

IN THE SUPREME COURT OF OHIO

Phillip Pixley,	:	Case No.: 13-0797
Appellee,	:	On Appeal from the Lucas
v.	:	County Court of Appeals,
	:	Sixth Appellate District
Pro-Pak Industries, Inc., et al.,	:	Court of Appeals
Appellants.	:	Case No.: L-12-1177

FILED

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SUPREME COURT OF OHIO

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS
PRO-PAK INDUSTRIES AND TOLEDO L & L REALTY COMPANY**

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I. INTRODUCTION AND EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case is of public and great general interest to all Ohio employers and employees. Because the case presents issues regarding the definitions of “equipment safety guard” and “deliberate removal” under R.C. §2745.01(C), the case directly impacts the scope of employer intentional tort liability. The two issues in this case include whether the definition of an “equipment safety guard” is limited to protecting only operators and whether the “deliberate removal” of such a guard occurs only when there is evidence the employer made a deliberate decision to lift, push aside, take off or otherwise eliminate the guard from the machine.

In *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, this Court defined an equipment safety guard as “a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment” and defined deliberate removal as “the employer making a deliberate decision to lift, push aside, take off or otherwise eliminate an equipment safety guard from a machine.” In reversing the trial court’s summary judgment, the Sixth District Court of Appeals ignored the definitions of “equipment safety guard” and “deliberate removal” set forth by this Court in *Hewitt* and expanded the definition of “equipment safety guard” to include all employees. Ohio employers and employees have a very real interest in knowing the scope of employer intentional tort liability. The definition of “equipment safety guard” and “deliberate removal”

under R.C. §2745.01(C) must be clear and consistently applied. The appellate court's decision not only undermines the General Assembly's clearly expressed intent to restrict employer intentional tort liability to those cases in which the employer deliberately intends to injure an employee, but also ignores this Court's *Hewitt* definitions of "equipment safety guard" and "deliberate removal".

The Sixth District Court of Appeals' decision causes further confusion by leaving unresolved the persons to be protected within the definition of equipment safety guard and the nature of evidence necessary to show a deliberate removal of such a guard. By expanding the definitions of "equipment safety guard" and "deliberate removal", the appellate court utilizes the rebuttable presumption set forth in R.C. §2745.01(C), to circumvent the General Assembly's clearly expressed intent to limit intentional tort liability to only those situations in which the employer deliberately intends to injure the employee. The Sixth District Court of Appeals' decision and rationale returns employer intentional tort liability to the common law standard and actually requires an employer to prove it did not deliberately intend to injure the employee in order to rebut the presumption created under R.C. §2745.01(C).

The remedy for workplace injuries is the Workers' Compensation system, not the courtroom. If the definition of equipment safety guard is expanded to include all employees, there will be adverse implications to employers. Ultimately, there will be increased litigation as well as potential liability for many workplace injuries.

Pro-Pak respectfully requests the Court to accept the present appeal and clarify whether the definition of an “equipment safety guard” applies to only operators of the equipment and whether the definition of “deliberate removal” requires proof the employer deliberately decided to remove a guard in order to effectuate the General Assembly’s intent of restricting, not expanding, the scope of employer intentional torts.

STATEMENT OF THE CASE AND FACTS

A. Statement Of The Case

This lawsuit arises out of an intentional tort claim. On July 2, 2008, Appellee, Phillip Pixley (“Pixley”), was injured on the job while working as a maintenance employee at Appellant Pro-Pak Industries, Inc. On June 23, 2010, Pixley filed a complaint against Appellants Pro-Pak Industries, Inc. and Toledo L & L Realty Co.

On July 22, 2010, Pro-Pak¹ filed an answer denying it committed an intentional tort. As affirmative defenses, Pro-Pak asserted it was immune from suit as a complying employer under the Ohio Workers’ Compensation Act. Pro-Pak further asserted Pixley’s injuries were the direct and proximate result of his violation of safety rules, standards, procedures or protocol.

On March 12, 2012, Pro-Pak filed a motion for summary judgment. On June 4, 2012, the trial court granted summary judgment in favor of Pro-Pak and

¹ For the purposes of this Memorandum in Support of Jurisdiction, Appellants, Pro-Pak Industries and Toledo L & L Realty Co., who owned the property where Pro-Pak was located, will be collectively referred to as Pro-Pak.

dismissed Pixley's action. Relying on *Fickle v. Conversion Technologies International, Inc.*, (6th Dist. App. No. WM-10-016), 2011-Ohio-2960, the trial court held the definition of an equipment safety guard was to shield the operator from exposure or injury. It is undisputed Pixley was not the operator of the transfer car. The trial court further found that Pixley could not establish Pro-Pak deliberately intended to injure him because Pro-Pak did not require him to work in the path of the transfer car at the time he was injured.

On July 2, 2012, Pixley appealed the trial court's decision. On April 5, 2013, the Sixth District Court of Appeals rendered its decision reversing the trial court's summary judgment. The Sixth District Court of Appeals expanded the definition of persons protected by an equipment safety guard as set forth in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317 and failed to apply the *Hewitt* definition of deliberate removal to the undisputed facts.

B. Facts

On July 2, 2008, Pixley was injured while in the course and scope of his employment. Pro-Pak manufactures corrugated paper containers, boxes, and packaging materials. Pixley worked as a maintenance employee at Pro-Pak.

The product at Pro-Pak is moved from one area to another by conveyors which are situated parallel to each other. The product is transferred between conveyors and throughout the facility by two transfer cars. These transfer cars operate perpendicular to the conveyor lines.

On the day of the accident, a motor for one of the conveyor lines was not working because it had burned out. Pixley went to the conveyor line to write down the model number to order a new motor. While Pixley was bending over on one knee to record the motor's model number, he was hit by the transfer car. The driver of the transfer car was operating it from the back controls instead of the front controls which would have provided a more clear view of the aisleway.

The transfer car was equipped with a siren and strobe lights which operated when the car moved. It is undisputed that the siren and strobe lights were working at the time of Pixley's injury. The transfer car also was equipped with a safety bumper on its leading edge. If compressed, the safety bumper was designed to instantly stop the transfer car. Pixley contends the safety bumper was deliberately bypassed. However, there is no evidence any part of Pixley's body came in contact with the safety bumper at the time of injury.

Before the subject accident, Pixley had been told by another maintenance employee that the new motor for the conveyor line had been ordered and received in the maintenance department. The new motor would have to be installed on a weekend when there was no production. There was no reason for Pixley to be in the aisleway to obtain the model number of the motor. Despite his knowledge that there was only a very narrow gap, perhaps a couple of inches, between the side edge of the transfer car and the end of the conveyor, Pixley placed his leg in the aisleway. Pixley admitted his leg should not have been in the path of the transfer car.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW:

Proposition Of Law No. 1: The Hewitt Court's Definition Of Equipment Safety Guard Is Limited To Protecting Operators Only.

An “equipment safety guard” under R.C.§2745.01(C), includes a device designed to shield the *operator* from exposure to or injury by a dangerous aspect of the equipment. *Hewitt v. L.E. Myers Company*, No. 96138, 2012-Ohio-5317. In *Hewitt*, the Court was asked to determine whether an equipment safety guard for purposes of R.C.§2745.01(C) includes only those devices that shield an employee from injury by guarding the point of operation. *Id.* The Court specifically limited the definition to include an operator, not all employees. *Id.*

Contrary to this Court’s decision in *Hewitt*, the Sixth District Court of Appeals concluded, “. . .upon our examination of *Hewitt*, we do not think the definition of an equipment safety guard should be limited to protecting only operators” (See Decision and Judgment pgs. 8-9). In expanding the definition of equipment safety guard, the Sixth District Court of Appeals ignored this Court’s binding precedent. An Ohio appellate court is bound to follow binding precedent from the Ohio Supreme Court. *See Coniglio v. State Med. Bd. of Ohio*, 10th Dist. no.: 07AP-298, 2007-Ohio-5018. Because the Sixth District Court of Appeal’s decision is contrary to this Court’s recent decision in *Hewitt*, it must be reversed.

The Sixth District Court of Appeals’ expansion of the definition of persons protected by an equipment safety guard cannot be reconciled with this Court’s

holding in *Hewitt*. In *Hewitt*, appellant asserted an equipment safety guard meant a safety device attached to a machine that was intended to guard an employee from injury. This Court addressed the Sixth District Court of Appeals' decision in *Fickle v. Conversation Technologies Internatl., Inc.*, 6th Dist. no. WM-10-016, 2011-Ohio-2960, *modified by Beyer v. Rieter Automotive N. Am., Inc.*, 6th Dist. No. L-11-1110, 2012-Ohio-2807. An expanded definition of persons protected with the definition of an equipment safety guard was rejected.

This Court adopted the definition set forth in *Fickle*. "As used in R.C. 2745.01(C), 'equipment safety guard' means 'a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.'" The definition comports with the General Assembly's intent to limit the scope of employer intentional torts. *Stettler v. R.F. Corman Derailment Services, LLC*, 125 Ohio St.3d 280, 2010-Ohio-129; *Kaminski v. Metal and Wire Co.*, 125 Ohio St.3d 250, 2010-Ohio-2027. In overturning the summary judgment granted by the trial court, the Sixth District Court of Appeals expanded the definitions of equipment safety guard and deliberate removal which is inconsistent with this Court's holding in *Hewitt* and contrary to the General Assembly's intent.

A. The Expansion Of The Definition Of An Equipment Safety Guard To Include All Employees Is Contrary To The Express Intent Of The General Assembly

The structure of R.C. §2745.01 further supports limiting the definition of equipment safety guard to protecting the operator only. This Court previously indicated, “The General Assembly’s intent in enacting R.C. §2745.01, as expressed particularly in R.C. §2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause injury, subject to subsections (C) and (D).” *Kaminski, supra*. Because the rebuttable presumption of intent in R.C. 2745.01(C) is an exception to the generally applicable specific intent standard, it must be construed narrowly to respect the policy choices embodied in the specific intent standard. The broad interpretation adopted by the Sixth District Court of Appeals diminishes the General Assembly’s policy decision to enhance the exclusivity of the workers’ compensation remedy by adopting a limited, “specific intent” standard for intentional tort claims.

The rule of law established by the Sixth District Court of Appeals is not supported by the General Assembly’s intent in enacting R.C. 2745.01(C) and should be reversed.

B. The Ohio Supreme Court’s Reversal In *Beary v. Larry Murphy Dump Truck Service, Inc.* On The Authority Of *Hewitt* Does Not Support The Sixth District Court of Appeal’s Expansion Of The Definition Of Equipment Safety Guard.

The Ohio Supreme Court’s reversal of the Fifth District Court of Appeals’ decision in *Beary v. Larry Murphy Dump Truck Service, Inc.* (5th Dist. App. No.

2011-CA-00048), 2011-Ohio-4977 on the authority of *Hewitt* to determine whether the back-up alarm was an equipment safety guard, does not show an intent on the part of this Court to expand the definition of an equipment safety guard to include all employees. The Fifth District Court of Appeals granted summary judgment in favor of the employer by relying on the definition of an equipment safety guard set forth by the Ohio Industrial Commission. *Id.* The Sixth District Court of Appeals indicated, “We think that had the Ohio Supreme Court intended to limit equipment safety guards to only those safety devices that are designed to specifically protect operators, such a reversal would have been unnecessary.”

In *Beary*, while appellant was stretching caution tape around a parking lot to keep motorists from driving into an area where paving would occur, he was hit from behind by a skid steer. *Id.* The skid steer did not have a back-up alarm that would have warned appellant the machine was approaching him. *Id.* The record showed the backup alarm had not been working for some time. *Id.* The Ohio Supreme Court remanded the case with the instruction to apply the definition of equipment safety guard set forth in *Hewitt*, not to broaden that definition.

In expanding the definition of equipment safety guard, the Sixth District Court of Appeal’s decision is contrary to this Court’s well established precedent and undermines the clear intent and purpose of the intentional tort statute. As such, the Sixth District Court of Appeals’ decision must be reversed.

**C. This Case Presents Issues Which Were Not Addressed In
*Hewitt And Fickle.***

In its rationale to expand the definition of equipment safety guard, the Sixth District Court of Appeals indicated the issue of the protection of operators versus other employees who encounter the equipment was not before the Ohio Supreme Court in *Hewitt* or before the court in *Fickle*. Here, Pixley was not the operator of the transfer car with the safety bumper. For purposes of safety and training, it is important for Ohio employers to know whether an equipment safety guard is a device designed to shield the operator of the machine or all employees from a workplace hazard.

The appellate court's decision leaves the definition under R.C. §2745.01(C) unresolved. Accordingly, this Court should accept the present appeal to resolve and clarify the issues raised under Ohio's intentional tort statute.

Proposition Of Law No. 2: The "Deliberate Removal" Of An Equipment Safety Guard Occurs Only When There Is Evidence The Employer Made a Deliberate Decision To Lift, Push Aside, Take Off Or Otherwise Eliminate The Guard From The Machine.

Assuming the Court finds the safety bumper constituted an equipment safety guard, the record does not show it was deliberately removed. The *Hewitt* Court defined "deliberate removal: as: "An employer makes a deliberate decision to lift, push aside, take off or otherwise eliminate that guard from the machine." (emphasis added).

There is no evidence any part of Pixley's body contacted the safety bumper at the time of injury. Pro-Pak's plant superintendent testified Pixley did not come

into contact with the bumper to trigger the transfer car to shut off. The plant superintendent did not see any physical evidence such as blood or skin on the cover of the safety bumper or the corner edge of the transfer car's frame. The plant superintendent also looked at the edge and corner of the conveyor line for any blood, markings, tissue or skin and did not see anything. Based on the physical evidence and undisputed facts below, no part of Pixley's body ever contacted the safety bumper.

Even if Pixley contacted the safety bumper, there is no evidence Pro-Pak deliberately removed it. The record is void of any evidence that Pro-Pak made a careful and thorough decision to bypass, get rid of or otherwise eliminate the safety bumper on the transfer car. If the safety bumper was bypassed, there are no facts showing Pro-Pak did so.

This case is analogous to *Conley v. Endres Processing* (Third Dist. App. No. 16-12-11), 2013-Ohio-419. In *Conley*, the employee claimed the employer deliberately removed a metal plate that covered the auger's belts and pulleys which the employee contended was a safety guard pursuant to R.C.2745.01(C). *Id.* The Court assumed the metal plate was a safety guard, and concluded there was no evidence the employer deliberately removed it. *Id.*

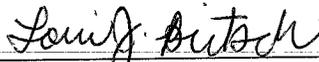
Similarly, even if the safety bumper was bypassed, Pixley has failed to present any evidence Pro-Pak made "a careful and thorough decision to get rid of or eliminate" the bumper pursuant to *Hewitt*. Accordingly, Pro-Pak respectfully requests the Court accept jurisdiction of this case to establish a clear rule for courts

and litigants as to whether deliberate removal under R.C. §2745.01(C) can be established by simply showing an equipment safety guard was removed or whether the employee must show the employer deliberately decided to remove it.

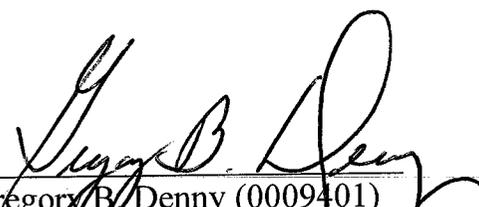
CONCLUSION

For all of the reasons set forth herein, Pro-Pak urges the Court to accept the present appeal for review and determine whether the definition of an equipment safety guard under R.C. §2745.01(C) is to protect only the operator or all employees. Pro-Pak further requests the Court to determine whether an employee is required to present evidence that the employer made a deliberate decision to remove or bypass a guard in order to establish deliberate removal under R.C. §2745.01(C).

Respectfully submitted,



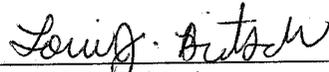
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served via ordinary U.S. Mail, this 17th day of May, 2013, upon the following: David R. Grant, Esq., *Attorney for Appellee* Plevin & Gallucci Co., LPA, 55 Public Square, Suite 2222, Cleveland, OH 44113; and Adam J. Bennett, Esq., *Attorney for Involuntary Plaintiff, BWC*, Andrew Cooke & Associates, LLC, 243 N. Fifth Street, Suite 300, Columbus, OH 43215.



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APPENDIX

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Phillip E. Pixley

Court of Appeals No. L-12-1177

Appellant

Trial Court No. CI0201004718

v.

Pro-Pak Industries, Inc., et al.

DECISION AND JUDGMENT

Appellees

Decided: APR 05 2013

David R. Grant, Jeffrey H. Friedman and Stephen S. Vanek,
for appellant.

Timothy C. James, Lorri J. Britsch and Gregory B. Denny,
for appellees.

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas awarding summary judgment in favor of appellees, Pro-Pak Industries, Inc., and

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Toledo L & L Realty Co. (collectively "Pro-Pak"),¹ on appellant's, Phillip Pixley, employer intentional tort claim. We reverse.

A. Facts and Procedural Background

{¶ 2} Pro-Pak is in the business of manufacturing corrugated containers, boxes, and packaging materials. Its facility contains two long central aisles that are approximately eight to ten-feet wide. Numerous conveyer lines, which are about one-foot high and bolted to the floor, run immediately perpendicular to these central aisles on both sides. Product is moved throughout the plant along one of the conveyer lines until it reaches a central aisle. There, a transfer car loads the product and transports it to another conveyer line. The transfer car proceeds along a fixed path that is cut into the floor, and is operated by an employee who stands at a control station located on either end of the car. It is intended that the transfer car operator use the control panel located in the front of the car in the direction the car is moving. Approximately two inches separate the side edge of the transfer car and the end of the conveyer lines.

{¶ 3} Pixley worked for Pro-Pak in its maintenance department. On the day of his injury, Pixley was examining a non-working motor on one of the conveyer lines in order to retrieve its model and serial number so that a replacement motor could be ordered. As Pixley knelt down to access the motor, he extended his right leg into the central aisle. At that time, another employee, Jonathan Dudzik, was operating the transfer car. Dudzik was positioned at the rear end of the transfer car, and had just loaded a tall stack of

¹ Toledo L & L Realty Co. owns the building where Pro-Pak is located.

material onto the car. Dudzik testified in his deposition that as he started moving the transfer car he did not see Pixley. The transfer car contacted Pixley's right leg, trapping it in the pinch point between the car and the conveyer lines. Pixley's leg was severely injured.

{¶ 4} The transfer car is equipped with a safety bumper that is designed to compress when 15-20 pounds of force is applied. The bumper is connected to a proximity switch in such a manner that whenever the bumper is compressed as little as two inches, the switch opens the electrical circuit, thereby shutting off power to the transfer car. However, Dudzik's deposition testimony indicates that, at the time of the accident, the transfer car did not stop until Dudzik manually stopped it upon seeing Pixley roll up and over the bumper.

{¶ 5} On June 23, 2010, Pixley commenced this employer intentional tort claim under R.C. 2745.01. Pro-Pak moved for summary judgment, arguing that Pixley failed to show that Pro-Pak deliberately intended to injure him. Pixley opposed the motion, relying on R.C. 2745.01(C), which provides for a rebuttable presumption of intent to injure if the employer deliberately removes an equipment safety guard. In support, Pixley pointed to the affidavits and reports of Kevin Smith, P.E., and Gerald Rennell. Those experts concluded that the safety bumper on the transfer car was designed such that the only way the bumper could have been compressed without shutting off power to the car was if the proximity switch had been deliberately bypassed. Pro-Pak replied, arguing that there was no evidence that the proximity switch was deliberately bypassed,

and even assuming it was, Pro-Pak was still entitled to summary judgment because the bumper was not an "equipment safety guard."

{¶ 6} Upon consideration of the motion and the briefs, the trial court found that the bumper was not an equipment safety guard because it did not shield the operator of the equipment from exposure to, or injury by, a dangerous aspect of the equipment. Therefore, the trial court granted summary judgment in favor of Pro-Pak.

B. Assignment of Error

{¶ 7} Pixley has timely appealed, raising a single assignment of error:

The trial court erred when it granted summary judgment in favor of Pro-Pak Industries, Inc. and Toledo L & L Realty Co. on Phillip Pixley's employer intentional tort claims.

II. Analysis

{¶ 8} We review appeals from an award of summary judgment de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Applying Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 9} Pixley's employer intentional tort claim is governed by R.C. 2745.01, which provides, in pertinent part,

(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.

(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.

{¶ 10} Pixley relies on R.C. 2745.01(C), alleging that Pro-Pak deliberately removed an equipment safety guard in two ways. First, he contends that Pro-Pak deliberately removed an equipment safety guard by failing to adequately train the transfer car operators to use the control panel at the front of the car in the direction the car is travelling. Second, Pixley contends that Pro-Pak deliberately bypassed the proximity

switch on the safety bumper, allowing the bumper to be compressed without shutting off power to the transfer car. Pixley argues that the evidence shows that, at the least, a genuine issue of material fact exists regarding whether Pro-Pak deliberately removed an equipment safety guard. Therefore, because deliberate removal of an equipment safety guard creates a rebuttable presumption that Pro-Pak intended to injure him, Pixley concludes summary judgment is inappropriate.

{¶ 11} Resolution of this appeal requires us to delve once again into the nebulous world of “equipment safety guards.” In so doing, we are guided by the recent Ohio Supreme Court decision in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795. In *Hewitt*, the Supreme Court was asked to decide whether “equipment safety guard” for purposes of R.C. 2745.01(C) includes only those devices on a machine that shield an employee from injury by guarding the point of operation of that machine and whether the “deliberate removal” of such 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 ¶ 1.

{¶ 12} The specific safety items in that case were rubber gloves and sleeves designed to prevent an employee from being shocked when he or she was working on energized electrical lines. In reaching its conclusion that the rubber gloves and sleeves were not equipment safety guards, the court looked to the plain and ordinary meaning of the words since “equipment safety guard” is not defined in the statute. Based on the plain

and ordinary meaning, the court determined that “equipment safety guard” means “a protective device on an implement or apparatus to make it safe and to prevent injury or loss.” *Id.* at ¶ 18. The court then differentiated the rubber gloves and sleeves from equipment safety guards, characterizing the gloves and sleeves as “[f]ree-standing items that serve as physical barriers between the employee and potential exposure to injury.” *Id.* at ¶ 26. The gloves and sleeves were “personal protective items that the employee controls.” *Id.* In contrast, the court held that an “equipment safety guard” is “a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.” *Id.*, quoting *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, ¶ 43.

{¶ 13} Furthermore, the Ohio Supreme Court determined that the employer did not deliberately remove the rubber gloves and sleeves. The court of appeals had held that the employer’s decision to place the employee close to the energized wires without requiring him to wear protective equipment amounted to the deliberate removal of an equipment safety guard. *Id.* at ¶ 27. However, the Ohio Supreme Court disagreed, and 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 from the machine.” *Id.* at ¶ 30. The court continued, “the employer’s failure to instruct [the employee] to wear protective items such as rubber gloves and sleeves and requiring [the employee] to work alone in an elevated bucket do not amount to the deliberate removal of an equipment safety guard within the meaning of R.C. 2745.01(C) so as to create a

rebuttable presumption of intent.” *Id.* Therefore, the Ohio Supreme Court reversed the court of appeals and ordered judgment in favor of the employer.

{¶ 14} Applying *Hewitt* to the present case, we hold that Pixley’s argument that Pro-Pak’s failure to adequately train the transfer car operators constituted the deliberate removal of an equipment safety guard is without merit. *Hewitt* is clear: “Although ‘removal’ may encompass more than physically removing a guard from equipment and making it unavailable, such as bypassing or disabling the guard, *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.*” (Emphasis added.) *Id.* at ¶ 29. Therefore, the failure to train on a safety procedure does not create a rebuttable presumption of intent to injure under R.C. 2745.01(C).

{¶ 15} Turning to his argument that Pro-Pak deliberately removed an equipment safety guard by deliberately bypassing the proximity switch on the safety bumper, we hold that a genuine issue of material fact exists which precludes summary judgment.

{¶ 16} At first glance, *Hewitt* appears to resolve Pixley’s argument. *Hewitt* defines an “equipment safety guard” as “a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.” *Hewitt* at ¶ 26. Pro-Pak argues, and the trial court reasoned, that the safety bumper is not an equipment safety guard because it is not designed to shield *the operator* from injury. However, upon our examination of *Hewitt*, we do not think the definition of an equipment safety guard

should be limited to protecting only operators. We reach this conclusion for three reasons.

{¶ 17} First, the issue of the protection of operators versus other employees who encounter the equipment was not before the Ohio Supreme Court in *Hewitt*, or before us in *Fickle*—the case from which the Ohio Supreme Court adopted its definition of “equipment safety guard.” In *Fickle*, we were presented with an operator who was injured while she was splicing laminated roofing material around a roller. *Fickle*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, at ¶ 2-3. *Fickle*’s claim turned, in part, on whether the jog control switch and an emergency stop cable that had been temporarily disconnected were equipment safety guards. We held that they were not because they were not designed to protect her from the pinch point on the roller. *Id.* at ¶ 43-44.² Consideration of the safety of other employees who encountered the machine was not relevant to resolving her claim.

{¶ 18} Second, the Ohio Supreme Court, relying on *Hewitt*, recently reversed an award of summary judgment in favor of the employer where the injured employee was not the operator of the machine. *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 134 Ohio St.3d 359, 2012-Ohio-5626, 982 N.E.2d 691. In *Beary*, the employee was placing caution tape around a construction site when a skid steer, often called a “Bobcat,” backed

² Our holding in *Fickle* was modified by *Beyer v. Rieter Automotive N. Am., Inc.*, 6th Dist. No. L-11-1110, 2012-Ohio-2807, 973 N.E.2d 318, ¶ 13, which construed R.C. 2745.01(C) more broadly to include free standing equipment, such as face masks, within the scope of an “equipment safety guard.” This broader interpretation was rejected by *Hewitt*.

into him causing serious injuries. *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 5th Dist. No. 2011-CA-00048, 2011-Ohio-4977, ¶ 4-5. Evidence existed that the backup alarm on the skid steer had not been working for some time. One person testified that the wires powering the alarm were corroded to the extent that the wires had broken, while another witness testified that the wires appeared to have been intentionally disconnected. *Id.* at ¶ 13.

{¶ 19} The trial court granted summary judgment in favor of the employer on the employee's intentional tort claim, relying on the Ohio Industrial Commission's definition of "equipment safety guard" and finding that the backup alarm was not an equipment safety guard because it was not designed to guard anything. *Id.* at ¶ 16. The Fifth District affirmed. In so doing, it agreed with our reasoning in *Fickle*, which applied the plain and ordinary meaning of "equipment safety guard" instead of any industry-specific administrative definitions. Interestingly, however, the Ohio Supreme Court reversed the Fifth District's decision on the authority of *Hewitt*, and remanded the case to the trial court to apply *Hewitt* and determine whether the back-up alarm is an equipment safety guard. *Beary*, 134 Ohio St.3d 359, 2012-Ohio-5626, 982 N.E.2d 691 at ¶ 1. We think that had the Ohio Supreme Court intended to limit equipment safety guards to only those safety devices that are designed specifically to protect operators, such a reversal would have been unnecessary.

{¶ 20} Finally, limiting the definition of an "equipment safety guard" to only those items on machines that protect the operator is inconsistent with the remainder of R.C.

2745.01(C), which creates a rebuttable presumption of intent to injure another if an occupational disease or condition occurs as a direct result of a deliberate misrepresentation of a toxic or hazardous substance. This second basis for creating a rebuttable presumption is not limited to situations where the employer made a deliberate misrepresentation to a person who handled or was in control of the substance. Instead, it applies to anyone to whom the representation was made, who was subsequently injured as a direct result. Similarly, we think that any employee who is injured as a direct result of the employer's deliberate removal of a device that is designed to shield a dangerous aspect of the equipment should be entitled to a rebuttable presumption of an intent to injure.

{¶ 21} Accordingly, we read the Ohio Supreme Court's definition of an "equipment safety guard" as "a device designed to shield the [employee] from exposure to or injury by a dangerous aspect of the equipment."

{¶ 22} In the present case, the safety bumper on the transfer car is clearly designed to protect employees from a dangerous aspect of the equipment. The service manual, under the section "Protective Devices," identifies potential dangers associated with use of the transfer car:

Most accidents come as a result of plant personnel assuming the transfer car will watch out for them, especially when the car is driven by an operator. All personnel in the vicinity of cars should be aware that the car can cause severe injuries or death if limbs are caught beneath the bumpers

or *between the car and stationary conveyors*. Personnel must be warned not to stand between stationary conveyors near the car aisle. Personnel must also be warned not to stand in the car aisle with their back to the car. Plant personnel should be trained never to enter the car aisle while the car is in motion. (Emphasis added.)

The service manual goes on to identify safety features designed to protect employees from those potential dangers, specifically identifying the safety bumper:

2.5.4 Collapsible Bumper

The standard United Pentek transfer car is equipped with a collapsible bumper * * *. The car is stopped if for any reason a bumper is tripped. When a bumper is tripped, the car can only be moved manually in the opposite direction. This bumper uses an inductive proximity switch that is triggered when the bumper begins to collapse. The drive is de-energized immediately upon contact with an obstacle and stops within the collapsible length of the bumper.

Therefore, we conclude the safety bumper is an equipment safety guard, and not a safety device as in *Fickle*, or a piece of personal protective equipment as in *Hewitt*.

{¶ 23} Having determined that the bumper is an equipment safety guard, we must next address if a genuine issue of material fact exists as to whether Pro-Pak deliberately bypassed it. Pro-Pak contends there is no evidence that any mechanism was removed from the safety bumper of the transfer car. As support, it points to deposition testimony

that the maintenance records indicated no work was performed on the transfer car in the year before the incident, and that the transfer car was on a preventative maintenance checklist to check the functioning of the safety bumpers once a month. Pixley, on the other hand, relies on the experts' affidavits and reports that the only way the bumper would have not functioned properly was if it had been deliberately bypassed. Further, the experts concluded that the safety bumper did not function properly when it contacted Pixley's leg. To corroborate their conclusion, the experts pointed to a video of the transfer car taken shortly after the accident that shows the safety bumper dragging on the ground as the transfer car moved. They concluded the compression of the bumper caused by the dragging should have been enough to shut off power to the transfer car. However, Pro-Pak disputes that the dragging would impair the function of the bumper, citing the maintenance supervisor's deposition testimony to that effect.

{¶ 24} Upon our review of the evidence and deposition testimony, and when viewing it in the light most favorable to Pixley as we must, we hold that a genuine issue of material fact exists as to whether Pro-Pak deliberately bypassed the safety bumper. Based on the expert testimony, reasonable minds could conclude that the bumper compressed enough to shut off power to the transfer car, the power was not shut off, and the only way the bumper could have compressed as far as it did without shutting off the power was if the proximity switch had been deliberately bypassed.

{¶ 25} Finally, we note that Pro-Pak argues extensively that it did not direct Pixley to kneel down and inspect the motor, or to stick his leg into the path of the transfer car,

and thus there was no intent to injure him. However, whether Pro-Pak intended to injure Pixley is the ultimate question for the trier of fact, and because a genuine issue of material fact exists that could create a rebuttable presumption of intent to injure, summary judgment is not appropriate.

{¶ 26} Accordingly, Pixley's assignment of error is well-taken.

III. Conclusion

{¶ 27} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is reversed. The matter is remanded to the trial court for further proceedings consistent with this decision. Pro-Pak is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

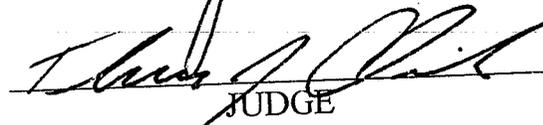
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

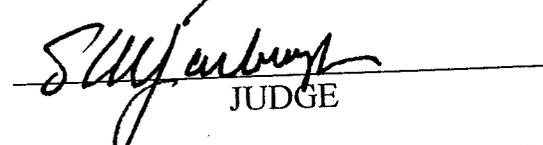
Mark L. Pietrykowski, J.

Thomas J. Osowik, J.

Stephen A. Yarbrough, J.
CONCUR.


JUDGE


JUDGE


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:
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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Phillip E. Pixley,

Plaintiff,

vs.

Pro-Pak Industries, Inc., et al.,

Defendants.

*

* Case No. CI0201004718

* OPINION AND JUDGMENT ENTRY

* Hon. Myron C. Duhart

*

*

*

This workplace intentional tort case is before the Court on the motion for summary judgment filed by defendants Pro-Pak Industries, Inc. and Toledo L & L Realty Co. (collectively "Pro-Pak"). Upon review of the pleadings, evidence, arguments of the parties, and applicable law, the Court finds that it should grant the motion.

I. FACTUAL BACKGROUND

For the sole purpose of ruling on the instant motion, and construing allegations and evidence in favor of the plaintiff, the Court finds the following facts.

On July 2, 2008, the plaintiff, Phillip Pixley, sustained injuries in the course and

scope of his employment as a maintenance employee while at his work site in Lucas County, Ohio ("work site") operated by Pro-Pak. (Complaint paras.13-17.) Pro-Pak manufactures corrugated paper containers, boxes, and packaging materials at the work site. (See Arney Affid.para.2.) Employees move product from one area at the work site to another by a series of conveyors which are situated parallel to each other. (Pixley Depo.pp.71-73.) The employees transfer product between conveyor lines using one of two three-ton motorized "transfer cars" which operate in an aisle-way perpendicular to the conveyor lines. (See Pixley Depo.pp.70-74.) When an operator of a conveyor or a transfer-car would encounter a mechanical issue with her/his machine, the operator would note the problem on a "slip" and would turn in the slip to the maintenance department; the slips operated as a "duty list" of work for the maintenance employees to complete. (Pixley Depo.pp.37-39.) On the day of his injury, a drive motor for one of the conveyor lines was not working because the motor had burned out; burned-out motors were common at the work site. (Pixley Depo.pp.70-75.) Having earlier noted a duty slip about the burned-out motor, and "need[ing] to get up" from his first task of the day "and stretch [his] legs out," Mr. Pixley decided to go to the conveyor line and record the model number so Pro-Pak could order a proper replacement motor. (Pixley Depo.p.70.) While Pixley was bending over on one knee to record the motor's number, a transfer-car operator drove the front of the car into Mr. Pixley causing Pixley serious injuries to his leg. (Pixley Depo.pp.70-73.) Pixley's leg was caught between the end of the conveyor line and the transfer car. (Complaint para.17.) At the time, the operator was driving the car from the rear instead of from the front as was the proper driving procedure. (See F.Smith Depo.pp.74-75,211-212.) Standing at the back of the car, the operator was unable to see Mr. Pixley kneeling. (Dudzick Depo.p.76.) The transfer car had a

"safety-bumper" on the car's leading edge. (See R.K.Smith Affid./Report pp.5-9.) The safety-bumper was designed to deactivate and to stop the transfer car instantly if the bumper was even slightly compressed due to a collision with an object; also, if the safety-bumper were to fail for any reason, the transfer car would stop automatically. (See R.K.Smith Affid./Report pp.6-9.) On or before July 2, 2008, someone at the work site deliberately bypassed, and thus deactivated, the safety-bumper on the transfer car; this allowed the transfer car to continue to operate even if the bumper was depressed due to striking an object. (See R.K.Smith Affid./Report pp.6-9.) The safety-bumper did not stop the transfer car after the car struck Mr. Pixley. (R.K.Smith Affid./Report para.D.)

Mr. Pixley filed this action against Pro-Pak and other defendants to recover for his injuries.

II. DISCUSSION

In Count One of his complaint, Mr. Pixley alleges that Pro-Pak committed a so-called workplace intentional tort against him which he asserts is a violation of R.C. 2745.01.¹

¹R.C. 2745.01 reads in its entirety as follows:

(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.

(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.

(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121.

See Stetter v. R.J. Corman Derailment Servs., L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, at ¶1 (referring to the statute as "Ohio's employer intentional-tort statute").² Mr. Pixley asserts that "one or more of the actions and inactions of [Pro-Pak] constitute 'deliberate intent' as set forth in R.C. 2745.01[A]." (Complaint para.21.) He also alleges that Pro-Pak "deliberate[ly] remov[ed] an equipment safety guard, such that [Mr. Pixley] is entitled to a presumption that their removal was committed with intent to injure [him] as set forth in R.C. 2745.01[C]." (Complaint para.19.) The "equipment safety guard" he identifies is the safety-bumper on the transfer car. (Opposition Brief pp.21-22.)

A. LIABILITY UNDER "OHIO'S EMPLOYER INTENTIONAL-TORT STATUTE"

Generally, actions against employers for injuries sustained by employees in the course of employment must be brought under the Ohio Workers' Compensation Act. *Richie v. Rogers Cartage Co.*, 89 Ohio App.3d 638, 643, 626 N.E.2d 1012 (1993). However, in some situations an injured worker also may bring an injury claim against her or his employer under Ohio's employer intentional-tort statute, R.C. 2745.01, and/or under Ohio's pre-existing common-law for a workplace intentional tort as discussed in *Fyffe v. Jenos, Inc.*, 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991). *See Stetter*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, at paragraph three of the syllabus ("R.C. 2745.01 * * * does not eliminate the common-law cause of action for an employer intentional tort"). The relevant provisions of the statute are as follows:

(A) In an action brought against an employer by an employee * * * for damages

and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

²The *Stetter* case, together with its sister decision, *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, "confirm the constitutional validity of R.C. 2745.01." *Kaminski* at ¶2.

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 [1.] with the *intent to injure another* or [2.] 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 * * * creates a *rebuttable presumption that the removal * * * was committed with intent to injure another* if an injury * * * occurs as a direct result.

* * *. (Emphasis added.)

Subject to sub-sections (C) and (D), "the General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with *specific intent* to cause an injury * * *." (Emphasis added.) *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, at ¶56.

A plain reading of sub-sections (A) and (B) together reveals that the statute provides two avenues by which an employee may establish "specific intent" so that an employer may be liable: 1) where the employer commits a tortious act with the actual "intent" to injure "another" (*i.e.*, anyone), (*see* sub-section [A]); or 2) where the employer commits a tortious act with "the belief that the injury was *substantially certain to occur*" -- the phrase "substantially certain to occur" is defined by the statute as the employer acting with the "*deliberate intent to cause an employee* [not just "anyone"] *to suffer an injury*," (*see* sub-sections [A] and [B]).³ By

³Sub-section (A) names two situations of liability: 1) acting with actual "intent" to injure "another"; and 2) acting with the belief that the injury was "substantially certain" to occur. Then, sub-section (B) defines "*substantially certain*" as "*deliberate intent to cause an employee an injury*." (Emphasis added.) Thus, by taking a moment to scrutinize these two subsections together, we find that the sub-sections clearly present the two situations for liability we discuss in the text above.

enacting R.C. 2745.01, the Generally Assembly, "rejects the notion that acting with a belief that injury is *substantially certain* to occur is analogous to *wanton misconduct*." *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, 885 N.E.2d 204, at ¶17, cited in *Kaminski* at ¶57. Thus, the Generally Assembly "intends to significantly restrict actions for employer intentional torts." *Kaminski* at ¶57.

Even though the statute generally preconditions liability on an employee establishing the employer's "specific intent" to injure, R.C. 2745.01(C) allows an employee to establish a rebuttable presumption of such "specific intent" by showing that the employer "[d]eliberate[ly] remov[ed] an equipment safety guard." R.C. 2745.01(C). See *Roberts v. RMB Enters.*, 12th Dist. No. CA2011-03-060, 2011-Ohio-6223, at ¶24 (so observing); *Hewitt v. L.E. Myers Co.*, 8th Dist. No. 96138, 2011-Ohio-5413, at ¶24, fn.6 ("The whole point of [sub-section (C)] is to presume the injurious intent required under [sub-sections (A) and (B)]"). When an employee establishes such a rebuttable presumption, the presumption of "intent" is in place until the employer rebuts the presumption with competent evidence. *Hewitt* at ¶35. "It is important to note that R.C. 2745.01(C) does not require proof that the employer removed an equipment safety guard with the *intent to injure* in order for the presumption to arise." (Emphasis added.) *Fickle v. Conversion Technologies Intl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, at ¶32, fn.2.

A number of Ohio courts since *Kaminski* and *Stetter* have discussed what constitutes an "equipment safety guard"; again, if the employer removes such a guard, the removal creates a presumption that the employer "intent[ed] to injure another." In *Fickle v. Conversion Technologies Intl., Inc.*, supra, 2011-Ohio-2960, after a thorough analysis of the undefined phrase, the Sixth Appellate District concluded that, "as used in R.C. 2745.01(C), an

'equipment safety guard' 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." (Emphasis added.) *Id.* at ¶43. A number of Appellate Districts have followed the *Fickle* court's focus on the "operator" of a dangerous aspect of industrial equipment as the party intended by the General Assembly to be protected by the R.C. 2745.01(C) presumption. See *Barton v. G.E. Baker Constr.*, 9th Dist. No. 10CA009929, 2011-Ohio-5704, at ¶11 (a trench box is not an equipment safety guard); *Hewitt v. L.E. Myers Co.*, 8th Dist. No. 96138, 2011-Ohio-5413, at ¶24 (rubber gloves, to protect from electrocution, are an equipment safety guard); *Beary v. Larry Murphy Dump Truck Serv.*, 5th Dist. No. 2011-CA-00048, 2011-Ohio-4977, at ¶21 (back-up alarm on a "bobcat" tractor was not); *McKinney v. CSP of Ohio, LLC*, 6th Dist. No. WD-10-070, 2011-Ohio-3116, at ¶18 (improper programming of the computer on an industrial press constituted removing an equipment safety guard). We find that the protection-of-the-"operator" standard is proper to guide our analysis in this case.

In its motion, Pro-Pak contends that it did not violate R.C. 2745.01. Pro-Pak argues that neither basis alleged by Mr. Pixley allows him to avoid summary judgment because: 1) Pro-Pak did not deliberately intend to cause injury to Mr. Pixley; and 2) Pro-Pak did not remove "an equipment safety guard." The Court agrees with Pro-Pak.

1. Deliberate Intent -- R.C. 2745.01(A) and (B)

First, Pro-Pak contends that Mr. Pixley cannot establish that Pro-Pak deliberately intended to injure him. Pro-Pak recites evidence indicating Pro-Pak had no such intent: Mr. Pixley, himself, chose when and how to enter the conveyor line area -- Pro-Pak did not tell him to work in aisle-way at the time of his injury; the transfer car driver was aware of a "blind spot"

in front of the car, but he did not see Mr. Pixley (at most evidence of the operator's negligence); the transfer cars had sirens and "whirling" lights operating at the time of his injuries (thus, Pro-Pak took some safety precautions); and there was no evidence affirmatively indicating that Pro-Pak intended to injure Mr. Pixley or any other person.

Pro-Pak cites to *Hubble v. Haviland Plastic Prods. Co.*, 3d Dist. No. 11-10-07, 2010-Ohio-6379, in support of its motion. *Hubble* was a R.C. 2745.01 case that arose in a plastic-recycling facility. The employer stored bales of plastic in high stacks; bales had fallen unexpectedly in the past. While the employee was sweeping the floor near a stack, a bale fell and injured him. The court concluded that "the employer acted with reckless disregard for the safety of its employees when it was aware of the danger of the falling bales and took no action to correct the situation." *Id.* at 9. Nonetheless, the court held that "reckless disregard does not reach the statutory requirement of 'deliberate intent to cause an employee to suffer an injury * * *'" as contemplated by the statute. *Id.* Thus, the *Hubble* court concluded that summary judgment was proper in favor of the employer.

Pro-Pak also cites to *Holloway v. Area Temps*, 8th Dist. No. 93842, 2010-Ohio-2106. In *Holloway*, a warehouse employee was using a "'stand up' tow motor" to load manufactured-product into a delivery truck. *Id.* at ¶4. The employer required the driver of any delivery truck being loaded to place "chocks" under the truck's wheels so the truck would not roll during the loading process. *Id.* at ¶5. Because a driver of a truck being loaded failed to chock the wheels, the employee was injured when the truck unexpectedly shifted causing the tow motor to fall on him. *Id.* at ¶6. The *Holloway* court concluded that, "the record reflects that the accident that resulted in Holloway's injury was caused by mistake or negligence, rather than intentional

conduct." *Id.* at ¶14. The court found summary judgment proper.

In the instant case, like in *Hubble* and *Holloway*, Pro-Pak did not require the employee -- Mr. Pixley -- to encounter a substantially-certain danger; Pro-Pak did not require him to encounter the danger posed by the transfer car. Thus, the Court finds that Mr. Pixley failed to create a genuine issue of material fact that Pro-Pak had the "specific intent" to injure him.

2. Presumption of Intent to Injure -- R.C. 2745.01(C)

Second, Pro-Pak argues that Mr. Pixley cannot establish that he is entitled to a rebuttable presumption of "intent to injure," under R.C. 2745.01(C), because he cannot establish that Pro-Pak "deliberate[ly] remov[ed] an equipment safety guard." Pro-Pak asserts that, even if Mr. Pixley can establish that Pro-Pak did deliberately disarm the safety-bumper on the transfer car, that bumper was not "an equipment safety guard" as contemplated by the statute. Pro-Pak argues that Ohio courts uniformly hold that "an equipment safety guard" is "a device designed to shield the *operator* of the *equipment* from exposure to or injury by a *dangerous aspect of the equipment*." (Emphasis added.) See *Beary v. Larry Murphy Dump Truck Serv.*, 5th Dist. No. 2011-CA-00048, 2011-Ohio-4977, at ¶21, citing and following *Fickle v. Conversion Technologies Intl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, at ¶¶29,42. Pro-Pak contends that there is no dispute that Mr. Pixley was not "operating" the transfer car at the time he was injured.

Mr. Pixley counters that the protect-the-operator standard articulated by the *Fickle* court is not the proper standard for determining "deliberate removal by an employer of an equipment safety guard." Mr. Pixley argues that, "[t]he more reasoned approach has to take into

account which employee(s) the specific equipment safety guard was actually designed and intended to protect. In this case, the safety bumper was meant to protect employees and bystanders who *may inadvertently be in the path* of a moving transfer car." (Sur-Reply Brief p.11.) (See also Opposition Brief p.8 -- the "safety bumper was * * * protecting any person standing in the path of the transfer car").

Mr. Pixley has not cited any Ohio authority extending the definition beyond "operators." We have found no authority supporting that proposition. To the contrary, many courts have cited the *Fickle* "operator" standard. See *Roberts v. RMB Ents., Inc.*, 12th Dist. No. CA2011-03-060, 2011-Ohio-6223, at ¶24 (quoting *Fickle*); *Barton v. G.E. Baker Constr.*, 9th Dist. No. 10CA009929, 2011-Ohio-5704, at ¶11; *Hewitt v. L.E. Myers Co.*, 8th Dist. No. 96138, 2011-Ohio-5413, at ¶24 ("operator" quoting *Fickle*); *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 5th Dist. No. 2011-CA-00048, 2011-Ohio-4977, at ¶¶21-22 (citing *Fickle*); and *McKinney v. CSP of Ohio, LLC*, 6th Dist. No. WD-10-070, 2011-Ohio-3116, at ¶18 ("operator"). The Court finds that this strict approach -- limiting the definition of "equipment safety equipment" to items designed to protect the "operator" -- conforms with the intent of the General Assembly as found by the *Kaminski* court. The General Assembly "intends to significantly restrict actions for employer intentional torts." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, at ¶57.

Thus, the Court find Pro-Pak's motion well-taken on this issue.

B. LIABILITY FOR A COMMON-LAW INTENTIONAL TORT

As we mentioned above, the Supreme Court of Ohio has held that the General Assembly's enactment of R.C. 2745.01 does not 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.⁴ Even though Mr. Pixley did not prosecute this common-law claim expressly, he may have done so impliedly. Thus, we will address the common-law action.

The court, in *Fyffe v. Jenos, Inc.*, 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus (1991), set forth a three-prong test in order to determine "intent" in a common-law employer intentional tort case. In pertinent part the *Fyffe* court stated as follows:

[I]n order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) *knowledge* by the employer of the existence of a *dangerous process, procedure, instrumentality or condition* within its business operation; (2) knowledge by the employer that if the employee is *subjected by his employment* to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a *substantial certainty*; and (3) that the employer, under such circumstances, and with such knowledge, did act to *require the employee to continue to perform the dangerous task.*" (Emphasis added.) *Id.* at paragraph one of the syllabus.

As mentioned above, Ohio courts have sought to "significantly limit[]" the situations in which "intent" may be inferred. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d at 117, 522 N.E.2d 489. Regarding "intent," the *Van Fossen* court held:

"To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. Where the risk is great and the probability increases that particular consequences may follow, then the employer's conduct may be characterized as

⁴"An employee * * * may recover at common law for injuries sustained as a result of the intentional conduct of his [or her] employer." *Richie v. Rogers Cartage Co.*, 89 Ohio App.3d 638, 643, 626 N.E.2d 1012 (1993), citing *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135, 522 N.E.2d 477 (1988); *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (1988); *Blankenship v. Cincinnati Milacron Chem., Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 572 (1982).

recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the *mere knowledge and appreciation of a risk -- something short of substantial certainty -- is not intent.*" (Emphasis added.) *Id.* at paragraph six of the syllabus.

To establish the first *Fyffe* prong -- "knowledge" -- the employee must prove "that the employer had 'actual *knowledge* of the *exact dangers* which ultimately caused' injury." (Emphasis added.) *Sanek v. Duracote Corp.*, 43 Ohio St.3d 169, 172, 539 N.E.2d 1114 (1989), citing *Van Fossen*, 36 Ohio St.3d at 112. However, the employee need not prove that the employer had an actual subjective intent to injure, *Richie*, 89 Ohio App.3d at 644, nor is he/she required to prove that the employer had knowledge of the "*specific harm* that might befall the injured employee," (emphasis added) *Burns v. Presrite Corp.*, 97 Ohio App.3d 377, 382-384, 646 N.E.2d 892 (1994).

To establish the second *Fyffe* prong -- "substantial certainty" -- the employee must demonstrate that the employer had known that the employee's job duties exposed her to that exact danger in a way that harm was substantially certain to befall her. *Burns v. Presrite Corp.*, 97 Ohio App.3d at 384. See also *Whitlock v. Ent. Metal Serv., Inc.*, 6th Dist. No. L-94-115, 1994 Ohio App.Lexis 4904, *11 (Nov. 4, 1994). "Only where the employer acts despite knowledge that an injury is substantially certain to result from a dangerous process, procedure or condition is the employer treated as if it desired the resulting injury." *Howard v. Columbus Prod. Co.*, 82 Ohio App. 3d 129, 135, 611 N.E.2d 480 (1992).

To establish the third *Fyffe* prong -- "required" -- "the employee must show that the employer, [1.] knowing of the *dangerous condition*, and [2.] knowing of the *substantial*

certainty of harm, [3.] did act to require the employee to continue to perform the dangerous task." *Adams v. Casey Sales & Serv.*, 6th Dist. No. WD-96-030, 1996 Ohio App.Lexis 5492, *13 (Dec. 6, 1996). The employee satisfies this prong by showing that she was subjected to an unavoidable, dangerous condition while performing her normal duties, and the employer has taken no steps to prevent the employee from being exposed to that dangerous condition. *Howard* at 135-136. See also *Moore v. Baron Drawn Steel Corp.*, 118 Ohio Misc.2d 112, 1998-Ohio-719, 770 N.E.2d 117, at ¶25 (citing cases in which the dangerous task was an unavoidable part of the employee's duties). However, when the employer leaves the precise manner in which to perform a task to the employee's discretion, and other methods of obtaining the result are available, "the employer has not 'required' the employee to encounter the danger." *Moore*, at ¶27.

The Court has found several common-law workplace intentional tort cases that are factually very similar to the instant case. These cases help us understand how the "required" prong operates. In *Reising v. Broshco Fabricated Prods.*, an employee was injured when the industrial press he was operating unexpectedly cycled as he was reaching into the machine to dislodge a piece of product; the court found the "required" element not satisfied after concluding the employer did not require the employee to reach into the machine, and the employee had other methods available. *Reising v. Broshco Fabricated Prods.*, 5th Dist. No. 2005CA0132, 2006-Ohio-4449, at ¶¶50-52. In *Solakakis v. National Mach. Co.*, the Eleventh Appellate District concluded that the trial court properly granted summary judgment in favor of the employer in another case in which the employee was injured while reaching into an industrial machine; the court found that: the employer had no policy requiring the employee to reach into the machine; reaching into the machine was not an unavoidable part of his job; and the employees job duties

did not require him to be in the precise location in which he encountered the danger. *Solakakis v. National Mach. Co.*, 11th Dist. No. 98-T-0090, 1999 Ohio App.Lexis 3609, *19. In *Adams v. Casey*, the plaintiff was injured in the course of her employment while driving a vehicle owned by the employer; the court concluded she failed to establish the "required" prong finding that: the worker chose not to wear her seatbelt (a proximate cause); she chose the timing of her errand; and she had alternative means. *Adams v. Casey Sales & Serv.*, 6th Dist. No. WD-96-030, 1996 Ohio App.Lexis 5492, *14. In *Moore v. Baron*, the employee slipped into a scaldingly hot "dip tank" after mounting the walkway along to edge of the tank in order to help a co-worker who had fallen in the tank; the court found that the plaintiff failed to establish the "required" prong because: the employee had no duty to rescue the co-worker; and the employee had other means of affecting a rescue. *Moore v. Baron Drawn Steel Corp.*, 118 Ohio Misc.2d 112, 1998-Ohio-719, 770 N.E.2d 117, at ¶27.

In harmony with the rulings in *Reising*, *Solakakis*, *Adams*, and *Moore*, we now find that reasonable minds could only conclude that Pro-Pak did not require Mr. Pixley to kneel in the aisle-way at all (much less at the precise time he did so); thus, Mr. Pixley is unable to establish the "required" prong. The Court also finds that reasonable minds could only conclude that kneeling in the aisle-way was not an unavoidable part of his job as a maintenance man; indeed, his interaction with the transfer car was not a volitional component of his normal job duties. Thus, the Court finds that Pro-Pak is entitled to summary judgment on any common-law intentional tort claim which Mr. Pixley impliedly raises in his complaint.

C. CONCLUSION

Based on the foregoing, the Court finds that Pro-Pak is entitled to judgment as a

matter of law against Mr. Pixley.

JUDGMENT ENTRY

The Court hereby ORDERS that the March 7, 2012 motion for summary judgment filed by defendants Pro-Pak Industries, Inc. and Toledo L & L Reality Co. is granted. The Court further ORDERS that the plaintiff's claims against these two defendants are dismissed with prejudice. The Court finds no just reason for delay.

6/4/12

M. Duhart

Myron C. Duhart, Judge

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