

ORIGINAL

No. 2011-2013

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE No. 10-96138

LARRY HEWITT,
Plaintiff-Appellee,

v.

THE L.E. MYERS COMPANY,
Defendant-Appellant.

FILED
DEC 10 2012
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLANT THE L.E. MYERS COMPANY'S MEMORANDUM OPPOSING RECONSIDERATION

Defendant-Appellant The L.E. Myers Company ("L.E. Myers") opposes Plaintiff-Appellee Larry Hewitt's request for reconsideration. That request is meritless because: 1) it constitutes (improper) reargument; and 2) this Court correctly rejected Hewitt's arguments by a 6-1 vote. The Court's opinion properly adopts a construction of the rebuttable presumption of intent in Ohio's workplace intentional tort statute (R.C. 2745.01(C)) that is consistent with a legislative intent to limit workplace intentional torts and the construction of R.C. 2745.01(C) adopted by a majority of Ohio's appellate courts. Hewitt has already received his meaningful workers' compensation remedy, as well as the benefits of a settlement of a VSSR claim. He is entitled to no more.

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**I. HEWITT'S UNPRESERVED AND UNSUPPORTABLE
"SUBSTANTIAL CERTAINTY" THEORY**

Hewitt's latest request for a remand to address a "substantial certainty" theory under R.C. 2745.01(B) should be rejected. Hewitt's Merit Brief contained extensive argument on this point, centered on the claim "that the jury's verdict can be affirmed on the basis of the 'substantial certainty' test that has been codified in R.C. 2745.01(B)." (See Appellee Merit Br. at 14-15.) His counsel spent a sizable percentage of his oral argument time pressing the very same point. See Oral Argument, Case No. 2011-2013, *Larry Hewitt v. The L.E. Myers Co., et al.*, available at <http://www.OhioChannel.org/MediaLibrary/Media.aspx?fileId=137108> (argument of Hewitt's counsel at 27:11). Notwithstanding the mandate of Supreme Court Practice Rule 11.2(B) that "a motion for reconsideration shall not constitute a reargument of the case," Hewitt now argues — for the third time — that the case should be remanded for consideration of his "substantial certainty" theory. That argument remains misplaced.

First, the Trial Court's entry of a partial directed verdict on Hewitt's theories of liability under R.C. 2745.01(A) and (B) is dispositive, not "immaterial." (Mot. for Recon. at 2.) In its ruling, the Trial Court explained that Hewitt did not make his "case with regard to the other sections under the statute," expressly limiting Hewitt's "theory of recovery * * * to subsection (C)." (Tr. 395, Supp. 129.) The Eighth District Court of Appeals recognized as much. (App. Op. at 5, Merit Br. Appx. 11, explaining that Trial Court found "Hewitt failed to prove his case with respect to R.C. 2745.01(A) and (B)"

and “limited Hewitt’s theory of recovery to R.C. 2745.01(C).”) So did this Court. See *Hewitt v. L.E. Myers Co.*, ___ Ohio St.3d ___, 2012-Ohio-5317, ¶ 10.

The Trial Court’s partial directed verdict became appealable upon the entry of final judgment. *E.g., Sims v. Joyce Mfg. Co.*, 8th Dist. No. 69563, 1996 WL 199828, *3 (Apr. 25, 1996) (oral announcement of partial directed verdict is “vested with finality” upon entry of final judgment). Because Hewitt’s “substantial certainty” theory “seeks to change” the partial directed verdict ordered by the Trial Court, he was required to file a cross-appeal to preserve that theory. App.R. 3(C) (party who “seeks to change * * * an interlocutory ruling merged into the judgment * * * shall file a notice of cross-appeal”); *Williams v. Spitzer Auto World Amherst, Inc.*, 9th Dist. No. 07CA009098, 2008-Ohio-1467, ¶ 23 (cross-appeal required to challenge trial court’s rulings on directed verdict motion). He failed to do so, and the “substantial certainty” theory he wishes to assert on remand is therefore waived.

Second, even if preserved, Hewitt’s “substantial certainty” theory is foreclosed by this Court’s precedents. Hewitt purports to base his “substantial certainty” theory on the “test * * * codified in R.C. 2745.01(B).” But this Court previously explained that the General Assembly’s intent, “as expressed particularly in 2745.01(B), [is] to permit recovery from employer intentional torts *only when an employer acts with specific intent to cause injury[.]*” *Kaminsky v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 56. This Court’s opinion in this case reaffirms that point. *Hewitt*, 2012-Ohio-5317, at ¶ 25 (“A broad interpretation of the phrase does not comport with the General Assembly’s efforts to restrict recovery ‘*only*’ when an employer acts with

specific intent.”) (Emphasis sic.). And the recent opinion in *Houdek v. ThyssenKrupp Materials, N.A.* puts the matter to rest: *Houdek* holds that, “absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee’s exclusive remedy is within the workers’ compensation system.” Slip Opinion No. 2012-Ohio-5685, ¶25.

Since this Court’s authoritative construction of R.C. 2745.01(B) requires a plaintiff to prove “deliberate intent,” Hewitt’s request for a remand to press a broader “substantial certainty” theory is not only waived but also futile. Hewitt admits he cannot establish the required deliberate intent (*see* Appellee’s Merit Br. at 12-13), and his latest request for a remand should be rejected.

II. THIS COURT’S CORRECT INTERPRETATION OF R.C. 2745.01(C)

Next, as he did in his Merit Brief (*see id.* at 21-22), Hewitt confuses statutory construction with the application of this construction to a particular set of facts in a misguided effort to paint this Court’s construction of the phrase “equipment safety guard” in R.C. 2745.01(C) as “extreme.” Far from being “extreme,” this Court’s construction of “equipment safety guard” comports with the construction adopted by every Ohio appellate district (other than the court below) to consider the issue.

Borrowing from a Sixth Appellate District opinion, this Court construed “equipment safety guard” to mean: “a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment[.]” *Hewitt*, 2012-Ohio-5317, ¶ 26, quoting *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, ¶ 43. Several appellate districts had already adopted this

construction, as this Court noted. *See id.* at ¶ 21 (collecting cases from the Fifth, Ninth, and Twelfth Appellate Districts). And while Hewitt claims the Sixth District subsequently backpedalled from *Fickle* (Mot. to Recon. at 4), he fails to note the more recent Sixth District opinion reaffirming *Fickle*. *See Zuniga v. Norplas Indus., Inc.*, 6th Dist. Nos. WD-11-066, WD-11-067, 2012-Ohio-3414, ¶ 23.

Hewitt's real concern is not with this construction of "equipment safety guard," but with how it applies in particular cases. (Mot. to Recon. at 5-6.) He claims "[i]t is not at all clear" this construction covers only those guards attached to machines. (*Id.*) But that surely is the natural import of this Court's construction of "equipment safety guard." Both this Court's opinion and the dissent recognized as much. *Hewitt*, 2012-Ohio-5317, at ¶ 18 ("equipment safety guard" refers to "a protective device on an implement or apparatus to make it safe and to prevent injury or loss"); *id.* at ¶ 34 (Pfeifer, J., dissenting) (recognizing the majority opinion as concluding that "an 'equipment safety guard' means a protective device on an implement or apparatus to make it safe and prevent injury or loss"). So did at least one judge who joined in the Sixth Appellate District opinion on which this Court's construction is based. *Fickle*, 2011-Ohio-2960, at ¶ 50 (Singer, J., concurring) ("equipment safety guards" include only "those devices that prevent the worker from physical contact with the 'danger zone' of the machine and its operation").

Hewitt's attempt to argue that his case somehow still fits within R.C. 2745.01(C) notwithstanding the Court's construction of "equipment safety guard" merely illustrates this point. Hewitt attempts to argue that his personal rubber gloves and sleeves were a

“device” that “shields” lineman from “dangerous equipment” (wires). (Mot. to Recon. at 5.) But that overlooks the key limitation that “equipment safety guards” include only those devices designed to shield “an operator” from injury “by a dangerous aspect of the equipment.” Only mechanized equipment includes devices designed to shield “an operator” from dangerous portions of “the equipment.” It would strain credulity to refer to an apprentice lineman as an “operator” of a deenergized power line, or characterize the deenergized power line as “the equipment” the lineman is operating. As this Court correctly recognized, “personal protective items that the employee controls” are not “equipment safety guards.” *Hewitt*, 2012-Ohio-5317, at ¶26.

Contrary to Hewitt’s suggestion (Mot. to Recon. at 6), this does not imply that only an “operator” may invoke the rebuttable presumption of intent in R.C. 2745.01(C). The point is not that only “operators” of machinery have standing to assert a presumed intent theory, but rather that the device itself must be *designed* to “shield the operator.” Thus, it is the function of the device on the machine that matters — not the identity of the injured employee who attempts to invoke the presumed intent theory. Therefore, like operators, janitorial employees injured by the deliberate removal of a device on a machine falling within this Court’s construction of “equipment safety guard” may assert a claim under R.C. 2745.01(C).

Finally, Hewitt’s argument that his rubber gloves and sleeves were somehow “deliberately removed” continues to ignore the critical distinction between telling a worker he *should not need* to wear a particular safety item and instructing a worker that he *cannot wear* that item. (Mot. to Recon. at 6.) The only evidence of a “decision” to

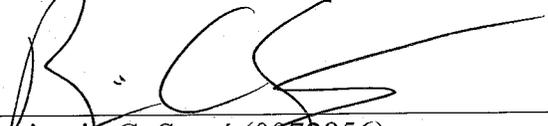
instruct Hewitt that he *should not need* his rubber gloves and sleeves — an alleged “decision” that contradicts the directives of the Daily Briefing Log that Hewitt signed the day of the accident, see Def.’s Exh. J, Supp. 138 — shows this “decision” was predicated on a judgment that Hewitt *would not be harmed*. See Tr. 249-50, Supp. 106-07 (Cromity testifies that “we didn’t think the apprentices *would need to wear* their gloves and sleeves because they *wouldn’t be coming in contact with* any energized conductor.”) (emphasis added); *id.* 141-42 (Hewitt testifies that Law told him he “*shouldn’t need* no rubber” because he “*shouldn’t come into contact with* anything.”) (emphasis added). Hewitt was never told he *could not* wear his rubber gloves and sleeves.

There simply is no evidence that anyone at L.E. Myers made “a careful and thorough decision to get rid of or eliminate” Hewitt’s rubber gloves and sleeves, much less an item that qualifies as an “equipment safety guard.” *Hewitt*, 2012-Ohio-5317, at ¶ 29.

III. CONCLUSION

This Court's opinion correctly construes R.C. 2745.01(C) and properly orders the entry of judgment in favor of L.E. Myers. For all of the above reasons, Hewitt's Motion for Reconsideration should be denied.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing **Appellant The L.E. Myers Co.'s Memorandum Opposing Reconsideration** was served on December 7, 2012 pursuant to Civ.R. 5(B)(2)(c) by mailing it by United States mail to:

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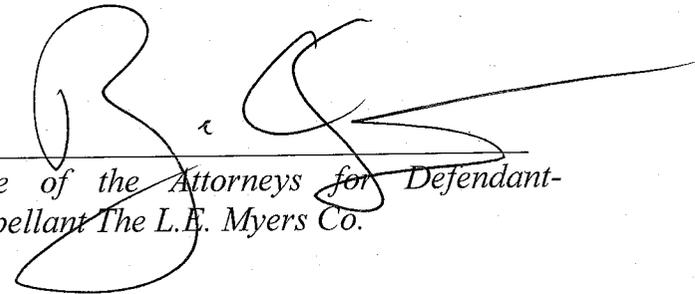
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