

IN THE SUPREME COURT OF OHIO

CASE NO. 2013-0797

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PHILLIP E. PIXLEY  
Plaintiff-Appellee

-vs-

PRO-PAK INDUSTRIES, INC.; TOLEDO L & L REALTY CO.,  
Defendant-Appellants.

ON APPEAL FROM THE SIXTH JUDICIAL DISTRICT  
COURT OF APPEALS CASE NO. L-12-1177

MERIT BRIEF OF PLAINTIFF-APPELLEE,  
PHILLIP E. PIXLEY

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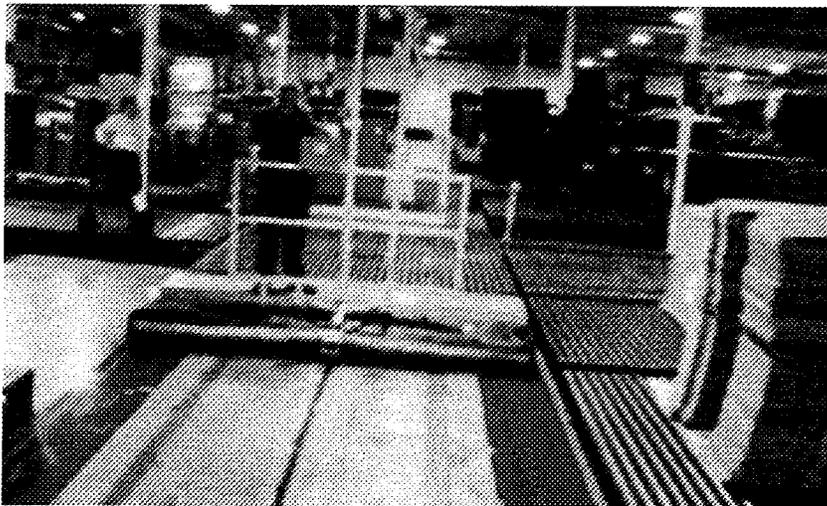
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## STATEMENT OF THE CASE AND FACTS

The unanimous decision that was rendered by the Sixth Judicial District Court of Appeals accurately summarizes the case history and relevant facts. *Pixley v. Pro-Pak Indust., Inc.*, 2013-Ohio-1358, 988 N.E. 2d 67 (6<sup>th</sup> Dist. 2013). In response to a pending motion for summary judgment, the following evidence had been produced in accordance with Civ. R. 56(C).

### **A. THE WORKPLACE INCIDENT**

Plaintiff-Appellee, Phillip E. Pixley, is a 31 year-old resident of Palmyra, Michigan. *T.d. 122, Deposition of Phillip E. Pixley ("Pixley Depo.")*, pp. 5-7. He graduated from high school in 2001, but he has no degrees beyond that. *Id.*, pp. 14-15. He worked as a laborer until he was hired by Defendant-Appellant, Pro-Pak Industries, Inc. ("Pro-Pak"), in June 2008. *Id.*, p. 16. He was assigned to the maintenance department and required to work from 6:00 a.m. until 3:30 p.m., six days a week. *Id.*, pp. 37-38. Plaintiff received minimal training, most of which was on-the-job. *Id.*, p. 44. He recalled no instruction on lock-out/tag-out safety protocols. *Id.*, p. 45.



Inside the Pro-Pak building, several conveyor lines crisscrossed the flooring. *T.d. 122, Pixley Depo.*, p. 72. Heavy industrial "transfer cars" ran along the tracks. *Id.*, pp. 72-73. Pro-Pak

employees were regularly required to cross the aisles over which the tracks ran, even while the system was operational. *T.d. 121, Deposition of Frank Smith ("F. Smith Depo.")*, p. 124. According to former maintenance technician Troy A. Jeffries

("Jeffries"), they walked and stood in the path of the carts every day, usually multiple times a day, and sometimes for extended periods. *T.d. 114, Deposition of Troy A. Jeffries ("Jeffries Depo."), pp. 59-61.* The conveyor line was de-energized only during certain maintenance activities. *Id.*

The transfer carts ran close to the conveyor lines to facilitate loading, leaving a gap by the side of less than three inches. *T.d. 121, F. Smith Depo., p. 200.* When the cart passed by a conveyor line, a pinch point was created several inches above the walking surface.



*Id.*

The industrial transfer cars were equipped with collapsible safety bumpers on each end. *R. 117, Deposition of Jonathan Dudzik ("Dudzik Depo."), p. 44; R. 121, F. Smith Depo., pp. 85-86.* They were situated approximately an inch and a half off the ground. *T.d. 121, F. Smith Depo., p. 102.* Whenever the vinyl outer covering pressed against another object, a switch was triggered that would stop the conveyor line. *T.d. 121, F. Smith Depo., pp. 85-86; T.d. 118, Deposition of John D. Aguirre ("Aguirre Depo."), pp. 27-28 & 31-32.* Maintenance technician Jeffries was able to tell from the footprints he observed that workers were stepping and standing on the bumpers on a weekly basis. *T.d. 114, Jeffries Depo., pp. 26-27.* There was a "no step" warning on the cover. *Id., p. 27.* Jeffries' concern was that the ongoing practice was loosening the internal cables. *Id., p. 27.* The technician would have to adjust the cables when he saw the bumpers dragging on the ground. *Id., p. 22-23, 40, 64-65.*

The maintenance department did not regularly lock-out and tag-out machinery

that was being inspected or serviced. *T.d. 122, Pixley Depo., pp. 53-56.* During his few weeks of employment with Defendant Pro-Pak, Plaintiff had never been advised to undertake such precautions when working on the conveyor motors. *Id., pp. 86-89.* Aguirre testified that even though he was authorized to lock-out and tag-out the transfer cars, he had never done so. *T.d. 118, Aguirre Depo., p. 56.*

On the morning of July 2, 2008, Plaintiff arrived for work at 6:00 a.m. *T.d. 122, Pixley Depo., 69-70.* He was under the impression that one of the conveyor line motors was burnt out and needed replacement, which was fairly common. *Id., p. 71.* One of his superiors in the maintenance department, Tye J. Rod ("Rod"), was helping him collect and record serial numbers off the line motors. *Id., p. 70.*

At roughly 10:30 a.m., Plaintiff knelt by one of the conveyor tracks. *T.d. 122, Pixley Depo., pp. 70 & 73-74.* He did not think he would be there long. *Id., p. 87.* The new employee was focused on reading the serial number on the motor he was examining. *Id., p. 75.* He was doing exactly what he had been instructed to do. *Id., p. 76.*

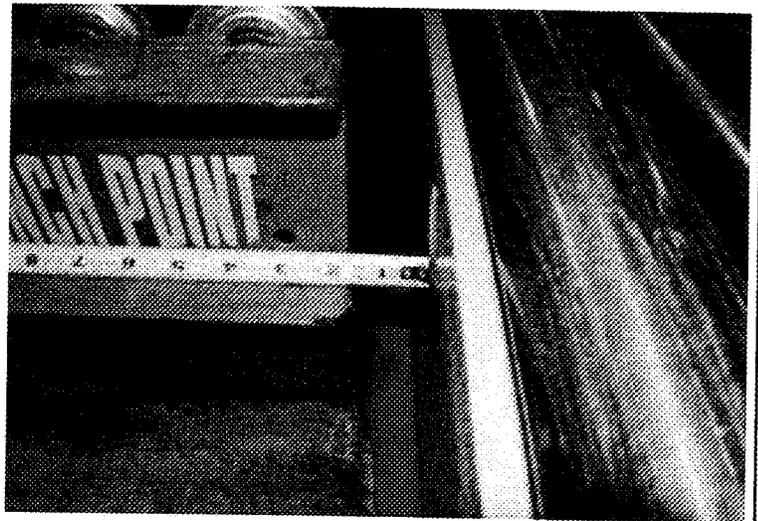
Jonathan Dudzik ("Dudzik") had been working as a machine operator at Pro-Pak for only a few months. *T.d. 117, Dudzik Depo., pp. 10-12.* On the morning of the incident, he had been operating the transfer cars along a track, but he had not seen Plaintiff anywhere in the vicinity. *Id., pp. 74-75.* Dudzik still knew from the previous day's activities that Plaintiff and Rod were working on the conveyor lines. *Id., p. 78.* He also had not been trained on lock-out/tag-out protocols, although he vaguely recalled the procedure being performed sometime earlier. *Id., p. 80.*

That morning, Dudzik saw Rod working on this transfer car on his conveyor line. *T.d. 117, Dudzik Depo., pp. 82-83.* Once the lock was removed, he was told he could start using the cart again. *Id., p. 83.* After he loaded the cart, Dudzik proceeded to the operators' station to activate the conveyor. *Id., pp. 85-86.* Because the load was

blocking his view, he could not see directly in front of the cart. *Id.*, p. 87.

All of a sudden, Dudzik noticed Plaintiff's body emerge over the front bumper. *T.d. 117, Dudzik Depo., pp. 89-90.* His leg had been caught in the two to three inch pinch point that was created when the cart passed by the conveyor line. *T.d. 119, Deposition of Scott Armev ("Armev Depo."), pp. 86-87; T.d. 121, F. Smith Depo., pp. 200-201; T.d. 116 Deposition of Jeffrey Kane ("Kane Depo."), pp. 54-55 & 67-68.* The maintenance worker rolled up and over the cart. *T.d. 117, Dudzik Depo., p. 90.* Dudzik immediately released the control lever and the cart stopped. *Id., pp. 90-91.* Plaintiff continued to roll and landed on his back by the side of the cart. *Id., pp. 90-91.* When Dudzik approached Plaintiff and saw the blood that was pooling around the aisle, he knew that his co-worker was seriously hurt. *Id., p. 92.* Once he was extricated, Plaintiff was flown by helicopter with emergency rescue personnel to the University of Toledo Hospital. *T.d. 122, Pixley Depo., pp. 93-94 & 116.*

Sometime later Defendant Pro-Pak added warning stickers to the sides of the conveyors. *T.d. 120, Depo. of Tye J. Rod ("Rod Depo."), p. 193.* Several addressed the pinch point that was created by the moving transfer carts. *Id.* Similar warnings were added on the floor. *Id., p. 93.* Bright red warning stripes were painted down the length of the aisles. *Id.*



## **B. PLAINTIFF'S INJURIES**

Plaintiff remained confined in the hospital for approximately two weeks. *T.d. 122, Pixley Depo., pp. 116-117.* He underwent a number of medical procedures,

including four reconstructive surgeries. *Id.*, pp. 116. Plaintiff was then transferred to a nursing care facility. *Id.*, pp. 113 & 117-118. More surgery and treatment was required at St. Vincent's Hospital and the University of Michigan over the next several months. *Id.*, pp. 118-120.

Because his left leg remains permanently disabled, Plaintiff can now only ambulate with crutches or a cane, and he sometimes uses a wheelchair. *T.d. 122, Pixley Depo.*, pp. 130-131. Not surprisingly, he has been diagnosed with depression and requires mental health treatment. *Id.*, p. 134.

### **C. PLAINTIFF'S EXPERT INVESTIGATION**

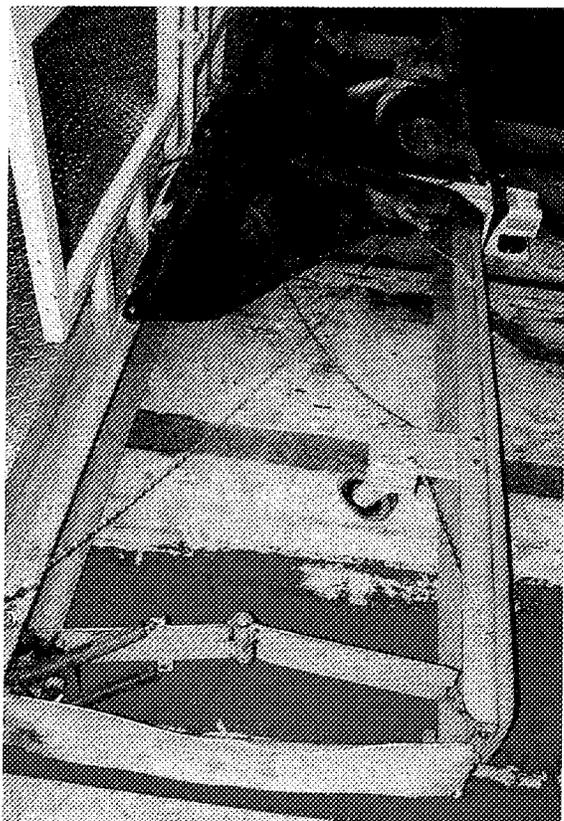
At the request of Plaintiff's counsel, an investigation of the incident was conducted by R. Kevin Smith, T. E. ("Smith"). *T.d. 126, Expert Affidavit of R. Kevin Smith, P.E. ("Kevin Smith Aff.")*. He is a well-qualified mechanical engineering safety and design consultant. *Id.*, pp. 1-3, paragraphs 1-7. He has confirmed that because the transfer cars moved up and down their tracks in the aisles that the workers were traversing, there was a potential for a severe leg injury. *Id.*, p. 3, paragraph 8(a). Since the operator could not always see in front of a loaded car, the danger posed was even greater. *Id.*, paragraph 8(d). In recognition of the hazards that existed, the cars were equipped with safety guards that he described as follows:

The leading edge of the transfer car contained a collapsible safety bumper that, when contacting obstructions, was deigned to collapse under light forces, and trip electrical proximity switches to shut down and stop the transfer car before the safety bumper fully collapsed, thereby protecting a person in its path.

*Id.*, paragraph 8(c).

On the morning of the incident, the bumper pressed up against Plaintiff's exposed leg but the transfer car did not stop. *T.d. 126, Kevin Smith Aff.*, p. 3, paragraph 8(d). Dudzik finally noticed that his co-worker falling off to the side of the

heavy metal cart and disengaged the machinery. *Id.*, paragraph 8(d). Under the circumstances, the safety guard should have activated immediately upon contact and protected Plaintiff. *Id.*, paragraph 8(e). Because the fail-safe apparatus was designed to shut down the system in the event of a malfunction in the bumper mechanism, the



*Safety Bumper with Cover Removed and Caster Wheel Added*

safety guard must have been “intentionally bypassed.” *Id.*, paragraph 8(i).

Significantly, Occupational Safety and Health Administration (OSHA) investigators filmed the same transfer car moving freely along the track after Plaintiff was taken away. *T.d.* 126, *Kevin Smith Aff.*, pp. 3-4, paragraph 8(f). The bumper was dragging and bouncing along the aisle surface, which should have continuously activated the safety system and disengaged the machinery. *Id.* Everyone is in agreement that no repairs or modifications

had been made to the cart between the moment of Plaintiff’s injury and the appearance of the OSHA investigator several hours later. *T.d.* 116, *Kane Depo.*, p. 63; *T.d.* 119, *Arney Depo.*, pp. 65-66; *T.d.* 120, *Rod Depo.*, pp. 180-181; *T.d.* 121, *F. Smith Depo.*, pp. 153-154. The only plausible explanation is that the proximity switches in the bumper had been “deliberately and intentionally bypassed and disabled.” *T.d.* 126, *Kevin Smith Aff.*, paragraph 8(f).

The inoperable safety system, and the resulting danger posed to the workers, would have been obvious to the employer. *T.d.* 126, *Kevin Smith Aff.*, p. 4, paragraph 8(g) – (i). The professional engineer has concluded that:

Bypass of the bumper safety switch system constitutes

deliberate removal of a safety guard. This safety guard was designed specifically to protect individuals from being struck or crushed and seriously injured by the heavy moving transfer car. Operating the transfer car from the end opposite of the direction of travel, with forward view blocked by materials and the safety systems bypassed, clearly constitutes a deliberate and conscious bypass of critical safety systems. This intentional disregard for employee safety by Pro-Pak resulted in a condition where an injury was in my opinion, substantially certain to occur, and is a direct cause of the subject accident.

*Id.*, p. 5, paragraph 8(m).

These same sound findings were independently reached by another workplace safety specialist, Gerald C. Rennell ("Rennell"). *T.d. 127, Expert Affidavit of Gerald C. Rennell ("Rennell Aff.")*. He is also a professional engineer who has developed substantial experience with workplace safety devices and standards. *Id.*, pp. 1-3, paragraphs 1-7. He is in full agreement that Plaintiff's leg was caught and injured in the pinch point that was created between the transfer car and aisle flooring. *Id.*, p. 3, paragraph 8(a) - (b). The collapsible safety bumper should have deactivated the machinery and prevented the catastrophe. *Id.*, paragraph 8(c) - (d) & (k) - (l).

Rennell also appreciated the significance of the OSHA investigatory materials. *T.d. 127, Rennell Aff. p. 4, paragraph 8(m)*. Because the agency's video confirms that the transfer car remained operable following the incident, even with the bumper dragging along the aisle, the safety guard must have been deliberately disabled. *Id.*, paragraph 8(n) - (p) & (u). All too predictably, a newly hired worker was seriously disabled by the removal of the critical safety device. *Id.*, p. 5, paragraph 8(x).

#### **D. THE DISPOSITION BELOW**

In granting summary judgment, the trial judge concluded that the "equipment safety guard presumption" afforded by R.C. 2745.01 can only be invoked by an actual "operator." *Merit Brief of Appellants Pro-Pak Industries, Inc. and Toledo L & L Realty Company ("Appellants' Brief")*, Apx. 0026-27. The judge did not deny that genuine

issues of material fact exist upon whether a safety guard had been deliberately removed from the machinery. *Id.* The remainder of the opinion found that Plaintiff was unable to establish a potentially viable common law cause of action against his employer. *Id.*, 0027-32.

Plaintiff appealed that ruling, and the Sixth District reversed in part. Adhering carefully to *Hewitt v. L.E. Myers Co.*, 134 Ohio St. 3d 199, 2012-Ohio-5317, 981 N.E. 2d 795, the panel agreed with the employer that “the failure to train on a safety procedure does not create a rebuttable presumption of intent to injure under R.C. 2745.01(C).” *Pixley*, 2013-Ohio-1358, ¶11-14. But, the court refused to limit the statutory protections to only machinery operators and concluded that “the safety bumper is an equipment safety guard[.]” *Id.*, ¶15-22. Consistent with the trial court’s ruling, the Sixth District further found that genuine issues of material fact existed whether the protective device had been deliberately removed. *Id.*, ¶23-27.

At the request of Defendants, Pro-Pak and Toledo L & L Realty Company, this Court agreed to accept jurisdiction over this appeal. *Pixley v. Pro-Pak Indust., Inc.*, 136 Ohio St. 3d 1472, 2013-Ohio-3790, 993 N.E. 2d 777 (table).

## ARGUMENT

Defendants have fashioned two Propositions of Law, which will be separately addressed in the remainder of this Brief.

### PROPOSITION OF LAW I: THE HEWITT COURT'S DEFINITION OF EQUIPMENT SAFETY GUARD IS LIMITED TO PROTECTING OPERATORS ONLY

#### **A. DEFENDANTS' POINTLESS DISTINCTION**

Defendants' first Proposition of Law challenges the Sixth District's determination that the equipment safety guard presumption is available to all employees who are injured by a deliberate removal, and not just those who happen to qualify as the "operator." *Appellants' Brief*, pp. 6-11. The purely artificial distinction that the employer is championing has no support in the statutory language, as R.C. 2745.01(C) directs merely that:

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.

The statutory presumption that has been established is thus concise and unambiguous, as the Twelfth District has recently explained:

Simply stated, R.C. 2745.01(C) "establishes a rebuttable presumption that the employer intended to injure the worker if the employer deliberately removes a safety guard." *Rivers v. Otis Elevator*, 2013-Ohio-3917, 996 N.E.2d 1039, ¶25 (8<sup>th</sup> Dist. 2013).

*Downard v. Rumpke of Ohio, Inc.*, 12<sup>th</sup> Dist. No. CA2012-11-218, 2013-Ohio-4760, ¶20 (Oct. 28, 2013); *see also, Hoyle v. DTJ Ents., Inc.*, 2013-Ohio-3223, 994 N.E. 2d 492, 497, ¶16 (9<sup>th</sup> Dist. 2013).

It is undoubtedly no accident that the statute does not differentiate between operators and non-operators. "In construing a statute, it is the duty of the court to give

effect to the words used in [the] statute, not to insert words not used.” *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 331, 2010-Ohio-1829, 928 N.E.2d 421, 425, ¶22, quoting *State of Ohio v. S.R.*, 63 Ohio St.3d 590, 595, 589 N.E.2d 1319 (1992). Even if the legislature may have intended a different result (which is unlikely), a statute must be enforced in accordance with its plain and ordinary meaning. *Hubbard v. Canton City Sch. Bd. of Edn.*, 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E. 2d 543, ¶14-17.

Defendants’ contrived distinction between operators and non-operators is based solely upon this Court’s decision in *Hewitt*, 134 Ohio St. 3d 199. *Appellants’ Brief*, pp. 6-7. But, this Court did not consider, and expressed no view, whether an “operators only” prohibition had been imposed by the legislature. In *Hewitt*, a majority of this Court reversed determinations by the trial and appellate courts that an electrical lineman’s rubber gloves and sleeves could potentially qualify as equipment safety guards. *Id.*, 134 Ohio St. 3d at 202-206, ¶14-32. The injured worker’s job title was irrelevant to the Court’s holding, which was predicated instead upon the nature of the equipment and the common sense meaning of the relevant terms. *Id.* The majority reasoned that:

The word “guard,” a noun, is modified by the adjectives “equipment” and “safety.” 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. [emphasis added]

*Id.* at 203, ¶18.

This court then cited with approval the definition that had been fashioned earlier by the Sixth District in *Fickle v. Conversion Tech. Intern. Inc.*, 6<sup>th</sup> Dist. No. WM-10-016, 2011-Ohio-2960 (June 17, 2011). That decision also does not draw any meaningful distinctions between operators and non-operators. The *Fickle* court adopted a common-sense interpretation of the statutory phrase equipment safety guard, but the

panel ultimately concluded that the “jog control” and “emergency stop cable” on an adhesive coating machine did not qualify. *Fickle*, 2011-Ohio-2960 ¶29-43. Significantly, the Sixth District refused to accept the employer’s argument that the terms could only mean a “barrier guard” affixed to machinery. *Id.*, ¶32-33.

After rejecting the employer’s unduly strict interpretation of R.C. 2745.01(C), the *Fickle* court concluded that: “ \*\*\* [a]n ‘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.” *Id.*, ¶43. The opinion does not suggest that this sensible definition is all encompassing, such that the presumption is only available to those who hold the title of “operator.” *Id.*

The demise of the unduly narrow “barrier guard” definition is consistent with applicable workplace safety regulations. For instance, OSHA has explained in a subsection addressing machine guarding that:

\*\*\* Examples of guarding methods are barrier guards, two-handed tripping devices, electronic safety devices, etc. [emphasis added].

29 C.F.R. 1910.212(a)(1). Because administrative agencies have developed considerable expertise on issues falling within their jurisdiction, Ohio courts often defer to their interpretations of governing terms. See e.g., *Sharp v. Union Carbide Corp.*, 38 Ohio St. 3d 69, 72, 525 N.E. 2d 1386, 1389 (1988); *Maitland v. Ford Motor Co.*, 103 Ohio St. 463, 468, 2004-Ohio-5717, 816 N.E. 2d 1061, 1067, ¶26. The “electronic safety devices” installed in Pro-Pak’s bumper guards imposed an effective barrier between the employee and the equipment and thus fall within the purview of R.C. 2745.01(C). *McKinney v. CSP of Ohio, LLC*, 6<sup>th</sup> Dist. No. WD-10-070, 2011-Ohio-3116 (June 24, 2011) (finding that the light curtain on a molding press could qualify as an equipment safety guard); *Downard*, 2013-Ohio-4760, ¶36-39 (holding that statutory presumption applied to interlock switch attached to hinged hood that was intended to prevent workers from

falling into an activated tire shredder whenever the covering was opened); *Dudley v. Powers & Sons, LLC*, 6<sup>th</sup> Dist. No. WM-10-015, 2011-Ohio-1975 (Apr. 22, 2011) (concluding that jury had to resolve whether removal of dual palm actuating buttons on an industrial hydraulic press satisfied the requirements for the statutory presumption).

Defendants' ill-conceived interpretation of *Hewitt* cannot be reconciled with this Court's disposition of *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 5<sup>th</sup> Dist. No. 2011-CA-00048, 2011-Ohio-4977, ¶21 (Sept. 26, 2011). The Fifth District had held in that instance that a backup alarm on a skid steer did not shield an operator from anything and thus could not qualify as an equipment safety guard. *Id.*, ¶16-22. But, this Court unanimously reversed that determination on the authority of *Hewitt*. *Beary v. Larry Murphy Dump Truck Serv.*, 134 Ohio St.3d 359, 360, 2012-Ohio-5626, 982 N.E.2d 691.

Defendants' only retort to the Sixth District's reliance below upon *Beary*, 134 Ohio St.3d 359, is that: "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." *Appellants' Brief*, p. 10. This is certainly a curious position for the employer to advocate, given its staunch insistence that slavish adherence to *Hewitt dicta* is necessary. *Hewitt* merely adopted the *Fickle* court's non-inclusive "commonly understood" definition, which is precisely the same one that was followed by the Fifth District in *Beary*. And, there was never any dispute (and there is none now) that the injured worker in *Beary* was not the skid steer operator, but was simply a laborer who was tying caution tape around an overturned shopping cart in a parking lot when he was struck from behind. *Beary*, 2011-Ohio-4977, ¶15. As a matter of simple logic, the Fifth District would have been affirmed if this Court had intended to preclude all non-operators from enjoying the benefits of the statutory presumption. *See, e.g., Beyer v.*

*Riter Auto. N. Am., Inc.*, 134 St.3d, 379. 2012-Ohio-5627, 982 N.E.2d 708 (summarily reversing the appellate court on the basis of *Hewitt*). Defendants should not be allowed to pick-and-choose which Supreme Court precedents they intend to follow.

A virtually identical form of the equipment safety guard presumption was included in former R.C. 4121.80(G)(1), which had been enacted by 1986 S.B. 307. See *Fyffe v. Jenos, Inc.*, 59 Ohio St. 3d 115, 118-119, 570 N.E. 2d 1108, 1112 (1991). Even though numerous Ohio jurists have examined the provision (while in effect) over the last twenty-seven years, Defendants have been unable to identify a single example of any court (other than the trial judge below) denying the benefit of the subsection to a worker on the grounds that he/she did not happen to qualify as an operator. *Appellants' Brief*, pp. 6-11. They have cited *Conley v. Endres Processing Ohio, L.L.C.*, 3<sup>rd</sup> Dist. No. 16-12-11, 2013-Ohio-419 (Feb. 11, 2013), but the Third District held in that instance that a lockout device is an item controlled by the employee, not part of the equipment, and thus incapable of implicating the presumption. *Id.*, ¶14. In *Rivers*, 2013-Ohio-3917, an unsuccessful attempt was made to establish that an elevator was an equipment safety guard. There is thus no reason to fear that a flood of "non-operator" workplace intentional tort claims will submerge the Ohio judicial system if the Sixth District's sensible ruling is upheld.

## **B. THE NONSENSICAL RESULT**

Defendants and their *amici* are arguing, in essence, that the references to an "operator" in *Hewitt* and *Fickle* must mean that R.C. 2745.01(C) can only be invoked by workers holding the same job classification. If accepted by this Court, such an arbitrary distinction would quickly produce absurd results.

As but one example, if a plant manager was showing a novice mixing machine operator how to perform his duties, and both were splashed with a toxic chemical because a safety shield had been deliberately removed, only one of them would be

entitled to the presumption of a deliberate intent to injure. The employee who had detached the protective device will be deemed by operation of law to have done so with the intent to injure the new operator, but not the plant manager.

Even the same individual could be subjected to markedly different treatment under the statute as a result of pure happenstance. If a worker was charged with both operating an unguarded punch press, and fixing the apparatus in the event of a malfunction, his ability to invoke R.C. 2745.01(C) would turn upon the role he was performing at the moment that his fingers were crushed in the pinch point. In most cases, imaginative attorneys can always formulate some argument as to why a plaintiff was not actually engaged in the duties of an operator at the moment of injury.

As directed in R.C. 1.47(C), legislation should never be interpreted in a manner that produces absurd or unreasonable results. *Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968), paragraph four of the syllabus; *State, ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181-182, 480 N.E.2d 758 (1985). When resolving uncertainties, this Court should discern the objectives of the General Assembly by examining the language employed and the purposes to be accomplished. *State ex rel. Francis v. Sours*, 143 Ohio St. 120, 124, 53 N.E. 2d 1021 (1944). While there can be no doubt that a majority of the legislature desired to substantially restrict the common law workplace intentional tort theory of recovery, there is absolutely no reason to believe that any of them intended to discriminate against non-operators.

### **C. DEFENDANTS' PUBLIC POLICY RATIONALE**

Without citing any legislative history or materials, Defendants have theorized that perhaps the General Assembly really did mean to impose an "operators only" restriction because an "employer cannot anticipate, let alone intend, to injure anyone other than the operator of the machine from which the employer deliberately removes a guard." *Defendants' Brief*, pp. 8-9. This far-fetched speculation is demonstrably wrong,

as innumerable guards are unquestionably designed to protect more than just the operator. OSHA has directed – in no uncertain terms – that for all types of potentially dangerous machines:

One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. \*\*\* [emphasis added].

29 C.F.R. 1910.212(a). The federal regulations further specify, with respect to all employees, that:

The point of operation of machines whose operation exposes an employee to injury, shall be guarded. \*\*\* [emphasis added].

29 C.F.R. 1910.212(a)(3). Because supervisors, trainers, assistants, technicians, mechanics, and even maintenance workers are often required at some point during their job duties to work in, with, or near potentially dangerous equipment, OSHA has not limited its guarding regulations to just the operators.

On power machines and machine tools, the Safety and Hygiene Division of the Ohio Bureau of Workers Compensation (“Bureau”) requires that “guards shall be provided which will prevent the operator or other employees from coming in contact with the projecting unused portion of the revolving material.” *Ohio Admin. Code 4123:1-5-11(D)(4) (emphasis added)*. The Ohio regulation further states with regard to “nip points” that: “Means shall be provided to protect employees exposed to contact with nip points created by power driven in-running rolls, rollover platen, or other flat surface material being wound over roll surface.” *Ohio Admin. Code 4123:1-5-11(D)(10)(a) (emphasis added)*.

Defendants’ contrived public policy justification fails to account for the inescapable fact that guarding is often furnished on equipment that does not require an operator at all. As but one example, protective screen and gates must be installed over

ground level industrial exhaust fans “sufficient to prevent any part of any employee’s body from inadvertently contacting the blade.” *Ohio Admin. Code 4123:1-5-05(I)(3)* (*emphasis added*); *see also 29 C.F.R. 1910.212(a)(5)*. Chutes used in debris removal must be guarded when “employees are required to work in or pass through the area at the discharge end[.]” *Ohio Admin. Code 4123:1-3-19(D)(1)(b)*. A similar requirement has been imposed by OSHA for gears, pulleys, and other exposed rotating parts. *29 C.F.R. 1917.151(h)(1)*. Given that there are no operators of this equipment, the only conceivable purpose of the protective barriers is to prevent inadvertent contact by any employee.

As countless federal and state safety regulations attest, guarding is critical to protect not just machine operators, but also every other worker who is foreseeably threatened with harm. *See, e.g., Ohio Admin. Code 4123:1-5-1-11(D)(4)* (requiring for spindle lathes and other cutting machines that “guards shall be provided which will prevent the operator or other employees from coming in contact with the projecting unused portion of the revolving material”) (*emphasis added*); *Ohio Admin. Code 4123:1-5-11(D)(7)(a)* (requiring “grid type guards to prevent access of the employee’s hands into the danger zone” of hopper fed machinery); *Ohio Admin. Code 4123:1-7-13(A)* (“All tumbling mills shall be provided with a suitable guard to protect employees from the exposed parts of the mill during operation.”) Notwithstanding Defendants’ dubious assertions to the contrary, any company official, manager, or representative who possesses passing familiarity with these administrative mandates will appreciate that the removal of safety guards needlessly endangers everyone required to work in, with, or near the equipment. There is no legitimate reason for anyone to believe that only the employer’s operators will be exposed to harm.

Just like OSHA and the Bureau’s Safety and Hygiene Division, the General Assembly chose not to differentiate between operators and other exposed employees.

R.C. 2745.01(C). As this Court recently observed:

The General Assembly understands how to draft laws that contain exceptions, but included no exception that can be applied in this case. And we will not create an exception by judicial fiat. *Akron v. Rowland*, 67 Ohio St.3d 374, 380, 618 N.E.2d 138 (1993).

*Pauley v. City of Circleville*, \_\_\_\_ Ohio St. 3d \_\_\_\_, 2013-Ohio-4541, ¶38. Likewise, Chief Justice O'Connor has commented that: "Our democracy is not designed to permit four justices to needlessly override the studied policy judgment of 129 legislators and one governor." *Schussheim v. Schussheim*, 137 Ohio St. 3d 133, 2013-Ohio-4529, ¶61 (O'Connor, C.J., dissenting).

#### **D. TREATMENT OF UNDEFINED TERMS**

Because a definition of "equipment safety guard" has not been furnished in R.C. 2745.01, the legislature is presumed to have envisioned that the trier-of-fact will supply a plain and ordinary meaning, based upon the particular facts of each case. An instructive opinion is *State of Ohio v. Jones*, 2<sup>nd</sup> Dist. No. 5745, 1978 W.L. 216208 (Mar. 1, 1978). There, a defendant convicted of unauthorized use of a motor vehicle appealed the judgment, arguing that he should have received a special jury instruction that the statutory term "use," did not include being a passenger in the subject vehicle. The trial judge had wisely instructed the jury, instead, as follows:

[T]he word "use" does not have any particular legal definition; that the jury address the word use in the same way you would in your everyday utilization of the word. The jury was instructed to apply the ordinary, everyday meaning which each of you in your collective experience ascribe to that word. It has no special definition in the context of this case.

*Id.* at p. \*1. In agreeing that the judge's instruction was correct, the appellate court reasoned, in part:

There is no rule of law that requires the trial judge to define every word that is used in his instruction. Any attempt by the judge to be a talking dictionary of common words leads to an

unnecessary multiplication of words and confusion that implies special legal significance -- that does not exist -- and obscures rather than clarifies the true, simple meaning. The jurors must be credited with common sense and an understanding of simple English. Jurors are presumed to know the meaning of common words. It is never necessary to explain ordinary words or expressions when they are used in the sense in which they are commonly understood. [emphasis added].

*Id.* at p. \*2.

Similarly, in *State of Ohio v. Risner*, 3<sup>rd</sup> Dist. No. 6-91-21, 1992 W.L. 195311 (Aug. 4, 1992), the court concluded that there had been no error in permitting a jury to apply the ordinary, common meaning of undefined terms “stealth” and “deception.” “In the absence of definitions in Title 29 of stealth and deception that applied to the elements of aggravated burglary, these terms are to be given their ordinary and common meaning by the jury in the context that they are used. Juries are presumed to know the meaning of ordinary and common words.” *Id.* at p. \*5, citing *Baker v. Powhatan Mining Co.*, 146 Ohio St. 600, 67 N.E.2d 714 (1946), paragraph three of the syllabus; see also *State of Ohio v. Taylor*, 8<sup>th</sup> Dist. No. 78363, 2001 W.L. 637561, p. \*3 (June 7, 2001) (“Words of ordinary or common usage need not be defined for the jury.”); *State of Ohio v. Chandler*, 8<sup>th</sup> Dist. No. 59764, 2001 W.L. 931661, p. \*3 (Aug. 13, 2001) (stating same).

In *Harmon Grp. Corp. Fin., Inc. v. Academy of Med. of Columbus & Franklin Cty.*, 94 Ohio App.3d 712, 641 N.E.2d 785 (10<sup>th</sup> Dist. 1994), the court upheld a jury verdict rendered for violation of a broker-dealer statute. One of the statutory terms, “effect,” was undefined in the statute. The court held that it was not error for the trial court to fail to define the term for the jury. Because the statute did not define the term, “the jury could give it its plain and ordinary meaning.” *Id.*, 94 Ohio App.3d at 722. See, e.g., *State of Ohio v. Wood*, 2<sup>nd</sup> Dist. No. 2006 CA 1, 2007-Ohio-1027, ¶23 (Mar. 9, 2007) (“jury could properly determine the case by giving the words their common, ordinary meaning”); *State of Ohio v. Golden*, 5<sup>th</sup> Dist. No. CA-6727, 1993 W.L. 544280,

p. \*2 (Dec. 20, 1993) (“jury was able to properly determine the case by giving the words their common, ordinary meaning”).

This Court has already “determine[d] 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*, 134 Ohio St. 3d at 203, ¶18. No further elucidation is necessary, and would serve only to engraft restrictions and conditions that the General Assembly never saw fit to adopt. Ohio juries should be trusted to justly apply this commonly understood phrase to the particular facts of each case.

The first Proposition of Law lacks merit and should be rejected.

**PROPOSITION OF LAW 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**

**A. THE SIXTH DISTRICT’S SOUND REASONING**

The second Proposition of Law merely mimics the second half of the syllabus of *Hewitt*, 134 Ohio St. 3d 199 (“ \*\*\* ‘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.”) There is no need to re-establish that which has already been established.

Defendants are merely seeking to undermine the appellate court’s reversal of the entry of summary judgment in this fact-intensive case. In their view, “the Sixth District Court of Appeals ignored this Court’s definitions[.]” *Appellants’ Brief*, p. 1. A review of the well-reasoned opinion will confirm, however, that *Hewitt* was quoted extensively and applied to nearly every facet of the unanimous decision. *Pixley*, 2013-Ohio-1358, ¶11-22. Defendants appear to be laboring under a serious misunderstanding of the term “ignored.”

Defendants have yet to convince any jurist at any level that summary judgment is warranted upon the “[d]eliberate removal” requirement of R.C. 2745.01(C). Undeterred, they contend that the seemingly simple phrase requires proof that a sufficiently high-level decision was rendered to detach and discard an equipment safety guard before the presumption is triggered. *Appellants’ Brief*, pp. 11-15. Even though the safety guard presumption first emerged over 25 years ago, when 1986 S.B. 307 was enacted, they have failed to cite any authorities advocating such an extreme interpretation. *Id.*

The decidedly broad term “remove” (which is not defined in R.C. 2745.01) encompasses far more than just “physical” taking from another person. Merriam-

Webster defines the term as follows:

1 a : to change the location, position, station, or residence of <remove soldiers to the front>.

b : to transfer (a legal proceeding) from one court to another

2 : to move by lifting, pushing aside, or taking away or off <remove your hat>

3 : to dismiss from office

4 : to get rid of : ELIMINATE <remove a tumor surgically> [emphasis added].

This Court has essentially approved this definition for purposes of R.C. 2745.01(C) by holding that a deliberate removal “occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard.” *Hewitt*, 2012-Ohio-5317, syllabus. The majority stopped well-short of requiring proof of a formal company edict. *Id.* The prevailing understanding of the term “remove” has been identified by the Sixth District as follows:

\*\*\* Removal of a safety guard does not require proof of physical separation from the machine, but may include the act of bypassing, disabling, or rendering inoperable. See *Harris v. Gill* (Ala.1991), 585 So.2d 831, 836-837. Combining the above definitions, and considering the context in which the phrase is used in the statute, we find that “deliberate removal” for purposes of R.C. 2745.01(C) means a considered decision to disable, bypass, or eliminate, or to render inoperable or unavailable for use.

*McKinney*, 2011-Ohio-3116, ¶17. There has been no serious disagreement in this appeal that disabling a Pro-Pak bumper guard qualifies as a “removal” for purposes of the statutory presumption.

The unambiguous terms of R.C. 2745.01(C) require only that the “employer” deliberately removes a safety guard, not necessarily a company official or manager. Under the familiar doctrine of *respondeat superior*, the employer is charged with legal responsibility for the tortious acts and omissions of the employee. *Cleveland, C. & C.R.*

*Co. v. Keary*, 3 Ohio St. 201, 210-211 (1854); *Tucker v. Kroger Co.*, 133 Ohio App.3d 140, 147, 726 N.E.2d 1111, 1116 (10<sup>th</sup> Dist. 1999) (citations omitted); *Calhoun v. Middletown Coca-Cola Bottling Co.*, 43 Ohio App. 2d 10, 13-14, 332 N.E. 2d 73, 76-77 (1<sup>st</sup> Dist. 1974). The master who places a servant in position to cause harm to others will be liable for the foreseeable consequences that follow. *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 279, 344 N.E.2d 334, 340 (1976).

Consistent with these venerable principles, employers can be held legally responsible even for the intentional torts of low-level employees. *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398, 409-412, 45 N.E. 634, 638-639 (1896); *Tucker*, 133 Ohio App.3d at 147; *Calhoun*, 43 Ohio App. 2d at 13-14. Over a century ago, this Court squarely recognized that:

A master is liable for the malicious acts of his servant, whereby others are injured, if the acts are done within the scope of the employment, and in the execution of the service for which he was engaged by the master.

*Stranahan*, 55 Ohio St. 398, paragraph one of the syllabus; see also, *Osborne v. Lyles*, 63 Ohio St. 3d 326, 329-330, 587 N.E. 2d 825, 829 (1992).

In *Thomas v. Ohio Dept. of Rehab. & Corr.*, 48 Ohio App.3d 86, 548 N.E.2d 991 (10<sup>th</sup> Dist. 1988), the Tenth District upheld a determination of vicarious liability against an employer, where the employee-prison guard was found to have used unreasonable force in restraining an inmate. The *Thomas* court noted that:

[A]ppellant empowered [the officer] with the discretionary authority to use nondeadly force in limited circumstances. Appellant also assigned him the necessary instrumentalities to carry out his assigned duties. Appellant cannot now attempt to disavow responsibility for [the officer]'s unjustified use of force carried out in the performance of his assigned duties. Contrary to appellant's argument, the fact that [the officer]'s use of force was determined unjustified does not automatically take his actions outside the scope of his employment. \*\*\*

*Id.*, 48 Ohio App.3d at 89-90. The question of whether an agent was acting within the

scope of his/her agency is typically one of fact. *Posin*, 45 Ohio St. 2d 271, 279-280, 344 N.E. 2d 334, 340-341; *GNFH, Inc. v. West Am. Ins. Co.*, 172 Ohio App.3d 127, 148-149, 2007-Ohio-2722, 873 N.E.2d 345, 361-362 (2<sup>nd</sup> Dist. 2007).

A specific directive from management was not required under similar circumstances in *McKinney*, 2011-Ohio-3116. A press operator had lost several fingers while she was attempting to remove a part from a mold. *Id.*, ¶2. The apparatus had been equipped with a “light curtain” that was supposed to prevent the mechanism from activating when the worker’s hands were in the danger zone. *Id.* The ensuing investigation revealed that an unidentified employee had failed to properly program the safety device. *Id.*, ¶25-28. There was no evidence that any direct orders were furnished by anyone with management authority, as they had simply ignored the workers’ warnings that the system appeared to be malfunctioning. *Id.*, ¶21-28. Nevertheless, the appellate court unanimously concluded that a triable issue of fact existed over whether the statutory presumption had been satisfied. *Id.*, ¶28-29.

The same sound result had been reached in *Dudley*, 2011-Ohio-1975. In that case, the employer had acquired a hydraulic press that could be activated only when the operator pressed two buttons with both hands. *Id.*, ¶9. The device was then modified so that the dual palm buttons were replaced with an optical sensor. *Id.*, ¶10. On his first day on the job, a poorly trained operator lost his left hand when he inadvertently activated the optical sensor while reaching inside the press. *Id.*, ¶12. The trial judge entered summary judgment on the grounds that the cause of the injury had not been the “removal” of the dual palm buttons, but the installation of the sensor. *Id.*, ¶15. In reversing this determination, the unanimous Sixth District held that a triable issue of fact existed over whether the equipment safety guard presumption was applicable. *Id.*, ¶20. Significantly, for purposes of the instant action, the court did not require any proof that a manager had made a deliberate decision to detach the safety guard. *Id.*

## B. DEFENDANTS' INAPPOSITE AUTHORITIES

None of the authorities Defendants are touting actually require proof of a formal management decision to deliberately remove a safety guard. *Appellants' Brief*, pp. 11-15. Two paragraphs of analysis have been devoted to *Broyles v. Kasper Mach. Co.*, 517 Fed. Appx. 345, 353 (6<sup>th</sup> Cir. 2013), but the injured employee admitted in that instance that there was no evidence at all of any deliberate removal of a safety guard.

Nor was such a requirement imposed in *Conley*, 2013-Ohio-419, as the Third District proceeded to consider whether there was evidence that any of the employer's representatives possessed the requisite intent. *Id.*, ¶15-20. At best, the record indicated that numerous employees had been routinely removing a metal plate that covered belts and pulleys in an auger that arguably served as a safety guard. *Id.*, ¶20. The removal was thus a regular occurrence, which could not be attributed to any deliberate decisions. In contrast, the Pro-Pak bumper guards could only be disabled by someone who was intent upon eliminating the bothersome safety feature. *T.d. 126, Kevin Smith Aff., paragraph 8 (i) – (m); T.d. 127, Rennell Aff., paragraphs 8 (n) – (p) & (u).*

While Defendant is correct that the Eighth District found that there was “no evidence the employer made a deliberate decision to keep an elevator in operation knowing that it was dangerous” in *Rivers*, 2013-Ohio-3917, the panel certainly did not suggest that only direct proof of a formal corporate decision would suffice. *Appellants' Brief*, p. 14. In stark contrast to the case *sub judice*, no circumstantial evidence had been introduced that would allow reasonable minds to conclude that a deliberate decision to disable a safety guard had indeed been rendered.

## C. APPROPRIATENESS OF CIRCUMSTANTIAL PROOF

The General Assembly's refusal to require direct proof of a formal company decision is perfectly understandable. Had such language been included in R.C. 2745.01(C), then the important presumption would never be available. Few employers

ever issue written directives requiring mandatory safety guards to be detached or bypassed, and proving the existence of a verbal order is possible only through an admission by a sufficiently high-ranking official. Defendants fully appreciate that requiring direct evidence of a deliberate corporate decision will render the statutory subsection superfluous in nearly every case, and now insist that they are entitled to an immediate exit from this lawsuit because: "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." *Appellants' Brief*, p. 15.

As is often recognized in the criminal context, a defendant's mental state does not necessarily have to be proven through a confession. *State v. Huffman*, 131 Ohio St. 27, 1 N.E.2d 313 (1936), paragraph four of the syllabus. The requirement of intent may be established circumstantially based upon all the surrounding facts and circumstances. *In re Washington*, 81 Ohio St.3d 337, 340, 1998-Ohio-627, 691 N.E.2d 285.

In the civil realm, modern courts agree that the trier of fact can draw reasonable inferences from circumstantial evidence. *Markle v. Cement Transit Co., Inc.*, 8<sup>th</sup> Dist. No. 70175, 1997 WL 578940, p. \*3 (Sept. 18, 1997); *Barna v. Randall Park Assoc.*, 8<sup>th</sup> Dist. No. 65998, 1994 WL 393692, p. \*2 (July 28, 1994). "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 508, 77 S.Ct. 443, 449, 1 L.Ed.2d 493, fn. 17 (1957) (citations omitted). Ohio law no longer recognizes any distinction in probative value between these two types of proof. *Masonic Health Care, Inc. v. Finley*, 176 Ohio App. 3d 529, 2008-Ohio-2891, 892 N.E. 2d 942, 947, ¶151 (2<sup>nd</sup> Dist. 2008); *H. Park Ptnrs. L.L.C. v. Frick*, 181 Ohio App. 3d 691, 695, 2009-Ohio-1462, 910 N.E. 527, 530, ¶126 (6<sup>th</sup> Dist. 2009). In accordance with these precedents, this Court should reject the notion that a deliberate removal can only be established through direct proof of a formal corporate decision.

#### D. PLAINTIFF'S PROOF OF A DELIBERATE REMOVAL

As the appellate court justifiably determined below, reasonable minds could reach differing conclusions in this particular case over whether the bumper safety guard had been deliberately removed by a Pro-Pak representative, prior to Plaintiff's injury. *Pixley*, 2013-Ohio-1358, ¶23-25. As previously observed, Plaintiff's mechanical engineering safety and design expert has thoroughly examined the equipment, reviewed the incident, and confirmed that the transfer cars would only operate if the fail-safe system was in proper working order. *T.d. 126, Kevin Smith, Aff.*, p. 4, paragraph 8(j). Immediately after Plaintiff had been taken away from the Plaintiff, the cart had been filmed moving along the conveyor line with a depressed bumper dragging along the aisle, which should have caused the motors to disengage. *Id.*, paragraphs 8(j) – (k). The only way the motorized car could have remained operable was if the safety switches had been deliberately bypassed. *Id.*, paragraph 8(k) & (m).

A second safety engineer and guarding consultant, who has been retained by Plaintiff, has confirmed these findings. *T.d. 127, Rennell Aff.* The OSHA video conclusively reveals that the cart was moving with a collapsed bumper, which is only possible if the critical shut-off mechanism has been deliberately circumvented. *Id.*, paragraphs 8(m) – (p). As is commonplace, the fail-safe proximately switch is designed to prevent any operation if the safety assembly malfunctions, breaks, or fails. *Id.*, ¶8(o).

It is certainly significant that Defendants have made no earnest attempt to establish – through Civ.R. 56(E) compliant proof – that some other situation must have existed that would allow the incident to occur without a manager or employee deliberately bypassing the transfer cart's safety guard. No expert testimony has been cited suggesting that a transfer cart can be operated while the safety bumper drags and bounces on the ground, as depicted in the OSHA video, without activating the shut-

down mechanism. An intentional by-pass is not just the most likely conclusion that can be drawn, but the only one that is supported with comprehensive engineering analysis. *T.d. 126, Kevin Smith Aff.; T.d. 127, Rennell Aff.* It should not be forgotten that, as the moving party, they bore the initial burden of demonstrating that a jury trial is unnecessary because no genuine issues of material fact exist. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E. 2d 264, 274; *Vahila v. Hall*, 77 Ohio St.3d 421, 428-430, 1997-Ohio-259, 674 N.E. 2d 1164.

#### **E. ADMISSIBILITY OF EXPERT OPINIONS**

Defendants do not appear to be disputing that Plaintiffs' workplace safety engineers are qualified to testify as to the nature of the equipment at issue, the functionality on the transport system on morning in question, and the safety features that had been built into the apparatus. Citing *Nicholson v. Turner/Cargile*, 107 Ohio App. 3d 797, 809, 669 N.E. 2d 529 (10<sup>th</sup> Dist. 1995), Defendants have observed that suitably qualified experts are entitled to establish a breach of a standard created by law, but are not qualified to interpret statutory terms. *Appellants' Brief*, p. 12. Plaintiff does not disagree. Neither of his engineering experts has offered a definition of "equipment safety guard," and have simply afforded the terms their plain and ordinary meaning in reaching their opinions. *T.d. 126, Kevin Smith Aff.; T.d. 127, Rennell Aff.*

The experts' findings are thus fully admissible, as Ohio courts adhere to the principle that:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact. [emphasis added].

*Evid. R. 704.* This Rule has been afforded a reasonably expansive construction in this state. *See, e.g., State of Ohio v. Boston*, 46 Ohio St. 3d 108, 128, 545 N.E. 2d 1220, 1239-40 (1989) (holding that a pediatrician could testify that, in her opinion, a child had

been sexually abused);<sup>1</sup> *Titanium Indus. v. S.E.A., Inc.*, 118 Ohio App. 3d 39, 50-51, 691 N.E. 2d 1087, 1095 (7<sup>th</sup> Dist. 1997) (reversing the trial judge for refusing to permit an expert to testify as to whether a contract had been fully performed); *Town Invest., Inc. v. City of Mentor Bd. of Zoning App.*, 11<sup>th</sup> Dist. No. 89-L-14-145, 1991 W.L. 45673, p. \*5 (Mar. 29, 1991) (recognizing that land development consultant could opine upon ultimate issues during zoning appeal). In workplace intentional tort cases, courts have considered expert opinions bearing upon whether the employer possessed sufficient intent to cause the injury. *Shultzaberger v. Prince & Izant Co.*, 8<sup>th</sup> Dist. No. 88584, 2007-Ohio-3084, ¶25-27 (June 21, 2007); *Tulloh v. Goodyear Atomic Corp.*, 93 Ohio App.3d 740, 754-755, 639 N.E.2d 1203, 1212 (4<sup>th</sup> Dist. 1994); *Jones v. General Motors Corp.*, 3<sup>rd</sup> Dist. No. 4-96-21, 1997 W.L. 232730 (May 9, 1997). Ultimately, the trier of fact will have to determine whether the statutory presumption has been satisfied.

#### **F. THE NECESSITY OF A JURY TRIAL**

To their credit, Defendants have not suggested in their Brief that the trial court's entry of summary judgment can still be salvaged if Plaintiff is entitled to the benefit of the statutory presumption. Such a disposition is warranted only when the rebuttal evidence that has been offered by the employer is incontrovertible. *See e.g., Rudsill v. Ford Motor Co.*, 709 F. 3d 595, 606-609 (6<sup>th</sup> Cir. 2013). When an employer has merely furnished "self-congratulatory affidavits" denying that there was any intent to injure, or relies on evidence of questioned credibility, a trial remains necessary. *Downard*, 2013-Ohio-4760, ¶68-78; *Baker v. V.I.P. Contr.*, 12<sup>th</sup> Dist., CA90-08-178, 1991 W.L. 81870, pp. \*2-3 (May 13, 1991).

In *Dudley*, 2011-Ohio-1975, ¶21, the appellate court found that an injured employee had established the elements of the statutory presumption and then reasoned

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<sup>1</sup> *Boston* was modified on other grounds in *State of Ohio v. Dever*, 64 Ohio St. 3d 401, 1992-Ohio-41, 596 N.E. 2d 436.

that:

In an effort to rebut the presumption of intent, [the employer] has entered an affidavit from its manufacturing engineer that there was no intent by [the employer] to harm [the worker]. The testimony of [the employer's] employee cannot be weighed so heavily to say that reasonable minds could not disagree on the issue of intent. Should a jury determine that the rebuttable presumption does apply to this case, it will also be for them to determine whether this testimony, or any other evidence presented on this issue, is sufficient to rebut the presumption.

Since the instant Defendants have made no attempt to demonstrate in their Brief that the statutory presumption has been indisputably rebutted as a matter of law, the trial court's entry of summary judgment can no longer be justified. *See also, Zuniga v. Norplas Indus., Inc.*, 6<sup>th</sup> Dist. No WD-11-066, 2012-Ohio-3414, ¶20 (July 27, 2012) ("Once a statutory presumption of employer intent to injure is established, rebuttal of that presumption necessarily involves some weighing of evidence.")

The fact-intensive disputes that remain over the circumstances that produced Plaintiff's disabling injury are readily apparent from Defendants' Brief. Seemingly unconcerned with the standards imposed by Civ. R. 56(C), they have continued to rely heavily upon the unsubstantiated testimony of their own loyal employees and managers. *Appellants' Brief*, pp. 2-6. But, issues of credibility can be resolved only by the trier-of-fact, who will be entitled to reject even supposedly "uncontroverted" evidence. *Ace Seal Baling, Inc. v. Porterfield*, 19 Ohio St. 2d 137, 138, 249, N.E. 2d 892 (1969); *Bradley v. Cage*, 9<sup>th</sup> Dist. No. 20713, 2002-Ohio-816, 2002 W.L. 274638, pp. \*4-5 (Feb. 27, 2002).

Examples of Defendants' penchant for playing fast-and-loose with the evidentiary record are not difficult to identify, such as the representation that Plaintiff "admits his leg should not have been in the path of the transfer car. (Pixley Dep., pp. 146-147)." *Appellants' Brief*, p. 4. In truth, the worker had simply acknowledged during that point in the questioning that his leg was in the path of the transfer car, but he never conceded

that he was doing anything improperly. *T.d. 122, Pixley Depo., pp. 146-147.* Some of the employer's descriptions of the record defy common sense, such as the assurance that Plaintiff "cannot state with certainty he ever came in contact with the transfer car. (Pixley Dep. p. 94)." *Appellants' Brief, p. 12.* Not only is there no other explanation for how his leg was crushed in the Pro-Pak plant, but Dudzik watched him roll up and over the bumper. *T.d. 117, Dudzik Depo., p. 76.* All Plaintiff candidly acknowledged was that he was "guessing that the transfer car" hit him, as he never saw or heard anything approaching him and did not witness the impact. *T.d. 122, Pixley Depo., p. 94.*

This Court recognized some time ago that workers do not assume the risk of injury while they are dutifully performing their job duties. *Cremeans v. Willmar Henderson Mfg. Co., 57 Ohio St.3d 145, 151, 566 N.E.2d 1203, 1209, syllabus (1991); see also Stump v. Industrial Steeplejack Co., 104 Ohio App.3d 86, 94, 661 N.E.2d 212 (8th Dist. 1995).* Despite these precedents, Defendants have persisted in ridiculing the recently-hired employee for attempting to read the serial number off a motor when there was supposedly no need for him to do so. *Appellants' Brief, pp. 1, 4, & 9.* But, they are ignoring Plaintiff's unequivocal testimony that no one had ever told him that the replacement motor had already been ordered. *T.d. 122, Pixley Depo., p. 89.* This evidence is required to be accepted as true during these summary judgment proceedings. *Turner v. Turner, 67 Ohio St. 3d 337, 341, 1993-Ohio-176, 617 N.E. 2d 1123.*

Defendants seem to be under the impression that the statutory presumption must be reserved for dutifully attentive employees who are performing their job duties exactly as their superiors envisioned but are nevertheless injured through no fault of their own. This fanciful view overlooks the reality that guarding is mandated by federal and state agencies precisely because tired, distracted, and inexperienced workers can be maimed and killed through inadvertent contact with exposed hazards. *See, 29 C.F.R.*

1910.213(a)(12) (requiring guards on woodworking machinery “to prevent accidental contact with the saw”); 29 C.F.R. 1910.243(a)(3) (requiring guarding on sanding belts “against accidental contact”); 29 C.F.R. 1910.243(e)(1)(ii) (requiring power lawnmowers to be “guarded to prevent the operator’s accidental contact therewith”); 29 C.F.R. 1910.261(k)(28) (“Slitter knives shall be guarded so as to prevent accidental contact”); 29 C.F.R. 1928.57(a)(8)(i) (directing that where guards are required on farming equipment “they shall be designed and located to protect against inadvertent contact”). Indeed, the Bureau’s Safety and Hygiene Division has explicitly defined the terms “guard” and “guarded” as devices preventing “accidental contact.” *Ohio Admin. Code 4123:1-5-01(B)(69) & (70)*. Notably, none of these regulations are confined to just equipment operators.

In the end, reasonable jurors could certainly reject the vacuous complaint that “Pro-Pak could not have expected [Plaintiff] 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[.]” *Appellants’ Brief*, p. 9. Plant Superintendent Frank Smith himself fully appreciated, by his own acknowledgment, that workers were regularly exposed to the moving carts as they walked over and across the tracks while the system was operational. *T.d. 121, Frank Smith Depo.*, p. 124. He also knew the carts were equipped with collapsible safety bumpers to prevent injuries. *Id.*, pp. 86-87, 186-187, & 240-241. Sensible jurors could logically surmise from these circumstances that management understood that sooner or later a serious collision was inevitable if the safety mechanism remained inoperable. There is no requirement in R.C. 2745.01(C) that the employer must foresee the injury occurring in order for the presumption to apply, and this Court should refuse to rewrite the statute to Defendants’ liking.

Defendants’ criticisms of the Sixth District lack merit, and should be overruled.

**CONCLUSION**

Because genuine issues of material fact have been established over whether Plaintiff's workplace injury is attributable to the deliberate removal of an equipment safety guard, this Court should affirm in all respects the unerring decision that was unanimously rendered by the Sixth Judicial District Court of Appeals.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Brief** was served via e-mail on this 24<sup>th</sup> day of December, 2013 to:

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