “characterized by or resulting from careful and thorough consideration . . . .” “[T]he term ‘removal’ in the statute should be construed in accordance with the relevant dictionary definition of ‘remove.’” *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). “As relevant here, ‘remove’ is defined . . . as ‘to move by lifting, pushing aside, or taking away or off; also ‘to get rid of; eliminate.’” *Id.* “Removal of a safety guard does not require proof of physical separation from the machine, but may include the act of bypassing, disabling, or rendering inoperable.” *Id.* “‘Deliberate removal’ for purposes of R.C. 2745.01(C) means a considered decision to take away or off, disable, bypass, or eliminate, or to render inoperable or unavailable for use.” *Id.* In the present case, genuine issues of material fact remain as to whether there was a deliberate removal of the pins used to hold the ladder jack to the ladder. Specifically, a question of fact remains as to whether the pins were rendered unavailable for use.

“[A]s used in R.C. 2745.01(C), an ‘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.” *Barton v. G.E. Baker Construction*, 2011 Ohio 5704 (9th Dist. 2011); *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). “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.” *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). In coming to its definition of “equipment safety guard,” the Sixth District references a definition provided by the Third District in *Wehri v. Countrymark*, 1990 Ohio App. LEXIS 1957 (3rd Dist. 1990): “An equipment safety guard is a device placed on equipment to prevent an employee from being drawn into or injured by that equipment.” *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). The Sixth District noted that “equipment safety guards,” while “perhaps not constituting physical covers or barriers per se, are nevertheless designed to prevent exposure of the worker’s hands within the point of operation.” *Id.* “[I]t [is] apparent that not all workplace safety devices are ‘equipment safety guards’ as that term is used in Section 2745.01(C).” *Barton v. G.E. Baker Construction*, 2011 Ohio 5704 (9th Dist. 2011). The Court noted that “equipment safety guard” encompasses “more than the concept of a barrier guard,” but does not encompass “any device designed to prevent injury or to reduce the seriousness of injury.” *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). The Sixth District relied on Merriam-Webster’s Collegiate Dictionary’s definition of “guard” as “a protective or safety device; specif: a device for protecting a machine part or the operator of a machine.” *Id.*

The Sixth District goes on to explain its analysis and application of the definition of “equipment safety guard” to the case in front of it: “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 the purposes of the presumption in R.C. 2745.01(C). In reaching this conclusion, we recognize that those devices are designed or may operate to reduce the seriousness of injury to an operator whose hands or fingers are inadvertently drawn into the in-running rewind roller. We appreciate that these devices could

very well mean the difference between a relatively minor and catastrophic injury. The scope of our review, however, does not permit us to inquire as to whether the General Assembly should have provided for a presumption of intent to injure where these types of safety devices or features are deliberately removed by the employer. We are not empowered to override or second-guess the public policy determinations of the General Assembly, but must follow the plain language of the statute.” *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). Thus, the Sixth District distinguished between “safety devices/features” and “safety guards.”

The issues before this Court is whether the pins used to hold the ladder jack to the ladder constitute an “equipment safety guard.” This Court hereby adopts the definition of “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.” *Barton v. G.E. Baker Construction*, 2011 Ohio 5704 (9th Dist. 2011); *Fickle v. Conversion Technologies International*, 2011 Ohio 2960 (6th Dist. 2011). However, genuine issues of material fact remain as to whether the pins at issue meet the definition of “equipment safety guards.” Therefore, Summary Judgment is not proper on this issue.

### **III. Insurance Policy Coverage**

The Cincinnati Insurance Companies, as Intervening Plaintiff, seek summary judgment on their complaint for Declaratory Judgment. The Cincinnati Insurance Companies argue that the insurance policies in question do not provide coverage for the actions alleged by the underlying Plaintiff against the defendants.

The Commercial General Liability and Umbrella policies issued by the Cincinnati Insurance Companies provide coverage for “bodily injury” to which the insurance applies. The policy specifically excludes coverage for “bodily injury” which “may reasonably be expected to result from the intentional or criminal acts of the insured or which is in fact expected or intended by the

inured, even if the injury or damage is of a different degree or type than actually expected or intended.”

The Employers Liability Coverage policy (GA 106 OH 01 96) provides coverage for “bodily injury” caused by an “intentional act.” The policy excludes “liability for acts committed by or at the direction of an insured with the deliberate intent to injure.”

The Court finds that the policies exclude coverage for employer liability under R.C. 2745.01. As discussed above, the present version of R.C. 2745.01 defines “substantially certain” as meaning “that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” The Ohio Supreme Court has held that “under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury.” “[T]he General Assembly’s intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D).” *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St. 3d 250 (2010).

The Court notes that the policy’s “intentional act” coverage, as would-be coverage for an act which is substantially certain to cause “bodily injury,” is directly affected by the legislature’s definition of “substantially certain” in R.C. 2745.01(B) as meaning “that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” Employer torts under R.C. 2745.01(A) now fall within the exception that excludes coverage for “liability for acts committed by or at the direction of an insured with the deliberate intent to injure.”

No genuine issues of material fact remain and the Cincinnati Insurance Companies are entitled to Summary Judgment as a matter of law.

#### **IV. Punitive Damages**

The Court further notes that pursuant to the Employers Liability Coverage (Policy GA 106 OH 10 96), “punitive, exemplary, or other non-compensatory damages” are not covered under said policy.

#### **Conclusion**

The Court finds that Plaintiff is unable to prove a claim under R.C. 2745.01(A), except as modified by the rebuttable presumption provided for under R.C. 2745.01(C). To the extent that Plaintiff's claims rely on R.C. 2745.01(A) & (B) alone, summary judgment is GRANTED in favor of Defendants. To the extent that Plaintiff's claims rely on the rebuttable presumption provided for by R.C. 2745.01(C), genuine issues of material fact remain and Summary Judgment is DENIED. With regard to Intervening Plaintiff The Cincinnati Insurance Companies' Complaint for Declaratory Judgment, Summary Judgment is GRANTED. The Intervening Plaintiff owes no indemnity to Defendants DTJ Enterprises, Inc. and Cavanaugh Building Corporation as a result of the allegations set forth in the underlying Complaint.

IT IS SO ORDERED.



JUDGE THOMAS A. TEODOSIO

cc: Attorney David R. Grant  
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Attorney Mark W. Bernlohr  
Attorney Stephen J. Chuparkoff