

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANTS PRO-PAK INDUSTRIES AND TOLEDO L & L REALTY COMPANY

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I. INTRODUCTION

In arguing for affirmance of the appellate court decision, appellee Phillip Pixley (“Pixley”) and his *amici* request the Court expand the definition of “equipment safety guard” as used in R.C. 2745.01(C). Such an expansion not only ignores the General Assembly’s clearly expressed intent to restrict employer intentional tort liability in Ohio, but also requires the Court to disregard its holding in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, in which the Court 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.

In *Hewitt, supra*, the Court held that “deliberate removal” as used in R.C. 2745.01(C) means an employer made a deliberate decision to lift, push aside, take off or otherwise eliminate an equipment safety guard. There is no evidence that appellant Pro-Pak Industries, Inc. (“Pro-Pak”) deliberately removed an equipment safety guard from the transfer car.

II. LAW & ARGUMENT

Proposition of Law No. I

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

A. The Safety Bumper Is Not An “Equipment Safety Guard” Under R.C. 2745.01(C).

Pixley contends the safety bumper on the transfer car is an “equipment safety guard”. The safety bumper is designed to stop the transfer car when something contacts the bumper with sufficient force to trip the proximity switch in

the bumper. The bumper is not a device designed to shield the operator of the transfer car from exposure to or injury by a dangerous aspect of the transfer car.

In *Hewitt, supra*, the Court adopted the definition of “equipment safety guard” used by the Sixth District Court of Appeals in *Fickle v. Conversion Technologies International, Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960. In discussing the definition, the Court stated:

Fickle rejected the argument that “equipment safety guard” included “ ‘any device designed to prevent injury or to reduce the seriousness of injury.’ ” *Id.* at ¶ 39. “The General Assembly did not make the presumption applicable upon deliberate removal of any safety-related device, but only of an equipment safety guard, and we may not add words to an unambiguous statute under the guise of interpretation.” *Id.* at ¶42

In *Fickle, supra*, the safety devices at issue, namely a jog control and an emergency stop cable on an adhesive coating machine, were held as a matter of law not to be equipment safety guards for purposes of R.C. 2745.01(C). The emergency stop cable in *Fickle* performed a very similar function as the safety bumper in the present case. Both the emergency stop cable and safety bumper are designed to immediately shut off power to the equipment. Neither safety device shields an operator from exposure to a dangerous aspect of the equipment.

In *Beyer v. Rieter Automotive North American, Inc., et al.*, 6th Dist. Lucas No. L-11-1110, 2012-Ohio-2807, the Sixth District Court of Appeals, relying on the Eighth District Court of Appeals decision in *Hewitt v. L.E. Myers Co.*, 8th Dist. Cuyahoga No. 10-96138, 2011-Ohio-5413, expanded the definition of “equipment safety guard” to include face masks. However, in *Hewitt, supra*, this Court not

only reversed the appellate court's decision, but also abrogated the Sixth District Court of Appeals decision in *Beyer, supra*. In expressly rejecting an expanded definition of "equipment safety guard", the Court limited the definition to a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.

As set forth in *Hewitt, supra*, not all workplace safety devices are equipment safety guards. In *Zuniga, et al. v. Norplas Industries, Inc., et al.* 6th Dist. Wood Nos. WD-11-066; WD-11-067, 2012-Ohio-3414, the employee was working at the end of a rework conveyor belt. When she attempted to remove a piece of tape from the belt, her hand was pulled into a pinch point. A ventilation system that blocked access to the pinch point had been removed by the employer. Although the ventilation system functioned to block access to the nip point, it was not designed for that function. The appellate court held the ventilation system was not an "equipment safety guard" because, while having the effect of shielding the nip point, it was not designed for that purpose.

Pixley argues the interpretation of the term "equipment safety guard" under R.C. 4123.01(C) is a question of fact for the jury, not a question of law for the court. However, Ohio law is clear the meaning of the terms "equipment safety guard" and "deliberate removal" as used in R.C. 2745.01(C) are questions of law, and the interpretation of these terms is for the court, not the jury, in employment intentional tort cases. *Hewitt, supra; Fickle, supra; and Wright v. Mar-Bal Inc., et al.*, 11th Dist. Geauga County No. 11W001025, 2013-Ohio-5647.

B. An Expanded Definition Of “Equipment Safety Guard” Ignores This Court’s Decision In *Hewitt* And The General Assembly’s Intent In Enacting R.C. 2745.01.

Pixley urges the Court to expand the definition of “equipment safety guard” as set forth in R.C. 2745.01(C) to protect all employees, not just operators. Pixley argues limiting the definition of “equipment safety guard” to the protection of the operator creates arbitrary distinctions among workers and leads to nonsensical results. In arguing for an expanded definition of “equipment safety guard” to include all employees, Pixley chooses to ignore the legislative intent behind R.C. 2745.01. Pixley also ignores the fact that all employees who suffer injuries in the course of and arising out of employment are entitled to receive medical benefits and compensation under Ohio’s workers’ compensation law. Furthermore, if the injury results from the employer’s violation of a specific safety requirement, the employee is entitled to additional compensation under Article II Section 35 of the Ohio Constitution and Ohio’s Workers’ Compensation Act. Recovery for an intentional tort is clearly not the only source of compensation available to an employee injured in the course of employment.

In an attempt to support his argument for an expansive definition of “equipment safety guard”, Pixley cites a number of federal and state safety requirements and regulations. Pro-Pak acknowledges there are many federal and state safety codes containing requirements for the guarding of equipment and machinery in the workplace. These state and federal safety regulations are designed to make workplaces safe by imposing fines and monetary awards on employers who fail to comply with the requirements. However, federal and state

safety requirements and codes are simply irrelevant and immaterial to the issue of employer intentional tort liability under R.C. 2745.01, requiring a deliberate intent to injure. Relying on federal and state safety requirements to expand this Court's definition of "equipment safety guard" to establish a presumption of a deliberate intent to injure is disingenuous.

Pixley's reliance on *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 5th Dist. Stark No. 2011-CA-00048, 2011-Ohio-4977, is misplaced. Pixley takes this Court's reversal of the Fifth District Court of Appeals' decision out of context. In *Beary*, the employee was hit by a skid steer which did not have a backup alarm. The trial court inappropriately defined "equipment safety guard" by using an Industrial Commission definition. Relying on the Sixth District Court of Appeals' decision in *Fickle, supra*, the Fifth District Court of Appeals concluded the backup alarm was not an "equipment safety guard" under R.C. 2745.01(C). This Court remanded to the trial court to apply this Court's definition of "equipment safety guard" as set forth in *Hewitt, supra*. Pixley's argument that the case was remanded because the Court intended to expand the definition of "equipment safety guard" is logically flawed.

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.

A. “Deliberate Removal” Cannot Be Established By Unsubstantiated And Scientifically Unreliable Opinions And Inferences.

Pixley wrongly suggests the trier of fact can draw reasonable inferences from circumstantial evidence to decide whether there was a “deliberate removal” of an “equipment safety guard” by the employer. In an attempt to create a genuine issue of material fact to avoid summary judgment, Pixley relies solely on affidavits of R. Kevin Smith and Gerald Rennell, two safety engineers retained by plaintiff for the litigation. Neither Smith nor Rennell have personal knowledge of the facts surrounding Pixley’s injury.

The evidence before the trial court, including depositions and exhibits, fails to show Pixley’s leg contacted the safety bumper with sufficient force to trip the proximity switch and stop the transfer car. In fact, the evidence before the court shows quite the opposite. The depositions of Pixley and Jonathan Dudzik, the operator of the transfer car at the time of the injury, fail to show that Pixley’s leg contacted the safety bumper. When Dudzik started the car after loading the material, the car was less than six inches from the end of the conveyor line at which Pixley’s leg was pinched. (Dudzik Dep. p. 137). While there was a blind spot of approximately one foot immediately in front of the car, Dudzik could see the right corner of the safety bumper at all times. (Dudzik Dep. pp. 87-88, 137). Dudzik saw Pixley come up over the bumper, and come to rest on the side of the

transfer car. (Dudzik Dep. pp. 89-90). Based on the distance the car was from the conveyor line, Dudzik's starting and stopping of the car was almost instantaneous. (Dudzik Dep. p. 137). Dudzik did not recall seeing the bumper compress when Pixley came over it. (Duzik Dep. p. 140). Similarly, Pixley cannot state whether his leg came in contact with the safety bumper (Pixley Dep. P. 94). He believes his leg was caught between the transfer car and the end of the conveyor. (Pixley Dep. p. 95).

Despite this evidence, Pixley's safety engineering expert, R. Kevin Smith, states in his affidavit that when the bumper contacted Pixley's leg, the transfer car did not shut down and stop (§18(d) Smith Aff.). Similarly, Gerald Rennell, Pixley's other expert, states in his affidavit that if the collapsible bumper of the transfer car had been operating properly, it would have prevented Pixley's injury (§18(c)(d) Rennell Aff.).

Without any personal knowledge and with no facts in the record to show Pixley's leg contacted the bumper with sufficient force to trip the proximity switch and stop the car, the above statements of Rennell and Smith are pure speculation. Neither of plaintiff's experts performed any testing, accident reconstruction, analysis, or measurements to ascertain the location, direction and amount of the force that would have been applied to the bumper based on the facts of the accident as shown by the evidence. Without supporting their opinions with scientific methodology and principle, and without taking into account the facts surrounding the accident, the opinions of Pixley's experts amount to speculation.

After reviewing a 76 second video taken at the time of the OSHA investigation, Rennell and Smith further opine that the proximity switch on the safety bumper had been intentionally and deliberately bypassed. Neither Rennell nor Smith were present during the OSHA investigation. Neither expert has personal knowledge of the OSHA investigation. The OSHA video also shows a person using his foot to collapse the safety bumper, yet neither expert mentions this part of the video. Furthermore, neither expert performed any tests, analyses, measurements, re-enactments, or any other scientific methodology to establish the amount of force applied to the bumper as shown by the video and whether such force was sufficient to trigger the proximity switch in the bumper. Without supporting their opinions with scientific principles and methodology, the opinions of Pixley's experts are simply speculation. As such, they cannot be used to create a genuine issue of material fact so as to defeat summary judgment.

In *Valentine v. Conrad, PPG Industries, Inc., et al.*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, this Court held that an expert's opinion must be reliable and based on scientifically valid principles and methods. As this Court stated, the focus is on how the experts arrived at their conclusions. If the expert does not support his opinion by a particular methodology or scientific principle, the opinion becomes mere speculation and guesswork. Such evidence is not helpful to the trier of fact and has no place in the course of law.

When an expert failed to perform any significant tests and improperly based opinions and calculations upon assumptions, the expert's methodology was too unreliable to comply with Evid.R. 702(C). *Marcus v. Rusk Heating &*

Cooling, Inc., et al., 12th Dist. Clermont No. CA2012-03-026, 2013-Ohio-528. A court should not focus on whether the opinion is correct, but whether the expert's conclusion is based on scientifically valid principles and methods. *Turker, et al. v. Ford Motor Co., et al.*, 8th Dist. Cuyahoga No. 87890, 2007-Ohio-085.

Pixley argues that *Conley v. Endres Processing*, 3rd Dist. Wyandot No. 16-12-11, 2013-Ohio-419, does not require a deliberate decision by the employer to remove an equipment safety guard. In *Conley, supra*, there was testimony that the equipment safety guard was frequently removed from the machine and was not on the machine at the time of the injury. Even though the employer may have been aware that at times employees failed to replace the equipment safety guard, the court held such a failure was inadvertent and not a consequence of any instruction from the employer.

Other than the unsubstantiated and scientifically unreliable opinions of Pixley's experts, there is no evidence the safety bumpers were bypassed. Furthermore, there is no evidence whatsoever in the record that Pro-Pak had knowledge the safety bumpers were bypassed or that Pro-Pak made a deliberate decision to bypass the safety bumpers.

Pixley contends *Broyles v. Kasper Machine Co., et al.*, 517 Fed.App. 345, (Sixth Circuit 2013), is not analogous to the present matter because the employee admitted there was no evidence the employer acted with deliberate intent. In affirming summary judgment in favor of the employer, the court did not consider only the employee's statement. The Court held that because all the

safety features in place before the employee's injury were in place at the time of the accident, there was no evidence of deliberate intent.

Following Pixley's accident, Pro-Pak employees inspected and tested the transfer car including activating and testing the safety bumpers. Following Pro-Pak's inspection, the transfer car and its components were found to be fully operational, and the car was placed back into service later in the day (Armey Dep. p. 63). OSHA investigated the accident and inspected the transfer car the following day. Following OSHA's investigation and inspection, which included the video tape upon which Pixley relies, OSHA neither cited Pro-Pak nor required Pro-Pak to make any repairs or maintenance to the transfer car. (Armey Dep. p. 77).

Without being able to show Pro-Pak deliberately bypassed the safety bumper, Pixley, relying on *McKinney v. CSP of Ohio, LLC*, 6th Dist. Wood No. WD-10-070, 2011-Ohio-3116 and *Dudley v. Powers & Sons, LLC*, 6th Dist Williams No. WM-10-015, 2011-Ohio-1975, argues a written order or directive from the employer is unnecessary to show deliberate removal under R.C. 2745.01(C) and that the issue of deliberate removal should be left to the jury. Pixley's position is untenable.

Although there was no directive by either employer in *McKinney* and *Dudley*, the undisputed evidence showed the employers in each case had actual knowledge of the removal of the safety guard. In *McKinney*, an employee had complained to her supervisor that the safety system of the press was not working because the press had been improperly programmed. Despite the employee's

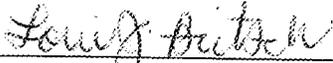
complaint, the supervisor ordered the employee to continue running the press. In *Dudley*, the employer had knowledge the dual palm system had been replaced by an electric sensor. Unlike the employers in *McKinney* and *Dudley*, there is no evidence Pro-Pak had knowledge the safety bumper was not operating properly, let alone knowledge that someone had deliberately bypassed the safety bumper.

With no evidence that Pro-Pak deliberately bypassed the safety bumper or directed another person to do so, Pixley next argues the doctrine of *respondent superior* applies. Pro-Pak acknowledges that in certain situations the tortious acts of employees within the course and scope of their employment may impose liability on the employer. However, the doctrine has no application to employer intentional tort liability under R.C. 2745.01(C). Deliberate removal requires a considered and deliberate decision to remove or bypass an equipment safety guard. Without knowledge an equipment safety guard has been removed, it necessarily follows an employer cannot have made a deliberate decision to remove. Pro-Pak had no knowledge the safety bumper ever malfunctioned, let alone that someone deliberately bypassed the proximity switch in the safety bumper.

CONCLUSION

Defendants-Appellants, Pro Pak Industries, Inc. and Toledo L & L Realty Co., respectfully request the Court reverse the decision of the Sixth District Court of Appeals and reinstate the trial court's summary judgment dismissing Pixley's complaint.

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