ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLANTS PRO-PAK INDUSTRIES, INC. AND TOLEDO L & L REALTY COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF FACTS 2

ARGUMENT 6

Proposition Of Law No. I: The *Hewitt* Court's Definition Of Equipment Safety Guard Is Limited To Protecting Operators Only 6

Proposition Of Law No. II: 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 11

CONCLUSION 15

CERTIFICATE OF SERVICE 16

APPENDIX

Notice of Appeal to the Ohio Supreme Court (May 17, 2013) 0001

Decision and Judgment of the Lucas County Court of Appeals (April 5, 2013) 0004

Opinion and Judgment Entry of the Lucas County Court of Common Pleas (June 4, 2013) 0018

R.C. Chapter 2745.01 0034

TABLE OF AUTHORITIES

CASES:

Akron Center Plaza, LLC v. Summit Cty. Bd. of Revision, 128 Ohio St.3d 145, 2010-Ohio-5035, 942 N.E.2d 1054 7

Beary v. Larry Murphy Dump Truck Service, Inc., 5th Dist. Stark App. No. 2011-CA-00048, 2011-Ohio-4977 10

Beyer v. Rieter Automotive North American, Inc., et al., 6th Dist. App. No. L-11-1110, 2012-Ohio-2807 7-8

Broyles v. Kasper Machine Co., et al., 517 Fed Appx. 345, (Sixth Circuit 2013) 13-14

Conley v. Endres Processing, 3rd Dist. Wyandot App. No. 16-12-11, 2013-Ohio-419 13

Fickle v. Conversion Technologies International, Inc., 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960 ..... 7-8, 12

Hewitt v. L.E. Myers Co., 8th Dist. App. No.10-96138, 2011-Ohio-5413 7-8

Hewitt v. L.E. Myers Co., 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795 ..... 1-2, 6-8, 10-11

Houdek v. ThyssenKrupp Materials, N.A., Inc., 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253 11

Nicholson v. Turner/Cargile, 107 Ohio App.3d 797, 809, 669 N.E.2d, (10th Dist. 1995) 12

Rivers, et al. v. Otis Elevator, et al., (8th Dist. Court of Appeals Case No. 99365), 2013-Ohio-3917 14-15

Stetter v. R.J. Corman Derailment Services, LLC, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092 8

STATUTES & OTHER AUTHORITIES

R.C. 2745.01 ..... 7-8, 10
R.C. 2745.01(C) 1, 7-11
Merriam-Webster's Collegiate Dictionary 7

I. INTRODUCTION

This case arises from an intentional tort claim and presents issues regarding the definitions of "equipment safety guard" and "deliberate removal" under R.C. 2745.01(C). Although this Court set forth the definitions of "equipment safety guard" and "deliberate removal" in *Hewitt v. L.E. Myers Co.,* 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, the Sixth District Court of Appeals ignored this Court's definitions of these terms. The appellate court expanded the definition of "equipment safety guard" to include a safety device to protect all employees, not just the operator of the equipment, and found an employer can be shown to have "deliberately removed" an "equipment safety guard" without any evidence the employer made a conscious, deliberate, and affirmative decision to disable or bypass the safety device.

To obtain the serial number off a gearbox/motor which had burnt out and needed to be replaced, appellee Phillip Pixley ("Pixley") placed himself in the aisle in which the transfer car traveled. Pixley was not required to obtain the serial number off the gearbox/motor because it already had been ordered and delivered to Pro-Pak's plant. Even if Pixley believed he was required to obtain the serial number off the burned out gearbox/motor, he surely was not required to place himself in harm's way in doing so. Pixley placed his leg in the path of the transfer car and as the car passed, Pixley's leg was pinched between the end of the conveyor and side of the transfer car, resulting in a degloving injury to Pixley's lower leg.

Pixley claims the safety bumper on the transfer car, designed to stop the transfer car when the bumper is compressed, should have shut the car off. Pixley argues that under R.C. 2745.01(C), he is entitled to the rebuttable presumption that Pro-Pak specifically intended to injure him because Pro-Pak "deliberately removed" an

"equipment safety guard" off the transfer car. Not only is the safety bumper not an equipment safety guard as defined by this Court in *Hewitt, supra*, the record if devoid of any evidence that Pro-Pak made a deliberate decision to eliminate or bypass the safety bumper.

II. STATEMENT OF FACTS

On July 2, 2008, Pixley was injured in the course of and arising out of his employment with appellant Pro-Pak Industries, Inc. ("Pro-Pak"). Pixley filed a workers' compensation claim and has received compensation and medical benefits under Ohio's workers' compensation law for the allowed injury.

Pro-Pak manufactures corrugated paper containers, boxes, and packaging materials at its facility in Maumee, Ohio. (Exh. A, ¶2, Armey Aff. attached to Defendants' Motion For Summary Judgment). Cardboard and paper product is moved from one area of the plant to another by a series of stationary conveyors situated parallel to each other. (Pixley Dep. pp. 71-73). Pro-Pak employees transfer product between conveyor lines by operating a transfer car in an aisle way perpendicular to the conveyor lines. (Pixley Dep. pp. 70-73). When a piece of machinery or equipment is in need of repair or maintenance, the operator of the machine writes the problem on a piece of paper and gives it to the maintenance department. The written slip of paper operates as a work or duty order to be performed by the maintenance department. (Pixley Dep. pp. 38-39).

Pixley was hired by Pro-Pak as a maintenance employee in June, 2008. (Pixley Dep. p. 42). Pixley possessed significant experience in corrugated paper and packaging plants, having worked in similar facilities such as Pro-Pak before he was hired. (Pixley

Dep. 45). Pixley was qualified to work as a maintenance employee at Pro-Pak, having previously worked on the same and similar equipment and machinery as that utilized at the Pro-Pak facility. (Pixley Dep. p. 45). Upon being hired, Pro-Pak provided Pixley with an initial orientation, which included safety training involving hazard communication, emergency action and lock out/tag out. (Armey Dep. p. 29). Pixley also received on the job training from the other maintenance employees. (Pixley Dep. p. 44).

The transfer car is equipped with both an audible siren and strobe lights which automatically operate when the car moves. (Dudzik Dep. p. 133). The transfer car is also equipped with a collapsible safety bumper on both the front and back ends. (F. Smith Dep. pp. 85-86). The purpose of the bumper is to stop the movement of the transfer car when a sufficient force comes into contact with the bumper, causing it to collapse. (F. Smith Dep. p. 86). The safety bumpers were part of Pro-Pak's preventive maintenance schedule and were checked on a monthly basis by the maintenance employees to make sure they were operating properly. (F. Smith Dep. pp. 108-109). An employee would apply force to the bumper with his foot while the transfer car was turned to the "on" position. If the "on" light went off at the control panel when force was applied to the bumper, the safety bumper was functioning properly. (F. Smith Dep. pp. 110-113).

Prior to Pixley's accident, a slip had been given to the maintenance department indicating a drive motor on one of the conveyors had burned out. It was common for a motor on a frequently used conveyor line to burn out. (Pixley Dep. p. 71). The burned out motor was a common model used throughout the plant and had been ordered numerous other times. (F. Smith Dep. p. 231). Tye Rod, another maintenance

employee, had obtained the serial number and ordered the replacement motor. (Rod Dep. p. 132). Approximately a week before Pixley's injury, Pro-Pak had received the new motor which was sitting on the floor in the middle of the maintenance department. (Rod Dep. p. 139). The new motor was approximately 20-24 inches long, 7-8 inches tall, and weighed 60-70 pounds. (Exh. B, ¶3,4 Aff. of T. Rod attached to Defendants' Motion For Summary Judgment). Tye Rod told Pixley the new motor had been delivered and that Pixley would need to replace the motor on a weekend when the conveyor line was not running. (Rod Dep. p. 140). During production hours, there is no reason for an employee to be working in the aisle way of the transfer car. (Rod Dep. p. 184).

On the morning of July 2, 2008, and not recalling that Tye Rod had told him the motor already had been ordered and delivered, Pixley decided to obtain the model number of the motor. (Pixley Dep. p. 70). Having earlier noted a duty slip about the burned-out motor and needing to get up for his first task of the day and stretch his legs, Pixley decided to go to the conveyor line and record the model number so Pro-Pak could order a replacement motor. (Pixley Dep. p. 70). To record the motor number, Pixley bent over and went down on one knee with his leg extending into the transfer car aisle. At that moment the transfer car operated by Jonathon Dudzik struck Pixley, resulting in Pixley's leg being caught between the end of the stationary conveyor line and the side of the transfer car. (Complaint ¶17). Pixley could have obtained the serial number of the motor without placing any part of his body in the aisle of the transfer car. (F. Smith Dep. p. 284). Pixley admits his leg should not have been in the path of the transfer car. (Pixley Dep. pp. 146-147).

Shortly before the accident, Dudzik had stopped the transfer car to load cardboard onto the car to be taken to the Langston machine. At that time, Dudzik saw no one at the conveyor line. (Dudzik Dep. p. 68). It took approximately 3-4 minutes to load the stacks of cardboard measuring approximately 5 feet 8 inches high onto the car. (Dudzik Dep. p. 134). After loading the cardboard, Dudzik began to operate the transfer car from the rear control panel, rather than the front panel. (F. Smith Dep. pp. 74-75, 211-212). Operating the car from the rear control panel with the stack of cardboard on the car reduced Dudzik's line of sight by creating a blind spot of approximately one foot immediately in front of the car. (Dudzik Dep. pp. 87-88). As such, Dudzik was unable to see Pixley kneeling in front of the transfer car. (Dudzik Dep. p. 76). It was only a matter of seconds from the time Dudzik pushed the lever to operate the transfer car to when he saw Pixley go over the bumper. (Dudzik Dep. p. 137). Pixley is unsure whether he came in contact with the transfer car. (Pixley Dep. p. 94). Dudzik saw Pixley come up over the bumper, but did not see him hit the bumper. (Dudzik Dep. p. 98). Dudzik believes Pixley's calf caught the corner of the transfer car behind the bumper. (Dudzik Dep. p. 98). Frank Smith, Pro-Pak's plant superintendent, saw no physical evidence that Pixley came in contact with the safety bumper. There were no marks, skin, blood, or any other evidence to show Pixley contacted the bumper. (F. Smith Dep. pp. 205-207).

Both the siren and strobe lights on the transfer car were working on the day of plaintiff's accident. (Exh. B, ¶7-8, Aff. of T. Rod). Plaintiff was aware of the lights on top of the transfer car and the car's siren. There is no evidence that either was non-operable at the time of the accident. (Pixley Dep. p. 79). No other employees had ever been injured by a transfer car at Pro-Pak. (Exh. A ¶4, Aff. of Armey).

Dudzik recalls no occasions when he was operating the transfer car and it unexpectedly shut off. (Dudzik Dep. p. 103). Smith had no knowledge of any occasions when the safety bumper did not function properly. (F. Smith Dep. p. 223). Occasionally, the safety bumper would drag on the floor, but this never affected the bumper's functioning, nor caused the transfer car to shut off. (Jefferies Dep. pp. 23, 41).

Following the accident, Pro-Pak employees tested and inspected the transfer car, which testing included activating the safety bumpers. Pro-Pak found the transfer car and all its components to be fully operational and the car was placed back into service later in the day. (Armey Dep. p. 63).

The day following Pixley's accident, an OSHA investigator appeared at the plant, investigated the accident and inspected the transfer car. OSHA found no defect or other problem with the operation of the car and required no repairs, maintenance or adjustments to the transfer car. (Armey Dep. p. 77).

II. ARGUMENT

Proposition of Law No. I

The *Hewitt* Court's Definition Of Equipment Safety Guard Is Limited To Protecting Operators Only

In *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, the 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. Because the appellate court failed to follow this Court's definition of an equipment safety guard, the Court must reaffirm its *Hewitt* decision, to wit: for purposes of establishing the

rebuttable presumption of intent to injure under R.C. 2745.01(C), an equipment safety guard is a device designed to shield the operator of the equipment, not all employees.

R.C. 2745.01(C) establishes a rebuttable presumption of intent to injure if an employee can prove the employer deliberately removed an equipment safety guard. However, R.C. 2745.01 does not define the terms "equipment safety guard" or "deliberate removal". In examining the plain and ordinary meaning of "guard", it is "a protective or safety device; *specif*: a device for protecting a machine part or the operator of a machine". *Hewitt*, *See also Merriam Webster's Collegiate Dictionary* (516 10th Ed. 1996). It is well established the interpretation of undefined statutory terms is not a question of fact, but rather a question of law for the court. *Akron Center Plaza, LLC v. Summit Cty Bd. Of Revision*, 128 Ohio St.3d 145, 2010-Ohio-5035, 942 N.E.2d 1054.

In *Hewitt, surpa,* the Court noted that the Sixth District Court of Appeals in *Fickle v. Conversion Technologies Intl., Inc.,* 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960, ¶38, had defined equipment safety guard as a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment. However, in *Beyer v. Rieter Automotive North American, Inc.*, 6th Dist. Lucas No. L-11-1110, 2012-Ohio-2807, the Sixth District Court of Appeals relied on the Eighth District Court of Appeals decision in *Hewitt*, 8th Dist., Cuyahoga No. 10-96138, 2011-Ohio-5413, to expand the definition of equipment safety guard to include face masks.

Shortly after the appellate court's decision in *Beyer, supra,* this Court reversed the Eighth District Court of Appeals decision in *Hewitt* and rejected an expanded definition of equipment safety guard. The Court specifically limited the definition of equipment safety guard to a device designed to shield the operator from exposure to or

injury by a dangerous aspect of the equipment. The Court also abrogated the appellate court's decision in *Beyer v. Rieter Automotive North American, Inc. in Hewitt, supra.*

As the plain language of R.C. 2745.01(C) indicates, the General Assembly did not make the presumption applicable upon the deliberate removal of any safety-related device, but only of an equipment safety guard. *Fickle v. Conversion Technologies, Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960, ¶42. An "equipment safety guard" for purposes of R.C. 2745.01(C) is "a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." In establishing this definition, the Ohio Supreme Court explicitly rejected a broader interpretation by stating that "to include any generic safety-related items ignores not only the meaning of the words used but also the General Assembly's intent to restrict liability for intentional torts." *Hewitt* at ¶24.

Because the clear intent of the General Assembly in enacting R.C. 2745.01 was to restrict workplace intentional tort claims to only those cases in which the employer specifically intends to injure the employee, the rebuttable presumption only arises if an operator of the equipment or machine from which the guard was deliberately removed is injured. Otherwise, there is no basis upon which to presume an employer intended to injure another. A broader definition of equipment safety guard to include protection of persons other than the operator does not comport with the General Assembly's intent to restrict intentional tort liability to only those situations in which an employer acts with specific intent to injure. *Stetter v. R.J. Corman Derailment Services, LLC,* 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092. Clearly, the employer cannot anticipate, let alone intend, to injure anyone other than the operator of the machine from which the

employer deliberately removes a guard. To expand the class of protected employees beyond the operator eliminates the rationale and underpinning for the creation of the rebuttable presumption under R.C. 2745.01(C).

Pro-Pak neither ordered nor required Pixley to work with part of his body in the path of the transfer car. Frank Smith did not understand why Pixley was obtaining the serial number, as the motor was a common motor that had been ordered many other times. (F. Smith Dep. p. 231). Furthermore, the new motor already had been ordered and delivered and was sitting on the floor of the maintenance department for about a week before Pixley's accident. (Rod Dep. p. 139). Not only was Pixley not required to obtain the serial number off the motor, Pixley was not required to obtain the number in the manner in which he did. Pixley could have obtained the serial number by simply standing between the conveyors without having any part of his body in the aisle way. In fact, Pixley admits he should not have had his leg in the aisle way of the transfer car (Pixley Dep. pp. 146-147). Pixley could have performed the job function without putting himself in harm's way.

R.C. 2745.01(C) creates a rebuttable presumption that an employer acts with intent to injure another. Because Pro-Pak could not have expected Pixley to put himself in harm's way by positioning himself in the path of the transfer car to record a serial number of a motor that already had been ordered and delivered to Pro-Pak, Pro-Pak could not have acted with specific intent to injure Pixley. Defining equipment safety guard as a device to protect only the operator of the particular machine or equipment from which the guard is deliberately removed is essential to establish the rebuttable presumption that the employer acted with intent to injure. To define equipment safety

guard as a device to protect all employees contravenes the legislature's intent of restricting employer intentional tort claims to only those in which the employer acts with a specific intent to injure. Such an expanded definition will increase litigation and employer intentional tort liability for many workplace injuries not caused by an employer's specific intent to injure. Employers will be required to rebut a presumption that they intended to injure an employee where there exists no basis for the rebuttable presumption in the first place.

The appellate court relied on *Beary v. Larry Murphy Dump Truck Service, Inc.*, 5th Dist. Stark App. No. 2011-CA-00048, 2011-Ohio-4977, to support its expansion of the definition of equipment safety guard under R.C. 2745.01(C). The appellate court reasoned that if the Ohio Supreme Court had intended to limit the definition of equipment safety guard to only those devices that are designed to protect operators, the Ohio Supreme Court would not have reversed the appellate court's decision in *Beary, supra.* However, *Beary* was reversed and remanded so the appellate court could apply the definition of equipment safety guard as set forth in *Hewitt, supra,* as opposed to the definition provided by the Industrial Commission. The mere fact that *Beary* was remanded to the appellate court to apply the proper definition of equipment safety guard in no way demonstrates this Court's intention to expand the definition of equipment safety guard to include all employees.

The appellate court's expansion of the definition of equipment safety guard cannot be reconciled with this Court's holding in *Hewitt.* The definition of an equipment safety guard as a device to protect the operator of a machine is consistent with the General Assembly's intent in enacting R.C. 2745.01. The Court should reaffirm its

holding in *Hewitt, supra,* that an equipment safety guard for purposes of R.C. 2745.01(C) is a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.

Proposition of Law No. II

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.

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. *Houdek v. ThyssenKrupp Materials N.A., Inc., et al.,* 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253. To receive the benefit of the rebuttable presumption that an employer acted with the intent to injure another under R.C. 2745.01(C), an employee must establish the employer deliberately removed an equipment safety guard if an injury directly results from the removal. *Hewitt, supra.* In the absence of a deliberate removal of an equipment safety guard by the employer, the employee must establish that the employer acted with specific intent to injure. *Houdek, supra.* 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. This Court in *Hewitt, supra,* stated that deliberate removal pursuant to R.C. 2745.01(C) "may be described as a careful and thorough decision to get rid of or eliminate an equipment safety guard." *Id.* at ¶29.

The meaning of the terms "equipment safety guard" and "deliberate removal" as used in R.C. 2745.01(C) is to be ascertained as a matter of law by the court. It is well

established that the interpretation of undefined statutory terms in not a question of fact, but a question of law for the court. This means, in particular, that such terms are not susceptible to definition by an expert witness. As the court stated in *Nicholson v. Turner/Cargile*,107 Ohio App.3d 797, 809, 669 N.E.2d 529, (10th Dist.1995),

> "while expert testimony may be used to establish breach of a standard created by statute, or rule, such testimony is not admissible to interpret statutory terms which create the standard."

In *Fickle, supra*, an emergency stop cable had been removed from the machine and not replaced. Additionally, the employer had failed to train the employee to properly use a jog control while operating the machine. Based on these facts, plaintiff's safety expert testified the employer had deliberately removed equipment safety guards from the machine. In affirming summary judgment for the employer, the appellate court held the expert's testimony to be irrelevant and inadmissible. The meaning of "equipment safety guard" and "deliberate removal" are questions of law for the court, opinions of safety experts are irrelevant to the determination.

Relying on the affidavit of Kevin Smith, one of Pixley's safety experts who inspected the transfer car approximately three years after the accident, Pixley argues Pro-Pak deliberately bypassed the safety bumper of the transfer car. Based on the OSHA video taken the day following the accident and allegedly showing the safety bumper dragging on the floor and not shutting off the transfer car, Kevin Smith opines the safety bumper was deliberately bypassed. Smith fails to state who bypassed the bumper, or when, where, and how the bumper was allegedly bypassed. Pixley cannot state with certainty he ever came in contact with the transfer car. (Pixley Dep. p. 94). The transfer car operator indicated Pixley came up over the bumper, but did not run into

it. (Dudzik Dep. p. 98). Dudzik thought Pixley's calf caught the corner of the transfer car past the bumper. (Dudzik Dep. p. 98).

Troy Jefferies, Pro-Pak's current maintenance supervisor, testified the safety bumper functions even at those times when it may drag on the floor (Jefferies Dep. p. 23). Although the bumper dragging on the floor is annoying and scratches the paint on the floor, neither Jefferies nor Dudzik are aware of the transfer car ever stopping abruptly when the bumper dragged. (Jefferies Dep. p. 23; Dudzik Dep. p. 103).

There is no evidence Pro-Pak made a deliberate decision to bypass the safety bumper. In *Conley v. Endres Processing*, 3rd Dist. Wyandot App. No. 16-12-11, 2013-Ohio-419, the employee claimed the employer deliberately removed a metal plate which covered the auger's belts and pulleys. In concluding the employer did not deliberately remove the metal plate, the court found no evidence the employer made a deliberate decision to lift, push aside, take off, or otherwise eliminate the metal plate. At best, the employer may have been aware that at times employees failed to replace the metal plate after removing it, but there was no evidence that this failure was the result of a deliberate decision by the employer.

If there is no express order that a safety mechanism was bypassed or the employer failed to follow a safety policy, the employer did not act with deliberate intent. *Broyles v. Kasper Machine Co., et al.,* 517 Fed.Appx. 345, (Sixth Circuit 2013). In *Broyles,* Broyles was a supervisor and in charge of Bay 26 which contained a carpet-forming machine. *Id.* On the day of the accident, the machine was having problems. *Id.* Without following the safety procedures, Broyles entered the restricted area to diagnose the problem before maintenance arrived. *Id.* Although Broyles attempted to get off the

machine before it rotated, he lost his balance and fell. *Id.* The United States Sixth Circuit Court of Appeals concluded the employer was not liable for an Ohio intentional tort action because Broyles could not prove the employer made a deliberate decision to bypass or eliminate a safety guard. Broyles could not make any showing of deliberate or subjective intent by anyone in management because all the safety equipment guards that were in place before the accident were in operation at the time of the accident. *Id.*

As in *Broyles, supra*, there is no testimony or other evidence that Pro-Pak made a deliberate decision to bypass the safety bumper. Pro-Pak's employees checked the operation and function of the safety bumpers on a monthly basis as part of the company's preventive maintenance program. (F. Smith Dep. pp. 108-109). The bumpers were manually checked by an employee exerting sufficient force on the bumper to shut off the power to the transfer car (F. Smith Dep. p. 107-108). On the same day as Pixley's accident, Pro-Pak employees tested the transfer car and safety bumper and determined both to be fully functional and operational (Armey Dep. p. 63). The day following the accident, OSHA inspected the transfer car and found no need for any repairs, maintenance, or adjustments. (Armey Dep. p. 77). Pixley has failed to present any admissible and relevant evidence that Pro-Pak deliberately removed an equipment safety guard.

In another case similar to the present action, the Eighth District Court of Appeals concluded there was no evidence the employer made a deliberate decision to keep an elevator in operation while knowing it was dangerous. *Rivers, et al. v. Otis Elevator, et al.* (Eighth Dist. Court of Appeals Case No.: 99365), 2013-Ohio-3917. In *Rivers,* the employee tripped and fell into the elevator. *Id.* Appellant asserted a negligence and

intentional tort claim. *Id.* Appellant contended the employer was liable for an intentional tort because it knew or should have known the elevator was not properly working and elected to continue to operate the elevator as opposed to shutting it down. *Id.* A maintenance worker testified no one reported any problems with the elevator. *Id.* The court held there was a lack of evidence that the employer made a deliberate decision to keep the elevator in operation knowing that it was dangerous. *Id.*

The record in the present case is devoid of any evidence Pro-Pak made a deliberate decision to bypass the safety bumper on the transfer car. There is no written order, maintenance slip, testimony from any witness or any other documentation whatsoever to show Pro-Pak made a deliberate decision to disable the safety bumper. It defies logic that Pro-Pak would deliberately bypass the safety bumper in light of the fact that its maintenance employees would inspect and check the functioning of the bumpers every month as part of Pro-Pak's preventative maintenance program. (F. Smith Dep. pp. 108-109).

III. CONCLUSION

For all the above reasons and based on the above cited authority, Pro-Pak requests the Court reverse the judgment of the Sixth District Court of Appeals and reinstate the trial court's summary judgment in favor of Pro-Pak, dismissing Pixley's complaint.

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 1st day of November, 2013, upon the following: David R. Grant, Esq., *Attorney for Appellee,* Plevin & Gallucci Co., LPA, 55 Public Square, Suite 2222, Cleveland, OH 44113; Adam J. Bennett, Esq., *Attorney for Involuntary Plaintiff, BWC,* Andrew Cooke & Associates, LLC, 243 N. Fifth Street, Suite 300, Columbus, OH 43215; Preston J. Garvin, Esq., *Counsel for Amicus Curiae Ohio Chamber of Commerce*, Garvin & Hickey, LLC, 181 East Livingston Avenue, Columbus, OH 43215; Robert A. Minor, Esq., *Counsel for Amicus Curiae Ohio Self-Insurers Association*, Vorys, Sater, Seymour and Pease, LLP, 52 East Gay Street, P.O. Box 1008, Columbus, OH 43216; and Daniel A. Richards, Esq., *Counsel for Amicus Curiae Ohio Association of Civil Trial Attorneys,* Weston Hurd, LLP, 1301 East 9th Street, Suite 1900, Cleveland, OH 44114.

Lorri J. Britsch

APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

Phillip E. Pixley,	:	13-0797
Appellee,	:	On Appeal from the Lucas County County Court of Appeals,
v.	:	Sixth Appellate District
Pro-Pak Industries, Inc., et al.,	:	Court of Appeals Case No.: L-12-1175
Appellants.	:	

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SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANTS PRO-PAK INDUSTRIES, INC. AND TOLEDO L & L REALTY COMPANY

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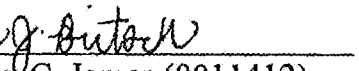
Notice of Appeal of Appellants Pro-Pak Industries and Toledo L & L Realty Company

Appellants Pro-Pak Industries and Toledo L & L Realty Company hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. L-12-1177 on April 5, 2013.

This case is of public and great general interest and warrants a review by the Ohio Supreme Court. A Memorandum in Support of Jurisdiction is being filed contemporaneously with this Notice of Appeal.

Respectfully submitted,



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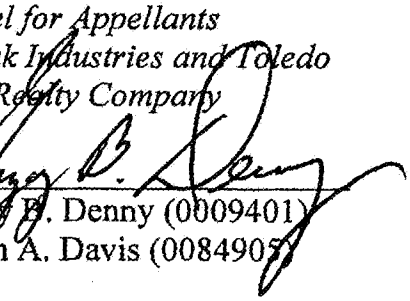

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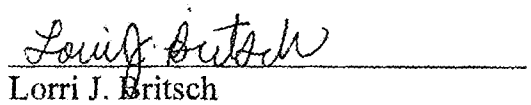
L & L Realty Company

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.



Lorri J. Britsch

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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

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[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. JUDGE

Thomas J. Osowik, J. JUDGE

Stephen A. Yarbrough, J. JUDGE
CONCUR.

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

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COMMON PLEAS COURT
BERNIE QUILTER
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IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Phillip E. Pixley,	*	
	*	Case No. CI0201004718
Plaintiff,	*	OPINION AND JUDGMENT ENTRY
vs.	*	Hon. Myron C. Duhart
Pro-Pak Industries, Inc., et al.,	*	
Defendants.	*	
	*	

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

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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* Armey 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. (Dudzik Depo.p.76.) The transfer car had a

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"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]

---

[1]R.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.

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See Stetter v. RJ. 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. Jeno's, 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

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

[2]The *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.

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> 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

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[3]Sub-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.

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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

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'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. <u>Deliberate Intent -- R.C. 2745.01(A) and (B)</u>

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"

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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

SCANNED

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

SCANNED

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 Generally 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

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employer intentional tort. *Stetter v. RJ. 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. Jeno's, 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

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[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).

SCANNED

> *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*

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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

SCANNED

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.

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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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NOTES OF DECISIONS (537)

In general
Burden of proof
Common law intentional tort
Constitutional issues
Effective date
Equipment safety guard
Evidence
Federal preemption
Insurance coverage
"Intentionally and deliberately" construed
Limitations periods
Loss of consortium
Questions of fact
Summary judgment

2745.01 Requirements for employer liability
Baldwin's Ohio Revised Code Annotated Title XXVII. Courts--General Provisions--Special Remedies (Approx. 2 pages)
Title XXVII. Courts--General Provisions--Special Remedies
Chapter 2745. Employment Intentional Tort

Unconstitutional or Preempted Prior Version Held Unconstitutional by Johnson v. BP Chemicals, Inc. Ohio Apr 14, 1999

R.C. § 2745.01

2745.01 Requirements for employer liability

Currentness

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

CREDIT(S)
(2004 H 498, eff. 4-7-05)

Notes of Decisions (537)

R.C. § 2745.01, OH ST § 2745.01
Current through 2013 Files 24 and 26 to 38 of the 130th GA (2013-2014)

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