IN THE SUPREME COURT OF OHIO

JOSE GALVAN CAMARA,	)	CASE NO. 2024-0064
	)	
Appellant,	)	
	)	On Appeal From The
v.	)	Court of Appeals for Madison County, Ohio
	)	Twelfth Appellate District
GILL DAIRY, LLC,	)	Case No. CA-2022-10-023
	)	
Appellee.	)	

BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLEE GILL DAIRY, LLC

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I. Introduction

By passing R.C. 2745.01, the General Assembly has statutorily restricted the common-law intentional tort exception to workers compensation immunity. To preserve the General Assembly's intention of narrowing the scope of intentional torts, any exceptions or evidentiary presumptions in the statute that would permit intentional tort liability must be construed narrowly.

This case presents another attempt to expand the common law employer-intentional-tort exception to the Workers Compensation immunity established by the Ohio Constitution and General Assembly. When the General Assembly amended R.C. 2745.01 in 2005 to define "substantially certain to occur" as requiring "deliberate intent to cause an employee to suffer an injury", it specifically "sought to statutorily narrow the common-law definition of employer intentional tort to 'direct intent' torts only." *Kaminski v. Metal & Wire Prods. Co*., 2010-Ohio-1027, ¶ 57. Although R.C. 2745.01(C) allows an evidentiary presumption of "deliberate intent to cause…an injury", the plain and ordinary meaning of that provision is consistent with the statute as a whole, requiring a willful, deliberate act—specifically "deliberate removal…of an equipment safety guard"—that sufficiently implies "intent to injure another" as required by subsection (A). And as the 12th District correctly recognized in its decision below, courts must preserve the intent of the Ohio Constitution and General Assembly by narrowly construing any exceptions or evidentiary presumptions against immunity.

Appellant Camara and *amicus curiae* OAJ ask this Court to employ grammatical nuances to broadly construe R.C. 2745.01(C) and to infer direct intent to injure from an employer's inaction after learning of the absence of a safety guard. This argument is inconsistent with the context of subsection (C), and it also runs contrary to the intent of the statute as a whole, as

expressed in R.C. 2745.01(B). Moreover, it violates the rule of narrow construction of exceptions to immunity. Adopting the interpretation urged by Camara and OAJ would expose Ohio employers to intentional tort lawsuits for nothing more than an employer's knowledge of a piece of broken machinery or inadvertent reassembly. Such knowledge is neither "deliberate removal" of an equipment safety guard nor evidence of "intent to injure".

Nor should the Court yield to the temptation to fashion a remedy beyond the plain language of the statute. Unless the evidence shows "deliberate removal" of a safety guard as required by R.C. 2745.01(C), the statute otherwise requires direct evidence of "intent to injure." While such evidence may be difficult, that is the policy decision of the General Assembly and is consistent with the immunity granted under the Ohio Constitution. Workers should not receive double compensation, and employers should not be exposed to double liability—paying both their Workers Compensation premiums and still facing civil liability in court—unless the injured worker can meet the criteria plainly set forth by the General Assembly.

II. Interest of *Amicus Curiae* Ohio Association of Civil Trial Attorneys

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization of attorneys, supervisory or managerial employees of insurance companies, and other business executives who devote a substantial portion of their time to the defense of civil damage lawsuits and the management of insurance claims brought against individuals, corporations, and governmental entities. For over fifty years, OACTA has actively supported efforts to ensure that Ohio's civil justice system is fair and efficient by promoting predictability, stability, and consistency in Ohio's constitutional safeguards, statutory laws, and legal precedents.

On issues of importance to its members, OACTA has filed *amicus curiae* briefs in significant cases before federal and state courts in Ohio advocating and promoting public policy and sharing its perspective with the judiciary on matters that will shape and develop Ohio law.

III. Statement of Facts

OACTA adopts the Statement of Facts contained in the merit brief of Appellee Gill Dairy, Inc.

IV. Argument

Camara and OAJ ask the Court to apply a grammatical analysis to the specific words "deliberate removal" in R.C. 2745.01(C). But before diving into the grammatical weeds, it is helpful to first study the entire forest. The meaning of R.C. 2745.01(C) becomes clear when it is understood in the context of the constitutional and statutory framework of Workers Compensation immunity and the passage of R.C. 2745.01 as a whole.

OACTA respectfully submits that when R.C. 2745.01 is understood as a whole, Proposition of Law #1 is seen as a loaded question: it incorrectly assumes that, with the right proof, "deliberate removal" in R.C. 2745.01(C) can be broadly construed to include "deliberately not replacing". As explained below, that is an incorrect approach to statutory construction. As an exception or evidentiary presumption against immunity, R.C. 2745.01(C) must be construed narrowly and, as this Court has already stated in *Hewitt v. L.E. Myers Co*., 2012-Ohio-5317, can only mean physical separation or "removal". Any other act, including deliberately not replacing a broken safety guard, must otherwise meet the standard of R.C. 2745.01(A), i.e., that it was "committed…with the intent to injure another".

1. Employers who comply with Workers Compensation statutes are granted constitutional and statutory immunity from civil liability.

Article II, Section 35 of the Ohio Constitution creates the worker's compensation system, authorizing "a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom." The Constitution explicitly restricts the remedies of injured workers and grants immunity to compliant employers, stating:

> Such compensation shall be *in lieu of all other rights to compensation*, or damages, for such death, injuries, or occupational disease, and *any employer who pays the premium* or compensation provided by law, passed in accordance herewith, *shall not be liable to respond in damages at common law or by statute* for such death, injuries or occupational disease.

Id. (*emphasis* added). Accordingly, Ohio courts have long recognized that "an employer in compliance with the workers' compensation laws of this state" enjoys "statutory and constitutional immunity from suits arising out of employment." *Kendall v. U.S. Dismantling Co.*, 20 Ohio St.3d 61, 65 (1985).

2. Statutes are to be construed as a whole and given their ordinary meaning.

The constitutional separation of powers requires Ohio's judicial branch to defer to the General Assembly as Ohio's "ultimate arbiter of public policy." *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 21. All legislative power of the state is vested in, and solely exercised by, the General Assembly. Article II, Section 1, Ohio Constitution; *Kaminski,* 2010-Ohio-1027, ¶ 60. "This authority includes the power to alter, revise, modify, or abolish the common law as the General Assembly may deem necessary to further the common good." *Id.* Statutes passed by the General Assembly establish the public policy of the state. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 566 (1998).

Thus, when interpreting statutes, this Court has routinely stated that "the primary goal in construing a statute is to ascertain and give effect to the intent of the legislature." *State v. Taylor*, 2014-Ohio-460, ¶ 14, quoting *State v. Robinson*, 2009-Ohio-5937, ¶ 18.

"The intent of the General Assembly must be determined primarily from the language of the statute itself." *Stewart v. Vivian*, 2017-Ohio-7526, ¶ 24. Courts must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Natl. Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

Accordingly, it is a cardinal rule of statutory interpretation that the words in a statute "should be construed in their ordinary and natural meaning, and be given the meaning ordinarily attributed to them unless a different intention appears in the statute." *State ex rel. Gareau v. Stillman*, 18 Ohio St.2d 63, 64, (1969).

It was precisely that rule that directed this Court's ruling in *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 2012-Ohio-5685, where the Court declined to broadly interpret "equipment safety guard" to include stand-alone safety equipment such orange cones, reflective vests, and retractable gates. The Court noted "that 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." *Id.*, ¶ 29.

Applying these principles to the interpretation of R.C. 2745.01(C), this Court has previously acknowledged the purpose of R.C. 2745.01 as a whole is to "statutorily narrow the common-law definition of employer intentional tort to 'direct intent' torts only." *Kaminski*, 2010-Ohio-1027, ¶ 57. Ohio common law recognizes two types of "intentional tort" claims, i.e., "direct intent" torts where the actor specifically intends a harmful result, and "inferred intent", where the actor may not specifically desire to cause injury but nonetheless is "substantially certain" that

injury would occur. See *Harasyn v. Normandy Metals, Inc*., 49 Ohio St.3d 173, 175 (1990). In amending R.C. 2745.01, the General Assembly removed the "substantial certainty" type of intentional tort as an exception to workers compensation immunity.

The General Assembly achieved this by redefining "substantially certain" to mean "that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death. R.C. 2745.01(B). By redefining "substantially certain to occur", the statute establishes "that only injuries caused by truly intentional acts should be recognized as the basis for an intentional-tort action, and that all other injuries should be compensable only through the workers' compensation system." *Kaminski,* 2010-Ohio-1027, ¶ 85.

Understanding the purpose of R.C. 2745.01 as a whole clarifies the purpose of the evidentiary presumption in subsection (C), which provides:

> (C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

First, it should be noted that R.C. 2745.01(C) does not create a separate or alternate cause of action from a "direct intent" tort. Rather, it is an evidentiary presumption, or alternate means of proof, that the "the removal or misrepresentation *was committed with intent to injure another*…." (*Emphasis* added). Subsection (C) still requires "intent to injure"; it merely construes certain actions as *prima facie* evidence of such intent.

Camara and OAJ focus this Court's attention of the first two words of R.C. 2745.01(C), arguing that "deliberate removal" can be broadly construed to include an "ignored condition".

But this takes two words out of context, and is also inconsistent with the overall intent of the statute.

Camara and OAJ argue that "removal" can be interpreted as a noun, i.e., as a static condition, rather than as a verb, i.e., the act of removing something. But this ignores the rest of subsection (C).

First, "deliberate removal" is immediately followed by the adverbial phrase "by an employer." When "removal" is treated as an action, "by the employer" makes complete sense, defining who performed the action. In contrast, if "removal" is an object or condition of an object, "by the employer" makes no sense.

Moreover, subsection (C) continues to say that "[d]eliberate removal by an employer of an equipment safety guard…creates a rebuttable presumption that the removal or misrepresentation *was committed with intent to injure another*…" (*Emphasis* added). Actions can be "committed with intent", but objects or conditions of objects cannot.

Thus, the internal structure of subsection (C) requires that "removal" must be treated as an action.

More importantly, subsection (C) must itself be read within the broader context of subsection (A), which provides that "the employer shall not be liable unless the plaintiff proves that the employer *committed the tortious act* with the intent to injure another…." (*Emphasis* added). Although Subsection (C) permits circumstantial evidence of "intent to injure", the context of Subsection (A) it plainly requires a "tortious ***act***", which in the case of subsection (C) is "deliberate removal". Thus, both subsections (A) and (C) refer to human action, not the condition of an inanimate object.

Camara and OAJ further argue that "deliberate" can be construed as including "willfully ignored". But this argument likewise ignores the context of Subsection (A) requiring a plaintiff to prove "that the employer *committed the tortious act with the intent to injure another*…." (*Emphasis* added). Ignoring something does not reflect a deliberate intent to inflict harm. It may be negligence, or—at best—an action with common-law "substantial certainty." But it does not rise to the level of "deliberate intent to cause…an injury" as required by R.C. 2745.01(B).

Indeed, this Court noted in *Kaminski* that R.C. 2745.01 harmonizes Ohio's workers compensation laws with the vast majority of jurisdictions nationwide, where "intentional tort" "cannot…be stretched to include accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury." *Kaminski,* 2010-Ohio-1027, ¶ 100. "[E]ven if the alleged conduct goes beyond aggravated negligence, and includes such elements as *knowingly permitting a hazardous work condition to exist*…the conduct still falls short of actual intention to injure that robs the injury of accidental character." *Id.,* fn. 16 (*emphasis* added).

This highlights the analytical flaw in *Thompson v. Oberlander's Tree & Landscape, Ltd.*, 2016-Ohio-1147 (3rd Dist.). In *Thompson*, the Third District stated that evidence of a careless or reckless omission could satisfy R.C. 2745.01(C) because subsection (C) "is not held to the same standard as subsection (A)." *Id.* at ¶35. That is not true. While subsection (C) creates a presumption or an inference, it is nonetheless a presumption of the same "intent to injure" required by subsection (A). *Thompson* dismissed the employer's arguments as incorrectly "focus[ed] on the deliberate intent to injure under R.C. 2745(A)" *Id.* But this ignores the plain

language of subsection (C), which treats "*deliberate* removal" as *prima facie* evidence that the removal "was committed *with intent to injure another*", thus satisfying subsection (A)'s requirement of direct intent. (All *emphasis* added). The plain language and context of both subsections (A) and (C) require deliberate "intent to injure".

3. Exceptions to constitutional and statutory immunities are to be construed narrowly.

Camara, OAJ, and the Third District's decision in *Thompson* argue that "deliberate removal" should be broadly construed to encompass deliberate decisions not to replace or install safety guards. While courts may broaden common law remedies, it would violate the separation of powers and an employer's constitutional immunity to imply an exception to immunity that was not expressly granted by the General Assembly.

Where the Constitution and General Assembly have bestowed an immunity and created specific exceptions or evidentiary presumptions, such exceptions or presumptions must be construed narrowly, for the purpose of preserving the over-arching grant of immunity and respecting the General Assembly's policy decision as to any exception. See *Doe v. Dayton City Sch. Dist. Bd. of Edn*., 137 Ohio App.3d 166, 169 (1999)("Because those exceptions and defenses are in derogation of a general grant of immunity, they must be construed narrowly if the balances which have been struck by the state's policy choices are to be maintained.") Although *Doe* addressed political subdivision immunity, the same rule applies here.

Notably, in *Thompson* the Third District expressly admitted it was broadening the literal interpretation of R.C. 2745.01(C). Quoting the 7th District's analysis in *Wineberry v. N. Star Painting Co*., 2012-Ohio-4212 (7th Dist.), *Thompson* acknowledged that "under a narrow construction [the omission of a guard] might not be considered deliberate removal", but that under

the facts "a broader interpretation of the term "remove" was required." *Thompson*, 2016-Ohio-1147 at ¶ 32, quoting *Wineberry* at ¶ 38.

While courts may broaden remedies when applying common law, they must defer to the policy decisions of the General Assembly when applying statutory law. More specifically, courts are not permitted to judicially enhance a narrow, statutorily-created exception to an immunity. Doing so, even under the guise of "statutory interpretation", entangles the court in policy-making.

Such policy-making is reflected in the *Wineberry* court's decision to add boundaries to its "broader interpretation" of the term "remove." *Wineberry* determined that in order for the failure to install a safety guard to constitute the equivalent of "deliberate removal" under R.C. 2745.01(C), the safety guard must be required by statute, code, regulation, or a manufacturer's instructions. *Wineberry*, 2012-Ohio-4212 at ¶¶ 39-40. *Thompson* likewise recognized that *Wineberry* was placing limits on its "broader interpretation." *Thompson*, 2016-Ohio-1147 at ¶ 32.

Apart from improperly broadening a limited statutory exception to immunity, such additional conditions or requirements are precisely the kind of policy-making that courts ought not to perform. Doing so intrudes into the jurisdiction of the General Assembly as the "ultimate arbiter of public policy". *Arbino*, 2007-Ohio-6948, ¶ 21. It is not for the courts to decide whether statutory exceptions to immunity are too narrow or broad, or the evidentiary presumptions too strict or lenient, and to alter the General Assembly's formulation of public policy.

Thompson also misconstrues this Court's decision in *Hewitt v. L.E. Myers Co.*, 2012-Ohio-5317. In *Hewitt*, this Court determined that "equipment safety guards", as used in R.C. 2745.01(C), means mechanical safety devices on machinery, not free-standing personal protective equipment such as helmets, face shields, gloves, and the like. Although the dissent called the

decision "draconian", the decision complied with the doctrine of separation of powers by narrowly interpreting the General Assembly's grant of an exception to immunity.

Thompson, however, latched onto a discussion in *Hewitt* that is actually *dicta* and not pertinent to the ruling. In *Hewitt*, the injured employer argued that the employer's requirement for him to work close to energized wires without requiring him to wear protective rubber gloves or sleeves amounted to the "deliberate removal" of an equipment safety guard. In discussing "deliberate removal", the Court stated:

> Hewitt argues that "removal" is a broad term that encompasses more than just a physical removal. Although "removal" may encompass more than physically removing a guard from equipment and making it unavailable, such as bypassing or disabling the guard, an employer's failure to train or instruct an employee on a safety procedure does not constitute the deliberate removal of an equipment safety guard.

Hewitt, 2012-Ohio-5317 at ¶ 29.

In *Thompson*, the Third District pointed to these comments to argue that "deliberate removal" could be construed broadly and could include the failure to install a safety guard when assembling a chain saw.

But *Hewitt*'s commentary on "removal" was inconsequential *dicta*. The facts in *Hewitt* did not involve any such "bypassing or disabling"; in fact, *Hewitt* did not involve machinery whatsoever. It is also unclear if the statement construed the word "removal" as used in the statute or in isolation, and it appears at odds with the actual syllabus of the ruling, which is that "deliberate removal" means "a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine." *Id.* at syllabus. To the extent the *Hewitt dicta* signals any broader interpretation of "deliberate removal" than given in the syllabus, it would be at odds with the doctrine of separation of powers—which is recognized and heeded in the *Hewitt* opinion and

syllabus—including that R.C. 2745.01(C) is an exception to immunity that should be construed narrowly, not broadly.

Thompson also postulates a false "circular reasoning" criticism, specifically that R.C. 2745.01(C) cannot require "deliberate intent" in order to prove "deliberate intent" under R.C. 2745.01(A). *Thompson*, 2016-Ohio-1147 at ¶ 30. But this criticism misconstrues the focus of R.C. 2745.01(C). As explained in *Hewitt*, subsection (C) requires evidence of "deliberate removal", i.e., a "careful and thorough" decision to remove the guard. *Hewitt,* 2012-Ohio-5317 at ¶ 29. That is a different action than "deliberate intent to injure". The intent to injure is inferred from the purposeful and deliberate removal of the safety guard, but there is nothing anomalous or circular about requiring proof that the removal was willful and deliberate. Rather, such evidence is consistent with the entire purpose of R.C. 2745.01, which is to limit all employer intentional tort liability to acts of deliberate intent to injure.

4. The OAJ argument would improperly presume a "deliberate intent to injure" even in situations of negligent omission.

Apart from erroneously focusing on the condition of equipment rather than the actions of a person, OAJ's argument would infer "deliberate intent to injure" from a condition where a safety guard was simply broken or inadvertently left off. It presumes "intent to injure" from mere knowledge of a dangerous condition. But as discussed above, this Court has already determined that mere knowledge of a dangerous condition does not satisfy the requirement of R.C. 2745.01 as a whole. See *Kaminski,* 2010-Ohio-1027at ¶ 100 and fn. 16. Indeed, it would nullify the General Assembly's definition of "substantial certainty" in R.C. 2745.01(B) and return Ohio workers compensation jurisprudence to the days of common law.

V. Conclusion

The purpose of R.C. 2745.01 is to strengthen employers' compensation immunity by narrowing the scope of common law intentional tort liability. Because R.C. 2745.01(C) allows an evidentiary presumption of an exception to immunity, it must be construed narrowly in order to preserve the overall purpose of the General Assembly. The decision below of the Twelfth District properly recognized these constraints and should be affirmed.

Respectfully submitted,

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APPENDIX

CITED PROVISIONS OF OHIO CONSTITUTION
(attached)

Article II, Section 1 | In whom power vested

Ohio Constitution / Article II Legislative

Effective: *1953*

The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

Article II, Section 35 | Workers' compensation

Ohio Constitution / Article II Legislative

Effective: *1923*

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all right of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award

established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

CERTIFICATE OF SERVICE

I certify that on this 6th day of August, 2024, a copy of the foregoing was served pursuant to Civ.R. 5(B)(2)(f) via e-mail to all counsel of record reflected on the cover pages of this brief.

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