[Cite as *Dudley v. Powers & Sons, L.L.C.*, 2011-Ohio-1975.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

David Dudley	Court of Appeals No. WM-10-015
Appellant/Cross-Appellee	Trial Court No. 06 CI 311
v.	
Powers & Sons, LLC, et al.	**DECISION AND JUDGMENT**
Appellee/Cross-Appellant	Decided: April 22, 2011

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Kevin J. Boissoneault and Jonathan M. Ashton, for appellant/cross-appellee.

Marc J. Meister, for appellee/cross-appellant.

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OSOWIK, P.J.

{¶ 1} This is an appeal and cross-appeal from a judgment of the Williams County Court of Common Pleas which granted summary judgment to appellee/cross-appellant on appellant/cross-appellee's intentional tort claim. For the reasons set forth below, we reverse the judgment of the trial court and deny the cross-appeal.

{¶ 2} Appellant/cross-appellee, David Dudley, sets forth the following four assignments of error:

{¶ 3} "I. The trial court erred where it invaded the province of the jury to determine the proximate cause of Appellant David Dudley's injuries.

{¶ 4} "II. The trial court erred where it incorrectly applied the standard of review concerning rebuttable presumptions.

{¶ 5} "III. The trial court erred where it failed to find that Appellant David Dudley is entitled to the statutory presumption of injurious intent codified at R.C. § 2745.01(C).

{¶ 6} "IV. The trial court erred where it granted summary judgment in favor of Appellee Powers & Sons, LLC."

{¶ 7} Appellee/cross-appellant, Powers & Sons, LLC ("Powers"), sets forth the following assignment of error on cross-appeal:

{¶ 8} "The trial court committed reversible error when it failed to rule upon and thereby implicitly denied Defendant Powers & Sons, LLC's Motion to Strike Portions of the Deposition Testimony of Gerald Rennell, Ph.D., wherein he opined that the removal of dual palm buttons during the 2002 retooling of the subject press constituted the removal of an equipment safety guard thereby establishing 'deliberate intent' for purposes of R.C. 2745.01(C)."

{¶ 9} The following undisputed facts are relevant to the issues raised on appeal. In 2000, Powers purchased a two-ton hydraulic press to be used in the manufacture of

steering arms also referred to as "drag links." A Powers employee inserted a metal ring, attached to a handle or "stem," underneath the hydraulic ram. The machine would then cycle downward forming the ring into a socket. When initially purchased by Powers, the machine was designed and equipped with dual actuating buttons. This required the operator of the press to use both hands to activate the ram, ensuring that they were clear of the point of operation during the downward cycle.

{¶ 10} In 2002, Powers made in-house modifications to the press in response to complaints by press operators and supervisors. These changes included the installation of a sliding block and mandrel, the installation of a wire mesh cage around the ram, and, most significantly to the instant case, removing the original equipment dual actuating buttons in favor of an optical sensor. As redesigned, an operator would manually place the ring on the block and mandrel and slide it through an opening in the wire mesh cage placing the ring in position beneath the ram. When the ring was in position the optical sensor would detect it and automatically activate the press. When the block and mandrel were properly in place, the point of operation was inaccessible to the press operator.

{¶ 11} On October 13, 2005, Dudley arrived at Powers for his first day of work and was assigned by a supervisor to operate the aforementioned hydraulic press. After a brief demonstration by a fellow Powers employee, Brad Wyrick, on how to operate the machine, Dudley began operation of the press. Although Wyrick demonstrated the press operation, Dudley received no instruction on maintenance or service of the press, the location or use of any air hose, or that the press was activated by an electronic sensor.

{¶ 12} Dudley operated the press for the next three hours without incident until a scheduled break. Upon returning from break, Wyrick removed the block from the press to tighten the fasten point on the mandrel. While doing this, Dudley observed a loose ring inside of the press. When Dudley reached into the press to clear this ring, his hand activated the optical sensor causing the press to cycle and crush his left hand.

{¶ 13} Subsequently, Dudley filed an intentional tort claim against Powers pursuant to R.C. 2745.01. In his claim, Dudley asserted, and provided the supporting expert opinion testimony of Gerald Rennell, Ph.D., that the dual button controls were "safety guards," raising a rebuttable presumption of intent. R.C. 2745.01(C) reads in pertinent part:

{¶ 14} "Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result."

{¶ 15} Both parties then filed motions for summary judgment. On July 2, 2010, the trial court granted Powers' motion for summary judgment, ruling that the direct cause of the injury was not the removal of the dual buttons, but the installation of the electronic sensor. As such, the court determined that R.C. 2745.01(C) did not apply and that no statutory rebuttable presumption arose. The court reasoned that without this rebuttable presumption reasonable people could not disagree and Powers was entitled to judgment as a matter of law. Dudley now appeals this decision. In turn, Powers cross-appeals

seeking to strike Dr. Rennell's expert opinion testimony that the dual buttons were equipment safety guards.

{¶ 16} The legitimacy of the first three assignments of error are substantively implied by the assertion set forth in the fourth assignment. As such, our analysis will commence with that assignment.

{¶ 17} In Dudley's fourth assignment of error, he claims that the court erred by granting summary judgment to Powers. When reviewing a grant of summary judgment, this court will conduct its review de novo. *Doe v. Schaffer*, 90 Ohio St.3d 388, 390. Summary judgment is appropriate where the court determines that "there is no issue of material fact and that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C); see, also, *State v. Tompkins* (1996), 75 Ohio St.3d 447, 448.

{¶ 18} R.C. 2745.01 provides that a rebuttable presumption of intent arises where the removal of a safety guard is a direct cause of the injury. As directly relevant to this case, Dudley asserts that the removal of the dual button control was a direct cause of his injury, putting him within the purview of the statute. In contrast, Powers asserts, and the trial judge agreed, that the direct cause of the injury was not the removal of the dual button control, but the installation of a proximity switch, removing it from the purview of the statute.

{¶ 19} After consideration of these conflicting positions, we find that what the direct cause of the injury is constitutes a factual issue to be determined, not as a matter of law, but by the trier of fact. As such, a genuine issue of material fact remains in dispute

in this case. The case was not properly disposed of via summary judgment. Therefore, we find that the trial judge made a reversible error when it granted summary judgment to Powers. Dudley's fourth assignment of error is found well-taken.

{¶ 20} Given our reversal of summary judgment in the fourth assignment of error, the bulk of the first three assignments of error are rendered moot. Dudley's first assignment of error is in essence a reiteration of our conclusion that the direct cause of Dudley's injury is an issue of material fact. Likewise, this determination of fact will ultimately decide the issue Dudley raises in his third assignment of error as to whether R.C. 2745.01(C) is applicable to his case. We find the first assignment of error well-taken and the third assignment of error moot given our determination in the fourth assignment of error.

{¶ 21} Lastly, appellant's second assignment of error speaks to the standard of review for rebuttable presumptions. In an effort to rebut the presumption of intent, Powers has entered an affidavit from its manufacturing engineer that there was no intent by Powers to harm Dudley. The testimony of a Powers employee cannot be weighed so heavily to say that reasonable minds could not disagree on the issue of intent. Should a jury determine that the rebuttable presumption does apply to this case, it will also be for them to determine whether this testimony, or any other evidence presented on this issue, is sufficient to rebut the presumption. As such, we likewise find the second assignment of error moot.

{¶ 22} On cross-appeal, Powers seeks to strike the expert testimony of Dr. Rennell in which he states that dual palm buttons are safety guards. We cannot agree that the testimony should be stricken.

{¶ 23} Dr. Rennell's testimony goes to refute Powers' assertion that dual button controls are not safety guards. This issue is, of course, of special importance in determining whether or not Dudley can invoke R.C. 2745.01(C). While we do not take this occasion to address whether dual button controls are safety guards as a matter of law, we believe it is improper to strike expert testimony speaking to this issue.

{¶ 24} Powers' argument centers on its belief that the average layperson can determine whether or not dual button controls are safety guards. This ignores the fact that industrial technology incorporates complex mechanical and electrical systems.

{¶ 25} While it may be true that Powers, a sophisticated manufacturer, understands the way in which these machines function, it cannot impute its knowledge on jurors who must make the final determination of what does or does not constitute a safety guard. On remand, Powers may provide its own expert testimony refuting Dr. Rennell's opinion, but it may not have Dr. Rennell's opinion as to whether or not dual control buttons are safety guards stricken from the record. Powers' cross-assignment of error is found not well-taken.

{¶ 26} On consideration whereof, the judgment of the Williams County Court of Common Pleas is reversed. The case is remanded to the trial court for further

proceedings consistent with this decision. Appellee/cross-appellant is ordered to pay the cost of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE
CONCUR.