[Cite as *McKinney v. CSP of Ohio, L.L.C.*, 2011-Ohio-3116.]

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

Teresa A. McKinney	Court of Appeals No. WD-10-070
Appellant	Trial Court No. 2009CV0819
v.	
CSP of Ohio, LLC, et al.	**DECISION AND JUDGMENT**
Appellee	Decided: June 24, 2011

* * * * *

Jonathan M. Ashton, Michael D. Bell and Kevin J. Boissoneault, for appellant.

Thomas J. Cabral and Colleen A. Mountcastle, for appellee.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas which granted summary judgment to appellee, Continental Structural Plastics, Inc. ("CSP"), on appellant Teresa A. McKinney's intentional tort claim. For the reasons set forth below, we reverse.

{¶ 2} CSP is a manufacturer of molded parts for automobiles. In 2007, appellant was employed there. On August 13, 2007, she was operating a press when she was injured as she attempted to remove a fender part from a molding press. As a "deflasher," appellant's job was to step on the foot pedal of the press. This would raise the ejectors and they would lock in. While the ejectors remained raised, appellant would remove the part from the mold and place it on a cooling rack. The press operator would then lower the ejectors using a T-stand button. The press was also equipped with a light curtain safety device which surrounds the entry to the interior of the press. It is designed to protect a deflasher from contact with moving machinery. On the day of her accident, the ejectors failed to lock in and the light curtain safety device did not activate. Thus, the ejectors came down on her right hand on her first attempt to remove a part from the mold. She consequently lost the distal portions of her middle and ring fingers on her right hand. It was later determined that the ejectors failed to lock in and the light curtain device did not activate because the press had been improperly programmed.

{¶ 3} On August 11, 2009, she filed a complaint against CSP alleging an employer intentional tort. On October 4, 2010, the court granted summary judgment to CSP. Appellant now appeals setting forth the following assignments of error:

{¶ 4} "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.

{¶ 5} "II. The trial court erred where it improperly weighed conflicting evidence and granted summary judgment in favor of appellee CSP of Ohio, LLC.

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

{¶ 7} "IV. The trial court erred where it granted summary judgment in favor of appellee CSP of Ohio, LLC."

{¶ 8} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated: "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

{¶ 9} R.C. 2745.01 provides, in pertinent part:

{¶ 10} "(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.

{¶ 11} "(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.

{¶ 12} "(C) Deliberate removal by an employer of an equipment safety guard * * * creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury * * * occurs as a direct result."

{¶ 13} In its summary judgment motion, CSP argued that appellant failed to show, as required by the statute, that CSP deliberately injured her. Furthermore, CSP argued that appellant had failed to show that CSP deliberately removed any equipment safety guards such to create a rebuttable presumption of intent pursuant to R.C. 2745.01(C). In response, appellant argued that the fact that CSP knew the press was not operating properly and the fact that CSP nonetheless continued production demonstrates a deliberate intent to injure appellant. In granting summary judgment to CSP, the court found that reasonable minds could only conclude from the evidence that CSP had no deliberate intent to injure appellant and that, as a matter of law, an error in programming did not amount to R.C. 2745.01(C)'s "deliberate removal by an employer of an equipment safety guard."

{¶ 14} The General Assembly has not provided a definition of "equipment safety guard" or "deliberate removal" for purposes of R.C. 2745.01(C). In her first assignment of error, appellant contends 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.

{¶ 15} It is well-settled that words used in a statute are to be given their plain and ordinary meaning unless otherwise indicated. *Ohio Assn. of Pub. School Emp. v. Twin Valley Local School Dist. Bd. of Edn.* (1983), 6 Ohio St.3d 178, 181. Further, R.C. 1.42 provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." The plain, ordinary, or generally accepted meaning of an undefined statutory term is invariably ascertained by resort to common dictionary definitions. See, e.g., *State v. Prade*, 126 Ohio St. 3d 27, 2010-Ohio-1842, ¶ 37-39, *Kimble v. Kimble*, 97 Ohio St.3d 424, 2002-Ohio-6667.

{¶ 16} Following these principles, 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.

{¶ 17} "Remove" is defined in Merriam-Webster's Collegiate Dictionary (10 Ed. 1996) 987 as "to move by lifting, pushing aside, or taking away or off"; also "to get rid of: eliminate." 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. 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 disable, bypass, or eliminate, or to render inoperable or unavailable for use.

{¶ 18} "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 (10 Ed. 1996) 516. "Safety" means "the condition of being safe from undergoing or causing hurt, injury, or loss." Id. at 1027. "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 or danger, harm, or loss." Id. at 1027.

{¶ 19} In sum, we do not find that the trial court erred in failing to rely on expert testimony to define the statutorily undefined terms of R.C. 2745.01. See *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960. Appellant's first assignment of error is found not well-taken.

{¶ 20} Appellant's second, third and fourth assignments of error will be addressed together. Appellant contends that questions of fact remain as to whether CSP committed a tortious act with the intent to injure appellant and as to whether CSP deliberately removed equipment safety guards from the press she was operating at the time of her injury.

{¶ 21} Nona Booze testified in her deposition that she has been employed at CSP for over 25 years. On August 11, 2007, she was working as a deflasher on press 5. Jeff Sheldon was the press operator. She had worked on this particular press a number of times. At the beginning of her shift, at approximately 10 p.m., she stepped on the pedal to raise the ejectors so she could remove the part from the mold. As she removed her foot from the pedal, as she was trained to do, the ejectors failed to lock in and instead came down. Booze testified that she called her foreman, Brett Smith. When he arrived, Booze testified that she complained that her table and cooling rack were loose. As she began to tell him about the failure of the ejectors to lock in, Booze testified that Smith started to walk away. He told her he would call maintenance and that she should keep the press running. In her written statement after appellant's accident, Booze stated that Smith: "Wouldn't let me explain. He just blew me off." She also testified that: "I think if Brett would have stopped and let me show him what I was talking about, he would have shut the press down until it was fixed."

{¶ 22} Booze and Sheldon continued to run the press. Booze testified she made sure her foot was on the pedal at all times. At approximately 12:30 a.m. on August 12, 2007, appellant arrived to relieve Booze. Booze testified that she forgot to tell appellant that the press was not working properly. Soon after appellant began working on the press, she was injured.

{¶ 23} Jeff Sheldon testified that when Brett Smith came over to the press, Booze showed him that the ejectors were not locking in. Sheldon testified that Smith told them

to keep the press running and that he would have maintenance come to look at the press. Sheldon testified that no one came to look at the press before appellant's injury.

{¶ 24} Brett Smith testified that he remembered Booze telling him that she was having issues with the press so he called Jim Steele, the process technician. Steele told Smith that he would look into the matter. Because he never heard anything more about the press, Smith testified that he assumed the issue had been resolved. He also testified that at the time, he did not believe that the problem with the press was a "safety issue."

{¶ 25} Mark Senecal testified that he is the human resources generalist supervisor for CSP. His duties include inspecting, doing safety walks and general recordkeeping. He agreed that two safety measures should have been in place on press 5 the night of appellant's accident. Specifically, the T-stand button so that the press operator could lower the ejectors and the light curtain. They were not in place, according to Senecal, because the press was not properly programmed for that particular mold. Senecal testified that Booze attempted to notify Brett Smith that the "programming was not right for [the particular mold]" she was working on but that she failed to make it clear that it was a safety issue. In his incident report admitted into evidence, Senecal stated:

{¶ 26} "It is my belief that the changes that should have been made to the ejection system on press 5, prior to it going into production, did not occur because the people who normally make that type of change were not present. The maintenance supervisor who used to review mold setups has left the company. The mold technician was not present on Saturday to ensure the proper programming of the press prior to startup, nor was a

process engineer. Simply put, none of the right people were present to ensure the proper setup of the ejection system."

{¶ 27} It is undisputed that the press at issue was improperly programmed at the time of appellant's injury. It is also undisputed that had the press been properly programmed, certain safety devices would have been in place and appellant would not have been injured. To that end, we agree with appellant that the improper programming amounted to the removal of a safety device in that the result was to render the T-stand button and the safety curtains inoperable.

{¶ 28} Given the deposition testimony in this case that a supervisor was notified there was a problem with the press, a complaint he either ignored or did not appreciate the seriousness of, and, given the testimony that the workers were told to keep running the press after the complaint, and given the testimony from a CSP supervisor that "none of the right people were present" to ensure that the two safety measures were on press 5 the night of appellant's accident, we find that appellant has established a rebuttable presumption that the removal was committed with intent to injure. Accordingly, appellant's second, third and fourth assignments of error are well-taken.

{¶ 29} On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Wood County Court of Common Pleas is reversed. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

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. _____
CONCUR.
JUDGE