

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2013-0797

PHILLIP E. PIXLEY  
Plaintiff-Appellee

-vs-

PRO-PAK INDUSTRIES, INC., et. al.  
Defendant-Appellants.

ON APPEAL FROM LUCAS COUNTY  
COURT OF APPEALS, SIXTH APPELLATE DISTRICT

BRIEF OF *AMICI CURIAE*,  
OHIO ASSOCIATION OF CLAIMANTS' COUNSEL AND  
OHIO ASSOCIATION FOR JUSTICE  
URGING AFFIRMANCE ON BEHALF OF PLAINTIFF-APPELLEE

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## **INTRODUCTION AND INTERESTS OF *AMICI CURIAE***

The National Association of Claimants' Counsel (NACCA), Ohio Chapter, was founded in 1954. It was an organization created with the purpose "to help injured persons, especially in the field of workers' compensation."

In 1963, the NACCA was changed to the Ohio Academy of Trial Lawyers. Now known as the Ohio Association for Justice (OAJ), it is an organization of 1,500 lawyers dedicated to the protection of Ohio's consumers, workers, and families.

In 2008, the Ohio Association of Claimants' Counsel (OACC) was founded to advance the founding ideals of the NACCA and to promote the education of workers' compensation issues. The OACC is a statewide organization of workers' compensation attorneys.

The OACC and OAJ file this Amicus Brief to ask this Court to accept the decision of the Court of Appeals for the Sixth Appellate District and deny the Appellant's request to reverse the Sixth Appellate District's determination. The OACC and OAJ adopt the statement of facts set forth in Appellee Phillip Pixley's merit brief.

**PROPOSITION OF LAW I: THE HEWITT COURT'S DEFINITION OF EQUIPMENT SAFETY GUARD IS LIMITED TO PROTECTING OPERATORS ONLY**

The Ohio workers compensation system is statutorily based and the application of workers' compensation law necessitates statutory construction. *State ex rel. Brilliant Electric Sign Co. v. Indus. Comm.*, 135 Ohio St. 211, 20 N.E.2d 252 (1939). It is a court's responsibility to enforce the literal language of a statute wherever possible; to interpret, not legislate. Unless a statute is ambiguous, the court must give effect to its plain meaning." *Ohio Bur. of Workers' Comp. v. Dernier*, 6th Dist. No. L-10-1126, 2011-Ohio-150, ¶ 26, citing *Cablevision of the Midwest, Inc. v. Gross*, 70 Ohio St.3d 541, 544, 639 N.E.2d 1154 (1994). Further, if a word in a statute is not defined, the Ohio Supreme Court uses "its common, ordinary, and accepted meaning unless it is contrary to clear legislative intent. . . . [It] also reads the word in context using rules of grammar and common usage." *Cincinnati School Dist. Bd. of Edn v. State Bd. of Edn.*, 122 Ohio St.3d 557, 2009-Ohio-3628, 913 N.E.2d 421, ¶ 15. Last, the Ohio Supreme Court has a duty "to give effect to the words used [in a statute], not to delete words used or to insert words not used." *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969).

The General Assembly is entrusted with making policy decisions regarding who is covered by the workers' compensation system and actively exercises that right. The Ohio Supreme Court has consistently recognized the General Assembly's prerogative, explicitly stating that it "is not now, nor has it ever been, a judicial legislature." *Ritchey Produce Co., Inc. v. Ohio Dept. of Adm. Serv.*, 85 Ohio St.3d 194, 206, 707 N.E.2d 871. In *State ex rel. General Electric v. Indus. Comm.*, 103 Ohio St.3d 420, 2004-Ohio-5585,

816 N.E.2d 588, ¶ 49, the Ohio Supreme Court acknowledged that “if the current statutory scheme is outdated, it is more appropriately the legislature’s role to revise it.”

In the instant case, Appellants are seeking to have this Court read words into R.C. 2745.01(C) while also asserting that Appellees are trying to expand the statutory section in contravention of its plain language. But the language of R.C. 2745.01(C) simply does not limit its protection to operators; in fact, the word “operator” is nowhere in R.C. 2745.01(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.

This Court has never held that R.C. 2745.01(C) only applies to operators, and in fact, it was the Sixth District that originally defined the term “equipment safety guard” as applying to operators in *Fickle v. Conversion Tech. Intern. Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960 (June 17, 2011), because of the specific fact pattern of that case. In *Fickle*, 2011-Ohio-2960, ¶ 1-6, a rewind operator was injured when her left hand and arm got caught in the pinch point of a roller of an adhesive coating machine after an emergency stop cable (an emergency shut-off cord to stop the device) had been disconnected from one job but erroneously not reconnected during Fickle’s injury. She filed an intentional tort claim under R.C. 2745.01, alleging that Defendant “acted with injurious intent in removing the emergency stop cable.” *Id.* at ¶ 7.

The trial court granted summary judgment in favor of Defendant, finding that the emergency stop cable is not a guard under R.C. 2745.01 since it does not guard the pinch point from entangling an operator’s hand, and that it was not removed or taken off the

machine, just not reconnected. *Id.* at ¶ 11, ¶ 13. The Sixth District Court of Appeals affirmed, and found that the undefined terms in R.C. 2745.01(C) “should be given their plain and ordinary meaning.” *Id.* at ¶ 31. Accordingly, it looked to Merriam-Webster’s Collegiate Dictionary for the definition of “guard,” which defined it as “a protective or safety device; *specif*: a device for protecting a machine part or the operator of a machine.” *Fickle*, 2011-Ohio-2960, ¶ 38. Emphasizing that “guards” are “those devices [that] shield the employee’s hands or fingers from injury by keeping them out of the danger zone during the operating cycle,” *id.* at ¶ 42, rather than general safety devices, it held that the emergency stop cable did not fit this definition as it was not designed to stop the employee from encountering or making contact with the pinch point on the roller. *Id.* Accordingly, the court held that R.C. 2745.01(C) was not applicable to the facts.

The Ohio Supreme Court utilized the Sixth District’s definition of “guard” in *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, ¶ 26, when it held that protective rubber gloves and sleeves are personal items that an employee controls and do not constitute “an equipment safety guard” under R.C. 2745.01(C): “We adopt the definition in *Fickle* and hold that as used in R.C. 2745.01(C), ‘equipment safety guard’ means ‘a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.’” Importantly, the Court did not discuss the term “operator,” and never limited the protections of R.C. 2745.01(C) to operators, instead interchanging the terms “operator” and “employee” liberally throughout the decision: “Free-standing items that serve as physical barriers between the employee and potential exposure to injury, such as rubber gloves and sleeves, are not ‘an equipment safety guard’ for purposes of R.C. 2745.01(C).” *Id.*

Here, Appellants and Amici urge this Court to limit the protections of R.C. 2745.01(C) to operators because “[d]efining equipment safety guard as a device to protect only the operator of the particular machine or equipment from which the guard is deliberately removed is essential to establish the rebuttable presumption that the employer acted with intent to injure.” (Appellant Brief at 9). But the plain language of R.C. 2745.01(C) does not limit its protections to operators, and there is no need to add words to the statute or divine the intent of the General Assembly. *See* R.C. 2745.01(C) (“Deliberate removal by an employer of an equipment safety guard . . . creates a rebuttable presumption that the removal . . . was committed *with intent to injure another* . . .”).

Appellants also argue that “[t]o define equipment safety guard as a device to protect all employees contravenes the legislature’s intent of restricting employer intentional tort claims to only those in which the employer acts with a specific intent to injure.” (Appellant Brief at 10). But this interpretation contravenes the entire point of the rebuttable presumption in R.C. 2745.01(C):

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.

*Fickle*, 2011-Ohio-2960, ¶ 32, fn 2.

Moreover, the second part of the statutory section, which creates a rebuttable presumption of an intent to injure if an occupational disease or condition occurs as a direct result of a deliberate misrepresentation of a toxic or hazardous substance, is not

limited to protecting only those employees who were in control of, or who handled, the substance. Thus, why would the General Assembly create a statute that covered all employees from toxic substances but only those employees who were the actual operators of disabled safety guards? This interpretation is nonsensical. In short, if the General Assembly had wanted to protect only operators and not all employees, they would have enacted that statute—but they did not.

Last, the General Assembly ostensibly did not define “equipment safety guard” in the statute.<sup>1</sup> Moreover, it was the Sixth District’s definition of the term, derived from Merriam-Webster’s Dictionary, which the Ohio Supreme Court adopted in *Hewitt*. However, the precise definition in Merriam-Webster’s Dictionary does not limit the term to operators: “a protective or safety device; *specif: a device for protecting a machine part or the operator of a machine.*” *Merriam-Webster’s Collegiate Dictionary* 516 (10th Ed.1996). Here, the collapsible bumper was intended to protect employees as well as the transfer car. Accordingly, the definition derived from Merriam-Webster’s Dictionary, and utilized in *Fickle* and *Hewitt*, accurately defines the “guard” in the instant case. Moreover, if R.C. 2745.01(C) was intended to only cover operators, it is the General Assembly’s role to modify the statutory language, not this Court’s. *Ritchey Produce Co., Inc. v. Ohio Dept. of Adm. Serv., General Electric v. Indus. Comm.* But to employ such a restrictive interpretation absent legislative history and based upon one dictionary definition applied in a Sixth District opinion is judicial activism.

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<sup>1</sup> In Judge Pfeiffer’s dissent in *Hewitt*, he suggested that the General Assembly chose not to define “equipment safety guard” for a reason: “In my opinion, that is because they did not want an unduly restrictive meaning—one that they surely would have enacted had they chosen to. There are many “equipment safety guards” that absent the majority opinion’s new constrictive interpretation would give rise to a rebuttable presumption of intent to injure. Remember, the presumption is rebuttable, whereas the absence of the presumption is often, as in this case, dispositive.” *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, ¶ 37.

In fact, a cursory look at other dictionary definitions shows how arbitrary limiting the protections of R.C. 2745.01(C) to operators really is: “Guard: something that covers a dangerous part of a machine,” *MacMillan Dictionary*, <http://www.macmillandictionary.com/dictionary/american/guard>; “Guard: Any device to protect against injury or loss” *Webster New World Dictionary*, 269-70 (2d. Ed. 1984); “Guard: a device worn or fitted to protect injury or damage” *Oxford American Dictionary*, [http://www.oxforddictionaries.com/definition/american\\_english/guard?q=guard](http://www.oxforddictionaries.com/definition/american_english/guard?q=guard); “Guard: any device that protects against injury or loss d. a safety device, as in machinery” *Collins American English Dictionary*, <http://www.collinsdictionary.com/dictionary/american/guard>.

There is no court that has explicitly restricted the protections of R.C. 2745.01(C) to operators because the plain language simply does not dictate such a limiting definition. If this Court is to follow the plain and unambiguous words of the statute as Appellants suggest, it should not restrict the term to operators either.

**PROPOSITION OF LAW II: THE “DELIBERATE REMOVAL” OF AN EQUIPMENT SAFETY GUARD OCCURS ONLY WHEN THERE IS EVIDENCE THE EMPLOYER MADE A DELIBERATE DECISION TO LIFT, PUSH ASIDE, TAKE OFF OR OTHERWISE ELIMINATE THE GUARD FROM THE MACHINE**

Appellants and Amici assert that there is no evidence or testimony that shows that Pro-Pak made a deliberate decision to bypass the safety bumper, and accordingly does not enable Phillip Pixley to utilize the rebuttable presumption under R.C. 2745.01(C). (Appellant Brief at 14). However, Kevin Smith, a mechanical engineering safety and design consultant, explicitly testified that bypassing the bumper safety switch system constitutes deliberate removal of a safety guard:

Bypass of the bumper safety switch constitutes deliberate removal of a safety guard. This safety guard was designed specifically to protect individuals from being struck or crushed and seriously injured by the heavy moving transfer car. Operating the transfer car from the end opposite of the direction of travel, with forward view blocked by materials and the safety systems bypassed, clearly constitutes a deliberate and conscious bypass of critical safety systems. This intentional disregard for employee safety by Pro-Pak resulted in a condition where an injury was in my opinion, substantially certain to occur, and is a direct cause of the subject accident.

*T.d. 126, Expert Affidavit of R. Kevin Smith, p. 5, paragraph 8(m).* A second professional engineer reached the same conclusion: The collapsible safety bumper should have deactivated the machinery and prevented the catastrophe. *T.d. 127, Expert Affidavit of Gerald C. Rennell, p. 3, paragraph 8(m Id., paragraph 8(c) – (d) & (k) – (l).*

At the very least, and construing the evidence most strongly in Phillip Pixley's favor, there is a genuine issue of material fact as to whether Pro-Pak deliberately removed the safety guard. While Amicus OACTA urges that "Pro-Pak is faced with a presumption of intentionally injuring its employee despite a complete absence of evidence that it took any action, deliberate or not, that resulted in the removal of an equipment safety guard," (OACTA Brief at 7), there is evidence as demonstrated above, and that presumption is rebuttable by producing evidence that there was no intent to injure. *Rudisill v. Ford Motor Company*, 709 F.3d 595, 608 (6th Cir. 2013). Moreover, having to produce evidence that the safety guard was deliberately removed should not be conflated with showing an intent to injure—a burden that seems to be put on Phillip Pixley when Appellants and Amici discuss the possibility that it was instead a rogue third party responsible for disabling the guard.

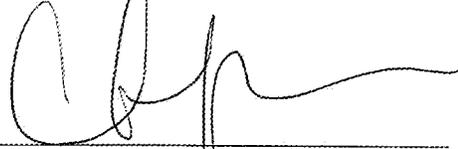
This Court should affirm the decision of the Court of Appeals because reasonable minds can come to more than one conclusion regarding whether Pro-Pak deliberately

bypassed the bumper. Moreover, the bumper should be considered an “equipment safety guard” under R.C. 2745.01(C) because it is consistent with the definition utilized by this Court in *Hewitt* and is clearly designed to protect both employees as well as the transfer car.

### CONCLUSION

Amici respectfully request that this Court affirm the decision of the Sixth District Court of Appeals reversing the trial court’s decision granting summary judgment to Pro-Pak because it correctly concluded that “[t]he safety bumper on the transfer car is clearly designed to protect employees from a dangerous aspect of the equipment” (Decision at ¶ 22), and hence, meets this Court’s definition of “equipment safety guard.” Moreover, a genuine issue of material fact exists regarding whether Pro-Pak deliberately bypassed the safety bumper based upon expert testimony and is a question of fact appropriate for a jury.

Respectfully submitted,

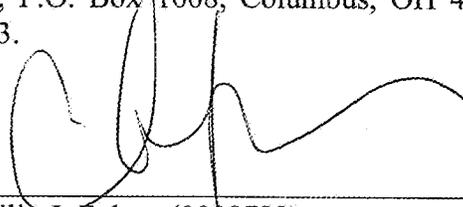


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