[Cite as *Barry v. Maxim Roofing Co., L.L.C.*, 2024-Ohio-2387.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

RICHARD BARRY	:	
	:	
Appellant	:	C.A. No. 30038
	:	
v.	:	Trial Court Case No. 2022 CV 00540
	:	
MAXIM ROOFING COMPANY LLC	:	(Civil Appeal from Common Pleas Court)
	:	
Appellee	:	
	:	

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O P I N I O N

Rendered on June 21, 2024

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BRIAN R. NOETHLICH, SANFORD A. MEIZLISH, & JASON C. COX, Attorneys for Appellant

KRISTINA E. CURRY, Attorney for Appellee

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LEWIS, J.

{¶ 1} Plaintiff-Appellant Richard Barry appeals from the judgment of the Montgomery County Court of Common Pleas granting summary judgment to Defendant-Appellee Maxim Roofing Company LLC ("Maxim") on Barry's intentional tort claims. For the reasons that follow, we will affirm the judgment of the trial court.

I. Facts and Course of Proceedings

{¶ 2} On February 9, 2022, Barry commenced an action against Maxim alleging employer intentional torts under R.C. 2745.01 and common law. According to the complaint, on April 21, 2020, Barry fell from a ladder and sustained severe injuries while working as an employee of Maxim on a roofing job at the Huber Heights Police Department. The fall occurred after Maxim's foreman allegedly instructed Maxim employees to separate an extension ladder into two separate ladders. The portion of the ladder subsequently used by Barry was the top section of the extension ladder, which meant that the portion of the ladder used by Barry did not have the typical safety feet at the bottom designed to help prevent the ladder from slipping and falling while being used. Complaint, ¶ 21-25.

{¶ 3} Maxim filed an answer, and several depositions were taken. On May 15, 2023, Maxim filed a motion for summary judgment. According to Maxim, it was entitled to judgment as a matter of law because "the accident in this case did not involve any employer actions done with a deliberate intent to cause injury to an employee under R.C. §2745.01(A) or (B), and there was no deliberate removal of a safety device to create a rebuttable presumption that the removal was committed with the intent to injure another under R.C. §2745.01(C)."

{¶ 4} Barry filed a memorandum opposing Maxim's motion for summary judgment. Barry contended that the undisputed testimony showed that Maxim had removed an "equipment safety guard" from the ladder at issue. Barry argued that "[b]ecause Maxim

deliberately removed an equipment safety guard, the Court should deny Maxim's motion for summary judgment, and find that the jury must presume that Maxim intended his injuries under R.C. 2745.01." Barry filed an affidavit in support of his opposition to Maxim's motion for summary judgment. Maxim filed a motion to strike the affidavit.

{¶ 5} On January 12, 2024, the trial court granted Maxim's motion for summary judgment and overruled Maxim's motion to strike the affidavit as moot. The trial court granted "Maxim judgment as a matter of law as to all claims raised in this matter by Plaintiff Richard Barry." Barry filed a timely appeal from the trial court's judgment.

II. The Safety Feet of the Ladder at Issue in this Appeal Were Not an "Equipment Safety Guard" within the Meaning of R.C. 2745.01(C)

{¶ 6} Barry's first assignment of error states:

> The Trial Court erred in awarding summary judgment to Appellee Maxim Roofing Company, LLC on Appellant Richard Barry's employer intentional tort claim by ruling that the safety feet of the ladder from which Mr. Barry fell were not an "equipment safety guard," and thus, finding that Mr. Barry was not entitled to a rebuttable presumption that the safety feet were removed with the intent to injure him under R.C. 2745.01(C).

{¶ 7} Appellate review of a trial court's ruling on a summary judgment motion is de novo. *Schroeder v. Henness*, 2d Dist. Miami No. 2012-CA-18, 2013-Ohio-2767, ¶ 42, citing *Helton v. Scioto Cty. Bd. of Commrs.*, 123 Ohio App.3d 158, 162, 703 N.E.2d 841 (4th Dist.1997). De novo review " 'means that this court uses the same standard that the

trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial.' " *Riverside v. State*, 2016-Ohio-2881, 64 N.E.3d 504, ¶ 21 (2d Dist.), quoting *Brewer v. Cleveland City Schools Bd. of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980). On such review, we do not grant deference to the trial court's decision. *Powell v. Rion*, 2012-Ohio-2665, 972 N.E.2d 159, ¶ 6 (2d Dist.), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶ 8} "Because of the immunity conferred by R.C. 4123.74 and Article II, Section 35, Ohio Constitution, for the vast majority of workplace injuries, a workers' compensation claim is an employee's exclusive remedy." *Hoyle v. DTJ Ents., Inc.*, 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.3d 122, ¶ 7, citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 110, 522 N.E.2d 489 (1988). "But when an employee seeks damages resulting from an act or omission committed by the employer with the intent to injure, the claim arises outside of the employment relationship, and the workers' compensation system does not preempt the employee's cause of action." (Citation omitted.) *Id*.

{¶ 9} The Ohio Supreme Court "first recognized an employee's right to sue his or her employer for an intentional tort in *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 572 (1982), syllabus." *Hoyle* at ¶ 7. The Court "reasoned that extending the immunity afforded to employers by the workers' compensation system to intentional torts would not further the legislative goals underlying the Workers' Compensation Act." *Id.* In particular, affording an employer immunity for intentional

torts would not promote a safe and injury-free work environment. *Id.*, citing *Blankenship* at 615. The Ohio Supreme Court subsequently held that an intentional tort involved an act committed with the specific intent to injure or with the belief that injury is substantially certain to occur. *Id.* at ¶ 8, citing *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90, 95, 472 N.E.2d 1046 (1984). Later, in *Fyffe v. Jeno's Inc.*, 59 Ohio St.3d 115, 118, 570 N.E.2d 1108 (1991), the Ohio Supreme Court held that an employee could establish intent based on substantial certainty by demonstrating the following: "(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task."

{¶ 10} But then the General Assembly enacted R.C. 2745.01, which took effect on April 7, 2005. That statute provides, in part:

> (A) In an action brought against an employer by an employee * * * for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
>
> (B) As used in this section, "substantially certain" means that an

> employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.
>
> (C) Deliberate removal by an employer of an equipment safety guard * * * creates a rebuttable presumption that the removal * * * was committed with intent to injure another if an injury * * * occurs as a direct result.

{¶ 11} R.C. 2745.01(A) incorporates the definition of an employer intentional tort from *Jones* and requires a plaintiff to prove either deliberate intent to injure or a belief that injury was substantially certain. *Hoyle* at ¶ 10. "But R.C. 2745.01(B) equates 'substantially certain' with 'deliberate intent' to injure." *Id.* Thus, the two options of proof under R.C. 2745.01(A) seemingly became: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure. *Hoyle* at ¶ 10, citing *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 55. "[W]hat appears at first glance as two distinct bases for liability is revealed on closer examination to be one and the same." *Id.*, quoting *Rudisill v. Ford Motor Co.*, 709 F.3d 595, 603 (6th Cir.2013) (describing R.C. 2745.01 as "a statute at war with itself").

{¶ 12} Based on a review of this history and the language contained in R.C. 2745.01, the Ohio Supreme Court concluded that "[t]he General Assembly's intent in enacting R.C. 2745.01 was to 'significantly restrict' recovery for employer intentional torts to situations in which the employer 'acts with specific intent to cause an injury.' " (Citations omitted.) *Hoyle* at ¶ 11. " 'A]bsent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system.' " *Id.*, quoting

Houdek v. ThyssenKrupp Materials N.A., Inc., 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 25. R.C. 2745.01(C) permits an employee to prove the employer's intent without direct evidence. *Hoyle* at ¶ 12. "When the employee is injured as a direct result of the employer's deliberate removal of an equipment safety guard, R.C. 2745.01(C) creates a rebuttable presumption that the employer intended to injure." *Id*.

{¶ 13} In granting Maxim's motion for summary judgment, the trial court first looked at whether there was direct evidence in the record that Maxim intended to injure Barry. The trial court explained that Maxim met its initial burden on summary judgment by pointing to the following evidence showing that Maxim lacked this specific intent:

> Maxim provided Barry with OSHA safety training certification courses; Barry participated in weekly safety training meetings offered by Maxim; [the foreman] testified he was unaware that Barry did not tie off the top of the ladder until Barry had already fallen; the work crew at the Huber Heights Police Department had used the upper section of the ladder for several days; [the foreman] had instructed his crew to tie off the ladder to the building; Barry had observed the ladder tied off at the top on several occasions; and the entire Maxim crew had been using both sections of the separated ladder for several months.

Decision (Jan. 12, 2024), p. 8-9. The trial court then found that Barry had not met his reciprocal burden on summary judgment to point to evidence showing that a genuine issue of material fact existed.

{¶ 14} The trial court next addressed whether Barry was entitled to the

presumption of intent to injure contained in R.C. 2745.01(C). The trial court found that there was no genuine issue of material fact that the rebuttable presumption of intent to injure contained in R.C. 2745.01(C) did not apply. According to the trial court, the safety feet of the ladder were not an "equipment safety guard" within the meaning of R.C. 2745.01(C). As the court explained:

> The safety feet protect the operator of the ladder against a danger—the danger that the base of the ladder will slip on an unstable surface. But the mere fact that the safety feet protect against a danger does not make the safety feet an "equipment safety guard." The safety feet are not an "equipment safety guard" because they do not shield the user from exposure to or injury by a dangerous aspect of the *ladder*. Like the jog switch and the emergency stop cable in *Fickle* [*v. Conversion Technologies Internatl., Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960], the safety feet did nothing to prevent any part of Barry's body from being exposed to a dangerous point of operation of the equipment. Therefore, the Court finds that the safety feet attached to the lower section of the two-part ladder are not an "equipment safety guard."

(Emphasis sic.) Decision, p. 11.

{¶ 15} Barry contends on appeal that "the ladder's safety feet are an 'equipment safety guard' because they are a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." Appellant's Brief, p. 11. Barry argues that "[t]he distinction the Trial Court made below that the ladder *itself* must come

into contact with the employee and cause injuries is an arbitrary line and simply not legally meaningful." (Emphasis sic.) *Id.* at 14. Maxim responds that the trial court properly applied R.C. 2745.01 and the Ohio Supreme Court's holding in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795. According to Maxim, Barry failed as a matter of law to establish that the feet on the ladder were a device that was designed to shield the operator from injury by a dangerous aspect of the equipment. Appellee's Brief, p. 11, citing *Hewitt* and *Fickle*.

{¶ 16} In *Hewitt*, the Ohio Supreme Court defined "equipment safety guard" as "a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." *Hewitt* at ¶ 2. The Court rejected a broader definition that would have included any safety device. As the Court explained:

> To construe "equipment safety guard" to include any generic safety-related item ignores not only the meaning of the words used but also the General Assembly's intent to restrict liability for intentional torts. * * *
>
> A broad interpretation of the phrase does not comport with the General Assembly's efforts to restrict liability for intentional tort by authorizing recovery "*only* when an employer acts with specific intent." * * * It is not our role to second-guess the policy matters set by the General Assembly. * * * Consequently, we refrain from expanding the scope of the rebuttable presumption of intent in R.C. 2745.01(C).
>
> Free-standing items that serve as physical barriers between the employee and potential exposure to injury, such as rubber gloves and

> sleeves, are not "an equipment safety guard" for purposes of R.C. 2745.01(C). Instead, rubber gloves and sleeves are personal protective items that the employee controls. We adopt the definition in *Fickle* and hold that as used in R.C. 2745.01(C), "equipment safety guard" means "a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." *Fickle*, 2011-Ohio-2960, ¶ 43.

(Emphasis sic.) *Hewitt* at ¶ 24-26.

{¶ 17} Since the *Hewitt* Court adopted the definition of "equipment safety guard" used by the Sixth District in *Fickle*, it is helpful to review that decision. In that case, the Sixth District had to determine whether a jog control and an emergency stop cable were equipment safety guards. The *Fickle* court applied common dictionary definitions of "guard," "safety," and "protect" to produce the definition later adopted by the Ohio Supreme Court in *Hewitt*. *Fickle,* 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960, at ¶ 38-39. Further, the Sixth District cited with approval a decision from the Third District that previously explained "equipment safety guard" as follows:

> An equipment safety guard is a device placed on equipment to prevent an employee from being drawn into or injured by that equipment. As examples we think of screens over moving belts or over moving gears and pulleys, and of presses which can only be activated by an employee by pressing one or more switches positioned so that no part of the employee will be in the path of the presses action when the employee activates the switches.

Id. at ¶ 40-41, quoting *Wehri v. Countrymark, Inc.*, 3d Dist. Allen Nos. 1-89-13, 1-89-14, 1990 WL 68030 (May 21, 1990), *rev'd on other grounds*, *Wehri v. Countrymark, Inc.*, 61 Ohio St.3d 719, 576 N.E.2d 789 (1991).

{¶ 18} As noted above, the General Assembly's intent in enacting R.C. 2745.01 in 2005 was to significantly restrict recovery for employer intentional torts. The Ohio Supreme Court decisions since that time have enforced this significant restriction by narrowly defining the meaning of "equipment safety guard." *E.g., Hewitt*; *Houdek*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 27 (adequate lighting and safety devices such as orange cones, reflective vests, and retractable gates are not equipment safety guards); *Bliss v. Johns Manville*, 172 Ohio St.3d 367, 2022-Ohio-4366, 224 N.E.3d 22, ¶ 19 (an access window was not an equipment safety guard). The appellate districts have followed this lead. *E.g., Cruz v. Western*, 8th Dist. Cuyahoga No. 109140, 2020-Ohio-5086, ¶ 14 (the profile gates were not equipment safety guards where they would not have kept a machine operator away from the drill tap); *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 2014-Ohio-4333, 20 N.E.3d 359, ¶ 17 (5th Dist.) (backup alarms are not equipment safety guards because they do not keep the bystander away from the zone of danger and do nothing to stop the machine from operating when an individual gets close to the machine).

{¶ 19} The primary case cited by Barry in support of his argument that the safety feet on the ladder fit within the definition of equipment safety guard is *Seaton v. Willoughby*, 2018-Ohio-77, 102 N.E.3d 1227 (9th Dist.). In that case, an employee of the City of Willoughby was operating an asphalt roller. "Unexpectedly, the roller began

to roll down an incline at a high rate of speed. [The employee] could not stop the roller as it careened out of control. When he attempted to jump off the machine to safety, he struck his head on the pavement. He subsequently died from his injuries." *Id.* at ¶ 2. The plaintiff contended that the emergency parking brake, the manufacturer's manual for the roller, and the necessary cotton pin master link qualified as equipment safety guards that the employer had removed. The City moved for summary judgment arguing that it was entitled to workers compensation immunity under R.C. 4123.74 and that the employer intentional tort exception to immunity was not applicable under the facts of the case.

{¶ 20} The trial court denied the motion for summary judgment. The trial court rejected the notion that either a manufacturer's manual or a master link could qualify as a safety guard. "With respect to the parking brake, however, the trial court determined that the parking brake did constitute a safety guard because its primary purpose was to ensure safety by preventing movement when the roller was not in motion." *Id.* at ¶ 13. The City appealed. On appeal, however, the City only argued that the trial court erred in denying the City's claim of immunity under R.C. 4123. The City did not challenge on appeal the trial court's conclusion that the parking brake qualified as an equipment safety guard but did contend that there was no evidence in the record that the City deliberately removed or disabled the parking brake on the asphalt roller. *Id.* at ¶ 14. The Ninth District concluded that there remained a question of material fact regarding whether the City had deliberately removed or disabled the parking brake. *Id.* at ¶ 18. We do not believe the *Seaton* case is particularly helpful to Barry given that whether the parking

brake fit within the definition of equipment safety guard in R.C. 2745.01(C) was not at issue in that appeal.

{¶ 21} Although it appears undisputed that the safety feet on a ladder are intended to decrease the possibility of a fall caused by the ladder's slipping or moving, it is well-established that not all safety devices are equipment safety guards. *E.g., Hewitt*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, at ¶ 24-26; *Fickle*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960, at ¶ 42. The safety feet on the extension ladder at issue in this appeal were not a device designed to shield the operator from exposure to or injury by a particular aspect of the ladder. While Maxim's alleged actions definitely increased the risk of injury to its employees, we are constrained to conclude that the safety feet of the ladder did not fit within the narrow definition of equipment safety guard adopted by the Ohio Supreme Court in *Hewitt*. As such, the trial court did not err in finding that Barry was not entitled to the presumption contained in R.C. 2745.01(C) and in granting summary judgment to Maxim.

{¶ 22} The first assignment of error is overruled.

III. The Trial Court Properly Considered Whether There Was Any Direct Evidence in the Record Supporting a Finding of Intent

{¶ 23} Barry's second assignment of error states:

> The Trial Court erred in finding that Appellee Maxim Roofing Company, LLC had no "specific intent" to injure Appellant Richard Barry, regardless of whether Mr. Barry was entitled to the statutory presumption

under R.C. 2745.01(C).

{¶ 24} In this assignment of error, Barry contends that the trial court "erred in finding that Maxim had no 'specific intent' before considering whether the presumption of intent under R.C. 2745.01(C) applied." Appellant's Brief, p. 14. According to Barry, "if [he] is entitled to the presumption [in R.C. 2745.01(C)], then the Trial Court is mistaken that Maxim had no 'specific intent' to injure as a matter of law." *Id.*

{¶ 25} We concluded in the first assignment of error that the trial court did not err in finding that the presumption of intent in R.C. 2745.01(C) did not apply to the facts of this case. Further, we see no error in the trial court's decision to first address whether there was direct evidence of intent to injure, which would have precluded summary judgment, before addressing whether the presumption in R.C. 2745.01(C) applied. In short, the trial court properly conducted analyses of whether there was direct evidence of intent to injure in the record and whether Barry was entitled to the presumption of intent to injure contained in R.C. 2745.01(C). The order in which the trial court conducted these analyses neither constituted error nor prejudiced Barry.

{¶ 26} The second assignment of error is overruled.

IV. Conclusion

{¶ 27} Having overruled both of Barry's assignments of error, the judgment of the trial court will be affirmed.

. . . . . .

EPLEY, P.J. and TUCKER, J., concur.