[Cite as *Fickle v. Conversion Technologies Internatl., Inc.*, 2011-Ohio-2960.]

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

Tara L. Fickle, et al.	Court of Appeals No. WM-10-016
Appellants	Trial Court No. 08 CI 164
v.	
Conversion Technologies International, Inc.	**DECISION AND JUDGMENT**
Appellee	Decided: June 17, 2011

* * * * *

Kevin J. Boissoneault and Jonathan M. Ashton, for appellants.

Joseph P. Dawson and C. William Bair, for appellee.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a summary judgment granted in favor of the employer in a workplace intentional tort action brought pursuant to R.C. 2745.01. Because we conclude that summary judgment was properly granted, we affirm the decision of the Williams County Court of Common Pleas.

{¶ 2} Plaintiff-appellant Tara Fickle was injured in the course of her employment with defendant-appellee, Conversion Technologies International, Inc. ("CTI"), on July 27, 2005, when her left hand and arm became caught in the pinch point of a roller at the rewind end of a Gravure Line adhesive coating machine.[1] Gravure is a method or technique for applying coating to a substrate by means of rollers. The Gravure Line at CTI is a 20-foot long network of horizontal spindles, guides, accumulators, and coating applicators, used in the fabrication of laminated roofing material. The laminating process begins at a feed station, where rolls of raw material are unwound, and ends at a rewind station, where the fabricated material emerges from an accumulator, passes underneath a guide roller, and is spooled counterclockwise around a cardboard core.

{¶ 3} At the time of her injury, Fickle had just removed a section of nonconforming laminated roofing material and was in the process of splicing the conforming ends around the rewind roller. The duties of a CTI rewind operator in regard to nonconforming sections of processed material vary in accordance with customer specifications. Some customers prefer that the imperfections or wrinkles in the membrane be marked on the material, while other customers require them to be removed.

{¶ 4} The removal of nonconforming material is accomplished through a cut-and-splice procedure known as "tucking." First, the nonconforming area is identified or pre-

[1]There is some discrepancy in the record as to when the incident giving rise to appellant's injuries occurred. At various points throughout the proceedings below, the incident is intermittently referred to as having occurred on July 25 and July 27, 2005. The precise date of appellant's injuries in July 2005 is of no determinative consequence in this case, since R.C. 2745.01 was enacted effective April 7, 2005.

marked with red tape. Second, the beginning of the affected area is cut while the rewind roller is in neutral, leaving an unattached flap of conforming material on the rewind roll. Third, the incoming material is fed out of the accumulator, extended approximately four feet beyond the rewind roll, and cut at the tail end of the defect. Finally, the machine is restarted and the two detached ends of the conforming material are spliced together on the rewind roller. This latter part of the tucking process requires the rewind operator to hold the end of material coming out of the accumulator on top of the rewind roll and smooth out the wrinkles as the material advances toward the pinch point.

{¶ 5} The rewind end of the Gravure Line is equipped with a "jog/continuous" switch, which is located on a control panel to the right of the machine. When placed in jog mode, the rewind roller will run only so long as the jog button is depressed and will stop when the operator's finger comes off the button. Otherwise, the roller runs uninterrupted on this particular job at a speed of approximately 20 to 30 feet per minute. Prior to the day of her injury, Fickle had never performed or been trained in the tucking procedure on a job that required the removal of nonconforming material. Her first and only training in that regard occurred approximately two hours before her injury and consisted entirely of watching a co-worker, Katrina Scalf, perform the operation. Specifically, Scalf trained Fickle to run the machine in continuous mode while splicing the material back together on the rewind roll.

{¶ 6} The rewind station is also equipped with an emergency stop cable, which connects to a red box on the left side of the machine. This cable was found to have been

disconnected and laying on the machine at the time of Fickle's injury. As a matter of policy and practice at CTI, the emergency stop cable was disconnected and reconnected from one job to the next depending on the size and configuration of the rolls of fabricated material. It was not the practice of CTI to leave the emergency stop cable permanently disconnected. The cable had been disconnected on the previous job because the product being run on that job resulted in rolls of material that rubbed against the cord, but was supposed to have been reconnected at the time of Fickle's injury.

{¶ 7} On May 23, 2008, Fickle refiled a complaint against CTI, which had formerly been dismissed under Civ.R. 41(A). The complaint alleged a claim for employer intentional tort under common law and R.C. 2745.01, but sought a declaration that the statute was in violation of the Ohio Constitution. The gravamen of the complaint, as pertinent to the present proceedings, was that CTI acted with injurious intent in removing the emergency stop cable and training Fickle to perform the tucking procedure with the rewind roller in continuous mode. The complaint further asserted claims for loss of consortium by or on behalf of Fickle's husband and two minor children, also appellants herein.

{¶ 8} The trial court stayed the proceedings on April 1, 2009, pending a determination by the Supreme Court of Ohio as to the constitutionality of R.C. 2745.01. On March 23, 2010, the Ohio Supreme Court held the statute constitutional in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027 and *Stetter v. R.J.*

Corman Derailment Servs., L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029. The trial court then lifted the stay and reinstated the cause to its active docket on April 5, 2010.

{¶ 9} On July 26, 2010, CTI moved for summary judgment on two grounds. First, CTI argued that the record contained insufficient evidence to satisfy the standard of specific or deliberate intent to injure under R.C. 2745.01(A) and (B). Second, CTI maintained that the presumption of intent to injure set forth in R.C. 2745.01(C), which arises upon a showing of "deliberate removal by an employer of an equipment safety guard," is inapplicable under the present facts. Specifically, CTI contended that neither the jog control nor the emergency stop cable constitutes an equipment safety guard and that neither of those devices was deliberately removed in this case.

{¶ 10} In response, appellants relied heavily on the opinions of their safety expert, Gerald Rennell, who testified at deposition and by attached affidavit that CTI removed two equipment safety guards from the Gravure Line when it disconnected the emergency stop cable and failed to train Fickle to use the jog control while performing the tucking procedure. In its reply, CTI argued that the meaning of "equipment safety guard" and "deliberate removal" is a question of law for the court and that the opinions of appellants' safety engineer are irrelevant to that determination.

{¶ 11} On September 20, 2010, the trial court entered summary judgment in favor of CTI, finding that reasonable minds could only conclude from the evidence that "(1) C.T.I. had no deliberate intent to injure Fickle and (2) C.T.I. did not deliberately remove any equipment safety guard." In regard to the latter finding, the trial court rejected

appellants' contention that the meaning of the undefined statutory terms in R.C. 2745.01(C) is a question of fact to be determined by expert testimony. The court then proceeded to give those terms their ordinary meaning, finding that "these statutory terms are not terms of art defined by statute."

{¶ 12} In regard to the jog control, the court reasoned that "a failure to train * * * cannot be construed as a deliberate removal" and that the jog switch is not a guard because it does not "shield from accidental contact, the [operator's] hand and/or arm from entering the rewind pinch point in the first place. As to the emergency stop cable, the trial court reasoned:

{¶ 13} "The cable does not guard or prevent the rotating rewind pinch point from catching or entangling the operator's hand, arm or clothing; rather it is an emergency shut-off cord to stop the rewind to minimize the extent of the injury to the operator. This emergency cable is not a guard. Further, this emergency stop cable was never removed or taken off the machine; it was still there, just disconnected. Someone just forgot to reconnect the cable."

{¶ 14} Appellants now appeal that judgment, asserting the following four assignments of error:

{¶ 15} "I. The trial court erred where it improperly held that the undefined terms in R.C. § 2745.01 are questions of law to be decided by the court.

{¶ 16} "II. The trial court erred where it improperly weighed conflicting evidence and granted summary judgment in favor of Appellee Conversion Technologies International, Inc.

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

{¶ 18} "IV. The trial court erred where it granted summary judgment in favor of Appellee Conversion Technologies International, Inc."

I. PRESUMPTION OF INTENT TO INJURE

{¶ 19} The first three assignments of error are directed at the applicability of R.C. 2745.01(C) and will be considered together. Essentially, these assignments pivot on progressive inquiries into how and by whom the terms "deliberate removal" and "equipment safety guard" are to be defined. Specifically, those inquiries are (1) whether the meaning of the undefined terms is to be decided as a matter of law by the court or as a matter of fact based on expert testimony, (2) whether those terms should be given their common meaning or some technical meaning, (3) whether the jog control and emergency stop cable are equipment safety guards for purposes of R.C.2745.01(C), and (4) whether those devices were deliberately removed from the Gravure Line.

A. INTERPRETATION OF THE UNDEFINED TERMS IN R.C. 2745.01(C) IS A QUESTION OF LAW FOR THE COURT

{¶ 20} R.C. 2745.01 provides:

{¶ 21} "(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased 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.

{¶ 22} "(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.

{¶ 23} "(C) 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."

{¶ 24} The General Assembly has not provided a definition of "equipment safety guard" or "deliberate removal" for purposes of R.C. 2745.01(C). Appellants argue that since those terms are undefined in the statute and "concern specialized areas of knowledge beyond the court's expertise," their definition is a question of fact to be supported by expert testimony. We disagree.

{¶ 25} It is well-established that the interpretation of undefined statutory terms is not a question of fact, but a question of law for the court. *Akron Centre Plaza, L.L.C. v. Summit Cty. Bd. of Revision*, 128 Ohio St. 3d 145, 2010-Ohio-5035, ¶ 10; *Gilman v. Hamilton Cty. Bd. of Revision*, 127 Ohio St.3d 154, 2010-Ohio-4992, ¶ 8; *Riedel v. Consol. Rail Corp.*, 125 Ohio St.3d 358, 2010-Ohio-1926, ¶ 6; *State v. Snyder*, 5th Dist.

No. 02-CA-48, 2002-Ohio-7049, ¶ 17; *Brennaman v. R.M.I. Co*. (1994), 70 Ohio St.3d 460, 466; and *Neiman v. Donofrio* (1992), 86 Ohio App.3d 1, 3.

{¶ 26} This means, in particular, that such terms are not susceptible to definition by an expert witness. As explained by the Tenth District Court of Appeals:

{¶ 27} "While expert testimony may be used to establish breach of a standard created by statute or rule, such testimony is not admissible to interpret statutory terms which create the standard. * * * Thus, when a * * * duty is set forth in statutes and regulations, an expert may not define the duty by interpreting statutory or regulatory terms. * * * To the extent that plaintiffs' expert testifies to the meaning of 'temporary stresses' within the building code, that testimony is not relevant to a determination of any duty the OBBC requirements impose on [defendants]." (Citations omitted.) *Nicholson v. Turner/Cargile* (1995), 107 Ohio App.3d 797, 809. See, also, *Dawson v. Williamsburg of Cincinnati Mgt. Co*. (Feb. 4, 2000), 1st Dist. No. C-981022.

{¶ 28} Thus, we agree with the trial court that the meaning of the terms "equipment safety guard" and "deliberate removal" in R.C. 2745.01(C) is to be ascertained as a matter of law by the court, and that the testimony of appellants' safety engineer is irrelevant to that determination.

B. THE UNDEFINED TERMS IN R.C. 2745.01(C) ARE TO BE GIVEN THEIR PLAIN AND ORDINARY MEANING

{¶ 29} "In the absence of clear legislative intent to the contrary, words and phrases in a statute shall be read in context and construed according to their plain, ordinary meaning." *Kunkler v. Goodyear Tire & Rubber Co*. (1988), 36 Ohio St.3d 135, 137. The

plain, ordinary, or generally accepted meaning of an undefined statutory term is invariably ascertained by resort to common dictionary definitions. See, e.g., *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, ¶ 17-18; *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 56-57; *Inland Prods., Inc. v. Columbus*, 10th Dist. No. 10AP-592, 2011-Ohio-2046, ¶ 26 et seq.; *Gen. Motors. Corp., Central Foundry Div. v. Fockler* (1991), 75 Ohio App.3d 587, 591-592; and *In re Adoption of Jordan* (1991), 72 Ohio App.3d 638, 644.

{¶ 30} This court recently relied on the dictionary definition of "deliberate" in construing that term for purposes of R.C. 2745.01. In *Forwerck v. Principle Business Ents., Inc*., 6th Dist. No. WD-10-040, 2011-Ohio-489, we found that "deliberate" as used in the statute means "'characterized by or resulting from careful and thorough consideration—a deliberate decision.'" Id. at ¶ 21, quoting Merriam-Webster's Collegiate Dictionary (10 Ed.1996) 305.

{¶ 31} The trial court held, and CTI agrees, that the undefined terms in R.C. 2745.01(C) should be given their plain and ordinary meaning. Accordingly, CTI proposes, and we agree, that the term "removal" in the statute should be construed in accordance with the relevant dictionary definition of "remove." As relevant here, "remove" is defined in Merriam-Webster's Collegiate Dictionary (10 Ed.2000) 987 as "to move by lifting, pushing aside, or taking away or off"; also "to get rid of: ELIMINATE." Contrary to the assertions of CTI, however, this does not mean that a guard must "be taken off of the equipment and made unavailable for use for there to be a rebuttable

presumption of intent [to injure]." Removal of a safety guard does not require proof of physical separation from the machine, but may include the act of bypassing , disabling, or rendering inoperable. See *Harris v. Gill* (Ala. 1991), 585 So.2d 831, 836-837. Thus, in *Forwerck* this court agreed with appellant that a "deliberate process of requiring employees to use a ladder to climb over a six foot eight inch guard wall to clean moving machinery may constitute a deliberate removal of a guard pursuant to R.C. 2745.01(C)." Id., 2011-Ohio-489, ¶ 15.

{¶ 32} Combining the above definitions, and considering the context in which the phrase is used in the statute, we find that "deliberate removal" for purposes of R.C. 2745.01(C) means a considered decision to take away or off, disable, bypass, or eliminate, or to render inoperable or unavailable for use.[2]

{¶ 33} With respect to "equipment safety guard," however, CTI argues that we should construe that term to mean a "barrier guard" or "a barrier that prevents entry" in accordance with the definitions of "guard" provided by the Occupational Health and Safety Administration ("OSHA") in Section 1910.211(d)(32), Title 29, C.F.R., governing mechanical power presses, and former Ohio Adm.Code 4121:1-3-01(B)(13), now 4123:1-3-01(B)(13), relating to construction activity. We disagree.

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[2]It is important to note that R.C. 2745.01(C) does not require proof that the employer removed an equipment safety guard with the intent to injure in order for the presumption to arise. The whole point of division (C) is to presume the injurious intent required under divisions (A) and (B). It would be quite anomalous to interpret R.C. 2745.01(C) as requiring proof that the employer acted with the intent to injure in order create a presumption that the employer acted with the intent to injure. Such an interpretation would render division (C) a nullity.

{¶ 34} The General Assembly has not manifested any intent to give "equipment safety guard" or its component terms a technical meaning. There is nothing in the statute or the case law that suggests the General Assembly intended to incorporate any of the various equipment-specific or industry-specific definitions of guard appearing throughout the administrative or OSHA regulations, or for any agency or regulatory measure to be considered a definitional source.

{¶ 35} In some cases, courts have given a technical meaning to an undefined term where the statute regulates a specialized industry or field of practice and the term has acquired a technical or particular meaning in that industry or field. See *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St.3d 376, 2007-Ohio-2201, ¶ 26; *State v. Rentex, Inc*. (1977), 51 Ohio App.2d 57, paragraph one of the syllabus. But R.C. 2745.01 is not regulatory in nature and is not directed at the removal of an equipment safety guard in any particular industry or from any particular type of machine. Moreover, the term "guard" has not acquired a particular meaning as a "barrier" under the regulations. Depending on the type of equipment and industry, acceptable methods of "guarding" under the regulations include various devices and mechanisms that do not constitute a physical barrier erected between the employee and the danger, such as two-hand controls, pull-back guards, hold-back guards, inch controls, and electronic eye safety circuits. See, e.g., Ohio Adm.Code 4123:1-5-11(E) and 4123:1-5-10(C); Section 1910.255(b)(4), Title 29, C.F.R.

{¶ 36} In *Bishop v. Dayton* (Feb. 5, 1990), 2d Dist. No. 11634, Grady, J., concurring, explained that the principle of construing undefined statutory terms according to their generally accepted meaning should be applied in defining "equipment safety guard" under former R.C. 4121.80(G)(1), 141 Ohio Laws, Part I, 733-737:[3]

{¶ 37} "The General Assembly has not provided a definition of 'equipment safety guard' as that term is used in the statute. A review of the legislative history, staff notes, and Committee Reports, also fail [sic] to provide any guidance or understanding of the meaning of that term. Therefore, it can only be defined according to the common understanding of the meaning of the words used."

{¶ 38} "Guard" is defined as "a protective or safety device; *specif*: a device for protecting a machine part or the operator of a machine." Merriam-Webster's Collegiate Dictionary, supra, at 516. "Safety" means "the condition of being safe from undergoing or causing hurt, injury, or loss." Id. at 1027. And "equipment" is defined as "the implements used in an operation or activity: APPARATUS." Id. at 392. In turn, "device" is "a piece of equipment or a mechanism designed to serve a special purpose or perform a special function." Id. at 316. "Protect" means "to cover or shield from exposure, injury, or destruction: GUARD." Id. at 935. "Safe" is defined as "free from harm or risk" and "secure from threat of danger, harm, or loss." Id. at 1027.

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[3]Former R.C. 4121.80, effective August 22, 1986, provided in division (G)(1): "Deliberate removal by the employer of an equipment safety guard * * * is evidence, the presumption of which may be rebutted, of an action committed with the intent to injure another * * *." R.C. 4121.80 was ultimately declared unconstitutional by the Ohio Supreme Court in *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624.

{¶ 39} Arguing that the term equipment safety guard "encompasses more than the concept of a barrier guard," appellants would have us construe that term as "any device designed to prevent injury or to reduce the seriousness of injury." Appellants point out that this court has conceived a safety guard as more than a barrier guard in *Vermett v. Fred Christen & Sons, Inc*. (2000), 138 Ohio App.3d 586. We agree with appellants that a safety guard encompasses something more than an actual physical structure or barrier erected between the employee and the danger. We do not, however, agree with their definition.

{¶ 40} In *Vermett*, this court considered wrist restraints and dual palm buttons as "point of operation safeguarding." Id. at 602. Similarly, in *Wehri v. Countrymark, Inc*, (May 21, 1990), 3d Dist. Nos. 1-89-13, 1-89-14, the Third District gave the following definition of equipment safety guard as used in former R.C. 4121.80(G)(1):

{¶ 41} "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."

{¶ 42} These cases do not support appellants' definition, as they do not involve devices that allow the operator to encounter or contact the danger. The devices that are mentioned or considered in these cases, while perhaps not constituting physical covers or

barriers per se, are nevertheless designed to prevent exposure of the worker's hands within the point of operation. Recognizing dual palm buttons and pull-back or hold-back mechanisms as equipment safety guards is consistent with the common definition of the statutory terms, because those devices shield the employee's hands or fingers from injury by keeping them out of the danger zone during the operating cycle. The General Assembly did not make the presumption applicable upon the deliberate removal of any safety-related device, but only of an equipment safety guard, and we may not add words to an unambiguous statute under the guise of interpretation. *Davis*, supra, 115 Ohio St.3d 180, 2007-Ohio-5049, ¶ 15, 20; *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 15; *State ex rel. Purdy v. Clermont Cty. Bd. of Elections* (1997), 77 Ohio St.3d 338, 340.

{¶ 43} Thus, as used in R.C. 2745.01 (C), an "equipment safety guard" would be commonly understood to mean a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.

C. THE ACTIONS OF CTI DID NOT CONSTITUTE THE DELIBERATE REMOVAL OF AN EQUIPMENT SAFETY GUARD

{¶ 44} The jog control and emergency stop cable in this case were not designed to prevent an operator from encountering the pinch point on the rewind roller and, therefore, are not equipment safety guards for purposes of the presumption in R.C. 2745.01(C). In reaching this conclusion, we recognize that those devices are designed or may operate to reduce the seriousness of injury to an operator whose hands or fingers are inadvertently drawn into the in-running rewind roller. We appreciate that these devices could very well mean the difference between a relatively minor and catastrophic injury. The scope of our

review, however, does not permit us to inquire as to whether the General Assembly should have provided for a presumption of intent to injure where these types of safety devices or features are deliberately removed by the employer. We are not empowered to override or second-guess the public policy determinations of the General Assembly, but must follow the plain language of the statute. See *State v. Shaffer*, 11th Dist. No. 2009-G-2929, 2010-Ohio-6565, ¶ 41; *In re J.O.*, 5th Dist. No. 09-CA-0135, 2010-Ohio-4296, ¶ 39; *State v. Doe*, 2d Dist. No. 19408, 2002-Ohio-4966, ¶ 16.

{¶ 45} In any event, neither of the subject devices was deliberately removed from the Gravure Line. As to the jog control, the failure to train or give instructions in regard to a safety procedure does not constitute the removal of a safety guard. See *Teal v. Colonial Stair & Woodwork Co.*, 12th Dist. No. CA2004-03-009, 2004-Ohio-6246, ¶ 22; *Williams v. Price* (Ala. 1990), 564 So.2d 408, 411. With respect to the emergency stop cable, we disagree with the trial court that this device was not removed, but was merely disconnected. Disconnecting the cable disables the stop control and, therefore, constitutes removal. However, it is undisputed that CTI intended for the cable to have been reconnected at the time of Fickle's injury. Thus, under the particular facts of this case, there is insufficient evidence to establish that the removal of the cable was deliberate.

{¶ 46} We conclude, therefore, that the presumption of intent to injure provided in R.C. 2745.01(C) is not applicable in this case. Accordingly, appellants' first three assignments of error are not well-taken.

II. DELIBERATE INTENT TO INJURE

{¶ 47} In their fourth assignment of error, appellants contend that the evidence is sufficient to withstand summary judgment under R.C. 2745.01(A) even without the presumption provided in division (C). Appellants argue that CTI failed to guard the point of operation, removed the two devices discussed above, and did not provide any safety training.

{¶ 48} We have already determined that the evidence is insufficient to establish that CTI deliberately removed the emergency stop cable for purposes of the presumption under division (C). In light of that determination, we must conclude that the removal of the cable is also insufficient to establish that CTI acted with deliberate intent to injure under divisions (A) and (B). We also find that a failure to provide adequate training and to guard the point of operation is not sufficient to establish deliberate intent to injure. These kinds of failures did not suffice to establish an employer intentional tort even under the common-law standard of "substantial certainty." See, e.g., *Davis v. AK Steel*, 12th Dist. No. CA2005-07-183, 2006-Ohio-596, ¶ 12; *Teal*, supra, 2004-Ohio-6246, ¶ 22. While the conduct of CTI in requiring Fickle to splice the material together by hand on an unguarded roller may be reckless, there is no evidence that CTI acted with deliberate intent to injure its employees.

{¶ 49} Accordingly, appellants' fourth assignment of error is not well-taken. The judgment of the Williams County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Peter M. Handwork, J. _____
JUDGE

Stephen A. Yarbrough, J.
CONCUR. _____
JUDGE

Arlene Singer, J. _____
CONCURS AND WRITES SEPARATELY. JUDGE

SINGER, J., concurring.

{¶ 50} I reluctantly concur with the majority, but must comment on the narrow path an injured worker must tread in order to survive summary judgment in an intentional tort case pursuant to the statute. We have found that the term "deliberate removal" pursuant to R.C. 2745.01(C) means a considered decision to remove, disable, bypass, eliminate, or to render inoperable or unavailable for use. We have held it is not necessary to limit the definition of a safety guard to a mechanism that is a physical barrier. But we have limited the definition to those devices that prevent the worker from physical contact with the "danger zone" of the machine and its operation. We have thus limited the injured worker from seeking redress for injuries resulting from the removal of other safety equipment under this section. Because the jog control does not create an absolute barrier to this danger zone, i.e. it still allows the operator to encounter the danger while

using the jog control, this court does not consider the jog control to be a safety guard. The majority addresses appellant's argument regarding inadequate training of the safety procedure when operating the machine without the jog control and cites several cases in support of the holding that failure to train or give instruction does not constitute the removal of a safety guard. However, is an equipment safety guard removed, disabled, bypassed, eliminated or rendered inoperable or unavailable for use if the operator has not been adequately trained to use it correctly? Because of the definition of safety guard that we have adopted and have applied to this case, I do not feel it necessary for us also rule out the possibility that, in the appropriate case, the lack of training, or incorrect training, could constitute a removal of a safety guard.