

**IN THE SUPREME COURT OF OHIO**

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

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**APPELLANTS' RESPONSE IN OPPOSITION TO APPELLEE'S MOTION  
FOR RECONSIDERATION**

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## MEMORANDUM

Defendants-Appellants, Pro-Pak Industries, Inc. and Toledo L&L Realty, (Pro-Pak), respectfully request the Court deny Plaintiff-Appellee Phillip E. Pixley's Motion for Reconsideration of the Court's December 18, 2014 decision.

### **I. Because Pixley Raises No New Matters In His Motion, The Court's Decision Should Not Be Reconsidered.**

Pixley fails to present anything new to warrant reconsideration of the Court's decision. Rather, Pixley's motion for reconsideration is simply a reargument of the case, incorporating the same arguments contained in his merit brief and presented at oral argument. Contrary to Pixley's inference, this Court understands the standards for accepting jurisdiction in discretionary appeals and deciding the issues presented therein.

Five Justices of the Court concurred in the decision that plaintiff failed to prove Pro-Pak deliberately removed an equipment safety guard for purposes of establishing the rebuttable presumption of intent to injure under R.C. 2745.01(C). Pixley argues the Court served as a "court of correction" contrary to the Ohio Constitution. But Pixley misses the point that the court, in fact, did set forth the standard of proof necessary to create the rebuttable presumption that an employer acted with intent to injure. Because the court no longer just speaks through its syllabus, but rather through its entire opinion, important standards were, in fact, established by this opinion.

The Court accepted Pro-Pak's discretionary appeal on two separate propositions of law: 1) The definition of equipment safety guard is limited to protecting operators only, **and** 2) 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. Both issues were thoroughly briefed and argued. The second issue was also of great importance because it would clarify what evidence is required to establish “deliberate removal” which then entitles a plaintiff to a presumption of intent to injure. Without that presumption, the burden of intent to injure is more difficult for a plaintiff to meet. In deciding Pixley failed to prove Pro-Pak deliberately removed an equipment safety guard, it became unnecessary for the Court to decide whether the definition of equipment safety guard is limited to protecting operators only. As such, a decision on whether the definition of equipment safety guard is limited to protecting operators only would have been an advisory opinion. The operator issue will survive for another appropriate case.

**II. The Court Set Forth A Clear Statement Of Law Regarding The Burden Of Proof Necessary To Establish The Rebuttable Presumption Of Intent To Injure Under R.C. 2745.01(C).**

Contrary to Pixley’s argument that the Court simply decided a factual dispute, the Court’s decision sets forth two important legal standards regarding the burden of proof necessary to establish the rebuttable presumption of intent under R.C. 2745.01(C). In clarifying the burden of proof necessary to establish an intentional tort claim, the Court provides important guidance to trial courts in handling these types of cases.

**A. The Mere Fact That An Accident Happened Is Not Sufficient Proof That There Was A Deliberate Removal.**

In this case, there is no evidence that Pro-Pak deliberately removed or disabled the safety bumper on the transfer car. Pixley therefore cannot avail himself of the statutory presumption, and he has not shown that Pro-Pak deliberately intended to injure him. The Court clarified the standard of proof set forth in *Hewitt v. L.E. Meyers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, by requiring evidence that the employer deliberately intended to

remove an equipment safety guard to establish a presumption of intent to injure under R.C. 2745.01(C). There is no evidence Pro-Pak made a deliberate decision to remove an equipment safety guard or directed anyone to remove an equipment safety guard. Without such evidence in a claim under R.C. 2745.01(C), summary judgment is appropriate.

**B. Absent Such Evidence, A Plaintiff May Not Bootstrap Their Case By Having An Expert Opine That Because An Accident Happened, There Must Have Been Deliberate Removal.**

Pixley's argument creates a strict liability standard based solely on the unsubstantiated opinions of his safety experts. Pixley's experts opine that the failure of the bumper was a result of human intervention. However, there is no evidence Pro-Pak made a deliberate decision to bypass the safety bumper. The Court held the expert opinions insufficient to create an issue of fact. Without evidence of deliberate removal by the employer, such a case cannot be bootstrapped by the use of experts to overcome summary judgment. These legal standards of proof will be important to guide trial courts on summary judgment in these types of cases.

**CONCLUSION**

The Court did much more than simply resolve a factual dispute between the parties. When a party is trying to take advantage of the presumption under R.C. 2745.01(C), the Supreme Court's decision sets forth a clear legal standard regarding the burden of proof necessary to establish an employer deliberately removed an equipment safety guard. The Court set forth a legal standard of proof for trial courts to follow in employment intentional tort cases. For the above reasons, Pixley's motion for reconsideration must be denied.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served by ordinary U.S Mail on this 8th day of January, 2015, upon:

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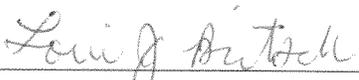
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