In the
Supreme Court of Ohio

JOSE GALBAN CAMARA,	:	Case Nos. 2023-1599 & 2024-0064
	:	
Appellant,	:	On Appeal from the
	:	Madison County
v.	:	Court of Appeals,
	:	Twelfth Appellate District
GILL DAIRY, LLC,	:	
	:	Court of Appeals
Appellee.	:	Case No. CA 2022-10-023

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Jose Galban Camara was seriously injured while working for Gill Dairy. Camara sued. He claimed, specifically, that Gill Dairy committed a tort against him by removing a safety guard from a piece of farm equipment he was using. Gill Dairy denied removing the safety guard. And, as part of trial proceedings, Gill Dairy argued that it was entitled to summary judgment. The trial court disagreed that summary judgment was justified. The case therefore proceeded to trial, and a jury found for Camara. On appeal, however, the Twelfth District set aside the jury's verdict: it concluded that the case should have never gone to trial because the trial court should have granted Gill Dairy summary judgment. Against this backdrop, this case presents two propositions—one about the standard of review, the other about statutory interpretation. The Twelfth District erred on both fronts.

Begin with the standard of review. Generally, when a trial court denies summary judgment, the moving party cannot immediately appeal. It follows that, by the time of any appeal, a trial will have already occurred. An appellate court faced with this situation may still review the denial of summary judgment. *Bliss v. Manville*, 172 Ohio St. 3d 367, 2022-Ohio-4366, ¶14. But the appellate court cannot pretend as if the trial never happened. An appellate court must instead consider whether "the trial proceedings show" a genuine factual dispute that supports the denial of summary judgment. *Id.* In

its decision below, the Twelfth District lost track of this standard. The court's analysis fixated on the pre-trial record, without adequate consideration of the trial proceedings.

Compounding the problem, the Twelfth District misread a key statutory provision. Under Ohio law, an employee seeking to recover from an employer for a tort must prove "that the employer committed the tortious act with the intent to injure another." R.C. 2745.01(A). But a statutory presumption sometimes lightens this burden. If an employer "[d]eliberate[ly] remov[es] … an equipment safety guard" from equipment its employee is using, then Ohio law presumes "that the removal … was committed with intent to injure another." R.C. 2745.01(C). Given the language of this presumption, the focus of appellate review should have been whether the trial record included enough evidence for a jury to reasonably find that Gill Dairy deliberately removed a safety guard from the equipment that injured Camara. But the Twelfth District held that, for R.C. 2745.01(C)'s presumption to apply, Camara also needed to prove that Gill Dairy deliberately chose to "not reattach" the safety guard after removing it. *Camara v. Gill Dairy, LLC*, 2023-Ohio-2339, ¶31 ("App. Op."). Because that element appears nowhere in the statutory text, the Twelfth District erred.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. This case presents two

topics that are of interest to the State: (1) the standard of review for denials of summary judgment and (2) the proper interpretation of the statutory presumption within R.C. 2745.01(C).

With respect to the standard of review, the State's interest is comparable to other litigants. The State, after all, is frequently a party to litigation. And, in some cases, the State and its officials are denied summary judgment, forcing them to proceed to trial before an appeal takes place. *See Ortiz v. Jordan*, 562 U.S. 180 (2011). In those scenarios, the State—like any other litigant—needs to know how to preserve summary-judgment arguments that a trial court rejects. Relatedly, the State has an interest in the standard by which appeals courts review arguments preserved at the summary-judgment stage.

The State also has an interest in a proper interpretation of R.C. 2745.01(C)—an interpretation that neither understates nor overstates an employee's burden. As a general matter, Ohio always has an interest in the correct interpretation and application of the General Assembly's work. In addition to that general interest, the interpretation of R.C. 2745.01(C) has downstream consequences for Ohio's workers' compensation system. Ohio's Bureau of Workers' Compensation often makes payments to, and on behalf of, injured workers out of a state insurance fund. When the Bureau makes payments to or on behalf of a claimant, it retains a right of recovery, which Ohio law calls "subrogation." R.C. 4123.931. If a worker who received state funds goes on to recover money from a third party, subrogation entitles the Bureau to a share of the worker's

recovery from the third party. The Bureau puts its share of the recovery back into the state insurance fund, which pays for the claims of other injured workers. R.C. 4123.931(K).

In this case, the Bureau has made payments to, and on behalf of, Jose Galban Camara. *See* BWC Tr. Br. (Jan. 3, 2022) (detailing payments). Those payments arose from the workplace injury that is the subject of this litigation. The Bureau thus possesses a subrogation interest that would vest if Camara ultimately recovers money in this case. Because of this subrogation interest, the Bureau was joined to this case as a (largely nominal) party at the trial level. *See* Journal Entry (Sept. 3, 2020). The Bureau was not, however, included as a party during proceedings before the Twelfth District. *See* Civil Docket Statement (Oct. 5, 2022).

STATEMENT OF THE CASE AND FACTS

1. Jose Galban Camara worked on a farm for Gill Dairy, LLC. App. Op. ¶2. His job included operating Gill Dairy's sand spreader. *Id.* The spreader connected to a tractor. And the tractor's engine powered the spreader "by way of a rotating power take-off shaft" that ran from the tractor to the spreader. *Id.* When the spreader was turned on, this rotating shaft would spin very fast—about 540 rotations per minute. *Id.*

Given the speed and force of this rotation, the sand spreader originally came with two safety guards. *Id.* The first safety guard, call it the "shield guard," was a plastic shield that surrounded the rotating shaft. *Id.* The second safety guard, call it the "connector

guard," was a three-sided metal box that covered the connection between the shaft and the spreader. *Id.* Both safety guards served "to prevent clothing or objects from catching in" the equipment. *Id.*

In the spring of 2019, Camara was operating Gill Dairy's sand spreader when he noticed a leak. *Id.* at ¶3. Camara left the tractor to investigate the leak. *Id.* Camara initially turned off the spreader, but he later restarted the device in order to determine where the leak was coming from. *Id.* Unfortunately, after restarting the spreader, Camara moved too close to the equipment and his coveralls became caught. *Id.* Before Camara could untangle himself, he was yanked over the spreader's rotating shaft. *Id.* As a result, Camara suffered serious injuries to his legs, right hand, and left shoulder. *Id.*

Critically here, by the time of this incident, the spreader Camara was using no longer possessed the two safety guards mentioned above. The shield guard had broken off and the connector guard was missing. *Id.*

2. Camara sued, alleging that Gill Dairy had committed an intentional tort against him. Notably, under Ohio's workers' compensation law, most employers contribute to a state insurance fund in exchange for protection from lawsuits and tort liability. *See* R.C. 4123.35(A), 4123.38, 4123.74. But, even with that bargain in place, an employee may still hold an employer liable for intentional torts. To do so, the employee must prove that the employer acted "with the intent to injure another." R.C. 2745.01(A). One way to prove this intent is through a statutory presumption. The relevant presumption says this:

"Deliberate removal by an employer of an equipment safety guard … creates a rebuttable presumption that the removal … was committed with intent to injure another." R.C. 2745.01(C).

Consistent with that presumption, a key dispute in this case was whether Gill Dairy had deliberately removed either of the sand spreader's safety guards. Unremarkably, the parties took competing views. Camara alleged that Gill Dairy had deliberately removed the safety guards from the spreader. Am. Compl. ¶¶27, 29. Gill Dairy denied those allegations. And Gill Dairy eventually moved for summary judgment, arguing that Camara had too little evidence of deliberate removal to justify a trial. *See* Gill Dairy Mot. Summ. J. 11–13 (Oct. 4, 2021). The trial court disagreed. It concluded that there was a genuine fact dispute as to whether Gill Dairy had deliberately removed a safety guard. Journal Entry 3 (Dec. 29, 2021).

The case proceeded to a jury trial. After the close of evidence, the trial court instructed the jury. The court explained that the parties agreed that Camara was injured "in the course of his employment" and that the shield guard and connector guard were both "equipment safety guards." App. Op. ¶8. It was thus for the jury to decide whether Gill Dairy "deliberately removed" either "safety guard from the spreader." *Id.* If Gill Dairy deliberately removed a safety guard, the trial court went on, that created "a rebuttable presumption that the removal was committed with intent to injure another." *Id.* But the

court also clarified that, even if that presumption applied, the jury was still "not required to find that the removal was committed with the intent to injure." *Id.*

After deliberating, a majority of the jury found in Camara's favor and awarded him roughly $1.9 million in damages. *Id.* at ¶9.

3. Gill Dairy appealed, and the Twelfth District overturned the jury's verdict. More precisely, the Twelfth District held that the trial court should have granted Gill Dairy summary judgment before the case ever reached a trial. App. Op. ¶¶13, 43.

The Twelfth District began with the standard of review. A trial court's errors in denying summary judgment, the Twelfth District acknowledged, often become harmless when a case goes to trial and the trial record supports a verdict in the non-moving party's favor. *Id.* at ¶14. But an appellate court may still review the denial of summary judgment on pure questions of law. *Id.* at ¶15. With little explanation, the Twelfth District held that the critical dispute in this case—whether Gill Dairy had deliberately removed either safety guard—was "a pure question of law." *Id.* at ¶16.

On the merits, the Twelfth District concluded that there was insufficient evidence to find that Gill Dairy intended to injure Camara. *Id.* at ¶37. The court first interpreted the statutory presumption within R.C. 2745.01(C). Again, that provision says that if an employer "[d]eliberately remov[es] … an equipment safety guard," the law presumes that the employer did so "with intent to injure another." R.C. 2745.01(C). The Twelfth District interpreted "the phrase 'deliberate removal' narrowly." App. Op. ¶31. To show

a deliberate removal, the court said, a plaintiff must show that the employer "made a considered decision" to *both* "remove" the safety guard *and* "not reattach" the safety guard. *Id.*

Applying that narrow interpretation, the Twelfth District concluded that "[n]o reasonable jury could have found from this evidence that it was" Gill Dairy that deliberately removed the safety guards. *Id.* at ¶37. To reach that conclusion, the Twelfth District considered only "[t]he summary-judgment evidence." *Id.* at ¶35. In other words, the Twelfth District's deliberate-removal analysis did not engage with the trial evidence. *Id.* at ¶¶34–38.

The Twelfth District went on to consider whether Camara had produced sufficient evidence of intent without the statutory presumption. *Id.* at ¶40. For *that* issue, the court considered the trial evidence. *Id.* It concluded that there was no evidence in the trial record that "Gill Dairy specifically intended to injure its employees." *Id.* at ¶41.

4. Camara asked the Twelfth District to reconsider its decision. He argued, among other things, that the Twelfth District erred within its initial analysis by failing to consider the full trial record when assessing whether Gill Dairy had deliberately removed an equipment safety guard. Mot. Recon. 6–7 (July 20, 2023).

The Twelfth District denied reconsideration. It again stressed that the denial of summary judgment is reviewable on appeal. Recon. Op. 4 (Nov. 27, 2023). And it again insisted that its decision resolved "a pure legal question," involving only the "application

of law to the facts of a case." *Id.* The Twelfth District nonetheless clarified that it had considered the trial record in reaching its decision. *Id.* at 5. The court suggested that "there was evidence" in the trial record "that Gill Dairy intentionally removed the connector guard" and that the company "was responsible for the removal." *Id.* But that evidence did not trigger R.C. 2745.01(C)'s presumption, in the Twelfth District's view, because "there was no evidence that Gill Dairy consciously decided not to replace the guard." *Id.*

Although the Twelfth District denied reconsideration, it certified a conflict among the courts of appeals. In particular, the Twelfth District recognized that its interpretation of "deliberate removal" was different than the Third District's interpretation in *Thompson v. Oberlanders Tree & Landscape, LTD.*, 2016-Ohio-1147 (3d Dist.). Recon. Op. 7. In *Thompson*, the Third District held that an employer's deliberate decision to not "repair or replace" a missing "equipment safety guard" amounted to deliberate removal for purposes of R.C. 2745.01(C). 2016-Ohio-1147 at ¶34. Accordingly, the Twelfth District certified the following conflict for this Court's review:

> Must an employee prove, in addition to the employer having mere knowledge of a missing safety guard, that the employer, besides doing nothing, made a deliberate decision not to replace the guard in order to establish a deliberate removal under R.C. 2745.01(C)?

Recon. Op. 8.

5. Camara appealed to this Court, raising two propositions of law. Camara's first proposition concerns interpretation of the presumption within R.C. 2745.01(C). Camara's

second proposition concerns the standard of review appellate courts apply when reviewing the denial of summary judgment after a trial has taken place.

This Court accepted both of Camara's propositions for review. *Case Announcements*, 2024-Ohio-880 (Mar. 13, 2024). It also agreed with the Twelfth District that a conflict exists as to the meaning of R.C. 2745.01(C). *Id.*

ARGUMENT

The Attorney General takes Camara's propositions in reverse order. This brief's first proposition addresses the standard by which appellate courts review the denial of summary judgment. Armed with that standard, this brief's second proposition explains why the Twelfth District misinterpreted R.C. 2745.01(C). As part of his second proposition, the Attorney General answers the conflict question that the Twelfth District certified. *Below* 21–22.

***Amicus Curiae* Ohio Attorney General's Proposition of Law No. 1:**

> *When a trial court denies summary judgment and then holds a trial, an appellate court—reviewing the denial of summary judgment—must consider whether the trial record establishes a genuine dispute of material fact.*

For the most part, summary-judgment standards are well understood. Trial courts are quite familiar with the standard for evaluating a party's motion for summary judgment under Civil Rule 56. Appellate courts are likewise familiar with how to review a trial court's grant of summary judgment. But this case involves a more complicated, and less applied, standard: the standard that governs when an appellate court conducts

a *post-trial* review of a trial court's *denial* of summary judgment. The Twelfth District misunderstood that standard, leading it to wrongly set aside a jury's verdict.

I. When an appellate court reviews the denial of summary judgment after a trial has taken place, the court must consider the trial record before finding reversible error on any fact-driven issue.

Two basic principles set the stage for the discussion here. *First*, the factual record in a case naturally evolves as the case progresses. At the pleading stage, a case turns on the parties' allegations. *See* Civ.R. 12(B)(6), (C). At the summary-judgment stage, attention shifts to whatever affidavits, depositions, or other evidentiary submissions the parties can assemble. *See* Civ.R. 56(C). Then, if a case makes it to trial, the trial evidence takes center stage. *See* Civ.R. 50. *Second*, appellate review is limited to judgments and final orders. *Mill Creek Metro. Park Dist. Bd. of Comm'rs v. Less*, 172 Ohio St. 3d 24, 2023-Ohio-2332, ¶8. A trial court's denial of summary judgment, however, is an interlocutory order. Thus, at least in most instances, "the denial of a motion for summary judgment is not a final, appealable order." *Id.* at ¶11.

Taken together, these two principles raise questions about how parties preserve challenges to a trial court's denial of summary judgment. Are denials of summary judgment even reviewable on appeal after a trial has taken place? If so, which factual record does an appellate court's review focus on?

This Court has long answered that denials of summary judgment motions *are* reviewable on appeal, even after a trial has taken place. *Balson v. Dodds*, 62 Ohio St. 2d

287, 289 (1980); *accord Bliss*, 172 Ohio St. 3d 367, ¶14. But the nature of this review depends on the nature of the parties' dispute. When a trial court's denial of summary judgment is based on a "pure question of law," an appellate court reviews the matter as it would any other legal question. *Bliss*, 172 Ohio St. 3d 367, ¶¶13–14. That is, an appellate court reviewing a pure question of law gives a trial court "no discretion to make errors of law." *Id.* at ¶13; *see also Continental Insurance Company v. Whittington*, 71 Ohio St. 3d 150, 158–59 (1994).

A distinct standard applies, however, when a trial court's summary-judgment denial turns on a fact-driven issue—namely, a dispute about whether a "genuine issue of material fact existed." *Whittington*, 71 Ohio St. 3d at 156, 159. In those scenarios, the result of a trial "is not to be disturbed solely because it might have appeared before trial that no genuine issue of material fact existed." *Id.* at 159. Instead, denial of summary judgment will constitute reversible error only if both the summary-judgment record and the trial record show that no genuine issue of material fact existed. *Id.* The key takeaway being that, once a trial has occurred, an appellate court must consider the trial record when resolving any question about disputed facts.

Notably, the Court's approach is in some ways similar to, and in other ways different than, the federal approach in this area. Like this Court, the U.S. Supreme Court has held that a party seeking to preserve "a purely legal issue resolved at summary judgment" may appeal the denial of summary judgment without re-raising its legal argument at

trial. *Dupree v. Younger*, 143 S. Ct. 1382, 1386–87 (2023). On the other hand, the U.S. Supreme Court has held that, for fact-driven disputes, a party *cannot* appeal an order denying summary judgment after a trial on the merits. *Ortiz*, 562 U.S. at 183–84. Rather than appealing the denial of summary judgment, a party in the federal system must submit a motion challenging the sufficiency of the trial evidence, so as to later enable "an appellate court … to review the sufficiency of the evidence after trial." *Id.* at 189. The rationale is that once a case "proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Id.* at 184. By way of comparison, then, the federal standard is harsher with respect to how parties preserve fact-driven arguments raised at the summary-judgment stage. At the same time, both the federal and state standard recognize that once a trial has taken place, the trial record becomes central to resolving any factual disputes.

II. The Twelfth District misapplied this Court's standard of review.

Applying this Court's standard here, the Twelfth District needed to account for the trial record when reviewing the denial of summary judgment.

Recall this case's circumstances. The parties disputed whether Camara was entitled to a presumption of intent based on the deliberate removal of an equipment safety guard. *See* R.C. 2745.01(C). The trial court denied Gill Dairy summary judgment because it concluded that there was a triable fact issue as to whether Gill Dairy had deliberately removed a safety guard from the equipment that injured Camara. Journal Entry 3 (Dec.

29, 2021). Because the trial court's denial of summary judgment was based on the perceived existence of a genuine fact dispute, and because a trial occurred before appeal, the trial court committed reversible error *only if* the trial evidence confirmed that there was no genuine issue of material fact. *Whittington*, 71 Ohio St. 3d at 156, 159.

By failing to engage with the trial evidence, *see* App. Op. ¶¶34–38, the Twelfth District necessarily misapplied that standard. The court suggested that it did not need to look at the trial record because the issue of deliberate removal was a "pure question of law." App. Op. ¶16; *see also* Recon. Op. 4. But that misunderstands the meaning of "pure question of law" in this context. A purely legal question is a question "about the substance and clarity of pre-existing law." *Ortiz*, 562 U.S. at 190. Said differently, a purely legal question is a question that "can be resolved without reference to any disputed facts"—on the "law books," so to speak. *Dupree*, 143 S. Ct. at 1389–90. By contrast, factual disputes "involve contests" between the parties "about what occurred" or "why an action was taken or omitted." *Ortiz*, 562 U.S. at 190. For such disputes, a court must look to the record evidence (which evolves as a case progresses) to decide whether different factual findings are possible. Or think of the distinction this way: by the plain terms of this Court's standard, "pure questions of law" must be something different than questions about whether a "genuine issue of material fact existed." *Whittington*, 71 Ohio St. 3d at 159. Otherwise, the dual paths of review that *Whittington* and other cases outline—one for pure legal questions, one for fact-related questions—make no sense. *See above* 11–12.

Here, the parties' dispute over whether Gill Dairy had deliberately removed a safety guard went beyond a pure question of law. *Contra* App. Op. ¶16; Recon. Op. 4. It is true that *part* of the parties' dispute was the legal interpretation of "[d]eliberate removal" under R.C. 2745.01(C). But the parties *also* debated "what occurred" on the ground. *See Ortiz*, 562 U.S. at 190. That is, the parties disputed what circumstances had caused safety guards to be missing from the sand spreader that injured Camara. Tellingly, the Twelfth District's deliberate-removal analysis spent considerable time discussing what facts the parties' summary-judgment submissions did or did not plausibly establish. App. Op. ¶¶34–37. That is a sure sign that the parties' dispute here was not a pure question of law.

One final point remains before moving on. At the reconsideration stage, the Twelfth District repeated its mistaken belief that this case "turned exclusively" on "a question of law." Recon. Op. 4. That said, the Twelfth District's reconsideration analysis arguably rendered harmless its confusion about the standard. At that point, the court clarified that it *had* considered the trial evidence in reaching its decision. *Id.* at 5. But the court also hinted that "there was evidence" within the trial record "that Gill Dairy intentionally removed the connector guard." *Id.* Under a correct interpretation of R.C. 2745.01(C), that evidence should have led the Twelfth District to revisit its initial decision. But the Twelfth District stood pat. Thus, while the Twelfth District's reconsideration analysis perhaps cured the court's error with respect to the standard of review, that analysis highlights

that the Twelfth District misread R.C. 2745.01(C). The Attorney General turns to this statutory issue now.

***Amicus Curiae* Ohio Attorney General's Proposition of Law No. 2:**

> *To receive a presumption of intent under R.C. 2745.01(C), an employee must prove that the employer deliberately removed an equipment safety guard—an employee need not also prove that the employer consciously decided to never reattach or replace the guard.*

A plaintiff in a civil case must produce sufficient evidence to support the elements of each claim. *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 163 Ohio St. 3d 337, 2020-Ohio-5371, ¶21. But legal presumptions sometimes ease that burden. A presumption is a "procedural device that courts resort to" when evidence is lacking. *Hoyle v. DTJ Enters.*, 143 Ohio St. 3d 197, 2015-Ohio-843, ¶23. The idea is that, in some situations, the existence of predicate facts "produces a required conclusion in the absence of explanation." *Id.* (quotation omitted). A presumption thus "imputes to certain facts or a group of facts a certain prima facie significance or operation." *Id.* (alteration accepted). A presumption, in turn, shifts the burden onto the party opposing the presumption to come forward with rebuttal evidence. *Id.* at ¶24; *Brunny v. Prudential Ins. Co.*, 151 Ohio St. 86, 93 (1949).

Under Ohio law, for an employee to recover against an employer for a tort, the employee must prove "that the employer committed the tortious act with the intent to injure another." R.C. 2745.01(A). But intent to injure is presumed when an employer deliberately removes a safety guard from equipment its employee is using. R.C. 2745.01(C). The Twelfth District misinterpreted that presumption in this case.

I. To trigger the presumption within R.C. 2745.01(C), an employee must simply show that an employer deliberately removed an equipment safety guard.

Return to the statutory text. The relevant provision states in full:

> 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.

R.C. 2745.01(C). Breaking this language down, a factfinder presumes an employer's "intent to injure another" when (1) an employer "deliberate[ly] remov[es] … an equipment safety guard" and (2) "an injury … occurs as a direct result." *Id.* Here, the parties appear to agree on the second prong, that there was sufficient evidence to establish that Camara's injuries occurred as a direct result of missing safety guards. The critical disagreement is the meaning of the first prong, "deliberate removal."

The statute does not define "deliberate removal," so ordinary meaning applies. *See State v. Nelson*, 162 Ohio St. 3d 338, 2020-Ohio-3690, ¶18. Helpfully, this Court has already explained the ordinary meaning of the phrase. *Hewitt v. L.E. Myers Co.*, 134 Ohio St. 3d 199, 2012-Ohio-5317, ¶30. In *Hewitt*, the Court concluded that an employer's failure to require safety gloves did not trigger R.C. 2745.01(C)'s presumption. *Id.* at ¶27. To reach that conclusion, the Court held "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." *Id.* at ¶30. The Court in *Hewitt* left open the possibility that deliberate removal might "encompass more than physically

removing a guard from equipment," such as when an employer intentionally bypasses or disables a safety guard. *Id.* at ¶29. But the Court rejected the notion that mere omissions, in the form of "failure to train or instruct," were enough to constitute deliberate removal. *Id.*

Unsurprisingly, *Hewitt*'s holding squares with what anyone would find in a dictionary. "The plain meaning of the word 'remove' is 'to move by lifting, pushing aside, or taking away or off.'" *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St. 3d 491, 2012-Ohio-5685, ¶27 (quoting *Webster's Third New International Dictionary* 1921 (1986)). And an action is "deliberate" when it is "done intentionally," "[t]hought out or planned in advance," or taken with "careful thought." *Webster's II New College Dictionary* 298 (1995).

Applying ordinary meaning here, the key issue for appellate review should have been whether there was enough evidence to support a finding of deliberate removal. More precisely, accounting for the standard of review discussed above, the Twelfth District should have considered whether there was sufficient evidence within the trial record to create a genuine dispute of fact as to whether Gill Dairy made "a deliberate decision" to "take off" a safety guard from the sand spreader that injured Camara. *See Hewitt*, 134 Ohio St. 3d 199, ¶30. The Attorney General leaves any further argument about that case-specific question to the parties.

II. The Twelfth District added an element to R.C. 2745.01(C)'s presumption that is absent from the statutory text.

The Twelfth District saw things differently. It held that, for R.C. 2745.01(C)'s presumption to apply, an employee must show that an employer, after removing a safety guard, made a deliberate decision to "not reattach" the safety guard. App. Op. ¶31; *accord* Recon. Op. 5. That misreads the provision.

When reading statutes, courts have a "duty not to alter the language of a statute by adding or removing words." *State v. Jeffries*, 160 Ohio St. 3d 300, 2020-Ohio-1539, ¶18. And again, for R.C. 2745.01(C)'s presumption to apply, the statutory text requires (1) "[d]eliberate removal by an employer of an equipment safety guard" and (2) that "an injury … occurs as a direct result." The textual inquiry stops there.

To be sure, other considerations will be important to deciding whether an employer persuasively *rebuts* the statutory presumption after it attaches. For example, an employer's reasons for removing a safety guard may provide context and show that the employer had no true intent to injure. Along the same lines, evidence that an employer intended to replace or reattach an earlier-removed safety guard (but just absentmindedly forgot to do so) will be quite relevant at the rebuttal stage. Such considerations, however, are irrelevant to deciding whether the presumption attaches in the first place.

Contrary to the Twelfth District's suggestions, the statutory evolution of R.C. 2745.01 does not justify a different, narrower interpretation of "deliberate removal." *Contra* App. Op. ¶28. By way of background, at the end of 2004, the General Assembly amended the

Revised Code "to significantly restrict actions for employer intentional torts." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, ¶57; *see also* 150 Ohio Laws 5533–35 (2004) (enacting R.C. 2745.01 in its present form). Of particular note, the amendments added the language currently within R.C. 2745.01(B), which says that an employer must act "with deliberate intent" to be liable. That language makes clear that an employee may recover "for employer intentional torts only when an employer acts with specific intent to cause an injury." *Kaminski*, 125 Ohio St. 3d 250, ¶56. But R.C. 2745.01's specific-intent requirement is still "subject to subsection[] (C)" of the statute. *Id.* Put differently, while the statutory amendments restricted employer tort liability in significant ways, the General Assembly simultaneously decided to include R.C. 2745.01(C)'s presumption of intent. For this reason, the general spirit of the 2004 amendments cannot be used to rewrite the specific balance that the General Assembly struck via the statutory text.

A final point warrants mention. Although the Twelfth District misread R.C. 2745.01(C), it was correct that other Ohio courts have also misread the provision. *See* App. Op. ¶27. As alluded to earlier, some courts have held that an employer's omissions, such as the failure to repair broken equipment, can trigger the deliberate-removal presumption within R.C. 2745.01(C). *See Thompson*, 2016-Ohio-1147, ¶34; *Wineberry v. N. Star Painting Co.*, 2012-Ohio-4212, ¶¶3, 38 (7th Dist.). That is incorrect. Because the text requires that the employer "remov[e]" the safety guard, the statutory presumption

applies only when an employer takes affirmative action. Said in reverse, an employer's omissions do not trigger the presumption, even if those omissions are deliberate. App. Op. ¶¶24–26, 31; *see also Hewitt*, 134 Ohio St. 3d 199, ¶29. Lower courts that have held otherwise are improperly lessening the statutory burden that employees bear. But the Twelfth District's contrary interpretation went too far in the other direction.

* * *

With the above analysis in mind, return to the conflict between Ohio's courts of appeals. The Twelfth District certified the following question:

> Must an employee prove, in addition to the employer having mere knowledge of a missing safety guard, that the employer, besides doing nothing, made a deliberate decision not to replace the guard in order to establish a deliberate removal under R.C. 2745.01(C)?

Recon. Op. 8. The answer to this question is "no." Assuming an employer removes a safety guard in the first place, whether the employer "made a deliberate decision not to replace the guard" is irrelevant to whether the presumption within R.C. 2745.01(C) attaches.

That said, the phrasing of the certified question poses a false dichotomy. It does not follow—from answering "no" to the question—that R.C. 2745.01(C) applies anytime an employer is aware of a missing safety guard and does nothing. Rather, deliberate removal requires affirmative action on the employer's part. In this Court's words, "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." *Hewitt*, 134 Ohio St. 3d 199, ¶30. *That* is what an employee must prove for the presumption to apply.

CONCLUSION

For the above reasons, the Court should reverse the Twelfth District's decision and remand for further proceedings. The Court should answer the Twelfth District's certified question in the negative.

Respectfully submitted,

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