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IN THE SUPREME COURT OF OHIO

THOMAS BEYER, *et al.*,

*

CASE NO. 2012-1283

APPELLEES/
CROSS-APPELLANTS,

*

ON APPEAL FROM THE LUCAS
COUNTY COURT OF APPEALS
SIXTH APPELLATE DISTRICT

*

vs.

*

RIETER AUTOMOTIVE NORTH
AMERICAN, INC., *et al.*,

*

Court of Appeals Case No. C2011-1110

APPELLANTS/
CROSS-APPELLEES.

*

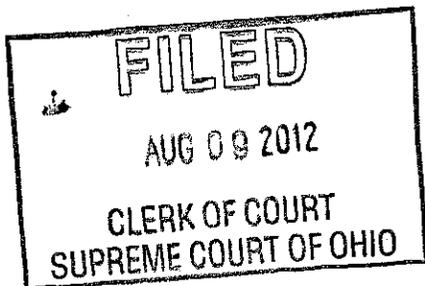
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NOTICE OF CROSS APPEAL OF
THOMAS H. BEYER and SHERRY BEYER

* * * * *

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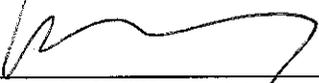


Appellees Thomas H. Beyer and Sherry Beyer hereby give notice of a cross appeal to the Supreme Court of Ohio from the Decision and Judgment of the Lucas County Court of Appeals, Sixth Appellate District, journalized in Case No. CL2011-1110 on June 22, 2012. This case is one of public or great general interest.

Respectfully submitted,

Spitler & Williams-Young Co., L.P.A.

By



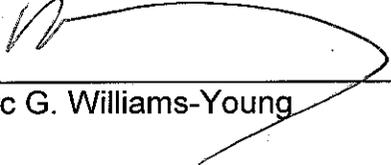
Marc G. Williams-Young

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Notice of Cross Appeal was mailed by first-class U.S. Mail, postage prepaid, to, Shawn W. Maestle and Jeffrey L. Tasse, Weston Hurd LLP, The Tower at Erieview, 1301 East 9th Street, Suite 1900, Cleveland, Ohio 44114-1862 this 8th day of August, 2012.

Spitler & Williams-Young Co., L.P.A.

By



Marc G. Williams-Young

Bates

MANDATE

THE STATE OF OHIO, LUCAS COUNTY, ss

i, BERNIE QUILTER, Clerk of Common Pleas Court and Court of Appeals, hereby certify this document to be a true and accurate copy of entry from the Journal of the proceedings of said Court filed 012212 on case number L11-1110.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name officially and affixed the seal of said court at the Courthouse in Toledo, Ohio, in said County, this 22 day of JUNE A.D., 2012

BERNIE QUILTER, Clerk

SEAL

By [Signature] IN THE COURT OF APPEALS OF OHIO
Deputy SIXTH APPELLATE DISTRICT
LUCAS COUNTY

FILED
COURT OF APPEALS
2012 JUN 22 A 8:00
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

Thomas H. Beyer, et al.

Court of Appeals No. L-11-1110

Appellants

Trial Court No. CI0200908668

v.

Rieter Automotive North American,
Inc., et al.

DECISION AND JUDGMENT

Appellee

Decided: JUN 22 2012

Marc G. Williams-Young and Elaine B. Szuch, for appellants.

Jeffrey L. Tasse and Brandon M. Fairless, for appellee.

HANDWORK, J.

{¶ 1} This is an appeal from a summary judgment issued by the Lucas County Court of Common Pleas, granted in favor of appellee regarding appellants' claims related to exposure to silica-containing substances. Because we conclude that the trial court erred in its interpretation of the definition of "equipment safety guard," we reverse and remand.

E-JOURNALIZED

JUN 22 2012

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Assignment of Error 3: The trial court erred in concluding that a face mask is not an "equipment safety guard" under R.C. 2745.01(C).

Assignment of Error 4: The trial court erred in concluding that Appellant Thomas Beyer did not show "specific intent" under R.C. 2745.01(A), (B).

Assignment of Error 5: The trial court erred in applying the "specific intent" standard.

Assignment of Error 6: The trial court abused its discretion in failing to permit Appellant Thomas Beyer to submit a Surreply.

I.

{¶ 5} We will address appellants' first, second, and third assignments of error together. Appellants assert in their first assignment of error that the trial court erred in granting summary judgment to appellee on their claim for employer intentional tort. In their second and third assignments of error, appellants argue that the trial court erred in its interpretation of "equipment safety guard" under R.C. 2724.01.

{¶ 6} The standard of review of a grant or denial of summary judgment is the same for both a trial court and an appellate court. Civ.R. 56(C); *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of facts, if any, * * * show that there is no genuine issue as to any material

fact" and, "construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C).

{¶ 7} R.C. 2745.01, the employer intentional tort statute, provides in pertinent part:

(A) In an action brought against an employer by an employee * * * for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable 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.

(B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

(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.

{¶ 8} The legislative intent behind R.C. 2745.01 is to permit recovery for employer intentional torts when an employer acts with specific intent to cause an injury, a

disease, a condition, or death, subject to the rebuttable presumption and exclusions in subsections (C) and (D) of that section. See *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, 885 N.E.2d 204, ¶ 17; *Laminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 56. Nevertheless, R.C. 2745.01 does not wholly eliminate the common-law cause of action for an employer intentional tort. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, paragraph three of the syllabus. The statute does, however, “significantly [limit] lawsuits for employer workplace intentional torts.” *Id.* at ¶ 28, citing *Talik, supra*.

{¶ 9} We have previously discussed the possible interpretation of the term “equipment safety guard” as used in R.C. 2745.01. See *Fickle v. Conversion Techs. Int'l Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960. Since the General Assembly did not define this term, “[i]n the absence of clear legislative intent to the contrary, words and phrases in a statute shall be read in context and construed according to their plain, ordinary meaning.” *Id.* at ¶ 29 (quoting *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135, 137, 522 N.E.2d 477 (1988)). Addressing the scope of this statutory term, we determined in *Fickle* that a “jog control and emergency stop cable” were not equipment safety guards for the purposes of the presumption in R.C. 2745.01(C). *Id.* Thus, in *Fickle*, we determined that the failure to provide proper training or safety instructions did not constitute the removal of a safety guard. *Id.* We also concluded that there was no evidence that the failure to reconnect an emergency stop cable, after

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maintenance, was deliberate, and therefore, did not constitute an intentional or
“deliberate” action by the employer. *Id.* Therefore, the outcome of that case did not turn
particularly on whether the particular devices involved were equipment safety guards, but
rather on the fact that no intent could be imputed to the employer by the evidence
presented.

{¶ 10} We now again interpret the meaning of the vague term “equipment safety
guard.” “[E]quipment” is defined as “the implements (as machinery or tools) used in an
operation or activity[.]” *Barton v. G.E. Baker Constr., Inc.*, 9th Dist. No. 10CA009929,
2011-Ohio-5704, ¶ 10, citing Webster's Third New International Dictionary 768 (1993).
“[S]afety” is defined as “the condition of being safe: freedom from exposure to danger:
exemption from hurt, injury, or loss [.]” *Barton, supra*, citing Webster's Third New
International Dictionary at 1998. As we stated in *Fickle*, “guard” may be defined as “a
protective or safety device; *specif*: a device for protecting a machine part or the operator
of a machine.” (Emphasis added.) Merriam-Webster's Collegiate Dictionary 516 (10th
Ed.2000). A “guard” may also be “a fixture or attachment designed to protect or secure
against injury * * *.” *Barton, supra*, citing Webster's Third New International
Dictionary at 1007.

{¶ 11} Subsequent to our decision in *Fickle*, the term “equipment safety guard”
has been interpreted more broadly in an Ohio appellate court. In *Hewitt v. L. E. Myers
Co.*, the Eighth District Court of Appeals determined that protective rubber gloves and
sleeves to be worn by electrical workers were equipment safety guards. *Hewitt*, 8th Dist.

No. 96138, 2011-Ohio-5413, ¶ 30. The *Hewitt* court reasoned that the gloves and sleeves “are equipment designed to be a physical barrier, shielding the operator from exposure to or injury by electrocution (the danger).” *Id.* The *Hewitt* court further stated:

Had the General Assembly envisioned that the presumption would be limited to injuries attributable to a “safety guard” that should have been attached to machinery “which employees are required to operate,” then such terms would have been included in R.C. 2745.01(C). A reading reveals that these terms are absent from the statute. If we accept L.E. Myers' interpretation, then employees who, by the very nature of their profession, work with equipment other than a machine or press would be barred from recovery under R.C. 2745.01(C). *Hewitt* points out this court's recent decision in *Houdek v. ThyssenKrupp Materials N.A., Inc.*, Cuyahoga App. No. 95399, 2011-Ohio-1694, where we stated that the “employer tort has not been abolished, but rather constrained. Whether an employer tort occurs in the workplace depends on the facts and circumstances of each case.” *Id.* ¶ 11. For the following reasons, we find that there was substantial evidence that L.E. Myers deliberately removed an equipment safety guard.

We agree with the reasoning in *Hewitt* and now conclude 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.

{¶ 12} In this case, like the protective rubber gloves in *Hewitt*, the face masks at the plant were personal protection equipment used in conjunction with other machinery or work and were necessary to prevent exposure to injury. According to Beyer, appellee knew that those masks were locked up at certain times, preventing their use, but still required employees to perform jobs under conditions in which breathing in silica dust was certain to occur. The unavailability of the masks allegedly caused appellant, still required to perform his job, to be directly exposed to toxic dust and chemicals.

{¶ 13} Modifying our decision in *Fickle*, we more broadly construe R.C. 2745.01(C) to include free standing equipment, such as face masks, within the scope of an "equipment safety guard." To exclude the face masks in this case, would be to permit, if not invite, an employer to escape liability for intentional tort acts by purporting to provide protective equipment which is never actually distributed or made available to their employees. Consequently, for the purposes of summary judgment, we conclude that appellant presented sufficient evidence to establish a rebuttable presumption under R.C. 2745.01(C) of the employer's deliberate intent to injure due to the removal of an equipment safety guard. Therefore, we conclude that the trial court erred in granting summary judgment as to appellants' claim for employer intentional tort.

{¶ 14} Accordingly, appellants' first, second, and third assignments of error are well-taken. Appellants' fourth, fifth, and sixth assignments of error are moot.

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{¶ 15} The judgment of the Lucas County Court of Common Pleas is reversed and remanded for proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Thomas J. Osowik, J.
CONCUR.

Peter M. Handwork

JUDGE

Mark L. Pietrykowski

JUDGE

Thomas J. Osowik

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.