Supreme Court of Ohio Clerk of Court - Filed June 17, 2024 - Case No. 2023-1599

In the
Supreme Court of Ohio

JOSE GALVAN CAMARA,

Plaintiff/Appellant,

vs.

GILL DAIRY, LLC,

Defendant/Appellee.

CASE NOS. 2023-1599 & 2024-0064

On Appeal from the Twelfth Appellate District, Madison County

Case No. CA 2022-10-023

MERIT BRIEF OF AMICUS CURIÆ, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLANT, JOSE GALVAN CAMARA

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No. Lower courts have erred by committing a false equivalency logical fallacy, choosing the verb "remove" instead of the noun "removal" when interpreting R.C. 2745.01(C). As a noun, "removal" encompasses not only the act of "removing" but also the state or process, allowing for consideration of the character and context of how something was removed and the fact that something has been removed. Because "removal" includes both a series or process of "removing" a guard as well as the "removed" status of a guard, requiring proof of a "decision" injects requirements not contemplated by the verbiage selected by the General Assembly in crafting the R.C. 2745.01(C) presumption, which was designed to limit the need for evidence of direct intent. 3

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INTRODUCTION

In 1911, Ohio established its worker's compensation system in response to the surge in workplace injuries spurred by industrialization. Since then, the advancement of technology and the wealth of information available to employers have significantly expanded. Alongside these advancements, safety standards have also seen notable growth. OSHA, operating under the Occupational Safety and Health Act for the past five decades, is a testament to this progress. With an abundance of data at hand, diverse workplace safety standards have developed, rooted in the certainties of the workplace. Indeed, everyone is aware of the inevitability of a workplace injury, and everyone is familiar with the signs that count down the number of days since the last workplace injury.

In tandem with the evolution of safety standards, safeguards have become the standard in modern machining practices. These safeguards, ranging from physical barriers to sensor-based monitoring systems, exemplify the proactive approach adopted by employers to ensure worker safety in the face of known hazards. Such measures not only adhere to regulatory requirements set forth by agencies like OSHA but also underscore a broader cultural shift towards prioritizing the well-being of workers in industrial environments.

In 2005, Ohio illustrated its workers' right of recovery against employers for intentional torts by codifying R.C. 2745.01. Since employers are not likely to memorialize their intent to injure workers in a corporate board resolution, employees are hard-pressed to prove direct intent. R.C. 2745.01(C) provides a much-needed presumption of intent when removal of an equipment safety guard occurs. Given the longstanding technological advances and the awareness of worker safety, the presumption falls nicely in line with those advances.

However, while the Revised Code provides the noun phrase, "[d]eliberate removal," appellate courts have misinterpreted this grammatical structure as a verb phrase, transforming the noun "removal" into the verb "remove." This transformation significantly undercuts and limits the meaning of the word the General Assembly selected in drafting R.C. 2745.01(C)'s presumption.

As this Court wrote in *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 29, "[o]ur role, in exercise of the judicial power granted to us by the Constitution, is to interpret and apply the law enacted by the General Assembly, not to rewrite it."

The matter before the Court presents the opportunity to clarify for all courts that the noun phrase deliberate removal is not to be replaced with the verb phrase to deliberately remove. And, by definition, removal, means "the act or process of removing : the fact of being removed." Merriam-Webster's Collegiate Dictionary (10th ed. 2000), p. 987.

IDENTIFICATION OF AMICUS CURIAE

The Ohio Association for Justice ("OAJ") is a statewide association of attorneys whose mission is to preserve the legal rights of all Ohioans by protecting their access to the civil justice system. Members of OAJ seek to preserve access to the courtroom and to promote public confidence in the legal system.

STATEMENT OF THE CASE AND FACTS

The Ohio Association of Justice adopts the Statement of the Case and Facts as presented by Amicus Curiæ Ohio Attorney General Dave Yost.

ARGUMENT

PROPOSITION OF LAW I: 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 of R.C. 2745.01(C)?

No. Lower courts have erred by committing a false equivalency logical fallacy, choosing the verb "remove" instead of the noun "removal" when interpreting R.C. 2745.01(C). As a noun, "removal" encompasses not only the act of "removing" but also the state or process, allowing for consideration of the character and context of how something was removed and the fact that something has been removed. Because "removal" includes both a series or process of "removing" a guard as well as the "removed" status of a guard, requiring proof of a "decision" injects requirements not contemplated by the verbiage selected by the General Assembly in crafting the R.C. 2745.01(C) presumption, which was designed to limit the need for evidence of direct intent.

1. The R.C. 2745.01(C) presumption functions to eliminate the need for direct evidence of intent.

R.C. 2745.01(C) provides:

> 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.

This Court found R.C. 2745.01(C)'s function was to allow employees to prove their employer's intent without direct evidence. *Hoyle. v DTJ Enterprises, Inc.*, 143 St.3d 197, 2015-Ohio-843, ¶12. Requiring direct evidence of intent from an entity is exceedingly difficult

because the manifestation of an entity's will is not as easily ascertainable as that of an individual. For instance, direct evidence of an entity's intent could be found in a business resolution (e.g., "We the undersigned comprise a majority of directors of this corporation and do hereby consent to the adoption of the following as if it was adopted at a regular called meeting of the board of directors. Now, therefore, it is resolved that the corporation shall authorize John Doe to push Jane Smith into the wall causing her injury.") In following up on direct evidence of intent, there is a significant barrier to securing a clean admission or confession of intent after the fact.

To engage the presumption, an employee must show the deliberate removal of an equipment safety guard.

2. "Removal" versus "remove."

a. "Deliberate removal" is a noun phrase using the noun "removal" modified by the adjective "deliberate." It is not a verb phrase with the verb, "remove."

"[The United States Supreme Court] naturally does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principles of English prose as irrelevant to a construction of those enactments." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 140, § 17. Grammar Canon – Words are to be given the meaning that proper grammar and usage would assign them (2012), quoting *Flora v. United States*, 362 U.S. 145, 150 (1960) (per Warren, C.J.).

In *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, this Court examined "deliberate removal," holding "'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." (Emphasis added). *Id*. at ¶ 30. This interpretation of removal relies on the root word, "remove," which was sourced from *Fickle v. Conversion Technologies Internatl.*, Inc., 6th Dist. No. WM-10-016, 2011-Ohio-2960, ¶ 31, quoting Merriam-Webster's Collegiate

Dictionary (10 Ed.2000) 987 (providing, "to move by lifting, pushing aside, or taking away or off"; also "to get rid of: ELIMINATE.")

While this Court's *Hewitt* holding remains correct because it lists one example by which deliberate removal may *occur*, Ohio's appellate courts have fallen into a grammatical whirlpool when interpreting "deliberate removal." Instead of reading "removal" as a noun, which it is, courts have frequently transplanted the verb "remove" into the statute. This changes not only the meaning and application of the statute but requires a substitution of the word "removal" with the word "remove," which the drafters did not use in R.C. 2745.01(C).

The Sixth District's *Fickle* opinion is an example. Instead of providing the definition of "removal," it relied solely on the definition of "remove." *Fickle*, ¶ 31. Below, the Twelfth District has fallen victim to this same interpretation. *Camara v. Gill Dairy*, 12th Dist. Madison No. CA2022-10-023, 2023-Ohio-2339, ¶ 29 (providing, "the Ohio Supreme Court's interpretation of "deliberate removal" has limited it to cases in which an employer acted to remove an existing safety guard.") Again, the Seventh District in *Wineberry v. N. Star Painting Co.*, 7th Dist. Mahoning No. 11 MA 103, 2012-Ohio-4212, correctly indicated that deliberate removal warrants a broader interpretation, but only quoted Merriam-Webster's Collegiate Dictionary (10th Ed. 1996, p. 987) for the definition of remove *and not removal*. Wineberry, ¶ 31; *see also Cruz v. Western/Scott Fetzer Co*, 8th Dist. Cuyahoga No. 109140, 2020-Ohio-5086, ¶ 19 (using the definition of "remove" as opposed to "removal"); *see also Hunter v. Cole Tool & Die Co.*, 5th Dist. Richland No. 2022 CA 0059, 2023-Ohio-2131, ¶ 28 (using the definition of "remove" as opposed to "removal"); *see also Turner v. Dimex, LLC*, 4th Dist. Washington No. 19CA3, 2019-Ohio-4251, ¶ 37 (using "remove" as opposed to "removal"); *see also Logossou v.*

AdvancePierre Foods, Inc., 1st Dist Hamilton No. C-170672, 2019-Ohio-363, ¶ 16 (using "remove" as opposed to "removal").

"Removal" is derived from the root word "remove," with the suffix "-al" converting it from an action (verb) to a thing or concept (noun). According to Merriam-Webster's Collegiate Dictionary (10th Ed. 2000, p. 987), "removal" is a noun defined as "the act or process of removing: the fact of being removed." This shift in part of speech means "removal" encompasses not only the act of taking something away but also the ongoing state or condition of it being absent. This requires interpretation that includes context and consequences. Because "removal" comprises these three parts, relying solely on the act of removing something is incorrect as it does not capture the full definition. Interpretation of R.C. 2745.01(C) must also include the process by which something is removed as well as its state of being. The Twelfth District's interpretation is in error because it only considers the act component, leaving two-thirds of the definition unaccounted for.

b. Considering the "process" of removing something.

Removal calls attention to both the act of removing something and the "process" of removing something. Merriam-Webster's Collegiate Dictionary (10th Ed. 2000, p. 927) defines "process" as a noun, meaning, "a series of actions or operations conducing to an end; especially: a continuous operation or treatment, especially in manufacture."

The distinction between "remove" as a verb and "process" as a noun carries two different meanings and focuses. Beginning with a temporal consideration, "remove" conveys a sense of immediacy, depicting a single, discrete action of physically taking something away. This implication suggests a direct intervention such as lifting an object or pushing it aside. In contrast, "process" encompasses a series of actions or steps that occur over time. It implies continuity and

progression through a sequence of events or steps rather than a singular act. In terms of interpretation, there is a distinction between static and dynamic perspectives. While "remove" tends to elicit a static understanding, focusing on a specific moment or instance of action, "process" emphasizes a continuous and evolving nature of events. The dynamic interpretation that "process" affords highlights the interplay of factors shaping overall events.

The distinction between "remove" and "process" is particularly important in a scenario involving the wear and tear of an equipment safety guard. Imagine an employer who possesses a comprehensive understanding of a particular piece of equipment and the hazards it presents. Additionally, the employer recognizes that an equipment safety guard is specifically designed to protect workers from those hazards. Over time, the equipment's usage results in wear and tear on the safety guard. The employer is cognizant of both the immediate consequences of this wear and tear and the ongoing process by which the operation of the machine causes it. Gradually, the safety guard deteriorates to the point of failure. The employer then faces a choice: continue operating the equipment, which will inevitably result in the safety guard's removal due to its deteriorated state, or cease operations to repair the guard. By opting to sustain business operations, the employer deliberately engages in the ongoing process by which the equipment's usage removes the safety guard, fully acknowledging that the continuous use of the machine will eventually lead to the guard's removal.

By limiting the definition of removal to the direct and immediate act of removing something, it forfeits the broader context that the complete definition calls for as well as calling attention to the continuous and evolving nature of events that could constitute removal of something.

c. Considering the "fact of being removed."

The final component of removal is the passive status being removed, which is independent of the actions or processes that led to it. The highlight is on the end result or outcome of the removal action, irrespective of the manner or specific actions or processes involved.

While the verb "remove" invites a static interpretation singularly focused on a direct act, "the fact of removal" invites a dynamic interpretation similar to "process." The fact of removal considers more than a singular act on how the resultant state was achieved; it calls for a review of what things occurred, underscoring a broader context and evolving circumstances of its condition. Moreover, this status can be adopted by an employer in the course of business.

By only reading "removal" as "to remove," the full weight of the definition is lost. Importantly, the fully appreciated definition includes omissions and inactions as well as commissions and actions. The status of being removed *can* be attained by an employer's decision not to repair or replace a piece of equipment.

3. Requiring plaintiffs to demonstrate a "decision" constricts the temporal context of removal to a finite point in time that the Revised Code does not provide for. Additionally, it runs counter to the purpose of the presumption by requiring a plaintiff to demonstrate mental intent.

As discussed above, the nature of the word "removal" implicates a wide discussion and comprehensive review of the underlying facts in any given situation. Not only does it include the act of removing something, but it also considers processes as well as the status of something being removed.

Requiring plaintiffs to demonstrate an employer's "decision" runs contrary to not only the definition of removal but also the function of the presumption. Initially, given the discussion of the components of removal above, the requirement of a "decision" runs counter to the process

component as well as the state of being a component of removal. While the term “decision” calls attention to a specific point in time or a focal point at which one places all conscious effort, the process and status components do are not so limited.

Secondarily, this requirement runs afoul of the presumption. While the presumption permits a plaintiff to establish an intent to injure based on an equipment safety guard’s deliberate removal, requiring evidence of a decision adds an extra, undefined, element to the equation. To decide is to “arrive at a solution that ends uncertainty or dispute about <~ what to do> b : to select as a course of action – used with an infinitive <*decided* to go>… 3 : to induce to come to a choice <her pleas *decided* him to help> ~ vi : to make a choice or judgment.” Merriam-Webster’s Collegiate Dictionary (10th Ed. 2000, p. 298). This invites a different standard of proof involving less than clear evidence. For instance, plaintiffs would be required to muster evidence of the mental status of an entity, including internal communications, policies, budget decisions, and maintenance records, where applicable. But, these records are problematic because an employer is less than likely to keep a diary of why it is intentionally injuring an employee. Additionally, negligent documentation practices would likely form the defense for an employer’s intentional processes. Such practices lead to the further obvious defense in the face of an omission to repair or replace: “we have not yet decided;” combined with the adjective, “deliberate,” how can one show careful consideration?

While evidence of a decision is certainly welcome in establishing the removal of an equipment safety guard, requiring that evidence as a new standard is one step too far from what the drafters provided.

4. “Remove” includes the omissive act of to “ignore.”

Turning back to *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, this Court examined “deliberate removal,” holding “‘deliberate removal’ of an equipment safety guard occurs when an employer makes a deliberate decision to life, push aside, take off, or *otherwise eliminate* that guard from the machine.” (Emphasis added). *Id*. at ¶ 30. Eliminate is defined as a “1 a : to cast out or get rid of : REMOVE, ERADICATE <the need to ~ poverty> b: to set aside as unimportant : IGNORE…” Merriam-Webster’s Collegiate Dictionary (10 Ed.2000) 374. To ignore is “to refuse to take notice of.” Merriam-Webster’s Collegiate Dictionary (10th Ed. 2000,p. 575).

While the act of making a decision may intersect with the act of ignoring something, they do not have the same definition and carry distinct meanings. First, the nature of each act is different. Ignoring something, even if done deliberately, involves passive inaction whereas a decision involves an active engagement in making a choice. Second, where one ignores something, even deliberately, there is awareness but a conscious choice to not engage or address the issue whereas a decision typically involves awareness and an active engagement to resolve or choose a path in handling something. Comparing outcomes, ignoring something maintains a status quo while making a decision brings in a change or resolution because a specific course of action is selected. Note, that a choice has a sense of being less formal than the action of making a decision. Even a “deliberate choice” has a less formal sense because a choice can be made with conscious intent and awareness, though not necessarily through a formal decision-making process. Decision also implies complex or significant selections whereas a choice is used to describe even trivial or everyday selections.

One can "deliberately ignore" without making a decision through subconscious choices (habitual behavior, subconscious biases, routine practices, etc.), situational factors such as overwhelming information or time constraints, or avoidance purposes.

In a situation where an employer is faced with information regarding a defective or nonfunctional equipment safety guard, deliberately ignoring prompts to effect repairs provides for an intentional act that effectively causes the removal of the equipment safety guard.

5. **The Twelfth District's Decision Errors Erred in Gill Dairy's decision to not repair or replace the guard.**

For the reasons explained above, a deliberate decision to allow an equipment safety guard to deteriorate into a state of disrepair where it is no longer effective constitutes a removal for purposes of R.C. 2745.01(C).

In *Thompson v. Oberlanders Tree & Landscape, Ltd.*, 3d Dist. Marion No. 9-15-44, 2016-Ohio-1147, the Third District considers a deliberate decision to ignore, effectively constituting an act of removing an equipment safety guard through *elimination*. The employer received a clear warning against operating the saw without the manufacturer-provided guard, and was also aware of industry standards and regulations mandating worker protection. *Id*. at ¶ 37-39. Despite knowing the evident and unnecessary risks posed by the unguarded saw, the employer still required the employee to use it. This information was not merely available to the employer passively; it came through the employer's observations and multiple employees bringing the missing guard to attention before the injury occurred. *Id*. at ¶ 40.

Employers frequently argue dangerous conditions alone are insufficient for an employer intentional tort, except, this ignores the distinct characteristics of a naturally and *unavoidable* dangerous condition versus a dangerous condition that an employer *can* eliminate but does not, instead opting to send workers into the "meat grinder" to voluntarily encounter those

unnecessary hazards. The Third District ultimately found the employer in its case made a deliberate decision to not repair or replace the safety guard on the chainsaw. *Id*. at ¶ 41. This "deliberate decision" was founded on two components: the Company instructed employees to use the unguarded chainsaws, or they would be fired, and separately, when the saw at incident went for repairs, the guard was not repaired or replaced. *Id*.

Employers frequently argue that dangerous conditions alone are insufficient grounds for an employer's intentional tort. However, this argument ignores the distinct difference between a naturally unavoidable dangerous condition inherent in the workplace and one that an employer can eliminate but chooses not to. Instead, they opt to send workers into the "meat grinder," where they voluntarily encounter unnecessary hazards. The Third District ultimately found that the employer in this case made a deliberate decision not to repair or replace the safety guard on the chainsaw. *Id*. at ¶ 41. This "deliberate decision" was based on two key factors: the company instructed employees to use the unguarded chainsaws under threat of termination, and separately, when the saw involved in the incident went for repairs, the guard was neither repaired nor replaced. *Id*.

While establishing a deliberate decision is ideal, it should not be necessary when the definition of deliberate also provides for careful consideration. One can undertake a course of conduct that ignores maintenance needs resulting in the deliberate removal of an equipment safety guard. All that needs to be shown is that a choice was made with careful consideration. Careful consideration is founded upon what knowledge of the facts the employer had.

Under the facts of *Thompson*, there was clearly careful consideration as to whether the removal status of the guard was endorsed by the employer. Not only was the employer aware of hazards, under requirements to implement a guard, aware of the missing guard and the requests

from the workers, but it still did not act. Inaction in the face of such clear information and knowledge of the hazards speaks to a deliberate removal.

The Twelfth District's reading of the *Hewitt* decision accounts for part of what could constitute a deliberate removal. This Court wrote, "[t]hus, the 'deliberate removal' referred to in R.C. 2745.01(C) may be described as a careful and thorough decision to get rid of or eliminate an equipment safety guard." (Emphasis added). *Hewitt* at ¶ 29; *see also* "[w]e hold that '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." (Emphasis added.) *Hewitt* at ¶ 30; *Compare* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 112, § 11 Mandatory/Permissive Canon – Mandatory words impose a duty; permissive words grant discretion. (2012) (providing "may" is permissive). This was derived from Fickle's opinion that "'deliberate' means 'characterized by or resulting from careful and thorough consideration – a deliberate decision,'" *Id*. at ¶ 28, quoting *Fickle* at ¶ 30-31. Thus, the deliberate nature of a removal could be said to occur when there is careful and thorough consideration, not just a deliberate decision. Compare Merriam-Webster's Collegiate Dictionary (10th Ed. 2000, p. 304) (providing, "deliberate" as "1 : characterized by or resulting from careful and thorough consideration <a ~ decision> 21 : characterized by awareness of the consequences <~ falsehood>…").

a. The Twelfth District's Reconsideration Errors in its Deliberate Decision Interpretation.

Below, the Twelfth District's decision on reconsideration found, "This court concluded that there was insufficient evidence that Gill Diary made a 'deliberate decision,' reached after careful and thorough consideration, to eliminate the connector guard." R. A.35 at 5. This analysis puts the cart before the horse because the court jumps from the removal over the presumption

and directly to intent, when it writes, "[a]t best, the evidence showed that the guard had been removed for repair purposes, and Gill Diary may have been aware that it had not been replaced." *Id*. But, then the Twelfth District reasons, "[w]hile there was evidence that Gill Diary intentionally removed the connector guard, and that it was responsible for the removal, there was no evidence that Gill Dairy consciously decided not to replace the guard." *Id*.

What the Twelfth District was seeking was the mental state of Gill Dairy. This was a battle Camara would never win, especially against an employer the jury found had spoliated evidence. This also works to void the presumption of intent to which Mr. Camara was entitled. Furthermore, Mr. Camara produced evidence that Mr. Gill knew about the wrapping hazard and the danger of an unguarded PTO shaft, and that state and federal regulations required such guarding. (R.66 at 6, Camara's Brief in Opposition to Motion for Summary Judgment).

Unlike the employer-company in *Thompson*, here there were *two separate* guards. On Gill Diary's best day, *assuming a lack of knowledge*, one can *attempt* to argue a single missing guard away as an accident, but two, *separately* bolted down guards? Exactly like in *Thompson*, Gill Dairy's malicious nature showed when it ordered Mr. Camara to continue working on the machine even though Mr. Camara, concerned for his safety, notified it about the missing guards. R.66 at 9. This was a completely unnecessary and preventable hazard. There is no higher course of conduct to affirm and adopt a guard's removed condition than to instruct workers to continue engagement with a machine knowing those workers would be encountering completely avoidable and unnecessary hazards. This solidified the removed status, constating a deliberate removal of the equipment safety guard.

CONCLUSION

Based on the analysis of the proposition and the arguments presented, it is evident that the interpretation of "deliberate removal" under R.C. 2745.01(C) requires a nuanced understanding. The distinction between "remove" as a verb and "removal" as a noun is crucial, with "removal" encompassing not only the act of physically taking away but also the ongoing state or process of absence. This broader definition supports the contention that deliberate removal can occur through deliberate choices such as ignoring hazards or failing to repair safety guards. The deliberate nature of such choices, whether through active instruction or omission despite knowledge of hazards, underscores the intentional exposure of workers to risks. Therefore, to establish deliberate removal, it is essential to consider both the actions taken and the omissions that contribute to the absence of safety measures.

The Twelfth District, in attempting to further limit the definition of "remove" missed its evaluation for the noun "removal." Additionally, while a "decision" can certainly be proof to invoke the presumption, it is not necessary. Accordingly, this Court has the opportunity to effectuate a clarification that honors the text the General Assembly drafted. The Twelfth District should be reversed, and the jury verdict should be reinstated in favor of Mr. Camara.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Merit Brief of Amicus Curiæ The Ohio Association for Justice in Support of Appellant was served this 17th day of June 2024, by email on the following:

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