[Cite as *Camara v. Gill Dairy, L.L.C.*, 2023-Ohio-2339.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

JOSE GALBAN CAMARA,	:	
Appellee,	:	CASE NO. CA2022-10-023
	:	O P I N I O N
- vs -		7/10/2023
	:	
GILL DAIRY, LLC,	:	
Appellant.	:	

CIVIL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CVH 20200107

Wegman Hessler, and Christopher A. Holecek and Angela M. Lavin, for appellee.

Curry, Roby LLC, and Bruce A. Curry and Stephen P. Tabatowski, for appellant.

HENDRICKSON, P.J.

{¶ 1} Appellant, Gill Dairy, LLC, appeals a judgment entered against it on the claim of appellee, Jose Camara, for an employer intentional tort. Because we conclude that the trial court should have granted Gill Dairy summary judgment on the claim, we reverse the trial court's judgment and enter judgment on behalf of Gill Diary.

I. Factual and Procedural History

{¶ 2} Camara was hired by Gill Dairy as a farm worker in October 2017. One of his

jobs was to operate the sand spreader. The spreader is powered by the tractor's engine by way of a rotating power take-off shaft (PTO shaft) that runs from the tractor to the hydraulic pump on the spreader and spins at 540 r.p.m. when powered. Because of the danger posed by the rotating PTO shaft, a plastic shield typically surrounds the shaft (shaft guard). The shaft guard looks like a pipe with a bell-shaped flare at the end where the shaft attaches to the spreader. The spreader manufacturer had installed a slightly flared three-sided metal box in front of the spreader's hydraulic pump that covered the PTO shaft's connection to the spreader (connector guard). These two safety guards were there to prevent clothing or objects from catching in the shaft or at the point of connection.[1]

{¶ 3} On April 22, 2019, Camara was operating the spreader and noticed that the hydraulic pump was leaking. He disengaged the PTO shaft, turned off the tractor and got off to investigate the leak. Camara was unable to determine the source of the leak, so he re-started the tractor and re-engaged the PTO shaft to pressurize the pump. Camara then walked back to the spreader and stood next to the pump. The shaft guard had previously broken off exposing the shaft and the connector guard on the spreader was missing. So, when Camara moved a little too close to the rotating PTO shaft, his coveralls caught on it and started to wrap around the shaft, yanking Camara over the PTO shaft. He sustained serious injuries to his legs, right thumb, and left shoulder.

{¶ 4} In June 2020, Camara filed a complaint against Gill Dairy asserting claims of employer intentional tort and spoliation of evidence relevant to the tort claim. Camara's tort claim alleged that Gill Dairy had removed and had failed to replace the connector guard that should have been attached to the spreader and had failed to replace the broken shaft guard.

1. Various names were used in the record and in the parties' briefs to refer to these two guards. In this opinion, we use the terms "shaft guard" and "connector guard" to refer to them, avoiding any confusion.

{¶ 5} R.C. 2745.01 limits an employer's liability for intentional torts to those committed with intent to injure. *See* R.C. 2745.01(A) and (B). Division (C) of the statute, though, "permits an employee to prove the employer's intent without direct evidence. 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." *Hoyle v. DTJ Ents., Inc.*, 143 Ohio St.3d 197, 2015-Ohio-843, ¶ 12. Camara focused his case on R.C. 2745.01(C).

{¶ 6} Gill Dairy moved for summary judgment on Camara's employer-intentional-tort claim, arguing that a failure to repair or replace a safety guard does not constitute "deliberate removal" under R.C. 2745.01(C) and that Camara could not prove Gill Dairy acted with intent to injure. Gill Dairy submitted the affidavits and depositions of its two owners, Tony Gill and Frank Van Genugten, who both categorically denied removing the connector guard or directing anyone else to do so. Camara responded by arguing that "deliberate removal" should be interpreted broadly to encompass the failure to repair, replace, or re-install safety guards that an employer knew were missing. Alternatively, Camara argued that there was sufficient direct evidence of Gill Dairy's intent to injure. On December 29, 2021, the trial court denied Gill Dairy's motion for summary judgment. The court did not address the legal question about whether a failure to repair or replace can constitute "deliberate removal" under R.C. 2745.01(C) and did not analyze the evidence. Rather, the court summarily concluded that there was a genuine issue of fact as to whether Gill Dairy "intentionally removed" the safety guard from the spreader.

{¶ 7} The case proceeded to a jury trial. The evidence presented included numerous exhibits along with the testimony of Camara, Zachary Bates (another employee), Van Genugten, and Gill. Camara testified that, during his 18 months of employment with Gill Dairy, he had never seen the connector guard on the sand spreader. He said that he

did not know who had removed the guard or when it may have been removed. Camara testified that the shaft guard, though, likely broke off from ordinary use. As Gill and Van Genugten had said in their affidavits and depositions, they both testified that they had not removed the connector guard or directed anyone to do so, nor did they know who had or why.

{¶ 8} At the close of all evidence, the trial court instructed the jury that it had to decide several disputed issues regarding Camara's employer-intentional-tort claim, including:

> (A) Did Defendant deliberately remove an equipment safety guard from the spreader?
>
> (B) If Defendant deliberately removed an equipment safety guard from the spreader, did Plaintiff's injury occur as a direct result of such conduct?
>
> (C) If Defendant's deliberate removal of an equipment safety guard from the spreader and Plaintiff's injury was the direct result of that conduct, has Defendant rebutted the presumption with equal or greater evidence that the removal was committed with the intent to injure Plaintiff?

(Jury Instruction No. 2). The jury instructions noted that there was no dispute that Camara was an employee acting in the course of his employment and no dispute that the shaft guard and connector guard on the spreader were equipment safety guards. The court instructed the jury using the pattern instructions in the Ohio Jury Instructions:

> The plaintiff claims that his injury was caused by the intentional or deliberate conduct of the defendant.
>
> Before you can find for the plaintiff, you must find by the greater weight of the evidence that:
>
> (A) the plaintiff was an employee of the defendant acting in the course of his employment;
>
> (B) the plaintiff's injury was proximately caused by the defendant's conduct; and

> (C) the defendant committed an act or omission with the intent to harm the plaintiff.
>
> * * *
>
> If you find that the defendant deliberately removed an equipment safety guard, you may but are not required to find that the removal was committed with the intent to injure if the injury occurred as a direct result of the deliberate removal.
>
> "Deliberate removal of an equipment safety guard" means that the defendant made a deliberate decision to remove, lift, push aside, take off, or otherwise eliminate an equipment safety guard.
>
> * * *
>
> 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.

(Jury Instruction No. 11). This instruction was given over Gill Dairy's objection to the inclusion of "or omission" in paragraph (C) as a misstatement of the law. The jury was also given interrogatories to answer, including:

> (A) Did the defendant, Gill Dairy LLC deliberately remove an equipment safety guard from the spreader/sand wagon?
>
> (B) Did the Defendant's removal of an equipment safety guard proximately cause an injury to the plaintiff?
>
> (C) Has the defendant, Gill Dairy LLC rebutted the presumption of intent to injure the plaintiff by proving by equal or greater weight of the evidence that the defendant did not intend to injure plaintiff?

{¶ 9} A majority of the jury (six jurors) found for Camara, answering "yes" to interrogatories (A) and (B) and "no" to interrogatory (C), and awarded him a total of $1,934,000 in economic damages, future lost wages, and future expenses. On the spoliation claim the jury found for Gill Dairy.

{¶ 10} Gill Dairy appealed.

II. ANALYSIS

{¶ 11} Gill Dairy assigns three errors to the trial court.

{¶ 12} Assignment of Error No. 1:

{¶ 13} THE TRIAL COURT ERRED BY DENYING GILL DAIRY'S MOTION FOR SUMMARY JUDGMENT.

{¶ 14} In the first assignment of error, Gill Dairy challenges the denial of summary judgment. "Generally, any error in denying a summary judgment motion is rendered moot or harmless if the motion is denied due to the existence of genuine issues of material fact and a subsequent trial results in a verdict in favor of the nonmoving party." *Clarkwestern Dietrich Bldg. Systems, LLC v. Certified Steel Stud Assn., Inc.*, 12th Dist. Butler No. CA2016-06-113, 2017-Ohio-2713, ¶ 12. Accordingly, as an initial matter, we must determine whether the denial of summary judgment is reviewable.

{¶ 15} "[A]n error in the denial of a summary judgment motion that presents a purely legal question is not rendered harmless by a subsequent trial on the merits." (Citations omitted.) *Id.* "Unlike factual questions, legal questions are not mooted by a subsequent trial that results in a verdict adverse to the movant." *Miller v. Lindsay-Green, Inc.*, 10th Dist. Franklin No. 04AP-848, 2005-Ohio-6366, ¶ 32, citing *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 158 (1994). Therefore, "[w]hen the alleged error in the denial of summary judgment is based purely on a question of law that must be answered without regard to issues of fact, the denial of summary judgment is reviewable." *Clarkwestern* at ¶ 13, citing *Promotion Co., Inc./Special Events Div. v. Sweeney*, 150 Ohio App.3d 471, 2002-Ohio-6711, ¶ 15 (7th Dist.). *See also Miller* at ¶ 32 (stating that "when a trial court denies a motion for summary judgment based upon the resolution of a purely legal question, an appellate court may review that decision regardless of the movant's success at trial").

{¶ 16} To succeed on his employer-intentional-tort claim, Camara must prove that

Gill Dairy intended to injure an employee. Gill Dairy argues here, as it did in its summary-judgment motion, that Camara cannot prove that it intended to injury anyone. Camara responds, as he did in the trial court, that he was entitled to the rebuttable presumption in R.C. 2745.01(C) because Gill Dairy deliberately removed equipment safety guards. Thus, Gill Dairy's contention is that, while Camara could prove that it had failed to repair or replace those safety guards, such an omission cannot constitute a "deliberate removal" as a matter of law. Whether "deliberate removal" under R.C. 2745.01(C) encompasses the failure to repair or replace an equipment safety guard is a pure question of law. Therefore, the trial court's denial of summary judgment is reviewable.

A. "Deliberate removal" does not encompass a failure to repair or replace

{¶ 17} "Generally, actions for injuries sustained in the course of employment must be addressed within the framework of Ohio's workers' compensation statutes." *Estate of Mennett v. Stauffer Site Servs., LLC*, 12th Dist. Warren Nos. CA2019-09-096 and CA2019-10-110, 2020-Ohio-4355, ¶ 10. However, an employee may bring an action against his or her employer for damages caused by the employer's intentional tort. *Id*. *See also Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 25 (absent a successful employer-intentional-tort claim "the injured employee's exclusive remedy is within the workers' compensation system"). The requirements for an employer to be held liable for an intentional tort have been codified in R.C. 2745.01, which pertinently provides:

> (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.
>
> (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 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.

{¶ 18} A common law cause of action against an employer for an intentional tort has been recognized in Ohio for some time. *See Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St.2d 608 (1982), syllabus. Under the common law, "[a]n intentional tort involves an act committed with the specific intent to injure or with the belief that injury is substantially certain to occur." *Hoyle*, 2015-Ohio-843 at ¶ 7, citing *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90, 95 (1984), citing 1 Restatement of the Law 2d, Torts, Section 8A (1965). "Intent" here "is usually understood to mean a subjective volitional decision * * * to cause harm; or an act or omission that is substantially certain, under an objective analysis, to cause harm." *Price v. Austintown Local School Dist. Bd. of Edn.*, 178 Ohio App.3d 256, 2008-Ohio-4514, ¶ 24 (7th Dist.), citing *Buckeye Union Ins. Co. v. New England Ins. Co.*, 87 Ohio St.3d 280, 289 (1999). Thus, common law employer liability was premised on an act or omission involving either an actual decision to cause harm or knowledge that harm is substantially certain to be caused.

{¶ 19} With the enactment of R.C. 2745.01 in 2005, the General Assembly "modified the common-law definition of an employer intentional tort." *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, ¶ 17. Although R.C. 2745.01(A) incorporates the common law definition of employer intentional tort "and requires a plaintiff to prove either deliberate intent to injure or a belief that injury was substantially certain," the definition of "substantially certain" in R.C. 2745.01(B) makes the two bases for liability the same. *Hoyle* at ¶ 10 (noting that "'what appears at first glance as two distinct bases for liability is revealed on closer examination to be one and the same,'" quoting *Rudisill v. Ford Motor Co.*, 709

F.3d 595, 602-603 [6th Cir.2013]). Under the statute, "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort." *Houdek*, at ¶ 25; *Hoyle* at ¶ 11 (quoting the same). Thus, R.C. 2745.01 "'significantly restrict[ed]' recovery for employer intentional torts to situations in which the employer 'acts with specific intent to cause an injury.'" *Hoyle* at ¶ 11, quoting *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 57. Indeed, the Ohio Supreme Court has recognized that "[i]t was the General Assembly's intent in enacting R.C. 2745.01 * * * to permit recovery for employer intentional torts *only* when an employer acts with specific intent to cause an injury." (Emphasis sic.) *Stetter v. R.J. Corman Derailment Serves., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶ 26, citing *Kaminski* at ¶ 56.

{¶ 20} In sum, "R.C. 2745.01 * * * does not eliminate the common-law cause of action for an employer intentional tort." *Id.* at paragraph 3 of the syllabus. What the statute does is narrow the intent element for this common-law tort. There is no indication, though, that the General Assembly intended to change the conduct element, which under the common law can be a tortious act or omission. As the Ohio Supreme Court has said, "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." (Emphasis added.) *Hoyle* at ¶ 7, citing *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624 (1991), paragraph one of the syllabus. Accordingly, under R.C. 2745.01, for an employer to be liable for an intentional tort—whether by act or omission—the plaintiff must prove that the employer specifically intended to injure an employee.

{¶ 21} R.C. 2745.01 permits a plaintiff to show an employer's specific intent to injure in two ways. One way is with direct evidence of intent. The other way is by establishing the rebuttable presumption in R.C. 2745.01(C), by proving the "[d]eliberate removal by an

employer of an equipment safety guard." *See Hoyle*, 2015-Ohio-843 at ¶ 12 (stating that division [C] "permits an employee to prove the employer's intent without direct evidence"). R.C. 2745.01(C) "'is not a separate tort, it merely provides a legally cognizable example of "intent to injure."'" *Id.*, quoting *Irondale Indus. Contr., Inc. v. Virginia Surety Co., Inc.,* 754 F.Supp.2d 927, 933 (N.D.Ohio 2010).

{¶ 22} The question before us concerns the interpretation of the phrase "deliberate removal." Camara argues for a broad interpretation that encompasses not only an act but also an omission, the failure to repair or replace an equipment safety guard. Conversely, Gill Dairy contends that the phrase should be interpreted narrowly, limiting it to the act of removing an existing safety guard.

{¶ 23} The Ohio Supreme Court's interpretations of the phrase have been in line with the plain meaning of the words. In *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, at ¶ 29, the Court said that "the 'deliberate removal' referred to in R.C. 2745.01(C) may be described as a careful and thorough decision to get rid of or eliminate an equipment safety guard." "Deliberate," said the Court, means "'characterized by or resulting from careful and thorough consideration—a deliberate decision,'" and "remove" means "'to move by lifting, pushing aside, or taking away or off'; also 'to get rid of: ELIMINATE.'" *Id.* at ¶ 28. Putting the meanings together, the Court concluded that "the 'deliberate removal' of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine." *Id.* at ¶ 30. Likewise, in *Houdek*, the Court said that "[t]he plain meaning of the word 'remove' is 'to move by lifting, pushing aside, or taking away or off.'" *Houdek* 2012-Ohio-5685 at ¶ 27, quoting *Webster's Third New International Dictionary* 1921 (1986). From these two decisions, it is apparent that to be a "deliberate removal" there must be both a deliberate decision—a decision reached after careful and thorough consideration—and

actual removal—the elimination of the existing safety guard.

{¶ 24} Camara urges us to follow two Ohio appellate courts that have interpreted "deliberate removal" more broadly to include omissions with respect to a safety guard. First, in *Wineberry v. N. Star Painting Co.*, 7th Dist. Mahoning No. 11 MA 103, 2012-Ohio-4212, an employee alleged that the employer had failed to place guardrails around a perch and scaffolding. The evidence showed that the guardrails were not actually removed but rather were not attached in the first place. The Seventh District was sympathetic to the trial court's interpretation of "deliberate removal" as requiring an affirmative act, saying that "[t]he word 'remove' does have a connotation of an action, not an omission. The element must be present and then eliminated; you cannot remove something when it is not there to begin with. Thus, the trial court held that the guardrail had to be on the perch and then removed in order to constitute deliberate removal." *Wineberry* at ¶ 37. The problem with this interpretation, though, said the appellate court, is that "[i]f a machine is shipped not fully assembled and the employer does not install the guard that comes with the machine, under a narrow construction it might not be considered deliberate removal since the guard was not initially attached." *Id.* at ¶ 38. So a broader interpretation of "deliberate removal" is "necessary," though the court did not explain the necessity. *Id*. Thus, the court concluded that the phrase "not only encompasses removing safety equipment, but also the failure to attach safety equipment provided by the manufacturer." *Id*. The Seventh District's interpretation arguably amounts to dicta, because the court ultimately held that the failure to place guardrails was not "deliberate removal," as there was no evidence that the guardrails were provided by the manufacturer or required by law.

{¶ 25} The Third District adopted an even broader interpretation in *Thompson v. Oberlander's Tree & Landscape Ltd*, 3d Dist. Marion No. 9-15-44, 2016-Ohio-1147. In that case, an employee was injured because the chainsaw he was using lacked a hand guard,

which was provided by the manufacturer and was required by law to be on the chainsaw. The appellate court cited what it called the Ohio Supreme Court's broad definition of "deliberate removal" in *Hewitt*, "a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine," *Hewitt* at ¶ 30, as well as *Wineberry*'s broad interpretation. The court reasoned that "the employer's careful and considered decision not to replace or repair a broken or missing guard is essentially 'eliminat[ing the] guard.'" *Thompson* at ¶ 34, quoting *Hewitt* at ¶ 30. Accordingly, the court concluded that "an employer deliberately removes an equipment safety guard when it makes a deliberate decision not to either repair or replace an equipment safety guard that is provided by the manufacturer and/or required by law or regulation to be on the equipment." *Id*.

{¶ 26} The Third District in *Thompson* points out that the Ohio Supreme Court's decision in *Hewitt* cites *Wineberry*. A careful reading, however, reveals that the citation is in support of a narrow interpretation of "deliberate removal." The *Wineberry* citation comes after this statement: "Although 'removal' may encompass more than physically removing a guard from equipment and making it unavailable, such as bypassing or disabling the guard, an employer's failure to train or instruct an employee on a safety procedure does not constitute the deliberate removal of an equipment safety guard." *Hewitt,* 2012-Ohio-5317 at ¶ 29. While *Hewitt* does say that removal "may encompass more than physically removing a guard," the examples that it gives of bypassing and disabling are both acts that presuppose an existing guard. Moreover, *Hewitt* then concludes that "deliberate removal" does not encompass the failure to train or instruct, which are examples of omissions—failures to act. The parenthetical following *Hewitt*'s *Wineberry* citation explains that in *Wineberry* "employer's failure to place guardrails around a perch and scaffolding was not a deliberate removal when the guardrails were never in place." *Id*. Thus, *Hewitt* does not cite *Wineberry*'s broad interpretation of "deliberate removal" but the fact that the safety

equipment (the guardrails) was not there to be removed.

{¶ 27} We decline to follow *Wineberry* and *Thompson* in their broad interpretations, for several reasons.

{¶ 28} *First*, the Ohio Supreme Court has indicated that R.C. 2745.01(C) should be interpreted narrowly. In *Hewitt*, the Court interpreted the phrase "equipment safety guard" narrowly, explaining that "[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.'" *Hewitt* at ¶ 25, quoting *Stetter*, 125 Ohio St.3d 280, 2010-Ohio-1029, at ¶ 26; *Kaminski*, 125 Ohio St.3d 250, 2010-Ohio-1027, at ¶ 56. The Court deferred to the policy set by the General Assembly and "refrain[ed] from expanding the scope of the rebuttable presumption of intent in R.C. 2745.01(C)." *Id*. Furthermore, the failure to repair or replace a safety guard is akin to permitting a hazardous condition to exist, and the Court has said that an employer's mere knowledge of a hazardous condition is insufficient to show intent to injure under R.C. 2745.01, *Houdek*, 2012-Ohio-5685 at ¶ 24, citing 6 *Larson's Workers' Compensation Law*, Section 103.03 (2001) (explaining that an employer's "knowingly permitting a hazardous work condition to exist [and] knowingly ordering employees to perform an extremely dangerous job * * * falls short of the kind of actual intention to injure that robs the injury of accidental character"); *Kaminski* at ¶ 56.

{¶ 29} *Second*, as we have already discussed, the Ohio Supreme Court's interpretation of "deliberate removal" has limited it to cases in which an employer acted to remove an existing safety guard. We decline to read the Court's definition of the phrase in *Hewitt*—"a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine"—as broadly encompassing omissions. Although the definition is not statutory, the ejusdem generis canon of statutory construction counsels that the collective

phrase "otherwise eliminate," at the end of the list of specific items, should be interpreted in light of the fact that the specific items presuppose the existence of an already attached guard.[2]

{¶ 30} *Third*, a broad interpretation, like that in *Wineberry* and *Thompson*, would in essence add language to R.C. 2745.01(C) that goes beyond the existing statutory language and improperly expand the scope of the statutory provision. The plain meaning of "deliberate removal" limits it to an act of removal. If the legislature had intended the presumption to apply to a failure to repair or replace a safety guard, it would have said so. Such a broad interpretation amounts to what the United States Supreme Court has called "[a]textual judicial supplementation." *Rotkiske v. Klemm*, ___U.S.___, 140 S.Ct. 355, 361 (2019). "It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" *Id.* at 360-361, quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012).

{¶ 31} Therefore, we interpret the phrase "deliberate removal" narrowly and in accord with its plain meaning. To show a "deliberate removal," the plaintiff must show that the employer made a considered decision to remove and not reattach an existing equipment safety guard. The failure to attach a missing safety guard or to repair or replace a broken guard does not trigger the statutory presumption. It is not that an employer cannot be liable for such omissions. But for there to be liability the plaintiff must also prove that the omission was done with a specific intent to injure an employee.

B. Summary judgment on Camara's employer-intentional-tort claim

{¶ 32} Having set out the law, we now turn to the question of summary judgment.

2. The ejusdem generis canon "instructs courts to interpret a 'general or collective term' at the end of a list of specific items in light of any 'common attribute[s]' shared by the specific items." *Southwest Airlines Co. v. Saxon*, ___U.S..___, 2022 WL 1914099, *5 (2022), quoting *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 225, 128 S.Ct. 831 (2008).

Under Civ.R. 56, "summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370 (1998). A "genuine" issue of material fact exists to prevent summary judgment only if "a reasonable jury could find that the evidence satisfies the evidentiary standards required at trial." *Myocare Nursing Home, Inc. v. Fifth Third Bank*, 98 Ohio St.3d 545, 2003-Ohio-2287, ¶ 33 (concluding that the party "did not produce evidence sufficient to demonstrate that the date of execution of the [contract]s was in genuine dispute").

{¶ 33} "When the moving party * * * has met its initial burden of showing that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the nonmoving party must then present evidence that some issue of material fact remains to be resolved." *Taylor v. Taylor-Wilson Dev. Co.*, 12th Dist. Fayette No. CA2012-08-026, 2013-Ohio-1954, ¶ 37, citing *Wells Fargo v. Smith*, 12th Dist. No. CA2012-04-006, 2013-Ohio-855, ¶ 25, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Also, "'if the moving party has demonstrated that the non-moving party's claim is factually implausible, then the non-moving party must produce more persuasive evidence to support his claim.'" *Id.*, quoting *Paul v. Uniroyal Plastics Co.*, 62 Ohio App.3d 277, 282 (6th Dist.1988), citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348 (1986). "'[A] trial court must determine whether sufficient competent evidence has been presented by the party opposed to the motion [for summary judgment] on any issue for which that party bears the burden at trial. Examination of the evidence is necessary to enable the court to determine whether the nonmoving party has met this threshold standard.'" (Citations omitted.) *Id.* at ¶ 37, quoting *Kassouf v. Cleveland*

Magazine City Magazines, 142 Ohio App.3d 413, 420 (11th Dist.2001). Accordingly, we review the record to determine whether there is sufficient evidence to permit a finding that Gill Dairy had the specific intent to injure as a matter of law. *See Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 12 (stating that the Court was "review[ing] the record to determine whether there is sufficient evidence to permit a finding of actual malice as a matter of law").

{¶ 34} We first consider whether there is sufficient evidence to establish the presumption of intent under R.C. 2745.01(C), that is, to permit a finding of "deliberate removal." In support of Gill Dairy's summary-judgment motion, the two owners of Gill Dairy, Tony Gill and Frank Van Genugten, each submitted an affidavit in which he stated that he did not remove or authorize the removal of either the shaft guard or the connector guard. "[A] moving party's self-serving affidavit is adequate evidence under Civ.R. 56 to demonstrate the absence of any genuine issue of material fact." *Belknap v. Vigorito*, 11th Dist. Trumbull No. 2003-T-0147, 2004-Ohio-7232, ¶ 28. "Unlike the nonmoving party's self-serving affidavit, the moving party's self-serving affidavit may be refuted by evidence demonstrating a genuine issue of material fact." *Id*. Indeed, "a self-serving affidavit 'may be the only way to initiate a summary judgment challenge * * * [given] the inherent difficulty in demonstrating a negative.'" *Ochsenbine v. Cadiz*, 166 Ohio App.3d 719, 2005-Ohio-6781, ¶ 27 (7th Dist.), quoting *Belknap* at ¶ 28. These affidavits clearly support Gill Dairy's claim for the purposes of summary judgment that it did not deliberately remove either safety guard.

{¶ 35} Other evidence corroborates the affidavits. Looking first at the shaft guard, it was asserted that the end of the shaft guard had simply broken off as a result of ordinary wear and tear. The summary-judgment evidence all points to this as the explanation. Camara himself testified in his deposition that the end of the shaft guard was broken due to

wear and tear and from "using it too much." Van Genugten too testified in his deposition that the shaft guard could crack and break. As for the connector guard, there is insufficient evidence to show who had removed it. The two owners of Gill Dairy both denied removing it, and there is no evidence that an employee removed it at the direction of either owner. Camara testified at his deposition that he had not removed the connector guard and that he did not know who had removed it. What the deposition testimony does show is that the connector guard was easy to remove and that any employee with a wrench could have done it.

{¶ 36} Camara's theory was that Tony Gill had removed the connector guard so that he could work on the spreader's hydraulic pump, which sits just behind the guard. In his affidavit, Camara stated that the sand wagon "was frequently serviced and repaired by Defendant [Gill] before my injury" and that "[a]fter every such repair, the sand wagon was returned to service with the [connector guard] in the same condition, without equipment safety shields, guards, or covers over the shaft, coupling, and stub unguarded at the end where it attached to the sand wagon." In an OSHA violation worksheet, an inspector wrote: "The [inspector] asked Mr. Vangenugten when the [connector] guard was removed or what happened to require the pump mounting to be repaired and Mr. Vangenugten did not know. Mr. Vangenugten stated he was not involved in the repair and that Mr. Gill did it. The [inspector] asked how long ago it was done and Mr. Vangenugten stated he did not remember, but that it had been like that since he could remember."

{¶ 37} No reasonable jury could have found from this evidence that it was Gill who had removed the connector guard. Camara's affidavit testimony merely indicates that safety guards were never in place after each time the sand wagon was serviced. He never indicated that the safety guards were present before any of these repairs were made by Gill.

{¶ 38} Even if it could be inferred from Camara's affidavit testimony that Gill removed the safety guards, there is no evidence from which a reasonable jury could have found that the removal was "deliberate." As we stated above, in order to establish a "deliberate removal," there must be both a careful and considerate decision to remove a safety guard and the actual removal itself. At most, the evidence shows that, like with the shaft guard, Gill Dairy was aware that the connector guard was missing. The evidence is insufficient to find that the connector guard was removed by Gill Dairy as the result of a deliberate decision. All that may be concluded is that the connector guard was removed to work on the hydraulic pump by someone and, for some reason, not reattached. As the Third District has concluded in an analogous situation, such evidence does not show "deliberate removal":

> At most, the evidence demonstrates that [Employer] may have been aware that at times employees failed to replace the metal plate after removing it. However, there is no evidence that this failure was the result of a deliberate decision by [Employer]. Rather, it appears that the employees' failure to replace the plate was usually inadvertent, and not a consequence of any instruction by [Employer]. Furthermore, [Plaintiff] has not presented any evidence regarding who removed the metal plate on the day of his accident. [Plaintiff] himself admitted that any number of employees could have removed the metal plate. Thus, we cannot find that the fact that the metal plate was removed from the auger on the day of [Plaintiff]'s accident was the result of a deliberate decision by [Employer].

Conley v. Endres Processing Ohio, L.L.C., 3d Dist. Wyandot No. 16-12-11, 2013-Ohio-419, ¶ 20.

{¶ 39} In sum, the evidence could not support a finding that Gill Dairy made a "deliberate decision to lift, push aside, take off, or otherwise eliminate" the connector guard. *Hewitt*, 2012-Ohio-5317 at ¶ 2. Nor could the evidence support a finding that Gill Dairy made "a careful and thorough decision to get rid of or eliminate" the connector guard. *Id*. at ¶ 29. Therefore, the presumption of specific intent to injure in R.C. 2745.01(C) does not

arise.

{¶ 40} Although this was at heart a R.C. 2745.01(C) case, in the interest of justice, we also consider whether there is sufficient direct evidence to support a finding of specific intent to injure. Because this question is not one of law, though, we must also consider the trial evidence. *See Whittington*, 71 Ohio St.3d 150. Accordingly, if the jury's verdict in Camara's favor is supported by the weight evidence introduced at trial, then any error by the trial court in denying summary judgment is moot. *See Miami Poplar Rentals, LLC v. Hudoba*, 12th Dist. Butler No. CA2013-06-094, 2014-Ohio-1323, ¶ 12 (reviewing denial of summary judgment "in the interest of justice" to determine if decision was supported by the weight of the evidence).

{¶ 41} The evidence presented at trial added little to the summary-judgment evidence. There is simply no evidence that Gill Dairy specifically intended to injure any of its employees. The most that can be found is that Gill Dairy was aware that the shaft guard was broken and that the connector guard was missing and that it knew that this presented its employees with a dangerous condition. But there is no evidence that, by not replacing the guards, Gill Dairy specifically intended to injure its employees. We recognize the difficulty that Camara would have proving such intent short of Gill Dairy confessing that it acted with intent to injure. *See Houdek*, 2012-Ohio-5685 at ¶ 33 ("An intent to injure can be inferred from the facts and circumstances of a particular case; otherwise, an injured worker would be dependent on an employer's confession to make his case.") (Pfeifer, J., dissenting). However, Camara has a remedy for his injuries through the workers' compensation system.

{¶ 42} Gill Dairy is entitled to summary judgment on Camara's employer-intentional-tort claim. There is no genuine issue of material fact as to whether Gill Dairy had the specific intent to injure. Considering the evidence and all reasonable inferences to be drawn

therefrom in the light most favorable to Camara, reasonable minds could conclude only that Gill Dairy did not specifically intend to injure anyone. Gill Dairy is entitled to judgment as a matter of law.

{¶ 43} The first assignment of error is sustained.

{¶ 44} Assignment of Error No. 2:

{¶ 45} THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON EMPLOYER INTENTIONAL TORTS WITH THE FORM JURY INSTRUCTION 1 OJI 537.09(2)(C) BECAUSE THE FORM INSTRUCTION INCORRECTLY STATES THE LAW AND DIRECTLY PREJUDICED GILL DAIRY.

{¶ 46} Assignment of Error No. 3:

{¶ 47} THE TRIAL COURT ERRED IN PRESENTING THE ISSUE OF FUTURE ECONOMIC DAMAGES TO THE JURY AND IN DENYING GILL DAIRY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL OR REMITTITUR.

{¶ 48} Because we have concluded that Gill Dairy is entitled to summary judgment on the employer-intentional-tort claim against it, these two assignments of error challenging trial matters are moot and need not be considered.

III. CONCLUSION

{¶ 49} The final judgment entered against Gill Dairy is reversed and vacated and, finding that Gill Dairy is entitled to judgment as a matter of law, we hereby enter summary judgment on behalf of Gill Dairy on Camara's employer-intentional-tort claim in accordance with App.R. 12(B).

{¶ 50} Judgment reversed and vacated and judgment entered on behalf of Gill Dairy.

M. POWELL and BYRNE, JJ., concur.