

Preston J. Garvin (0018641)
(Counsel of Record)
Michael J. Hickey (0021410)
Garvin & Hickey, LLC
181 East Livingston Avenue
Columbus, Ohio 43215
Telephone: (614) 225-9000
Facsimile: (614) 225-9080
wclaw@garvin-hickey.com
Counsel for Amicus Curiae
Ohio Chamber of Commerce

Daniel A. Richards (0059478)
(Counsel of Record)
Shawn W. Maestle (0063779)
Martha L. Allee (0088180)
Weston Hurd LLP
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114-1862
d Richards@westonhurd.com
smaestle@westonhurd.com
mallee@westonhurd.com
Counsel for Amicus Curiae
Ohio Association of
Civil Trial Attorneys

Robert A. Minor (0018371)
(Counsel of Record)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-6410
Facsimile: (614) 719-4874
raminor@vorys.com
Counsel for Amicus Curiae
Ohio Self-Insurers Association

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INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys (“OACTA”) is an organization of attorneys, corporate executives and managers who devote a substantial portion of their time to the defense of civil lawsuits and the management of claims against individuals, corporations, and governmental entities.

OACTA’s membership is frequently involved in the settlement, litigation, and planning of claims involving Ohio’s employer-intentional tort statute. With this experience, OACTA has consistently advocated for application of the employer-intentional tort statute that is constitutional, reflects the intent of the General Assembly, and provides fair and predictable adjudication.

The Court should reject the Sixth District’s effort to expand the definition of equipment safety guard and to allow a presumption of intent to injure absent evidence of deliberate removal of a safety guard by an employer. The appellate court’s approach ignores the plain language of R.C. 2745.01, ignores this Court’s precedent regarding the common meaning of the statute’s terms, and is contrary to the General Assembly’s intent to provide a *limited* exception to the exclusive remedy of Section 35, Article II of the Ohio Constitution.

The plain language of R.C. 2745.01 and the definitions of “equipment safety guard” and “deliberately remove” established in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795 should govern claims that an employer’s intent to injure an employee can be presumed because of an employer’s deliberate removal of an equipment safety guard. *Hewitt* appropriately enforced the language and intent of the General Assembly and the common meaning of undefined statutory terms. This approach follows Ohio’s principles of statutory

construction, ensures a fair and predictable application of the statute, and provides the balance sought by the General Assembly when it enacted R.C. 2745.01.

STATEMENT OF THE CASE AND FACTS

OACTA adopts the statement of the case and facts set forth in the Merit Brief of Appellants, Pro-Pak Industries, Inc. and Toledo L & L Realty Co.

ARGUMENT

Proposition of Law No. I: The Hewitt Court's Definition of Equipment Safety Guard Is Limited to Protecting Operators Only.

In *Hewitt*, the Court explicitly adopted a specific 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.” *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, ¶ 26. This definition of “equipment safety guard” is appropriate because it is the plain and ordinary meaning of the words, which are undefined in the statute.

In the absence of statutory definition, courts must look to the plain and ordinary meaning of words when construing a statute. *Sharp v. Union Carbide Corp.*, 38 Ohio St.3d 69, 70, 525 N.E.2d 1386 (1988). Generally, this plain and ordinary meaning is determined by looking to common dictionary definitions. *See, e.g., Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, 891 N.E.2d 311, ¶ 21; *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, 873 N.E.2d 1305, ¶ 17-18.

Hewitt acknowledged this general principle when it adopted the definition of “equipment safety guard” used by the Eighth District below in *Hewitt* and by the Sixth District in *Fickle v.*

Conversion Technologies Intl., Inc., 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960.

Fickle drew this definition from Merriam-Webster's Collegiate Dictionary:

“Guard” is defined as “a protective or safety device; specif: a device for protecting a machine part or the operator of a machine.” Merriam-Webster's Collegiate Dictionary [(10 Ed.2000)] at 516. “Safety” means “the condition of being safe from undergoing or causing hurt, injury, or loss.” *Id.* at 1027. And “equipment” is defined as “the implements used in an operation or activity: APPARATUS.” *Id.* at 392. In turn, “device” is “a piece of equipment or a mechanism designed to serve a special purpose or perform a special function.” *Id.* at 316. “Protect” means “to cover or shield from exposure, injury, or destruction: GUARD.” *Id.* at 935. “Safe” is defined as “free from harm or risk” and “secure from threat of danger, harm, or loss.” *Id.* at 1027.

Fickle at ¶ 38. From this definition, *Fickle* and *Hewitt* concluded that “equipment safety guard” means “a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.” *Hewitt* at ¶ 26; *Fickle* at ¶ 43; *See also Barton v. G.E. Baker Constr.*, 9th Dist. Lorain No. 10CA009929, 2011-Ohio-5704, ¶ 11 (using the “operator” definition and holding R.C. 2745.01(C) did not apply because “[a] trench is not a piece of equipment and the trench box is not designed to protect the operator of any piece of equipment.”).

Hewitt properly defined the plain and ordinary meaning of “equipment safety guard” by looking to the common dictionary definition. *See Sharp v. Union Carbide Corp.* at 70. The Sixth District's removal of “operator” from the definition rejects the plain and ordinary meaning of the term and thereby conflicts with this basic principle of statutory construction.

Further, expanding the definition of “equipment safety guard” by removing “operator” is inconsistent with the legislative intent. The primary goal in construing a statute is to ascertain the intent of the legislature. *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 704 N.E.2d 1217 (1999). The Court thoroughly discussed the General Assembly's intent in enacting R.C. 2745.01 when it decided the constitutionality of the statute in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066 and *Stetter v. R.J. Corman*

Derailment Servs., L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092. *Stetter* found that “R.C. 2745.01 embodies the General Assembly’s intent to significantly curtail an employee’s access to common-law damages for what we will call a ‘substantially certain’ employer intentional tort.” *Stetter* at ¶ 27; *See also Kaminski* at ¶ 57 (explaining that the legislative history indicates that the General Assembly sought to narrow the common-law scope of employer-intentional torts); *Accord Hewitt* at ¶ 25 (“As we explained in *Kaminski*, the statutory restriction of intentional-tort liability ‘is supported by the history of employer-intentional tort litigation in Ohio and by a comparison of the current statute to previous statutory attempts.’”), quoting *Kaminski* at ¶ 57. Expanding the definition of “equipment safety guard” and thereby the availability of recovery for employer-intentional torts is inconsistent with legislative intent.

Since the *Hewitt* definition of “equipment safety guard” embodies the plain and ordinary meaning of the term as reflected in the common dictionary definition and expanding the definition would be contrary to the General Assembly’s intent in adopting R.C. 2745.01, the Court should expressly hold that an “equipment safety guard” is a device that is designed to shield the *operator* of the equipment.

“[I]t is not the role of the courts to establish their own legislative policies or to second-guess the policy choices made by the General Assembly.” *Kaminski* at ¶ 61. The impact of the expansion of R.C. 2745.01(C) is not limited to employer-intentional torts. Ohio’s principles of statutory interpretation reflect the separate roles of the judiciary and legislature. Over time, judicial expansion of statutes beyond the plain meaning of their words or, as discussed below, removal of words from statutes will unsettle the balance of power between the judiciary and the legislature.

Proposition of Law No. II: The “Deliberate Removal” of an Equipment Safety Guard Occurs Only When There Is Evidence the Employer Made a Deliberate Decision to Lift, Push Aside, Take Off or Otherwise Eliminate the Guard from the Machine.

Allowing a presumption of an employer’s intent to injure absent evidence of the employer’s deliberate decision to lift, push aside, take off, or otherwise eliminate a guard from a machine would be contrary to the plain language of the statute and the General Assembly’s intent.

An employer will not be liable for damages resulting from an intentional tort “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.” R.C. 2745.01(A). However, R.C. 2745.01(C) creates a presumption of intent to injure:

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.

When construing a statute, “[t]he court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act * * *.” *State ex rel. McGraw v. Gorman*, 17 Ohio St.3d 147, 149, 478 N.E.2d 770 (1985), quoting *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 270 (1948), paragraph five of the syllabus. Under the plain language of R.C. 2745.01(C), it is not sufficient that an employee simply show that an equipment safety guard is absent. Rather, the employee must show that it was the employer that removed the guard and that such removal was deliberate: “Deliberate removal by an employer of an equipment safety guard * * * creates a rebuttable presumption that the removal * * * was

committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.” (Emphasis added.) R.C. 2745.01(C). The General Assembly could have drafted R.C. 2745.01(C) to state “Removal of an equipment safety guard * * * creates a rebuttable presumption” The General Assembly included the phrases “deliberate removal” and “by an employer.” Ohio courts cannot ignore the deliberate inclusion of these conditions by not requiring evidence of both. *See State ex rel. McGraw v. Gorman* at 149; *Kaminski* at ¶ 61.

Ohio courts must require evidence of “deliberate removal” as that word is commonly defined. As with “equipment safety guard,” *Hewitt* provided the meaning of “deliberate removal”: “[T]he “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* at ¶ 30. In identifying the meaning of “deliberate removal,” *Hewitt* cited the Eighth District’s decision below in *Hewitt and Fickle v. Conversion Technologies Intl., Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960, which relied upon Merriam-Webster’s Collegiate Dictionary (10 Ed. 1996) to determine the plain and ordinary meaning of the statute’s language. Ohio courts must enforce the General Assembly’s intent by giving meaning to all words in the statute, including “deliberate removal” and by giving words their plain and ordinary meaning where undefined.

The necessity of showing *deliberate* removal by the *employer* is supported by the context of R.C. 2745.01 as a whole and the General Assembly’s intent to restrict employer-intentional torts as identified in *Kaminski* and *Stetter*. “[S]ince words in a statute do not exist in a vacuum, they must be read in context of the whole statute.” *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234, ¶ 33; *See also* R.C. 1.42 (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage.”). Deliberate

removal of an equipment safety guard by an employer creates a presumption of intent to injure. Allowing the actions of third parties or the accidental removal of a guard by an employer to create a presumption of an employer's intent to injure is contrary to "the General Assembly's efforts to restrict liability for intentional tort by authorizing recovery 'only when an employer acts with specific intent.'" *Hewitt* at ¶ 24 (supporting its limited definition of "equipment safety guard"), quoting *Stetter* at ¶ 26; *See also Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 23-25.

In finding a genuine issue of material fact existed as to whether Pro-Pak deliberately bypassed the safety bumper, the appellate court found:

Based on the expert testimony, reasonable minds could have concluded that the bumper compressed enough to shut off power to the transfer car, the power was not shut off, and the only way the bumper could have compressed as far as it did without shutting off the power was if the proximity switch had been deliberately bypassed.

Pixley v. Pro-Pak Indus., Inc., 2013-Ohio-1358, 988 N.E.2d 67, ¶ 24 (6th Dist.). The employee offered only conclusory statements by its experts to support its position that the bumper's sensor had been knowingly disabled or bypassed and no evidence of a deliberate decision to remove or eliminate the sensor. The employee did not present evidence that it was Pro-Pak, and not a rogue employee or third party who performed the alleged disabling or bypassing. Thus, Pro-Pak is faced with a presumption of intentionally injuring its employee despite a complete absence of evidence that it took any action, deliberate or not, that resulted in the removal of an equipment safety guard.

Faced with a similar lack of evidence of deliberate removal by an employer, *Conley v. Endres Processing Ohio, LLC*, 3d Dist. Wyandot No. 16-12-11, 2013-Ohio-419, ¶ 15-20 applied *Hewitt* and affirmed summary judgment because there was no evidence of the employer's

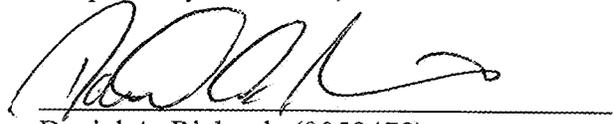
“deliberate decision to lift, push aside, take off, or otherwise eliminate” the metal plate at issue. The court emphasized that there was no evidence that the removal of the metal plate was the result of any action or failure of the employer, let alone a deliberate one. *Id.* at ¶ 20; *See also Roberts v. RMB Enters.*, 197 Ohio App.3d 435, 2011-Ohio-6223, 967 N.E.2d 1263, ¶ 24 (12th Dist.) (affirming summary judgment where there was no evidence that the employer deliberately removed the alleged safety feature); *Accord Wineberry v. N. Star Painting Co.*, 2012-Ohio-4212, 978 N.E.2d 221, ¶ 39-41 (7th Dist.) (affirming summary judgment for employer where employee failed to present evidence that the employer deliberately removed guardrails).

By finding a material issue of fact despite the employee’s failure to present evidence of the employer’s deliberate decision to lift, push aside, take off, or otherwise eliminate a guard from a machine, the appellate court allowed a presumption of intent to injure without evidence of the employer’s “deliberate removal” of an “equipment safety guard” as those terms are commonly given meaning. The appellate court’s decision contradicted the plain language of R.C. 2745.01 and should be reversed.

CONCLUSION

The appellate court improperly expanded the availability of a presumption of intent to injure beyond the plain language of R.C. 2745.01(C). The Court should reiterate the conditions of R.C. 2745.01(C) as identified and explained in *Hewitt*, reverse the judgment of the Sixth District, and enter judgment in favor of Appellants on the employee's claim for an employer-intentional tort.

Respectfully submitted,



Daniel A. Richards (0059478)

(Counsel of Record)

Shawn W. Maestle (0063779)

Martha L. Allee (0088180)

Weston Hurd LLP

1301 East 9th Street, Suite 1900

Cleveland, Ohio 44114-1862

drichards@westonhurd.com

smaestle@westonhurd.com

mallee@westonhurd.com

Counsel for Amicus Curiae,

Ohio Association of Civil Trial Attorneys

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Appellants has been served by regular U.S. mail, this 31st day of October, 2013 upon:

Timothy C. James, Esq.
Lorri J. Britsch, Esq.
Ritter, Robinson, McCreedy & James, Ltd.
405 Madison Avenue, Suite 1850
Toledo, Ohio 43604
Counsel for Appellants

Gregory B. Denny, Esq.
Carolyn A. Davis, Esq.
Bugbee & Conkle, LLP
405 Madison Avenue, Suite 1300
Toledo, Ohio 43604
Co-Counsel for Appellants

David R. Grant, Esq.
Plevin & Gallucci Co., LPA
55 Public Square, Suite 2222
Cleveland, Ohio 44113
Counsel for Appellee

Adam J. Bennett, Esq.
Andrew P. Cooke, Esq.
Cooke, Demers and Gleason
3 N. High Street, P.O. Box 714
New Albany, Ohio 43054
*Special Counsel for Involuntary Plaintiff
Ohio Bureau of Workers Compensation*

Preston J. Garvin, Esq.
Michael J. Hickey, Esq.
Garvin & Hickey, LLC
181 East Livingston Avenue
Columbus, Ohio 43215
*Counsel for Amicus Curiae
Ohio Chamber of Commerce*

Robert A. Minor, Esq.
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
*Counsel for Amicus Curiae
Ohio Self-Insurers Association*



Daniel A. Richards (0059478)

Counsel for Amicus Curiae,
Ohio Association of Civil Trial Attorneys