

IN THE SUPREME COURT OF OHIO

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| Phillip Pixley, |) | Case No.: 2013-0797 |
| |) | |
| Appellee, |) | On Appeal from the Lucas |
| |) | County Court of Appeals, |
| v. |) | Sixth Appellate District |
| |) | |
| Pro-Pak Industries, Inc., et al., |) | Court of Appeals |
| |) | Case No. L-12-1177 |
| Appellants. |) | |
| |) | |

MEMORANDUM IN RESPONSE OPPOSING JURISDICTION
OF APPELLEE PHILIP PIXLEY

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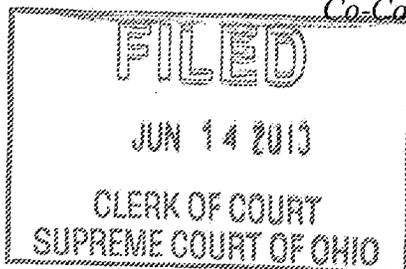
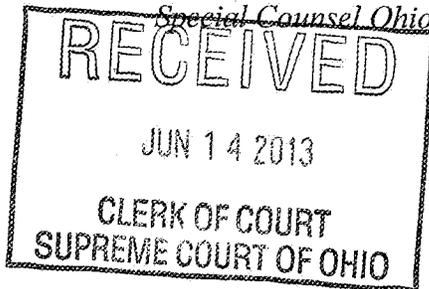


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I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case simply is not a case that raises any issue that is of public or great general interest. Further, the facts of this case are rather unique and whatever conclusions can be drawn from the Court of Appeal's decision has little to no precedential value for future matters.

In short, the Court of Appeals simply applied the language of R.C. §2745.01 and this Court's recent pronouncements and reasoning in *Hewitt v. L.E. Meyers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685 and *Beary v. Larry Murphy Dump Truck Service, Inc.* 134 Ohio St.3d 359, 2012-Ohio-5626.

In an effort to gain the jurisdiction of this Court, Defendants argue that the Sixth District "ignored the definitions of 'equipment safety guard' and 'deliberate removal' set forth by this Court in *Hewitt*." (Memorandum, pg. 1) Defendants also claim the Sixth District's decision "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." (Memo, pg. 2)

Neither of these claims are borne out by the Sixth District's decision. To the contrary, the decision simply applied the fact-specific analysis and reasoning that this Court used in *Hewitt* to a unique set of facts to determine whether the safety guard in question fit within the statute's "equipment safety guard" term. Defendants, however, continue to champion for the addition of language to the statute that unnecessarily further narrows and restricts the already limiting term "equipment safety guard" to only those safety guards that protect the operator of a machine.

The Sixth District's conclusion that the equipment safety guard at issue in this case *does*

fit within the statute's definition of that term is not a departure from sound logic or the legal analysis of this Court's decisions. Instead, it is consistent with the generally accepted and common understanding of those words. While Defendants' dissatisfaction with the ruling is evident, their urging to add even more restrictive and inflexible definitions to this statute should be directed to the General Assembly. As such, this decision does not raise an issue that is of public or great general interest nor is it of any significant precedential value.

Furthermore, the decision does not change or expand the definition of "deliberate removal" one iota. Indeed, the decision clearly applies the *Hewitt* Court's explanation of "deliberate removal" and concludes that there is sufficient evidence from which a jury can find that Appellant engaged in deliberate removal. Again, this is not a departure from this Court's recent rulings nor from the language or intent of R.C. §2745.01. Accordingly, this too is not an issue that is of public or great general interest.

Defendants' claim that this decision will have adverse implications to employers, will increase litigation and will potentially increase liability for workplace injuries is wholly unfounded. The decision simply provides one case-specific application of the statutory language and of this Court's recent pronouncements - both of which merely state what the law is and do not expand it.

In sum, the Sixth District Court of Appeals followed this Court's directives regarding the analysis and application of the statutory terms. Its findings are consistent with this Court's prior rulings and should not be disturbed.

II. STATEMENT OF THE CASE AND FACTS

A. Statement Of The Case

Plaintiff takes one exception with Defendants' statement of the case when they assert that the Sixth District "expanded the definition of persons protected by an equipment safety guard as set forth in *Hewitt* ... and [when the Court] failed to apply the *Hewitt* definition of deliberate removal to the undisputed facts." The Sixth District did neither.

B. Statement Of The Facts

Plaintiff disagrees with Defendants' claim that there was no evidence that any part of Pixley's body came in contact with the safety bumper at the time of injury. There was an abundance of evidence offered that given the physical arrangement of the equipment and Pixley's description of the incident, it is clear that his body not only came in contact with the safety bumper but that this incident could not have happened any other way than by Pixley contacting a non-functioning safety bumper.

Plaintiff also disagrees that Pixley had been told a new motor was already ordered and received and that there was no reason for him to be in the aisle where he was at the time. To the contrary, Pixley testified that he had never been told this and that he was required to do what he was doing at the time.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

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

As the Sixth District concluded in its decision, the *Hewitt* Court's analysis of the statutory term "equipment safety guard" was guided by the particular items at issue in that case, as was the

Sixth District's prior analysis in *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960. As such, the Sixth District reasoned that neither *Hewitt* nor *Fickle* necessarily intended their analysis of that term to be universally applied to every type of safety equipment. Moreover, neither case was directly confronted with, and hence neither directly addressed, the issue of whether the statutory term "equipment safety guard" only encompasses those guards that protect a machine operator or whether it also encompasses those guards that protect others in the immediate area that may encounter the machine. In fact, *Hewitt* even concluded:

Reading the words in context and according to the rules of grammar as we must, R.C. 1.42, we determine that the phrase "an equipment safety guard" means a protective device on an implement or apparatus to make it safe and to prevent injury or loss.

Hewitt at ¶ 18.

Both *Hewitt* and *Fickle* were guided by this definition and both decisions simply continued in their analysis of the specific facts and equipment at issue in those cases. The *Hewitt* case examined personal protective equipment in the form of gloves and sleeves. In *Fickle*, the Sixth District analyzed a jog switch and an emergency stop cable. After doing so, both *Hewitt* and *Fickle* concluded that the physical items in question did not shield the particular injured employee (which happened to be the operator or user) from exposure to or injury by a dangerous aspect of the equipment; as a result, the term "equipment safety guard" was not satisfied in those cases. In *Hewitt*, this Court concluded that "free-standing items that serve as physical barriers between the employee and potential exposure to injury, such as rubber gloves and sleeves, are not 'an equipment safety guard' for purposes of R.C. 2745.01(C)." *Hewitt* ¶ 26. In paragraph 22 of

its decision, the Sixth District rightfully and logically concluded that the unique safety bumper at issue in this case does fit within the meaning the statutory term.

Defendants misinterpret the *Hewitt* and *Fickle* decisions' continued case-specific analysis as setting forth the guiding definitions for all future equipment safety guards. There is no sound legal support or analysis for why this Court would have ever intended such an exceedingly narrow meaning to that undefined statutory term.

It is worth noting that there is no proliferation of recent decisions that rely on *Hewitt* to apply such a limited application of the term "equipment safety guard" to only those that protect a machine operator. For that reason, it would be premature for this Court to wade into this issue so soon after this Court has decided *Hewitt*.

Additionally, what has been lost in the soup is that the particular dictionary definition that both *Hewitt* and *Fickle* chose to consult actually defines a "guard" to include not just those devices that protect an operator of a machine, but also those devices that protect a part of the machine. *Hewitt* ¶ 17, *Fickle* ¶38. What Defendants fail to point out is that not only is this safety bumper designed and intended to protect other workers, but it also serves to protect the transfer car itself from damage should it come into contact with any other object such as a forklift. As such, the safety bumper certainly falls within the particular dictionary definition of "guard" used by the *Hewitt* case and the *Fickle* case.

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.

Defendants claim that the Sixth District's finding that the statutory term "equipment safety guard" also includes those items that protect non-operators somehow supplants or

undermines the clear intent of the General Assembly that enacted the statute. While Defendants never explain how this is so, Plaintiff would challenge them to do so.

Plaintiff acknowledges that this Court has held the General Assembly intended to constrain (but not eliminate) an employer's liability. See *Kaminski v. Metal & Wire Products Company*, 2010-Ohio-1027 at ¶ 98. It defies all logic, however, for Defendants to suggest that in order to support that legislative intent an even greater restriction must be added to the statutory term to limit it only to those guards that protect a machine operator and no one or nothing else. Defendants are demanding that the statute be re-written to read: "equipment safety guard *that protects a machine operator, only.*" That would result in further constraining the constraint that the General Assembly already did. There is simply no legislative history to support that the General Assembly ever intended to place such a fine and restrictive point on the term "equipment safety guard." Further, there is no public policy reason or other reason why the Legislature would have ever imagined or intended such a restrictive meaning to that undefined statutory term.

Consequently, the Sixth District's decision does not contradict the General Assembly's intent at all and it should be left undisturbed by this Court.

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.

It is instructive that shortly after *Hewitt*, this Court reversed summary judgment in favor of an employer and remanded a case to the trial court to determine whether an audible back-up alarm on a construction vehicle is "an equipment safety guard" under the authority of *Hewitt*.

Beary v. Larry Murphy Dump Truck Serv., Inc., 134 Ohio St.3d 359, 2012-Ohio-5626.

Defendants attempt to overlook or downplay the significance of this Court's remand in *Beary*.

Surely no one would dispute that an audible back-up alarm only protects non-operators from harm (and arguably the equipment itself from damage). It does not protect the actual machine operator at all. However, rather than affirm the granting of summary judgment to the employer by applying a requirement that the "equipment safety guard" must protect a machine operator, this Court instead remanded to the trial court "to determine whether the back-up alarm is 'an equipment safety guard.'" *Beary* ¶ 1.

The Sixth District understood *Beary* to be an indication from this Court (intentional or not) that *Hewitt* was never intended to be restricted to only those guards that protect a machine operator.

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

Plaintiff agrees that this Court never squarely addressed whether "equipment safety guards" that protect non-operators are also encompassed within this statutory term. That is not, however, an appropriate or sufficient reason to accept jurisdiction of this case.

Furthermore, the fact that *Hewitt* and *Fickle* did not squarely address the scope of this term is precisely why the reasoning and conclusion of the Sixth District's decision is sound and should be left undisturbed by this Court.

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.

Defendants continue their persistent (yet wholly incorrect) drum beat claiming there is no evidence they deliberately removed an equipment safety guard. Plaintiff offered undisputable evidence that Defendants’ claim is wrong. In any event, at best this is a question of fact for the jury to decide based upon the evidence. This is what the Sixth District concluded. This is not a proper basis or justification for this Court to exercise its discretionary jurisdiction.

While perhaps unnecessary, Plaintiff will address Defendants’ misguided assertions in more detail.

The *Hewitt* Court has already conclusively and clearly spoken on “deliberate removal” and the Sixth District very easily applied that guidance to the facts of this case. *Hewitt* tells us:

Although ‘removal’ may encompass more than physically removing a guard from equipment and making it unavailable, ... 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.

Hewitt ¶¶ 29-30.

With this explanation in mind, Defendants’ claims fall flat. Defendants claim in their memorandum that “there is no evidence [they] deliberately removed” or “made a careful and thorough decision to bypass, get rid of or otherwise eliminate the safety bumper.” Defendants also claim that if it was bypassed, there is no evidence they made “a careful and thorough decision to get rid of or eliminate [it] pursuant to *Hewitt*.”

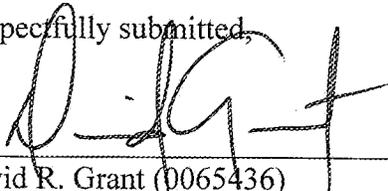
Defendants' claims represent their unrelenting attempt to convince themselves and others that $1 + 1 = 1$ in the hopes that sooner or later someone will believe them. Defendants would like to continue sticking their head in the sand and ignore the simple and undeniable science behind how their own machine is actually designed and works. The reality that Defendants' refuse to face is that Plaintiff's highly-qualified liability experts provide an instructive tutorial on how this transfer car, and its safety bumper in particular, are constructed and how the controls and wiring actually operate. Plaintiff's experts then go on to explain in very clear terms that unless the bumper's proximity switch has been knowingly and deliberately bypassed, whenever the bumper compresses even as little as one to two inches, all power to the transfer car immediately shuts off and the car stops. Plaintiff's experts then explain how the undeniable fact that immediately after this incident and before anyone made any repairs, adjustments or modifications, the safety bumper was collapsing nearly 30 inches without shutting off, which unmistakably means that the safety bumper was deliberately and knowingly (not accidentally or unintentionally) bypassed. Because of how the proximity switch operates, a broken proximity switch or poor maintenance simply and absolutely cannot cause this.

Understanding this, it is clear that an abundance of evidence was presented to prove that Defendants "made a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine." More important for this Court's current determination, however, is the fact that this is a very fact-specific issue based on the unique facts of this case and is not an appropriate justification for exercising jurisdiction over this case.

IV. CONCLUSION

For all of the foregoing reasons, this Court should decline to accept jurisdiction because the Sixth District's decision does not raise issues of public or great general interest nor does it offer any precedential value to future claims since it was very fact-specific.

Respectfully submitted,



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CERTIFICATE OF SERVICE

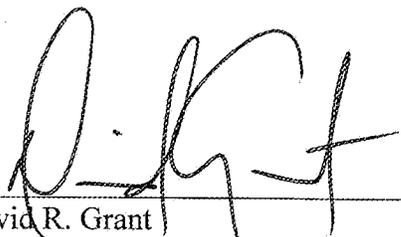
I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary

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