[Cite as *Pixley v. Pro-Pak Industries, Inc.*, 2013-Ohio-1358.]

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

Phillip E. Pixley	Court of Appeals No. L-12-1177
Appellant	Trial Court No. CI0201004718
v.	
Pro-Pak Industries, Inc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: April 5, 2013

* * * * *

David R. Grant, Jeffrey H. Friedman and Stephen S. Vanek,
for appellant.

Timothy C. James, Lorri J. Britsch and Gregory B. Denny,
for appellees.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas awarding summary judgment in favor of appellees, Pro-Pak Industries, Inc., and

Toledo L & L Realty Co. (collectively "Pro-Pak"),[1] on appellant's, Phillip Pixley, employer intentional tort claim. We reverse.

A. Facts and Procedural Background

{¶ 2} Pro-Pak is in the business of manufacturing corrugated containers, boxes, and packaging materials. Its facility contains two long central aisles that are approximately eight to ten-feet wide. Numerous conveyer lines, which are about one-foot high and bolted to the floor, run immediately perpendicular to these central aisles on both sides. Product is moved throughout the plant along one of the conveyer lines until it reaches a central aisle. There, a transfer car loads the product and transports it to another conveyer line. The transfer car proceeds along a fixed path that is cut into the floor, and is operated by an employee who stands at a control station located on either end of the car. It is intended that the transfer car operator use the control panel located in the front of the car in the direction the car is moving. Approximately two inches separate the side edge of the transfer car and the end of the conveyer lines.

{¶ 3} Pixley worked for Pro-Pak in its maintenance department. On the day of his injury, Pixley was examining a non-working motor on one of the conveyer lines in order to retrieve its model and serial number so that a replacement motor could be ordered. As Pixley knelt down to access the motor, he extended his right leg into the central aisle. At that time, another employee, Jonathan Dudzik, was operating the transfer car. Dudzik was positioned at the rear end of the transfer car, and had just loaded a tall stack of

[1] Toledo L & L Realty Co. owns the building where Pro-Pak is located.

material onto the car. Dudzik testified in his deposition that as he started moving the transfer car he did not see Pixley. The transfer car contacted Pixley's right leg, trapping it in the pinch point between the car and the conveyer lines. Pixley's leg was severely injured.

{¶ 4} The transfer car is equipped with a safety bumper that is designed to compress when 15-20 pounds of force is applied. The bumper is connected to a proximity switch in such a manner that whenever the bumper is compressed as little as two inches, the switch opens the electrical circuit, thereby shutting off power to the transfer car. However, Dudzik's deposition testimony indicates that, at the time of the accident, the transfer car did not stop until Dudzik manually stopped it upon seeing Pixley roll up and over the bumper.

{¶ 5} On June 23, 2010, Pixley commenced this employer intentional tort claim under R.C. 2745.01. Pro-Pak moved for summary judgment, arguing that Pixley failed to show that Pro-Pak deliberately intended to injure him. Pixley opposed the motion, relying on R.C. 2745.01(C), which provides for a rebuttable presumption of intent to injure if the employer deliberately removes an equipment safety guard. In support, Pixley pointed to the affidavits and reports of Kevin Smith, P.E., and Gerald Rennell. Those experts concluded that the safety bumper on the transfer car was designed such that the only way the bumper could have been compressed without shutting off power to the car was if the proximity switch had been deliberately bypassed. Pro-Pak replied, arguing that there was no evidence that the proximity switch was deliberately bypassed,

and even assuming it was, Pro-Pak was still entitled to summary judgment because the bumper was not an "equipment safety guard."

{¶ 6} Upon consideration of the motion and the briefs, the trial court found that the bumper was not an equipment safety guard because it did not shield the operator of the equipment from exposure to, or injury by, a dangerous aspect of the equipment. Therefore, the trial court granted summary judgment in favor of Pro-Pak.

B. Assignment of Error

{¶ 7} Pixley has timely appealed, raising a single assignment of error:

> The trial court erred when it granted summary judgment in favor of Pro-Pak Industries, Inc. and Toledo L & L Realty Co. on Phillip Pixley's employer intentional tort claims.

II. Analysis

{¶ 8} We review appeals from an award of summary judgment de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Applying Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any 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 viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 9} Pixley's employer intentional tort claim is governed by R.C. 2745.01, which provides, in pertinent part,

> (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.

{¶ 10} Pixley relies on R.C. 2745.01(C), alleging that Pro-Pak deliberately removed an equipment safety guard in two ways. First, he contends that Pro-Pak deliberately removed an equipment safety guard by failing to adequately train the transfer car operators to use the control panel at the front of the car in the direction the car is travelling. Second, Pixley contends that Pro-Pak deliberately bypassed the proximity

switch on the safety bumper, allowing the bumper to be compressed without shutting off power to the transfer car. Pixley argues that the evidence shows that, at the least, a genuine issue of material fact exists regarding whether Pro-Pak deliberately removed an equipment safety guard. Therefore, because deliberate removal of an equipment safety guard creates a rebuttable presumption that Pro-Pak intended to injure him, Pixley concludes summary judgment is inappropriate.

{¶ 11} Resolution of this appeal requires us to delve once again into the nebulous world of "equipment safety guards." In so doing, we are guided by the recent Ohio Supreme Court decision in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795. In *Hewitt*, the Supreme Court was asked to decide whether

> "equipment safety guard" for purposes of R.C. 2745.01(C) includes only those devices on a machine that shield an employee from injury by guarding the point of operation of that machine and whether the "deliberate removal" of such 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 ¶ 1.

{¶ 12} The specific safety items in that case were rubber gloves and sleeves designed to prevent an employee from being shocked when he or she was working on energized electrical lines. In reaching its conclusion that the rubber gloves and sleeves were not equipment safety guards, the court looked to the plain and ordinary meaning of the words since "equipment safety guard" is not defined in the statute. Based on the plain

and ordinary meaning, the court determined that "equipment safety guard" means "a protective device on an implement or apparatus to make it safe and to prevent injury or loss." *Id.* at ¶ 18. The court then differentiated the rubber gloves and sleeves from equipment safety guards, characterizing the gloves and sleeves as "[f]ree-standing items that serve as physical barriers between the employee and potential exposure to injury." *Id.* at ¶ 26. The gloves and sleeves were "personal protective items that the employee controls." *Id*. In contrast, the court held that an "equipment safety guard" is "a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." *Id.*, quoting *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, ¶ 43.

{¶ 13} Furthermore, the Ohio Supreme Court determined that the employer did not deliberately remove the rubber gloves and sleeves. The court of appeals had held that the employer's decision to place the employee close to the energized wires without requiring him to wear protective equipment amounted to the deliberate removal of an equipment safety guard. *Id.* at ¶ 27. However, the Ohio Supreme Court disagreed, and held 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. The court continued, "the employer's failure to instruct [the employee] to wear protective items such as rubber gloves and sleeves and requiring [the employee] to work alone in an elevated bucket do not amount to the deliberate removal of an equipment safety guard within the meaning of R.C. 2745.01(C) so as to create a

rebuttable presumption of intent." *Id.* Therefore, the Ohio Supreme Court reversed the court of appeals and ordered judgment in favor of the employer.

{¶ 14} Applying *Hewitt* to the present case, we hold that Pixley's argument that Pro-Pak's failure to adequately train the transfer car operators constituted the deliberate removal of an equipment safety guard is without merit. *Hewitt* is clear: "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.*" (Emphasis added.) *Id.* at ¶ 29. Therefore, the failure to train on a safety procedure does not create a rebuttable presumption of intent to injure under R.C. 2745.01(C).

{¶ 15} Turning to his argument that Pro-Pak deliberately removed an equipment safety guard by deliberately bypassing the proximity switch on the safety bumper, we hold that a genuine issue of material fact exists which precludes summary judgment.

{¶ 16} At first glance, *Hewitt* appears to resolve Pixley's argument. *Hewitt* defines an "equipment safety guard" as "a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." *Hewitt* at ¶ 26. Pro-Pak argues, and the trial court reasoned, that the safety bumper is not an equipment safety guard because it is not designed to shield *the operator* from injury. However, upon our examination of *Hewitt*, we do not think the definition of an equipment safety guard

should be limited to protecting only operators. We reach this conclusion for three reasons.

{¶ 17} First, the issue of the protection of operators versus other employees who encounter the equipment was not before the Ohio Supreme Court in *Hewitt*, or before us in *Fickle*—the case from which the Ohio Supreme Court adopted its definition of "equipment safety guard." In *Fickle*, we were presented with an operator who was injured while she was splicing laminated roofing material around a roller. *Fickle*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, at ¶ 2-3. Fickle's claim turned, in part, on whether the jog control switch and an emergency stop cable that had been temporarily disconnected were equipment safety guards. We held that they were not because they were not designed to protect her from the pinch point on the roller. *Id.* at ¶ 43-44.[2] Consideration of the safety of other employees who encountered the machine was not relevant to resolving her claim.

{¶ 18} Second, the Ohio Supreme Court, relying on *Hewitt*, recently reversed an award of summary judgment in favor of the employer where the injured employee was not the operator of the machine. *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 134 Ohio St.3d 359, 2012-Ohio-5626, 982 N.E.2d 691. In *Beary*, the employee was placing caution tape around a construction site when a skid steer, often called a "Bobcat," backed

[2] Our holding in *Fickle* was modified by *Beyer v. Rieter Automotive N. Am., Inc.*, 6th Dist. No. L-11-1110, 2012-Ohio-2807, 973 N.E.2d 318, ¶ 13, which construed R.C. 2745.01(C) more broadly to include free standing equipment, such as face masks, within the scope of an "equipment safety guard." This broader interpretation was rejected by *Hewitt*.

into him causing serious injuries. *Beary v. Larry Murphy Dump Truck Serv., Inc.*, 5th Dist. No. 2011-CA-00048, 2011-Ohio-4977, ¶ 4-5. Evidence existed that the backup alarm on the skid steer had not been working for some time. One person testified that the wires powering the alarm were corroded to the extent that the wires had broken, while another witness testified that the wires appeared to have been intentionally disconnected. *Id.* at ¶ 13.

{¶ 19} The trial court granted summary judgment in favor of the employer on the employee's intentional tort claim, relying on the Ohio Industrial Commission's definition of "equipment safety guard" and finding that the backup alarm was not an equipment safety guard because it was not designed to guard anything. *Id.* at ¶ 16. The Fifth District affirmed. In so doing, it agreed with our reasoning in *Fickle*, which applied the plain and ordinary meaning of "equipment safety guard" instead of any industry-specific administrative definitions. Interestingly, however, the Ohio Supreme Court reversed the Fifth District's decision on the authority of *Hewitt*, and remanded the case to the trial court to apply *Hewitt* and determine whether the back-up alarm is an equipment safety guard. *Beary*, 134 Ohio St.3d 359, 2012-Ohio-5626, 982 N.E.2d 691 at ¶ 1. We think that had the Ohio Supreme Court intended to limit equipment safety guards to only those safety devices that are designed specifically to protect operators, such a reversal would have been unnecessary.

{¶ 20} Finally, limiting the definition of an "equipment safety guard" to only those items on machines that protect the operator is inconsistent with the remainder of R.C.

2745.01(C), which creates a rebuttable presumption of intent to injure another if an occupational disease or condition occurs as a direct result of a deliberate misrepresentation of a toxic or hazardous substance. This second basis for creating a rebuttable presumption is not limited to situations where the employer made a deliberate misrepresentation to a person who handled or was in control of the substance. Instead, it applies to anyone to whom the representation was made, who was subsequently injured as a direct result. Similarly, we think that any employee who is injured as a direct result of the employer's deliberate removal of a device that is designed to shield a dangerous aspect of the equipment should be entitled to a rebuttable presumption of an intent to injure.

{¶ 21} Accordingly, we read the Ohio Supreme Court's definition of an "equipment safety guard" as "a device designed to shield the [*employee*] from exposure to or injury by a dangerous aspect of the equipment."

{¶ 22} In the present case, the safety bumper on the transfer car is clearly designed to protect employees from a dangerous aspect of the equipment. The service manual, under the section "Protective Devices," identifies potential dangers associated with use of the transfer car:

> Most accidents come as a result of plant personnel assuming the transfer car will watch out for them, especially when the car is driven by an operator. All personnel in the vicinity of cars should be aware that the car can cause severe injuries or death if limbs are caught beneath the bumpers

> or *between the car and stationary conveyors*. Personnel must be warned not to stand between stationary conveyors near the car aisle. Personnel must also be warned not to stand in the car aisle with their back to the car. Plant personnel should be trained never to enter the car aisle while the car is in motion. (Emphasis added.)

The service manual goes on to identify safety features designed to protect employees from those potential dangers, specifically identifying the safety bumper:

> 2.5.4 Collapsible Bumper
>
> The standard United Pentek transfer car is equipped with a collapsible bumper * * *. The car is stopped if for any reason a bumper is tripped. When a bumper is tripped, the car can only be moved manually in the opposite direction. This bumper uses an inductive proximity switch that is triggered when the bumper begins to collapse. The drive is de-energized immediately upon contact with an obstacle and stops within the collapsible length of the bumper.

Therefore, we conclude the safety bumper is an equipment safety guard, and not a safety device as in *Fickle*, or a piece of personal protective equipment as in *Hewitt*.

{¶ 23} Having determined that the bumper is an equipment safety guard, we must next address if a genuine issue of material fact exists as to whether Pro-Pak deliberately bypassed it. Pro-Pak contends there is no evidence that any mechanism was removed from the safety bumper of the transfer car. As support, it points to deposition testimony

that the maintenance records indicated no work was performed on the transfer car in the year before the incident, and that the transfer car was on a preventative maintenance checklist to check the functioning of the safety bumpers once a month. Pixley, on the other hand, relies on the experts' affidavits and reports that the only way the bumper would have not functioned properly was if it had been deliberately bypassed. Further, the experts concluded that the safety bumper did not function properly when it contacted Pixley's leg. To corroborate their conclusion, the experts pointed to a video of the transfer car taken shortly after the accident that shows the safety bumper dragging on the ground as the transfer car moved. They concluded the compression of the bumper caused by the dragging should have been enough to shut off power to the transfer car. However, Pro-Pak disputes that the dragging would impair the function of the bumper, citing the maintenance supervisor's deposition testimony to that effect.

{¶ 24} Upon our review of the evidence and deposition testimony, and when viewing it in the light most favorable to Pixley as we must, we hold that a genuine issue of material fact exists as to whether Pro-Pak deliberately bypassed the safety bumper. Based on the expert testimony, reasonable minds could conclude that the bumper compressed enough to shut off power to the transfer car, the power was not shut off, and the only way the bumper could have compressed as far as it did without shutting off the power was if the proximity switch had been deliberately bypassed.

{¶ 25} Finally, we note that Pro-Pak argues extensively that it did not direct Pixley to kneel down and inspect the motor, or to stick his leg into the path of the transfer car,

and thus there was no intent to injure him. However, whether Pro-Pak intended to injure Pixley is the ultimate question for the trier of fact, and because a genuine issue of material fact exists that could create a rebuttable presumption of intent to injure, summary judgment is not appropriate.

{¶ 26} Accordingly, Pixley's assignment of error is well-taken.

III. Conclusion

{¶ 27} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is reversed. The matter is remanded to the trial court for further proceedings consistent with this decision. Pro-Pak is ordered to pay the costs 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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE