

**IN THE SUPREME COURT OF OHIO**

STATE EX REL. CAMACO, LLC., :  
 :  
 Appellant, : Case No. 2015-0036  
 :  
 v. : ON APPEAL FROM THE FRANKLIN  
 : COUNTY COURT OF APPEALS,  
 : TENTH APPELLATE DISTRICT COURT OF  
 ROBERT J. ALBU AND THE : APPEALS CASE NO. 13A-1002  
 INDUSTRIAL COMMISSION :  
 OF OHIO, :  
 :  
 Appellees. :

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**REPLY BRIEF OF APPELLANT CAMACO, LLC**

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## ARGUMENT

This case is not about whether Albu is entitled to workers' compensation for injuries received in the course and scope of employment for Camaco.<sup>1</sup> It is about whether, in addition to paying workers' compensation, Camaco should be subject to a 35% penalty for the Accident.

Because the VSSR Award is a penalty against Camaco, all reasonable doubts concerning application of OAC 4123:1-5-17(G)(1)(a) to the Accident must be construed in favor of Camaco. *State ex rel. Gilbert v. ICO*, 116 Ohio St.3d 243, 2007-Ohio-6096, at ¶14. In this regard, OAC 4123:1-5-17(G)(1)(a) is not to be interpreted as imposing strict liability. *See State ex rel. Taylor v. ICO*, 70 Ohio St.3d 3d 445, 448-449, 1994-Ohio-445; *See State ex rel. M.T.D. Products, Inc. v. Stebbins*, 43 Ohio St.2d 114, 118, 330 N.E.2d 904 (1975); *State ex rel. Gilbert*, 116 Ohio St.3d 243, at ¶23. For this Court has recognized “the practical impossibility of guaranteeing that a device will protect against all contingencies.” *State ex rel. Gilbert*, 116 Ohio St.3d 243, at ¶23. Rather, the purpose of specific safety requirements is to “provide reasonable, not absolute safety for employees.” *Id.*

This Court has applied this strong public policy to avoid penalizing employers for unknown hazards. *See State ex rel. Taylor*, 70 Ohio St.3d 3d at 447-448; *State ex rel. Maghie & Savage, Inc. v. Nobel*, 81 Ohio St.3d 328, 330-331, 1998-Ohio-476; *State ex rel. M.T.D. Products*, 43 Ohio St.2d at 118.<sup>2</sup>

As explained nearly 40 years ago in *State ex rel. M.T.D. Products* where this Court found ICO abused its discretion by imposing VSSR liability where a safety gate failed for the first time:

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<sup>1</sup> For purposes of clarity, consistency and brevity, the same abbreviations used in Camaco's Merit Brief are used in this Reply Brief.

<sup>2</sup> Likewise, this Court has declined to penalize employers where an employee has deliberately circumvented a safety device resulting in a workplace injury. *See State ex rel. Quality Tower Serv., Inc. v. ICO*, 88 Ohio St.3d 190, 192-193, 2000-Ohio-296.

The purpose of the safety regulation is to provide reasonable safety for employees . . . The fact that a safety device that otherwise complies with the safety regulations failed on a single occasion is not sufficient to find that the safety regulation was violated . . . [The rule] does not purport to impose absolute liability for an additional award whenever a safety device fails. The regulation does not forewarn the employer that, in addition to providing a safety device, the safety device must also be completely failsafe . . . (citations omitted).

43 Ohio St.2d at 118.

Such concerns were echoed 20 years later in *State ex rel. Taylor* where this Court found that an employer did not violate a safety belt rule simply because it did not provide safety belts to employees working over fifteen feet in the air, explaining:

We . . . find that Ohio Adm. Code 4121:1-3-03(J)(1) requires the use of safety belts on operations above fifteen feet only if employees are actually at risk of falling. We decline to adopt appellant's assertion that since decedent indeed fell, he was obviously exposed to a hazard of falling. To do so effectively imposes a strict liability on employers in the event of a fall, contrary to *M.T.D., supra*.

The platform at issue was enclosed by guardrails. The exposure to falling that existed despite this precaution—indeed the fall itself—was attributable to the gate lock's unanticipated malfunction. To find that the employer violated [the rule] is to essentially penalize [the employer] for its inability to predict the device's first-time failure.

70 Ohio St.3d at 448-449.

Five years later, in *State ex rel. Pressware Int'l Inc. v. ICO*, this Court held that an employer could not be subjected to VSSR liability for a first time safety interlock gate malfunction that injures another employee provided, even when the employers' own maintenance worker was the cause, so long as "there was no reason for [the employer] ever to guess that a broken interlock could have reactivated the press." 85 Ohio St.3d 284, 290, 1999-Ohio-265.

Against this backdrop, the record clearly establishes the following:

- (1) There could be no potential hazards to Albu's head from physical contact with rigid objects if Albu remained outside the perimeter fence of Wayne Trail 2.

- (2) There could be no potential hazards to Albu's head from physical contact with rigid objects if Albu entered the perimeter fence of the Wayne Trail 2 via either of the safety-interlocked doors because all power would have been cut off to machinery inside the cell.
- (3) There could be no potential hazards to Albu's head from physical contact with rigid objects within the perimeter fence if the teach pendant was properly designed as a single point of control as to allow Albu to control the movement of all equipment within the cell.
- (4) Albu entered the perimeter fence of the Wayne Trail 2.
- (5) When Albu entered the perimeter fence of the Wayne Trail 2, he entered via a parts exit chute rather than either safety-interlocked doors. Both Staff Hearing Officers found that Albu's actions constituted circumventing or bypassing a safety feature of the Wayne Trail 2.
- (6) The first Staff Hearing Officer found that Albu's bypassing of the safety feature of the Wayne Trail 2 barred his VSSR claim.
- (7) The second Staff Hearing Officer found that Albu's bypassing of the safety feature of the Wayne Trail 2 did not cause Albu's injuries because the teach pendant was not properly designed as a single point of control as to allow Albu to control the movement of all equipment within the cell. This was based entirely upon Mangold's expert opinions.
- (8) There is no evidence in the record that anyone knew about the alleged improper design of the teach pendant until years after the Accident.
- (9) There is no evidence in the record that Albu ever argued that the teach pendant was improperly designed or that such improper design contributed to potential hazards to Albu's head from physical contact with rigid objects.
- (10) Camaco was never put on notice that the alleged improper design of the teach pendant could affect Albu's VSSR Claim until *after* the VSSR Award issued. Accordingly, Camaco never argued that the alleged improper design of the teach pendant was a hidden, latent design defect because this was not at issue in the VSSR proceedings.

(See Camaco's Merit Brief, pp. 3-19).

Neither the Tenth Appellate District nor the Appellees contend that the foregoing law should be changed. Instead, they contend that, under the foregoing facts, Camaco should be barred from relying upon such law based upon the doctrine of waiver; that is, Camaco sat on its rights during the administrative proceedings and failed to raise a defense to an issue that was never argued by Albu but was first raised by ICO sua sponte in the VSSR Award. Respectfully, this is not how waiver works. (*See* Camaco’s Merit Brief, pp. 26-33).

Tacitly conceding the extreme nature of their argument, both the Tenth Appellate District and Albu contend that waiver should apply because Camaco did not argue the notice defense in a motion for rehearing. (*See State ex rel. Camaco v. Albu*, 10<sup>th</sup> Dist. No. 13-AP-1002, 2014-Ohio-5330, at ¶8; Albu’s Merit Brief, pp. 7-8).<sup>3</sup> However, this Court has expressly held that an employer cannot raise a notice defense for the first time in a motion for rehearing. *State ex rel. Shelly Co. v. Steigerwald*, 121 Ohio St.3d 158, 2009-Ohio-585, at ¶¶15-26. This is consistent with general Ohio law with respect to post-judgment motions and motions to reconsider. (*See* Camaco’s Merit Brief, p. 28-29, FN 77-78).

ICO and Albu also argue that waiver should also apply because Camaco knew about Mangold’s opinion prior to the June 26, 2013 VSSR Rehearing. (*See* ICO’s Merit Brief, p. 14; Albu’s Merit Brief, pp. 7-8). While it is true that Camaco knew of Mangold’s opinions prior to the June 26, 2013 Rehearing, it is also true that at no time did Albu ever argue that there was anything wrong with the design of the teach pendant that would contribute to a potential hazard to Albu’s head from physical contact with rigid objects. Rather, Albu simply argued that he had to

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<sup>3</sup> The goal of the law in this area is to avoid “patently illogical result[s], common sense should prevail.” *State ex rel. Maghie & Savage, Inc.*, 81 Ohio St.3d at 331. To hold otherwise is to violate the legal maxim—*summum jus summa injuria*—extreme law is extreme wrong. *See Grogan Chrysler Plymouth, Inc. v. Gottfried*, 59 Ohio App.2d 91, 95, 392 N.E.2d 1283 (6<sup>th</sup> Dist. 1978); *see also State ex rel. Burchfield. v. Printech Corp.*, 83 Ohio St.3d 169, 1993-Ohio-121 (rejecting employee’s argument that foot protection should have been provided due to potential foot hazards “that exist[] as a part of everyday life”).

have the cell energized in order to troubleshoot the same, and therefore he could not enter through the safety-interlock doors. Camaco countered that the teach pendant could be used by Albu even if he had entered through the safety-interlock doors.<sup>4</sup> Thus, Albu presented nothing to the Staff Hearing Officer that should have prompted Camaco to provide a notice defense regarding the teach pendant. No one argued that there was anything wrong with it. Rather, it was the second Staff Hearing Officer who sua sponte interjected the issue in the final VSSR Award—when nothing could be done about it.

Even assuming that some extreme view of waiver could or should be applied in this case, Camaco argued that imposing such a punishment on an employer constitutes plain error because, at the time of the Accident, Camaco had no notice that the design of the teach pendant could contribute to a potential hazard to Albu’s head from physical contact with rigid objects. ICO does not address plain error in its brief. Albu summarily discounts the issue in its brief. (Albu’s Merit Brief, pp. 15-16).

The Tenth Appellate District declined to apply plain error for two reasons. First, the court of appeals was “unaware of any case in which the plain-error doctrine has been applied to overrule a commission decision granting a VSSR award, and relator fails to cite such decision.” (2014-Ohio-5330, at ¶9). Second, the court of appeals held that there was not any evidence that Camaco was *not* aware of the alleged defect in the teach pendant. (2014-Ohio-5330, at ¶9). Indeed, at FN 3, the court went one step further and noted that “there was evidence . . . indicating that, prior to claimant’s accident, another employee was nearly struck when performing a similar task and that one employee spoke with relator’s maintenance supervisor about modifying the system to avoid the risk of injury.” (2014-Ohio-5330, at ¶9, FN 3).

With respect to the first reason, the lack of precedent is not a reason to refuse to apply a

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<sup>4</sup> (Stipulation of Evidence, Ex. V, Bates Nos. Stip. Evid. 000757 to Stip. Evid. 000772).

well-established doctrine of law to an analogous situation. Certainly, the doctrine of waiver is “borrowed” from appellate law and applied to such mandamus actions because the circumstances are analogous. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81-83, 1997-Ohio-71 (applying appellate waiver doctrine to administrative appeal for same practical reasons). There is no reason plain error should not be similarly “borrowed”—particularly where such mandamus proceedings are the only vehicle of “review” for those being punished by the state in administrative proceedings without direct judicial review. Under such circumstances, the danger of unelected bureaucrats wielding the police powers of the state are too great to impose a blanket exemption upon mandamus actions challenging wrongful exercise of such powers. This is of no small moment to employees or employers. The next case may be an employee whose VSSR award is denied at the last second by an argument the employer never made.

With respect to the second reason, the Tenth Appellate District turned the issue on its head.

There was certainly evidence that Camaco did not know about the alleged defect:

- (1) At the June 26, 2013 Rehearing, Camaco presented extensive evidence about the manner in which the teach pendant worked and none of it alluded to any defect in the design of the teach pendant.<sup>5</sup>
- (2) The Wayne Trail 2 was installed just a few months before the Accident. (Camaco’s Merit Brief, p. 10).
- (3) Albu testified that he used the “E-stop” on the teach pendant to stop machinery within the cell. Sheppard, his trainer, testified that the Accident could not have happened if Albu had used the “E-stop.” (Camaco’s Merit Brief, pp. 11-12)
- (4) Mangold’s full report, affidavit and supporting materials were submitted by Camaco.<sup>6</sup> Nowhere did that report allege that Camaco was aware of any of the alleged defects in the teach pendant. Rather, over and over, the report alleged that WTT failed to provide Camaco with a teach pendant that met industry standards and failed to advise Camaco of the shortcomings. In pertinent part,

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<sup>5</sup> (Stipulation of Evidence, Ex. V, Bates Nos. Stip. Evid. 000757 to Stip. Evid. 000772).

<sup>6</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000505 to Stip. Evid. 000547).

Mangold opined that:

- (a) WTT rushed the Wayne Trail 2 and related equipment, including the teach pendant, into service without adequate understanding of safety considerations.<sup>7</sup>
  - (b) The teach pendant was supposed to have been designed to be a single point of control for equipment within the cell.<sup>8</sup>
  - (c) Contrary to industry standards, the teach pendant, as designed and in use at the time of the Accident, was not a single point of control for equipment within the cell.<sup>9</sup>
  - (d) Depositions of WTT and Camaco representatives demonstrated that *Camaco* was ignorant of the shortcomings in the control system of the Wayne Trail 2 because WTT did not understand those shortcomings and did not explain them to Camaco.<sup>10</sup>
  - (e) “Mr. Albu’s incident was avoidable” and “occurred as a result of the malfeasance of WTT and the numerous defects in the work cell sold to Camaco.”<sup>11</sup>
- (5) Kramer’s full report, affidavit and supporting materials were also submitted by Camaco.<sup>12</sup> Kramer opined that the Wayne Trail 2 would “operate in teach mode with the interlocking gate open. However, this was not adequately, if at all, conveyed to Camaco since Mr. Albu and other Camaco employees did not know of this feature.”<sup>13</sup>
- (6) Kvalseth’s full report, affidavit and supporting materials were also submitted by Camaco.<sup>14</sup> Kvalseth opined that:
- (a) “Camaco maintenance personnel appeared to lack training by WTT.”<sup>15</sup>
  - (b) The Wayne Trail 2 “Manual failed to adequately provide

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<sup>7</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000519 to Stip. Evid. 000523).

<sup>8</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000524 to Stip. Evid. 000525).

<sup>9</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000522 to Stip. Evid. 000523).

<sup>10</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000525 to Stip. Evid. 000526).

<sup>11</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000526).

<sup>12</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000452 to Stip. Evid. 000478).

<sup>13</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000471).

<sup>14</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000479 to Stip. Evid. 000504).

<sup>15</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000484).

such specific instructions” and “was not provided to Camaco until several weeks after the equipment was up and running.”<sup>16</sup>

- (c) Once delivered, “[t]he manual should have also provided specific instructions and guidelines about how to safely and properly perform the type of maintenance or troubleshooting as had to be performed when Mr. Albu suffered his injury. It is apparent from the depositions in this case that maintenance personnel and operators at Camaco lacked such instructions. The Manual should, for example, have explained how the robot could still be controlled if an individual entered the cell through an interlocked gate. Similarly, the *fault recovery* should have been sufficiently explained in the Manual so as to minimize the need for an individual have to enter the cell for troubleshooting.” (emphasis in original).<sup>17</sup>

- (7) In the VSSR Award, the second Staff Hearing Officer specifically found that “even the employees of Wayne Trail who trained the employees of [Camaco] were not aware” of the alleged defect in the teach pendant. (Camaco’s Merit Brief, p. 16).

On the other hand, there is no reasonable interpretation of the record under which one could infer that Camaco knew that there was anything wrong with the teach pendant at the time of the Accident.

Again, tacitly conceding the extreme nature of its ruling, at FN 3 of its Decision, the Tenth Appellate District, without analysis, made a cursory reference to Albu’s claims that Camaco had notice of the alleged defect because of earlier similar incidents—thereby suggesting, without actually holding, that maybe Camaco did have notice. (2014-Ohio-5330, at ¶9, FN 3).<sup>18</sup> However, as thoroughly explained at pp. 22-24 of Camaco’s Merit Brief, none of these other incidents are analogous to the Accident. While these other incidents may be closer in kind than a slip and fall in Camaco’s parking lot, there is no indicia from these incidents that Camaco had any

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<sup>16</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000484).

<sup>17</sup> (Stipulation of Evidence, Ex. K, Bates Nos. Stip. Evid. 000484).

<sup>18</sup> ICO wisely refrained from making this argument in its Merit Brief because it is unsupported by the evidence.

knowledge that there was anything wrong with the teach pendant.

Thus, there is not “some evidence” which supports the Tenth Appellate District’s dismissal of Camaco’s assertion that it did have knowledge of the alleged defect in the teach pendant at the time of the Accident. The error is even more egregious because the record is devoid of any argument by Albu that such an alleged defect could contribute to a potential hazard to Albu’s head from physical contact with rigid objects. Throughout the VSSR proceedings, Albu was arguing completely different theories. Because the issue was sua sponte interjected into the proceedings by the second Staff Hearing Officer at the very conclusion of the VSSR proceedings, Camaco was deprived of its ability to point out that the basis of the VSSR Award was contrary to prevailing authority from this Court and/or to further develop the record with respect to Camaco’s lack of knowledge of the alleged defect to the teach pendant. As a result of ICO’s actions, Camaco was subject to a 35% penalty on top of the workers’ compensation it is providing to an employee that ICO has twice found bypassed the safety features of the Wayne Trail 2. That substantial penalty is being imposed solely because of an alleged design defect in the teach pendant that the record demonstrates that Camaco knew nothing about. If ICO was going to inject an issue into the proceedings that neither party had argued, then the proper practice would have been to “give the parties notice of its intention and an opportunity to brief the issue.” *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 177, 522 N.E.2d 524 (1988). ICO did not follow such practice in this case. Instead, it struck out on its own and made a finding that was contrary to well-established law.

If waiver is to be applied under the extreme and unusual circumstances of this case, then its application constitutes exceptional circumstances which should prompt this Court to invoke plain error “to prevent a manifest miscarriage of justice” that “if left uncorrected, would have a material adverse effect on the character of, and public confidence in, [administrative] proceedings.”

*Townsend v. Phommarath*, 10<sup>th</sup> Dist. No. 10AP-598, 2011-Ohio-1891, at ¶9.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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