

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**REPLY BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
<u>Proposition of Law No. I:</u>	
The <i>Hewitt</i> Court’s Definition of Equipment Safety Guard Is Limited to Protecting Operators Only.	
	1
<u>Proposition of Law No. II:</u>	
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.	
	2
CONCLUSION.....	5
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Beary v. Larry Murphy Dump Truck Serv., Inc.</i> , 134 Ohio St.3d 359, 2012-Ohio-5626, 982 N.E.2d 691.....	1,2
<i>Cleveland, C. & C.R. Co. v. Keary</i> , 3 Ohio St. 201 (1854).....	3
<i>Conley v. Endres Processing Ohio, LLC</i> , 3d Dist. Wyandot No. 16-12-11, 2013-Ohio-419.....	5
<i>Dudley v. Powers & Sons, LLC</i> , 6th Dist. Williams No. WM-10-015, 2011-Ohio-1975	4
<i>Fickle v. Conversion Technologies Intl., Inc.</i> , 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960.....	1
<i>Hewitt v. L.E. Myers Co.</i> , 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795	1,2,4,5,6
<i>McKinney v. CSP of Ohio, LLC</i> , 6th Dist. Wood No. WD-10-070, 2011-Ohio-3116.....	4
<i>Occhionero v. Edmundson</i> , 11th Dist. Lake No. 99-L-188, 2001 Ohio App. Lexis 1553 (March 30, 2001).....	3
<i>Posin v. A.B.C. Motor Court Hotel, Inc.</i> , 45 Ohio St.2d 271, 344 N.E.2d 334 (1976)	3
<i>Roberts v. RMB Enters.</i> , 197 Ohio App.3d 435, 2011-Ohio-6223, 967 N.E.2d 1263 (12th Dist.).....	5
<i>Stetter v. R.J. Corman Derailment Servs., LLC</i> , 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092	4
<i>Stranahan Bros. Catering Co. v. Coit</i> , 55 Ohio St. 398, 45 N.E. 634 (1896)	3
<i>Thomas v. Ohio Dept. of Rehab. & Corr.</i> , 48 Ohio App.3d 86, 548 N.E.2d 991 (10th Dist.1988).....	3
<i>Tucker v. Kroger Co.</i> , 133 Ohio App.3d 140, 726 N.E.2d 1111 (10th Dist.1999).....	3
<i>Weimerskirch v. Coakley</i> , 10th Dist. Franklin No. 07AP-952, 2008-Ohio-1691	3
<i>Wineberry v. N. Star Painting Co.</i> , 2012-Ohio-4212, 978 N.E.2d 221 (7th Dist.).....	5

STATUTES:

Ohio Rev. Code, §2745.01.....3

Ohio Rev. Code, §2745.01(C)1,3,4,5

ARGUMENT IN REPLY

The Ohio Association of Civil Trial Attorneys (“OACTA”) offers this reply to address several important issues raised by Appellee’s Merit Brief. First, OACTA addresses the relevance of this Court’s decision in *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 134 Ohio St.3d 359, 2012-Ohio-5626, 982 N.E.2d 691. Second, OACTA addresses why the Court should not apply respondeat superior liability to the requirement of deliberate removal in R.C. 2745.01(C).

Proposition of Law No. I: The Hewitt Court’s Definition of Equipment Safety Guard Is Limited to Protecting Operators Only.

Beary v. Larry Murphy Dump Truck Serv., Inc., 134 Ohio St.3d 359, 2012-Ohio-5626, 982 N.E.2d 691, reversed the appellate court decision on the authority of *Hewitt v. L.E. Myers*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, ¶ 1, and remanded to the trial court to apply the “[C]ourt’s decision in *Hewitt* to determine whether the back-up alarm is ‘an equipment safety guard.’”

Contrary to Appellee’s argument, the Fifth District in *Beary* did not hold that the back-up alarm was not an equipment safety guard because it did not shield an operator. The Fifth District stated that it found the reasoning of *Fickle v. Conversion Technologies International, Inc.*, 6th Dist. Williams App. No. WM-10-016, 2011-Ohio-2960 persuasive; concluded that the back-up alarm was not an equipment safety guard, and held that the trial court did not err in finding the employer was entitled to summary judgment. *Beary v. Larry Murphy Dump Truck Serv.*, 5th Dist. Stark No. 2011-CA-00048, 2011-Ohio-4977, ¶ 22. The Fifth District did not include any analysis regarding whether the alarm was designed to protect an operator. *Id.*

The trial court in *Beary* applied the Ohio Industrial Commission definition of “guard”: “a covering, fencing, railing, or enclosure which shields an object from accidental contact.” *Id.* at ¶

16. The trial court held that the back-up alarm was not an equipment safety guard because it was not designed to guard anything. *Id.*

Thus, the Court was presented with a trial court decision that applied the wrong definition of “equipment safety guard” and an appellate court decision that cited with approval the proper definition but conducted no analysis of whether the safety device was within that definition. The Court properly remanded for analysis by the trial court applying *Hewitt*’s definition of “equipment safety guard.”

The Court’s remand in *Beary* asked the trial court to analyze whether the back-up alarm was an “equipment safety guard” under the definition in *Hewitt*. *Beary* in no way changed the definition of an “equipment safety guard” contained in *Hewitt*: “a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.” *Hewitt*, 2012-Ohio-5317, ¶ 26. The Court should now affirmatively state that the definition of “equipment safety guard” is exactly as it stated in *Hewitt*, one designed to protect the operator.

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.

As the Court rightly found in *Hewitt*, 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.” *Hewitt*, 2012-Ohio-5317, syllabus. This definition requires a deliberate decision by the employer, not any employee or third person. Applying respondeat superior liability to R.C. 2745.01 would contravene plain statutory language and the General Assembly’s intent.

Appellee suggests that respondeat superior liability should apply in the context of R.C. 2745.01 to create a presumption of an employer’s intent to injure where an employee removes an

equipment safety guard. *Appellee's Brief*, p. 21-22. Appellee cites various applications of the doctrine of respondeat superior liability in other tort contexts, including intentional torts, but not the R.C. 2745.01 employer intentional tort context. See *Cleveland, C. & C.R. Co. v. Keary*, 3 Ohio St. 201 (1854) (employer liable to employee for injury caused by another employee's negligence if the negligent employee was obeying the orders of a superior – decided prior to Ohio's workers compensation/employer intentional tort statutory framework for liability); *Tucker v. Kroger Co.*, 133 Ohio App.3d 140, 726 N.E.2d 1111 (10th Dist.1999) (claims of assault and battery, false arrest, false imprisonment, and negligent and intentional infliction of emotional distress by a store patron); *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 344 N.E.2d 334 (1976) (hotel guest's claims of negligence); *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398, 45 N.E. 634 (1896) (contract claim involving milk adulterated by an employee); *Thomas v. Ohio Dept. of Rehab. & Corr.*, 48 Ohio App.3d 86, 548 N.E.2d 991 (10th Dist.1988) (claim of assault brought by a prisoner).

An intentional tort claim brought against an employer under R.C. 2745.01(C) differs from the intentional torts cited by Appellee in that the statutory language requires "deliberate removal by an employer." The liability imposed by R.C. 2745.01 is for the employer's own action or inaction, not the tortious behavior of an employee. See *Occhionero v. Edmundson*, 11th Dist. Lake No. 99-L-188, 2001 Ohio App. Lexis 1553 (March 30, 2001) ("Appellee argues that it would be 'nonsense' to apply different pleading standards to a respondeat superior claim brought by an employee based on an intentional tort and an intentional tort claim against an employer. * * * An intentional tort claim against an employer differs because it is an allegation that the employer is liable for its own action or inaction, not the actions of its employee."); *Weimerskirch v. Coakley*, 10th Dist. Franklin No. 07AP-952, 2008-Ohio-1691, ¶ 7-8

(distinguishing between respondeat superior liability and the standard of intent necessary for an employer intentional tort). Appellee has not alleged that an employee committed a tort and Appellant is vicariously liable through the theory of respondeat superior. Appellee has alleged an intentional tort by the employer. Pursuant to the plain language of R.C. 2745.01(C), there must be deliberate removal by an employer, not an employee or third party. To construe “deliberate removal by an employer” to include any removal by an employee within the scope of his employment would also contravene “the General Assembly’s effort to restrict liability for intentional tort by authorizing recovery ‘only when an employer acts with specific intent.’” *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, ¶ 25, quoting *Stetter v. R.J. Corman Derailment Servs., LLC*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 26.

In support of his argument, Appellee cites *McKinney v. CSP of Ohio, LLC*, 6th Dist. Wood No. WD-10-070, 2011-Ohio-3116, and states that the Sixth District found a triable issue of fact regarding intent to injure despite a lack of a specific directive from management. *Appellee’s Brief* at 23. *McKinney* concluded that there was a triable issue because 1) a supervisor was notified of a problem with the press; 2) a foreman instructed the employee to keep the press running despite the complaint; and 3) none of the right people were present to ensure the safety measures were functioning. *Id.* at 21, 28. There was a direct order from management and the Sixth District relied upon this in finding a rebuttable presumption of intent.

The second case Appellee cites, *Dudley v. Powers & Sons, LLC*, 6th Dist. Williams No. WM-10-015, 2011-Ohio-1975, ¶ 18-19, reversed summary judgment because it found a triable issue of fact regarding whether the removal of a dual button control or the installation of a proximity switch was the direct cause of the injury. The Sixth District’s reversal was not based

upon an issue regarding who removed the dual button control and the facts reported in the decision indicate that the removal was part of significant in-house modifications of the press by the employer in response to complaints by operators and supervisors. *See id.* at ¶ 10. Neither of these cases support Appellee’s effort to apply respondeat superior liability to R.C. 2745.01(C) and thereby obviate the requirement of deliberate removal by the employer.

In contrast, *Conley v. Endres Processing Ohio, LLC*, 3d Dist. Wyandot No. 16-12-11, 2013-Ohio-419, found there was no deliberate removal by an employer where there was no evidence of a deliberate decision by the employer, no evidence of who removed the metal plate, and no evidence of a direction to employees to remove the plate. *Accord Roberts v. RMB Enters.*, 197 Ohio App.3d 435, 2011-Ohio-6223, 967 N.E.2d 1263, ¶ 24 (12th Dist.) (affirming summary judgment where there was no evidence that the employer deliberately removed the alleged safety feature); *Wineberry v. N. Star Painting Co.*, 2012-Ohio-4212, 978 N.E.2d 221, ¶ 39-41 (7th Dist.) (affirming summary judgment for employer where employee failed to present evidence that the employer deliberately removed guardrails).

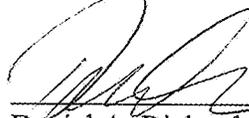
The plain language of R.C. 2745.01(C), this Court’s definition of deliberate removal in *Hewitt*, and the intent of the General Assembly require a deliberate decision to remove the equipment safety guard by the employer. The Court should reject Appellee’s effort to inject vicarious liability into the employer intentional tort standard and reverse the appellate court because it erroneously found a material issue of fact despite no evidence that the employer made a deliberate decision to remove an equipment safety guard.

CONCLUSION

The Court’s definition of “equipment safety guard” and requirement that the employer make “a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard” were

clear in *Hewitt*. In an effort to avoid *Hewitt*, Appellee has stretched the meaning of the Court's one paragraph remand in *Beary* and attempted to introduce vicarious liability into employer intentional torts. The Court should affirm its decision in *Hewitt* and reverse the judgment of the Sixth District.

Respectfully submitted,



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