ORIGINAL

No. 11-2013

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 10-96138

LARRY HEWITT,
Plaintiff-Appellee,

V.

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

MERIT BRIEF OF *AMICUS CURIAE*, THE OHIO ASSOCIATION FOR JUSTICE ON BEHALF OF PLAINTIFF-APPELEE LARRY HEWITT

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STATEMENT OF INTEREST

The Ohio Association for Justice ("OAJ") is Ohio 's largest victims' rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The OAJ is devoted to strengthening the civil justice system so that deserving individuals receive justice and wrongdoers are held accountable.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae concur in the statement of the case and facts and in the arguments presented in the Memorandum Opposing Jurisdiction of Plaintiff-Appellee Larry Hewitt.

ARGUMENT

PROPOSITION OF LAW NO. I: AN "EQUIPMENT SAFETY GUARD" UNDER R.C. 2745.01(C) INCLUDES ONLY THOSE DEVICES ON A MACHINE THAT SHIELD AN EMPLOYEE FROM INJURY BY GUARDING THE POINT OF OPERATION OF THAT MACHINE.

"The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws whenever he receives an injury."

Marbury v. Madison 5 U.S. 137 (1803) (John Marshall)

A. This Honorable Court Must Construe the Statute to its Plain and Ordinary Meaning.

The General Assembly, in drafting and enacting R.C. § 2745.01 used plain and unambiguous language. That statute only requires an employer to deliberately remove "an equipment safety guard." R.C. § 2745.01(C). Nowhere in the statute do the words "machinery", "machine", "on a machine" or "attached to a machine" or any derivations thereof appear in R.C.

§ 2745.01(C). A principle of statutory interpretation in Ohio is that it "is well recognized that a court cannot read words into a statute but must give effect to the words used in the statute." State ex rel. Butler Twp. Bd. Of Trustees v. Montgomery Cty. Bd. of Commrs. (2010), 124 Ohio St.2d 390, 394, 922 N.E.2d 945, 949, citing State ex rel. McDulin v. Indus. Comm. (2000), 89 Ohio St.3d 390, 392, 732 N.E.2d 367; Cleveland Elec. Illum. Co. v. Cleveland (1988), 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus, citing Columbus–Suburban Coach Lines v. Pub. Util. Comm. (1969), 20 Ohio St.2d 125, 127, 49 O.O.2d 445, 254 N.E.2d 8. Even if the legislature may have intended a different result (which is unlikely), a statute must be enforced in accordance with its plain and ordinary meaning. Hubbard v. Canton City Schools, 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E. 2d 543, ¶ 14-17. **This is black letter law.** Only an activist Court would read the words "machinery", "machine", "on a machine" and/or "attached to a machine" in interpreting R.C. § 2745.01. Hence, R.C. § 2745.01 is plain and unambiguous in its language requiring an employer to remove a safety guard that would prevent an injury to an employee.

Even is this Honorable Court were to look at the meaning of each word in "equipment safety guard", Appellant's argument still fails as a matter of law. According to the definitions of "equipment", "safety", and "guard" from the 2012 Random House Dictionary the definitions of these words mean the following:

1. Equipment: anything kept, furnished, or provided for a specific purpose.
2. Safety: The state of being safe; freedom from the occurrence or risk of injury, danger, or loss.
3. Guard: To keep safe from harm or danger; protect; watch over.

Dictionary.com Unabridged. Random House, Inc., Retrieved July 03, 2012. Here, it is unequivocal that any definition of "equipment safety guard" does not comply with Appellant's definition pursuant to the plain definitions of the words, even if this Honorable Court decides to actually look at the meaning of the words. However, this is unnecessary as "is well recognized that a court cannot read words into a statute but must give effect to the words used in the statute." State ex rel. Butler Twp. Bd. Of Trustees v. Montgomery Cty. Bd. of Commrs. (2010), 124 Ohio St.2d 390, 394, 922 N.E.2d 945, 949, citing State ex rel. McDulin v. Indus. Comm. (2000), 89 Ohio St.3d 390, 392, 732 N.E.2d 367

B. Each Intentional Court Case Must be Interpreted to the Specific Facts of Each Case.

Defendant-Appellee's interpretation of R.C. § 2745.01(C) leads to a result that can be described as nothing more than absurd. "Whether an employer tort occurs in the workplace depends on the facts and circumstances of each case." Houdek v. ThyssenKrupp Materials N.A. Inc. (8th Dist. 2011), 2011 WL 1326374, ¶ 11, cert. denied, 129 Ohio St.3d 1504. Wherefore, Hewitt's injuries must be limited to the facts and circumstances of his case.

C. Appellant's Reliance on Fickle is Completely Misplaced and has be Superseded by the Holding in Beyer.

Appellant and their Amicus friends have put all their eggs in one basket in arguing that Fickle v. Conversion Techs. Int'l Inc., 6th Dist. No. WM–10–016, 2011–Ohio–2960 is the end all and be all of the issue that is now before the court. The issue here is that Fickle is no longer good law. The cases relating to Fickle that Appellant and their Amicus friends held as follows:

1. Beary v. Larry Murphy Dump Truck Serv., Inc., 2011-Ohio-4977 appeal allowed, 2012-Ohio-648, 131 Ohio St. 3d 1456, 961 N.E.2d 1135: "We find the *Fickle* court's reasoning persuasive. We conclude the backup alarm is not an equipment safety guard pursuant to R.C. 2745.01(C). We find the trial court did not err in finding LMDT was entitled to summary judgment as a matter of law."

2. Barton v. G.E. Baker Constr., Inc., 2011-Ohio-5704 appeal not allowed, 2012-Ohio-1710, 131 Ohio St. 3d 1511, 965 N.E.2d 311, "From these common dictionary definitions, it becomes apparent that not all workplace safety devices are "equipment safety guards" as that term is used in Section 2745.01. See *Fickle v. Conversion Techs. Int'l Inc.,* 6th Dist. No. WM–10–016, 2011–Ohio–2960, at ¶ 42. "[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." *Id.* at ¶ 43.

However, since the Eighth District's ruling in Hewitt, the Sixth District has reconsidered its holding in Fickle as to what can be considered an "equipment safety guard." That Court found that **"to interpret the statutory terms so narrowly to exclude all protective equipment simply because it is not attached to a machine is to produce an absurd result."** Beyer v. Rieter Automotive N. Am., Inc., 6th Dist. No. L–11–1110 (June 22, 2012), 2012 WL 2366683, ¶ 11 (emphasis added). In Beyer, a worker was exposed to sand in the employer's manufacturing plant for a period of over 30 years and developed silicosis due to his inhalation of silica. Id. at ¶ 2. The employer provided face masks but oftentimes kept them locked away from the workers, yet required them to perform work where the employees would be exposed to silica particles, and the Sixth District found that this situation necessitated the expansion of the definition of equipment safety guard under R.C. §2745.01(C) to include "free standing equipment." Id. at ¶13.

The holding Beyer is the correct holding, and comports with public policy and the spirit of the law. For example, imagine for a second the canary in the coal mine example. Since the 1800s, canaries have been used in coal mines to protect coal miners from toxic gases. The canary is particularly sensitive to toxic gases such as carbon monoxide which is colorless, odorless and tasteless. Any sign of distress from the canary was a clear signal the conditions underground were unsafe and miners should be evacuated from the pit and the mineshafts made safer. Now imagine one day, the owner of the coal mine tells them not to take the canary into the mine with them. The coal mine fills with toxic gas, and because there was no canary in the mine

to alert them to the toxic gas, all the coal miners die. Would the coal miners not have a cause of action against the owner of the mine, because the canary was not attached to a piece of machinery? If the canary was regularly taken into the coal mine in a bird cage, would the bird cage be considered a piece of machinery? Under Appellant's theory, the coal miners would only have a cause of action for an intentional tort for deliberate removal of an "equipment safety guard" if the canary was glued or duct taped to a piece of machinery. This outcome makes no sense, and makes the law's outcome unjust, and irreconcilable with Appellants position.

Wherefore, Appellant's position is not the intention of R.C. §2745.01(C), and this Honorable Court should reject that a "equipment safety guard" needs to be a piece of machinery. At the heart of the rationale of Ohio having an intentional tort statute is protecting workers and community safety as a whole. As Justice Pfiefer stated in his dissent in Kaminski, "It is difficult to conjure a scenario where such a deliberate act would not constitute a crime. Are we to believe that criminally psychotic employers are really a problem that requires legislation in Ohio?" Kaminski v. Metal & Wire Prods. Co., 125 Ohio St.3d 250, 2010–Ohio–1027, 927 N.E.2d 1066.

PROPOSITION OF LAW NO. 2: THE PRESUMPTION CREATED UNDER R.C. 2745.01(C) REQUIRES AN EMPLOYER TO SHOW THERE WAS NO INTENT TO HARM THE EMPLOYEE AFTER THE DELIBERATE REMOVAL OF AN EQUIPMENT SAFETY GUARD.

The Appellant in its case failed to provide evidence to rebut the 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). The Eighth District correctly held that:

> When a rebuttable presumption exists, such presumption prevails until rebutted by evidence to the contrary. See Biery v. Pennsylvania RR. Co. (1951), 156 Ohio St. 75, 99 N.E.2d 895, paragraph two of the syllabus ("In an action based on negligence, the presumption exists that each party was in the exercise of ordinary care and such presumption prevails until rebutted by evidence to the contrary).

> See, also, Ferrando v. Auto-Owners Mut. Ins. Co., 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, ¶ 91 (In cases where the insured breaches the subrogation clause in an underinsured motorist policy, "a presumption of prejudice to the insurer arises, which the insured party bears the burden of presenting evidence to rebut").

No evidence was presented to the Court by Appellant that Hewitt's direct supervisors, who had significantly more experience working with power lines and had knowledge that Hewitt was still in the early stages of his apprenticeship, did not intend to injure him by having him work on power lines that were incorrectly said to be de-energized. As a result of this lack of a presumption by the Appellant, it created

> a mandatory inference or a legally required rule of reasoning. If reasonable minds must necessarily find the underlying facts and if the consequent presumed fact remains unrebutted, the court should direct that the presumed fact has been established as a matter of law.

Adamson v. May Co. (1982), 8 Ohio App.3d 266, 269, 456 N.E.2d 1212, 1216 citing Carson v. Metropolitan Life Ins. Co., (1956), 165 Ohio St. 238, 135 N.E.2d 259, 270, 59 O.O. 310. Under Adamson, L.E. Myers' decision to not rebut the presumption that Hewitt's supervisors instructing him to remove his gloves, which subsequently caused his injuries, established the fact that it was done so with the intent to injure Hewitt as a matter of law.

The rebuttable presumption contained in R.C. 2745.01(C) must be rebutted by the employer. See McKinney v. CSP of Ohio, LLC., 2011-Ohio-3116, ¶ 28. L.E. Myers failed to do so here, when they rested their case without presenting any evidence to rebut the presumption that Hewitt's gloves were removed with the intent to injure him. In McKinney, a press operator notified her foreman that the press she was stationed at was working incorrectly, and he failed to call in maintenance to inspect the machine. Id. Additionally, the foreman "either ignored or did not appreciate the seriousness of" the complaint. Id. The Sixth District found that:

> Given the testimony that the workers were told to keep running the press after the complaint, and given the testimony from a CSP supervisor that "none of the right people were present" to ensure that the two safety measures were on press 5 the night of appellant's accident, we find that appellant has established a rebuttable presumption that the removal was committed with intent to injure.

Id. These facts mirror the instant case. Hewitt was not being directly supervised by his superior, who instead sent him alone in the bucket to replace a supposedly "de-energized wire" and specifically told him that he should remove his rubber gloves and sleeves. Hewitt's injury was a direct result of L.E. Meyer's supervisors telling him that he should not wear his rubber gloves and sleeves, yet required him to work on the wire by himself. See Shanklin v. McDonald's USA, LLC., 5th Dist. No. 2008-CA-00074, 2009-Ohio-251, ¶ 42 (finding that there was no presumption of intent to injure employee where employees did not use and employer did not require the use of microwave oven that had housing removed for repair).

CONCLUSION

For the reasons set forth above, Amicus Curiae OAJ ask this Court to affirm the ruling of the Eighth District Court of Appeals below. Through the plain and ordinary meaning of the language contained in R.C. 2745.01, the definition does not exclude free-standing equipment safety guards that are deliberately removed by employers and cause injury to employees. The Defendant-Appellant also failed to rebut the presumption under R.C. 2745.01(C) that Mr. Hewitt's told him to remove his safety equipment in order to injure him, and as a result that conclusion must be reached as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Merit Brief of Amicus Curiae Ohio Association for Justice* was served by regular U.S. mail this 3rd day of July, 2012, on the following:

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