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## Ohio's Intentional Tort Statute Means What It Says

By Bonnie Kristan and Amy Wentz

On November 20, 2012, in a reversal significant for Ohio employers with workplace injuries, the Ohio Supreme Court held, in *Hewitt v. L.E. Myers*, that an employee's failure to use, or the employer's failure to require an employee to wear, personal protective equipment does not constitute a deliberate removal of an equipment safety guard under Ohio's intentional tort statute.<sup>1</sup>

### Employer Liability: Workers' Compensation Claim Versus Intentional Tort Claim

Ohio's no-fault workers' compensation scheme provides employees with the security of compensation for workplace injuries while, at the same time, providing some assurance to employers that they will not be in court every time an employee claims to have been injured at work. Ohio law carves out a very limited exception to this system, allowing injured employees to pursue an intentional tort claim in circumstances where the employer acted "with the intent to injure another or with the belief that the injury was substantially certain to occur."<sup>2</sup> Although "intent to injure" is typically very difficult to prove, a subsection of the statute creates a rebuttable presumption of an intentional injury when an employee can prove "[d]eliberate removal by an employer of an equipment safety guard."<sup>3</sup>

Plaintiffs' attorneys, hoping to take advantage of the "equipment safety guard" rebuttable presumption, have brazenly attempted to expand the definition of this phrase to include anything from faulty ventilation systems to failed back-up alarms, employment policies, and, as in *Hewitt*, personal protective gear. *Hewitt*, however, closes these floodgates (or at least narrows the opening) for these types of claims by providing a clearer definition of "equipment safety guard" and "deliberate removal."

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1 *Hewitt v. L.E. Myers Co.*, Slip Opinion No. 2012-Ohio-5317, syllabus ¶¶ 2-3.

2 Ohio Rev. Code Ann. § 2745.01(A).

3 Ohio Rev. Code Ann. § 2745.01(C).

## The *Hewitt* Opinion

In *Hewitt*, the plaintiff worked as an apprentice lineman for L.E. Myers Company, an electrical-utility construction contractor. On the day the employee was injured he was replacing old electrical power lines, working from an elevated bucket truck. Although he was required to use protective rubber gloves and sleeves that day, he elected not to because another lineman allegedly told him the protective gear was unnecessary as the lines were de-energized. Unfortunately, however, the coworker was mistaken and the employee received an electric shock and was severely burned when a wire he was handling came into contact with a live wire.

The employee applied for and received workers' compensation benefits and, in addition, he sued his employer, asserting a workplace intentional tort claim. Following the trial, a jury returned a verdict of nearly \$600,000 in the employee's favor, finding that the employer deliberately removed an equipment safety guard – the protective gloves and sleeves – and such deliberate removal amounted to an intent to injure. The court of appeals affirmed the jury verdict, and the employer appealed the case to the Ohio Supreme Court.

The Ohio Supreme Court disagreed with the lower courts and, instead, adopted a stricter interpretation of the intentional tort statute. Following a grammar lesson that would make Strunk and White proud, the court narrowly defined "equipment safety guard" as "a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment."<sup>4</sup> The court also narrowly defined "deliberate removal" of an equipment safety guard to mean the "deliberate decision to lift, push aside, take off, or otherwise eliminate that guard."<sup>5</sup> Pursuant to these definitions, the court concluded that "equipment safety guard" did not encompass generic safety-related items such as personal protective equipment.<sup>6</sup> The court further reasoned that 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."<sup>7</sup>

## Going Forward

The *Hewitt* decision should provide some relief to Ohio employers, as the court's strict interpretation of the "equipment safety guard" provision will, ideally, curb some of the intentional tort lawsuits that creative plaintiffs' counsel had been trying to crowbar into the rebuttable presumption. Nevertheless, workers' compensation rates continue to be a significant budget line-item for almost any employer, and a continued emphasis on workplace safety is the best way to minimize workers' compensation costs, whether such claims are pursued through the system or the courts.

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4 *Hewitt*, at 9.

5 *Id.* at 10.

6 *Id.* at 8 ("To construe 'equipment safety guard' to include any generic safety-related item ignores not only the meaning of the words used but also the General Assembly's intent to restrict liability for intentional torts.").

7 *Id.*