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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.

\*

\* \* \* \* \*

**APPELLEES THOMAS H. BEYER and SHERRY BEYER'S  
MEMORANDUM IN OPPOSITION TO JURISDICTION and  
JURISDICTIONAL MEMORANDUM ON CROSS APPEAL**

\* \* \* \* \*

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## Introduction

The facts in Plaintiffs-Appellees' case reveal that Defendant-Appellant Rieter Automotive North American Inc., (hereinafter "Rieter") deliberately removed face guards, particularly on the weekend clean-ups when they were often locked away, dangerously exposing Mr Beyer to inhalation of silica. The Sixth District below applied the plain and ordinary meanings of the words "equipment safety guard" as found in R.C. 2745.01 and applying this meaning, Mr. Beyer has met the definition of an "equipment safety guard". Under R.C. 2745.01(C) this creates a *rebuttable presumption* that the removal was committed with intent to injure and therefore summary judgment is inappropriate. In addressing Mr. Beyer's First, Second and Third Assignments of Error, the Appellate Court below correctly found that summary judgment was granted in error by the trial court.

## Statement Of The Case And Facts

### A.

Thomas H. Beyer brings this case against Rieter for the injuries, namely bilateral silica pneumoconiosis, he received as a result of his exposure to silica-containing substances. (Complaint at 14) This disease has forced him to stop working and has severely limited the things he is able to do. (Thomas H. Beyer Deposition, p. 37) There is no cure for this disease. His last day that he was able to work was in April 2008. (Beyer Depo., p. 37)

As a result of the injuries to her husband, Sherry Beyer brings a claim against Rieter for the services, counsel, love and consortiums which she would have enjoyed but for the conduct of Rieter. (Complaint at 24)

Rieter filed a motion for summary judgment asking that the trial court grant it judgment as a matter of law. The trial court granted the motion by Judgment Entry Granting Summary Judgment filed on April 14, 2011. On June 22, 2012, the Sixth District Court of Appeals reversed the judgment of the Lucas County Court of Common Pleas and remanded the proceedings.

### **Statement of Facts**

#### **A. Job Duties**

Mr. Beyer started working at what was known as Globe Industries located at 645 North Loyal Dorch Road, Oregon, Ohio in 1974. (Beyer Depo., p. 40) He was eighteen years old. (Thomas H. Beyer Affidavit, attached to Plaintiff's Memorandum in Opposition at Exhibit 1) The company became Rieter Automotive North American Inc. in June of 1995.<sup>1</sup> (Defendant's Answer to Plaintiff's First Set of Interrogatories) Rieter makes sound deadening materials for automobiles. (Thomas H. Beyer Affidavit) Over the years, Mr. Beyer worked a variety of jobs all over the plant. (Beyer Depo., p. 56-62) Mr. Beyer worked in the entire plant which consisted of a fiber area, a damper area, a molding area and a warehouse. (Defendant's Answer to Plaintiff's Interrogatory No. 10)

#### **B. Dangerous Materials**

Mr. Beyer's silicosis is due to his exposure to limestone and mica while working at Rieter. (Beyer Depo., p. 88) "The company makes sound deadening materials for

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<sup>1</sup> Globe Industries, Inc. was owned by Glöbe Acquisition Corporation. Rieter Acquisition acquired Globe Acquisition Corporation in June 1995. Globe Acquisition was merged into Rieter Acquisition Corporation. Globe Industries, Inc (then owned by Rieter Acquisition Corporation) changed its name several times and eventually to Rieter Automotive North America, Inc. (Defendant's Answers to Plaintiff's Interrogatories)

automobiles. It would mix either asphalt, limestone, or asbestos at one point and then mica, in a closed mixer inside the plant. The asphalt and limestone were pumped into the plant from outside storage facilities into a mixer." (Beyer Affidavit) Further, as Mr. Beyer understands it, limestone "has been in there almost the entire time." (Beyer Depo., p. 88)

Q. When did you work with it or how did you work with it [limestone]?

A. It got mixed in with the asbestos. That was upstairs here, line 1, limestone tanks outside but it was always over - I would say Rieter is like a quick-fix place, especially Globe was. I don't know today if they changed it, but there would always be a lot of leaks or stuff blowing out and -  
(Beyer Depo., p. 88)

Mr. Beyer testified that the dust and air were especially bad on the weekends when they would do clean-ups.

Q. Where the tanks were?

A. All over inside. Now, when we did clean-up or there was a breakdown, a plug in the line, if we had to blow down, which would be on the back of this line, sometimes on the weekends, you would see dust up in the cafeteria.  
(Beyer Depo., p. 89)

After he received his diagnosis, but while he was still working at Rieter, Mr. Beyer took photographs of how the plant looked on these weekend clean-ups. (See photographs attached to Thomas Beyer Affidavit, at Exhibit 1 )

Mr. Beyer obtained an independent consultation from expert Roger L. Wabeke. Mr. Wabeke is a board certified industrial hygienist, chemical safety engineer, and occupational toxicologist with over 45 years experience. (Affidavit of Roger L. Wabeke) Mr. Wabeke had the opportunity to interview Mr. Beyer. He also reviewed various documents in the case including the VSSR investigation, documents provided by defendant in

discovery, the deposition and discovery responses of the plaintiff, and photographs taken by the plaintiff. Mr. Wabeke has provided a thorough report setting forth his opinions.

Mr. Beyer has been diagnosed with silicosis. (Beyer Aff.) Silicosis is caused by "the inhalation of respirable airborne dust particles of silica." (Wabeke Aff at Exhibit 1, p. 1) Silicosis is a pneumoconiosis and one of other dust diseases. (Wabeke Aff at Exhibit 1, p. 1). Unlike other dust diseases of the lungs, silicosis is progressive even after exposure ceases. That is, one inhaling excessive respirable silica early in their career is a great risk of developing silicosis later in life. (Wabeke Aff. at Exhibit 1, p. 1)

Rieter possessed Material Safety Data Sheets (MSDS) which revealed the presence of silica and the inhalation health hazards of this dust. (Wabeke Aff., at Exhibit 2, p. 3) Silica was present in both limestone and mica dust and powders handled by Mr. Beyer. (Wabeke Aff. at Exhibit 1, p.1)

### **C. Respiratory Face Guards**

Respirators must be selected on the concentration of air contaminants in the employee's breathing zone per OSHA 29 CFR 1910.134: "Respirators shall be selected on the basis of the hazards to which the worker is exposed." Respirators have assigned protection factors. One cannot select the proper respirator without knowing air concentrations to which the worker is exposed." (Wabeke Aff., at Exhibit 1, p. 3)

Mr. Beyer frequently did not have masks available to him.

Q. So they always had those?

A. If they didn't run out or if they was locked in the front office.

Q. All right. Whenever you went to get them, you could get them?

A. No. A lot of times, on the weekends you couldn't get them.

Q. How often did you work weekends?

A. Quite a bit.

\*\*\*

Q. And then did you ever work overtime?

A. Oh, yes.

Q. It would depend on the work?

A. I did a lot of cleanup on the weekends. That's where I made my money.

(Beyer Depo., p. 85, 86)

These weekend shifts were anywhere from 4-16 hours. (Beyer Aff.) Mr. Beyer obtained signatures from a number of employees agreeing that masks were not always available during their employment at Rieter. (Beyer Depo., p. 103) (See Exhibit 3 to Beyer Depo.; See Exhibit 2 attached to Beyer Aff.)

Q. And that's referring to 3M, N95, right?

A. Right.

Q. And you said you have worn those in the past

A. Yes.

Q. And you say there were times when they would run out of them?

A. Run out or locked up or -

Q. But then again the times you wore them were when you chose to wear them. Sometimes they weren't comfortable, et cetera?

A. Right. But ***there were other times I wanted them and they weren't there.***

Q. Tell me when.

A. A lot of times on the clean up. I have no dates.

(Beyer Depo. p. 104) (Emphasis Added)

Again referring to the statement at Exhibit 3 of Mr. Beyer's deposition, defense counsel asked:

Q. In this statement on about the fifth line down, you talk about "Clean-Ups on the weekends masks were not always available."

A. Right

Q. So sometimes they were and sometimes they weren't. Is that correct?

A. Yes.

Q. They were either **locked up in the safe on the weekends** - right?

A. A lot of times, yes.

Q. Or they were **out of masks**?

A. Yes.

(Beyer Depo., p. 108, 109) (Emphasis Added)

Furthermore, Mr. Beyer was concerned about the dust problem and conditions he was forced to work in. Mr. Beyer's testimony is that the company was well aware of what these conditions were and in 2007, or 2008 a meeting was held regarding these concerns:

"When we had a meeting with the plant manager, Tony Pizzaro, and I asked him - I was really concerned with the dust problem and the smoke and I know money was an issue - "Could we put more exhaust fans in the roof to help get this out of the plant?" and his response was "We have to watch what we're pumping outside." Now I believe there was 25 or 20 people there and the plant manager was Tony Pizzaro."

(Beyer, Depo., p. 124)

#### **D. The Disease**

Starting in approximately 2004 Mr. Beyer began to feel ill and it got to where he "couldn't breathe" so he started going to the doctor and was not getting any better. (Beyer Depo., p. 23) In 2006, Mr. Beyer had a lung biopsy done that showed he had silicosis. (Beyer Affidavit) Mr. Beyer has been told that this is a permanent condition and it has no cure. (Beyer Affidavit) Mr. Wabeke verifies that there is no cure for silicosis, but "only symptomatic relief as disease progresses producing more fibrotic scar tissue in exchange tissues." (Wabeke Aff. at Exhibit 1, p.1)

In Mr. Beyer's worker's compensation claim, Rieter has not contested that the exposure at work caused the silicosis. (Beyer Affidavit)

## Arguments

### I. This Case Is Not Of Great Public Interest But Comports With Current Law

Appellants allege that the Sixth District decision below conflicts with decisions in the Ninth, Twelfth, and Fifth Districts. Appellants also allege an “intra-district conflict” claiming that the Sixth District in the instant matter “diverted from its previous analysis of the term ‘equipment safety guard’”. However the cases put forth by Appellants from the various districts demonstrate that the definition of “equipment safety guard”, as found in *Fickle, infra.*, has been applied consistently across the board to the facts unique to each case. The facts of the instant case, a case distinguishable as it involves Personal Protective Equipment, meets this definition and Mr. Beyer has therefore met the requirements of 2745.01(C).

In *Fickle v. Conversion Technologies International* (6<sup>th</sup> Dist. June 17, 2011) 2911 Ohio App. Lexis 2485, the Sixth District agreed with the appellants “that a safety guard encompasses something more than an actual physical structure or barrier erected between the employee and the danger.” In addressing the *Wheri v. Countrymark, Inc.* (May 21, 1990), 3<sup>rd</sup> Dist. Nos. 1-89-13 and 1-89 14, reversed on other grounds, (1991) 61 Ohio St.3d 719 decision (along with the *Vermett v. Fred Christen & Sons, Inc.* (2000) 138 Ohio App. 3d 586) the Sixth District did not adopt such a restrictive definition.

In *Fickle*, the court held that the words of the statute are to be given their “plain and ordinary meaning”. This Court first looked at and defined “deliberate removal” and found that, for the purpose of 2745.01(C), it means “a considered decision to take away or off, disable, bypass, or eliminate, or to render inoperable or unavailable for use.” *Id.* at ¶ 32.

The court in *Fickle* went on to look at “equipment safety guard”. Pointing out:

The General Assembly has not manifested any intent to give ‘equipment safety guard’ or its component terms any technical meaning. There is nothing in the statute or the case law that suggests the General Assembly intended to incorporate any of the various equipment-specific or industry-specific definitions of guard appearing through the administrative or OSHA regulations, or for any agency or regulatory measure to be considered a definitional source. *Fickle* at ¶34

Further the Sixth District stated that R.C. 2745.01 “is not regulatory in nature and is not directed at the removal of an equipment safety guard in any particular industry or from any particular type of machine” *Fickle* at ¶35

In *McKinney v. CSP of Ohio, LLC* (6<sup>th</sup> Dist. June 24, 2011), 2011 Ohio App. Lexis 2637 the Sixth District, using the same definition as it used in *Fickle*, found that the improper programming of a press amounted to the removal of the safety device and reversed the grant of summary judgment.

In looking at the Sixth District’s break down and careful analysis of the definition, Mr. Beyer meets all aspects of “equipment safety guard” as defined by this Court in *Fickle*, and in *McKinney*:

‘Guard’ is defined as ‘a protective or safety device; specif: a device for protecting a machine part or the operator of a machine’ Citing Merriam-Webster’s Collegiate Dictionary at 516. “ ‘Safety’ means ‘the condition of being safe from undergoing or causing hurt, injury, or loss.’” Id. at 1027. “ ‘[E]quipment’ 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

A face guard is certainly a “guard” as it protects the operator of a machine, in this

case a high pressured hose, from inhaling the particles of dust that were sprayed into the open air of Rieter's facility. Rieter admitted in it's deposition that a dust mask is a face guard.

A face guard creates "the condition of being safe" as it protects the wearer from injuries namely respiratory diseases such as silicosis. As above, it "prevents the inhaling of particulate matter by the employee" (Rieter Depo., p. 29) Rieter admitted in it's deposition that it provided these face guards for protective purposes. (Rieter Depo., p. 56)

As far as "equipment" is concerned Mr. Beyer used compressed air to clean the equipment at Rieter. (Wabeke Aff. at Exhibit 1, p.6) Rieter acknowledged that the compressed air hoses were used during the weekend clean-ups. In other words the air hoses are an "implement" used in an "operation or activity", cleaning up the machines.

In looking at Rieter's "Workplace Health and Safety Manual for Oregon, Ohio" (attached to Rieter Depo. at Exhibit 4) it discusses training and the use and maintenance of "PPE" (Personal Protective Equipment) (Rieter Depo., at p. 21) Saying in bold print "employees must wear protective equipment as specified by the company" (Rieter Depo., at p. 21)

The manual further mandates that compressed air is not "to be used to clean or move debris except in an authorized contained environment" which Rieter testified is "*during cleanup when the equipment is down*" (Rieter Depo., at p. 22) (Emphasis Added) Admitting that it authorizes using compressed air during clean up of the plant and equipment. (Rieter Depo., at p. 23 and p. 27)

The Sixth District concluded that an "equipment safety guard", as used in R.C. 2745.01(C) "would be commonly understood to mean 'a device that is designed to shield

the operator from exposure to or injury by a dangerous aspect of the equipment” *Fickle* at ¶43

Here, the Sixth District applied the definition as used in *Fickle* to the facts in Mr. Beyer’s case which directly deals with Personal Protective Equipment. This is distinguishable from the cases listed by Rieter: *Barton v. G.E. Baker Constr, Inc.* 2011-Ohio-504 (9<sup>th</sup> District), *Rober v. RMB Ent’s., Inc.* 2011-Ohio-6223 (12<sup>th</sup> District) or *Beary v. Larry Murphy Dump Truck Serv., Inc.* 2011-Ohio-4977 (5<sup>th</sup> District). All three of these cases apply the definition of “equipment safety guard” as set forth in *Fickle* to the facts of each individual case as the Appellate Court below did to the facts in this case. The differing results are a result of differing facts. The definition, however, has not changed.

Under the definition as set forth in *Fickle*, Mr. Beyer has met the requirements of 2745.01(C) and established that the face mask meets that definition of “equipment safety guard” and therefore a rebuttable presumption exists.

### **III. Should this Court Accept Jurisdiction in this Case, Thomas Beyer’s Fourth, Fifth and Sixth Assignments of Error Should be Considered by this Court**

In the event this Court accepts jurisdiction based on the reasoning in *Hewitt*, Appellees have filed a cross appeal as the Sixth District below did not address Mr. Beyer’s Fourth, Fifth and Sixth Assignments of Error, as set forth in the appeal to the Sixth District as follows:

- (1) Assignment of Error No. 4: Whether trial court erred in concluding that Thomas Beyer did not show “specific intent” under R.C. 2745.01(A), (B).
- (2) Assignment of Error No. 5: Whether the trial court erred in applying the “specific intent” standard.

- (3) Assignment of Error No. 6: Whether the trial court abused its discretion by failing to permit Appellant Thomas Beyer to submit a surreply

It is Mr. Beyer's position that the issues as presented by these assignments of error, should be considered by this Court, should it accept jurisdiction. The issues presented are of great general interest.

**(A) Assignment of Error 4: The Trial Court Erred in Concluding Thomas Beyer Did Not Show "Specific Intent" Under R.C. 2745.01(A) and (B)**

The Appellate Court below did not address the Fourth Assignment of Error which focused on subsections (A) and (B) of the employer intentional tort statute. The trial court erred in finding that Mr. Beyer did not demonstrate that Rieter had a "specific intent to cause and injury" pursuant to R.C. 2745.01(A) and (B).

R.C. 2724.01 provides the requirements for an employer intentional tort:

(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased 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.

Rieter had knowledge that the substances in question were dangerous. Rieter has not contested the fact that Mr. Beyer's silicosis came from his employment (Beyer Aff.) The fact that silica was used in the job processes at first Globe Industries and then Rieter is not contested. (See Defendant's Answers to Plaintiff's Interrogatories) Rieter therefore deliberately placed Mr. Beyer in harm's way when they did not provide him with adequate

protection in the form of a guard: a mask.

**(B) Assignment of Error 5: The Trial Court Erred in Applying the Specific Intent Standard**

The Appellate Court below did not address the Fifth Assignment of Error that dealt with the Eighth Appellate District's decision in *Houdek v. Thyssenkrupp Materials N.A., Inc.*, 2011-Ohio-1694. *Houdek* took a further look at *Kaminski v. Metal & Wire Products Co.*, (2008) 125 Ohio St. 3d 250 and the specific language of the statute. The Eighth District reversed the trial court's granting summary judgment, holding:

Taking the majority at its written word, we proceed on the basis that 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

The court in *Houdek* points out that the trial court found that Houdek was unable to establish the "requisite intent" on the part of Krupp. But what is the "requisite intent"?

According to R.C. 2745.01(A), the 'requisite intent' is described as either the 'the intent to injure' or 'the belief that the injury was substantially certain to occur.' Then in an about-face the statute defines 'substantially certain' as the 'deliberate intent' to injure. R. C. 2745.01(B). These terms are not synonymous. We are left to interpret two terms that are in a state of harmonic dissonance. We cannot harmonize (A) and (B) as is our charge.  
At ¶ 42

The Eighth District further held that the term "belief" must be interpreted objectively and "thus the test is, given the facts and circumstances of the case, what would a reasonably prudent employer believe." at ¶ 45 Analyzing the facts of the case and applying the substantial certain standard the Eighth District found there were genuine issues of material fact in existence. Likewise Mr. Beyer has demonstrated that, if the face guards are deliberately locked away, injury is substantially certain to occur. Rieter has knowledge that limestone and mica cause silicosis, Rieter knows that a mask protects the

employee and can prevent injury, and that to deliberately lock away these masks is tantamount to Rieter having substantial certainty that injury will result.

**(C) Assignment of Error 6: The Trial Court Abused It's Discretion in Failing to Permit Beyer to Submit Surreply**

The Sixth District did not address Mr. Beyer's Sixth Assignment of Error which deals with whether a trial court should consider all discovery matters in ruling on a motion for summary judgment. What should and should not be considered in deciding a motion for summary judgment is an issue that impacts all cases. The trial court below refused to allow Mr. Beyer to submit a surreply in this case. There were additional arguments found in Mr. Beyer's surreply including the *Houdek* case which was released and journalized on April 7, 2011. Counsel filed for leave to file surreply on April 8, 2011 and the trial court denied this motion.

Summary judgment is "a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury." *Dupler v. Mansfield Journal* (1980), 64 Ohio St. 2d 116, 120. This Court has admonished trial courts that they should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the non-moving party. See *Leibreich v. A. J. Refrigeration* (1993), 67 Ohio St. 3d 266, 269.

Rule 56(F), Ohio Rules of Civil Procedure, provides that "the court may refuse application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or make such other order as is just." The civil rule, Rule 56(F), is designed to prevent injustice. As the rule provides, allowing for the preparation of affidavits and other discovery is appropriate to allow the court to address the motions for

summary judgment. In failing to permit Mr. Beyer to submit a surreply with, among other issues, new case law directly on point, the trial court abused it's discretion.

### Conclusion

Based upon the foregoing, it is respectfully asserted that this Court should not accept jurisdiction of the appeal of the Administrator. This case is not one of public or great interest. The Sixth District's definition of "equipment safety guard" is none other than "the plain and ordinary meaning" which different courts have applied this definition as the individual facts of each case dictate. The court of appeals did not err in finding that Mr. Beyer has met the definition of an "equipment safety guard" under R.C. 2745.01(C) creating a *rebuttable presumption* that the removal was committed with intent to injure. However, if this Court does accept jurisdiction, it is respectfully requested Mr. Beyer's Fourth, Fifth and Sixth Assignments of Error be addressed

Respectfully Submitted,

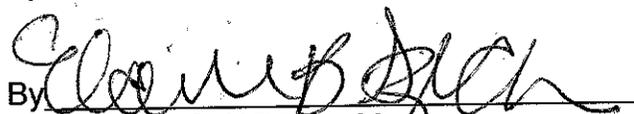
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### Certificate Of Service

This is to certify that a true copy of the foregoing 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 9<sup>th</sup> Street, Suite 1900, Cleveland, Ohio 44114-1862 this 28<sup>th</sup> day of August, 2012.

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