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**Gallagher Sharp Newsflash: The Ohio Supreme Court Narrowly Interprets the Employer Intentional Tort Statute's Equipment Safety Guard Provision**

Today, November 20, 2012, the Supreme Court of Ohio held that as used in R.C. 2745.01(C), Ohio's Employer Intentional Tort Statute, "equipment safety guard" means a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment. The Court also held that the "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.

In *Hewitt v. L.E. Myers Co.*, Slip Opinion No. 2012-Ohio-5317, the plaintiff was working as an apprentice lineman for the defendant replacing old electrical power lines in New London, Ohio. Plaintiff's job was to tie in the new de-energized power line. Company policy required workers to use protective rubber gloves and sleeves in case the lines became energized. Plaintiff admitted gloves were available, but, he claimed that his supervisor told him that he should not need the gloves and sleeves because the lines were de-energized. While plaintiff was working without protective gloves or sleeves, the wire became energized and he was severely burned.

Plaintiff filed suit claiming that the defendant employer, in effect, "removed" the protective gloves and sleeves that were the safety guards creating a barrier between him and the electrical current thus entitling him to a rebuttal presumption of his employer's intent to injure him. The case proceeded to trial and the jury found for the plaintiff. The trial court denied the defendant's motion for judgment notwithstanding the verdict. The Court of Appeals, Eighth Appellate District, affirmed the trial court's ruling finding that protective rubber gloves and sleeves were equipment safety guards within the meaning of R.C. 2745.01(C) and the decision by plaintiff's supervisor to have plaintiff work without the gloves and sleeves amounted to the deliberate removal of a safety guard.

The Supreme Court of Ohio disagreed, holding that for purposes of R.C. 2745.01(C), free-standing items that serve as physical barriers between the employee and potential exposure to injury, such as rubber gloves and sleeves, are not equipment safety guards as they are personal protective items that the employee controls. *Id.* at ¶26. An employee's failure to use them, or an employer's failure to require an employee to use them, does not constitute the deliberate removal by an employer of equipment safety guard. An "equipment safety guard" means "a device that is designed to shield the operator from exposure to injury by a dangerous aspect of the equipment." *Id.* The "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. *Id.* at ¶30.

*Hewitt* puts an end to the confusion created by conflicts among various appellate districts - - confusion that enabled plaintiffs' attorneys a way to render it impossible for employers to obtain summary judgment when it was asserted that a safety feature had been removed, even if such feature was free-standing and the removal was unintentional. It is anticipated that this decision

will likely lead to the reversal and/or dismissal of numerous pending cases throughout Ohio's court system and will result in fewer employer intentional tort cases being filed.

Justice Pfeifer dissented, raising concerns that the majority's decision is unduly restrictive and will fail to include important safety features such as kill switches and mechanisms for slowing machines down. Justices O'Connor and McGee Brown concurred in judgment only. A copy of the full opinion can be found at: <http://www.sconet.state.oh.us/rod/docs/pdf/0/2012/2012-Ohio-5317.pdf>

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