

**IN THE SUPREME COURT OF OHIO**

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**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.**

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

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**MOTION FOR RECONSIDERATION BY PLAINTIFF-APPELLEE,**  
**PHILLIP E. PIXLEY**

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David R. Grant, Esq. (#0065436)  
**PLEVIN & GALLUCCI Co., L.P.A.**  
55 Public Square, Suite 2222  
Cleveland, Ohio 44113  
(216) 861-0804  
[DGrant@pglawyer.com](mailto:DGrant@pglawyer.com)

Paul W. Flowers, Esq. (#0046625)  
**[COUNSEL OF RECORD]**  
**PAUL W. FLOWERS Co., L.P.A.**  
Terminal Tower, 35th Floor  
50 Public Square  
Cleveland, Ohio 44113  
(216) 344-9393  
[pwf@pwfco.com](mailto:pwf@pwfco.com)

*Attorneys Plaintiff-Appellee,*  
*Phillip E. Pixley*

Adam J. Bennett, Esq. (#0077891)  
**COOKE, DEMERS AND GLEASON**  
3 North High Street  
P.O. Box 714  
New Albany, Ohio 43054  
(614) 464-3900  
[abennett@cdgattorneys.com](mailto:abennett@cdgattorneys.com)

*Special Counsel for Involuntary Plaintiff,*  
*Ohio Bureau of Workers Compensation*

Timothy C. James, Esq. (#0011412)  
**ITTER, ROBINSON, MCCREADY & JAMES**  
405 Madison Avenue, Suite 1850  
Toledo, Ohio 43604  
(419) 241-3213  
[james@rrmj.com](mailto:james@rrmj.com)

*Attorney for Defendant-Appellants*

Gregory B. Denny, Esq. (#0009401)  
**BUGBEE & CONKLE, LLP**  
405 Madison Avenue, Suite 1300  
Toledo, Ohio 43604  
(419) 244-6788  
[gdenny@bugbeelawyers.com](mailto:gdenny@bugbeelawyers.com)

*Attorney for Defendant-Appellants*

Preston J. Garvin, Esq. (#0018641)  
**GARVIN & HICKEY, L.L.C.**  
181 East Livingston Avenue  
Columbus, Ohio 43215  
(614) 225-9000  
[wclaw@garvin-hickey.com](mailto:wclaw@garvin-hickey.com)

*Counsel for Amicus Curiae*  
*Ohio Chamber of Commerce*

Daniel A. Richards, Esq. (#0059478)  
**WESTON HURD, LLP**  
1301 East 9th Street, Suite 1900  
Cleveland, Ohio 44114  
(216) 687-3267  
drichards@westonhurd.com

*Counsel for Amicus Curiae*  
*Ohio Association of Civil Trial Attorneys*

Robert A. Minor, Esq. (#0018371)  
**VORYS, SATER, SEYMOUR,  
AND PEASE, LLP**  
52 E. Gay Street, PO Box 1008  
Columbus, Ohio 43216  
(614) 464-6410  
[raminor@vorys.com](mailto:raminor@vorys.com)

*Counsel for Amicus Curiae*  
*Ohio Self-Insurers Association*

## MEMORANDUM

Plaintiff-Appellee, Philip E. Pixley, requests that this Court reconsider the decision that was released on December 18, 2014. *Pixley v. Pro-Pak Industries, Inc.*, Sup. Ct. No. 2013-0797, 2014-Ohio-5460. The plurality opinion that was rendered in favor of Defendant-Appellant, Pro-Pak Industries, Inc. (“Pro-Pak”), fails to recognize and apply the appropriate standard of review. This oversight may be attributable to the fact that the majority declined to address the issue of law that had been the focus of the parties’ and *amici* briefing, and proceeded instead to question the appellate court’s evidentiary analysis. An untenable result was reached in the process.

Due to the structure of the Ohio Constitution, the Supreme Court does not serve as a “court of correction.” But that is exactly what occurred in the instant appeal. The vexing legal dispute that had been identified by the Sixth District was over whether the definition of “equipment safety guard” set forth in R.C. 2745.01(C) is confined to barriers that protect equipment operators, as opposed to all classes of employees. *Pixley v. Pro-Pak Industries, Inc.*, 2013-Ohio-1358, 988 N.E.2d 67 (6th Dist.), ¶¶6 & 16-21. The confusion that now exists has its origins in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, in which this Court held in the syllabus that the phrase “means a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment[.]” Employers across Ohio, and several jurists, interpret this passage as disqualifying employees who do not hold the title of “operator” from the protections afforded by the equipment safety guard presumption. However, this nonsensical view of the *Hewitt* syllabus cannot be reconciled with the disposition of *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 134 Ohio St.3d 359, 2012-Ohio-5626, 982 N.E.2d 691, where this Court remanded a workplace intentional tort claim that had

been brought by a laborer who was struck by an allegedly defective construction vehicle.

If deemed appropriate by a majority, this Court is certainly entitled to leave the Sixth District's sound resolution of the "operator's only" conundrum intact. Since no other constitutional questions or issues of public or great general interest remained that could confer jurisdiction under Section 2(B), Article IV, of the Ohio Constitution, the appeal should have been dismissed as having been improvidently allowed or the lower court should have been summarily affirmed. *S. Ct. Prac. R. 7.10*.

Instead, the plurality proceeded to address Defendant's fallback position, which consisted of nothing more than contrived criticisms of the Sixth District's evidentiary analysis. *Pixley*, 2014-Ohio-5460, ¶18-26. No new legal standards were recognized, modified, or eliminated by this Court. *Id.* In an opinion that is unlikely to have any impact outside of the instant parties' dispute, the plurality held merely that the testimony of the defense witness, when combined with Plaintiff's purported inability to produce "physical or scientific evidence of tampering" or direct proof of a deliberate decision by the employer, was sufficient to defeat the claim as a matter of law. *Id.*

The *Pixley* opinion is troubling in that there is no meaningful acknowledgement of the controlling summary judgment standards. This Court appears to have overlooked that all reasonable inferences were supposed to have been drawn most strongly in Plaintiff's favor. *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974); *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 433, 424 N.E.2d 311 (1981); *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-106, 483 N.E.2d 150 (1985); *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 88, 585 N.E.2d 384 (1992). Only the trier of fact may resolve questions of witness credibility. *Turner v. Turner*, 67 Ohio St.3d 337, 341, 1993-Ohio-176, 617 N.E.2d 1123.

In violation of these time-tested standards, this Court took several defense witnesses at their word and accepted their self-serving testimony as true. For example, Brian R. LaFreniere's assertion was adopted that "the safety bumpers could be pushed in at least three or four inches before breaking the circuit and stopping the car." *Pixley*, 2014-Ohio-5460, ¶20. And maintenance manager Troy Jefferies' insistence that "the safety bumpers still worked even if it dragged on the floor" was also embraced. *Id.* This Court also accepted as accurate the human resources manager's contention that she had personally observed the "employees test the safety bumper multiple times and each time they found that the act of compressing the bumper cut power to the transfer car and caused it to stop." *Id.* All of this suspect testimony was subject to legitimate debate, as none of these assertions had been verified through incontrovertible proof.

When courts blindly accept the testimony of defense witnesses, plaintiffs can rarely survive a motion for summary judgment. This case proves this point, as this Court concluded that the uncorroborated assertions of Defendants' employees discredited the findings of Plaintiff's experts, which were that the worker could not have been crushed unless the transfer cart's safety bumpers had been physically bypassed. *Pixley*, 2014-Ohio-5460, ¶20. These opinions were indeed founded upon "physical" and "scientific evidence[,] as the workplace safety specialists had carefully examined the OSHA video revealing that the bumper was bouncing and dragging along the aisle surface during post-incident testing, which was possible only if the proximity switch had been bypassed through human intervention. *T.d. 126, Kevin Smith Affidavit, ("Smith Aff."), paragraph 8(f); T.d. 127, Expert Aff. of Gerald. C. Rennell (Rennell Aff.), paragraph 8(n)(p)& (u).* Sensible jurors could also disagree with this Court's determination that Plaintiff's "experts provided no basis for the assertion that the proximity switch should have been triggered in

those circumstances[.]” *Pixley*, 2014-Ohio-5460, ¶20. Both engineers detailed in their sworn statements precisely how the safety bumpers were designed to operate, which was determined and confirmed through the personal inspections of the equipment and the manufacturer’s materials. *T.d. 126, Smith Aff., paragraph 8; T.d. 127, Rennell Aff., paragraph 8.* No plausible explanations to the contrary were offered by any defense experts. Given that the bumpers had been repeatedly stepped on and were observably loose, disabling the protective devices would have been necessary to keep them in operation. *Id.* Only the employer was in position to, and could have authorized, the elimination of the safety feature. *Id.*

While the experts’ ultimate findings had been developed circumstantially, which is necessary whenever there have been no admissions of wrongdoing, such proof is sufficient in the criminal realm to send a defendant to prison for life, or even death row. *State v. Scott*, 61 Ohio St.2d 155, 165, 400 N.E.2d 375 (1980). Yet even though the preponderance of the evidence standard controls in this civil action, Plaintiff is being precluded from establishing his workplace intentional tort claim in the same manner. A new requirement for direct and infallible proof appears to have been judicially engrafted upon R.C. 2745.01(C) that the General Assembly never approved.

As the ultimate arbiter of the facts, the jury possesses the undeniable prerogative to disbelieve even uncontroverted testimony. *Ace Seal Baling, Inc. v. Porterfield*, 19 Ohio St. 2d 137, 138, 249 N.E. 2d 892 (1969); *Bradley v. Cage*, 9th Dist. No. 20713, 2002-Ohio-816, 2002 W.L. 274638, \*4-5 (Feb. 27, 2002). Reasonable minds could certainly conclude in this instance that the defense testimony that has been adopted by this Court lacks credence not just because the witnesses are finally dependent upon Defendant, but also because their unsubstantiated claims that the transfer cars worked fine despite the

loose bumpers is contrary to the design and engineering principles that were identified by Plaintiff's experts. If the affidavits and reports that Plaintiff had furnished are accepted as true, which is necessary at the summary judgment stage of the proceedings, then the logical conclusion is that a critical safety barrier was deliberately removed by the employer within the meaning of R.C. 2745.01(C). But when this Court decided that the defense witnesses are more credible, and the opinions of Plaintiff's expert had been debunked, a permanently disfigured worker was denied his fundamental right to a trial by a jury of his peers. *Section 5, Article I, Ohio Constitution.*

### **CONCLUSION**

Because this Court exceeded its jurisdictional authority by addressing Defendant's mundane criticisms of the appellate court's evidentiary analysis, and failed to apply the appropriate summary judgment standards while reversing the decision, the opinion that was rendered on December 18, 2014 should be reconsidered and this appeal should either be dismissed as having been improvidently allowed or the Sixth District should be summarily affirmed. *S. Ct. Prac. R. 18.02.*

Respectfully Submitted,

/s/David Grant  
David Grant, Esq. (#0034591)  
**PLEVIN & GALLUCCI Co., L.P.A.**  
  
*Attorneys for Plaintiff-Appellee*

/s/Paul W. Flowers  
Paul W. Flowers, Esq. (0046625)  
**[COUNSEL OF RECORD]**  
**PAUL W. FLOWERS Co., L.P.A.**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Motion** was served via e-mail on this

29th day of December, 2014 to:

Timothy C. James, Esq.  
**RITTER, ROBINSON, MCCREADY &  
JAMES**  
405 Madison Avenue, Suite 1850  
Toledo, Ohio 43604  
[james@rrmj.com](mailto:james@rrmj.com)  
*Attorney for Defendant-Appellants*

Gregory B. Benny, Esq.  
**BUGBEE & CONKLE, LLP**  
405 Madison Avenue, Suite 1300  
Toledo, Ohio 43604  
[gdenny@bugbeelawyers.com](mailto:gdenny@bugbeelawyers.com)  
*Attorney for Defendant-Appellants*

Preston J. Garvin, Esq.  
**GARVIN & HICKEY, L.L.C.**  
181 East Livingston Avenue  
Columbus, Ohio 43215  
[wclaw@garvin-hickey.com](mailto:wclaw@garvin-hickey.com)  
*Counsel for Amicus Curiae  
Ohio Chamber of Commerce*

Daniel A. Richards, Esq.  
**WESTON HURD, LLP**  
1301 East 9<sup>th</sup> Street, Suite 1900  
Cleveland, Ohio 44114  
[drichards@westonhurd.com](mailto:drichards@westonhurd.com)  
*Counsel for Amicus Curiae  
Ohio Association of Civil Trial  
Attorneys*

Adam J. Bennett, Esq.  
**COOKE, DEMERS AND GLEASON**  
3 North High Street  
P.O. Box 714  
New Albany, Ohio 43054  
[abennett@cdgattorneys.com](mailto:abennett@cdgattorneys.com)  
*Special Counsel for Involuntary Plaintiff,  
Ohio Bureau of Workers Compensation*

Robert A. Minor, Esq.  
**VORYS, SATER, SEYMOUR,  
AND PEASE, LLP**  
52 E. Gay Street, PO Box 1008  
Columbus, Ohio 43216  
[raminor@vorys.com](mailto:raminor@vorys.com)  
*Counsel for Amicus Curiae  
Ohio Self-Insurers Association*

*/s/Paul W. Flowers*

Paul W. Flowers, Esq., (#0046625)  
**PAUL W. FLOWERS CO., L.P.A.**  
*Attorney for Plaintiff-Appellee*