

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

THEODORE H. KNIGHT,	:	APPEAL NO. C-110593
	:	TRIAL NO. A-0908155
TAMMY KNIGHT,	:	
	:	<i>OPINION.</i>
KYLIE KNIGHT,	:	
	:	
and	:	
	:	
CALEB KNIGHT,	:	
	:	
Plaintiffs-Appellants,	:	
	:	
vs.	:	
	:	
THE PROCTER & GAMBLE	:	
COMPANY,	:	
	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 28, 2012

The Moore Law Firm, Donald C. Moore, Jr., and Robert A. Herking, for Plaintiffs-Appellants,

Dinsmore & Shohl, LLP, Mark A. Vander Laan, Bryan E. Pacheco and Mark G. Arnzen, Jr., for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

{¶1} Plaintiff-appellant Theodore H. Knight was injured in a workplace accident. He and his wife and children, Tammy, Kylie and Caleb Knight, filed a complaint against his employer, defendant-appellee the Procter and Gamble Company (“P&G”). Knight alleged that P&G had committed an intentional tort against him under R.C. 2745.01. The record shows that Knight had been severely burned when hot glycerin had sprayed onto him from a pump on which he was working. P&G filed a motion for summary judgment, which the trial court granted.

I. Facts and Procedure

{¶2} At the time of the accident, Knight was working as a machinist in charge of maintaining the rotational equipment at P&G’s glycerin refinery. He did not have a supervisor who directed his daily activities. Knight was thoroughly trained on all aspects of equipment and plant safety and was the most knowledgeable employee at the plant about the rotating equipment and recirculation pumps.

{¶3} On the day of the incident, Knight noticed a slow leak coming from a recirculation pump. It was part of his job responsibilities to maintain and troubleshoot that pump. He stopped to check it, accompanied by two experienced coworkers.

{¶4} To find the leak’s location, Knight had to remove an insulation blanket. As he did so, the blanket hit a ball valve attached to the pump, causing 360-degree glycerin to spray out at great force onto Knight. Other employees helped him to the safety shower and called for help. Paramedics arrived a short time later and

took Knight to the hospital. He was severely burned, and hospitalized for approximately 60 days.

{¶5} The valve involved in the accident was supposed to have a cap to prevent contamination of the glycerin and for worker safety. It was uncapped at the time of Knight's accident. P&G policies and practices directed employees to cap all uncapped lines, although P&G knew that uncapped lines were an issue at the plant and that employees did not always follow those practices and procedures.

{¶6} P&G designated employees as "zone owners" and made them responsible for reviewing an area of the plant on a weekly basis to ensure conformity with P&G standards. Those review duties included capping or plugging lines. Additionally, the standard operating procedure at the plant required the employee to make a mental risk assessment before performing the type of maintenance that caused the accident. Although the uncapped pipe was in plain sight, Knight acknowledged that he did not do the mental risk assessment and that he did not see it.

{¶7} Employees at the plant needed to take samples of the glycerin at different points in the refining process. Most often, those employees would use a sample box to obtain the sample because it minimized contact with the hot glycerin. The pump where Knight was injured had had a sample box, but it had been removed in 2003 when that area of the plant had been redesigned. It was replaced with the ball valve that Knight accidentally opened. Conflicting evidence existed as to whether P&G required employees to continue to take samples at the location where Knight was injured. Knight did not take samples as part of his job, and was not sampling at the time he was injured.

{¶8} In granting summary judgment in favor of P&G, the trial court found that, viewing the evidence in Knight’s favor, the sample box “must be viewed as a safety guard” and, thus, Knight was entitled to a rebuttable presumption that the sample box had been removed with the intent to injure him. The court further found that P&G had rebutted the presumption.

{¶9} The court also found that “the pipe cap can be viewed as an equipment safety guard as well.” But because P&G did not deliberately remove the pipe cap, Knight was not entitled to the rebuttable presumption that the cap was removed with the intent to injure him.

{¶10} The court found that no genuine issues of material fact existed for trial and that P&G’s conduct did not rise to the level of an intentional tort as a matter of law. Therefore, the trial court granted summary judgment in favor of P&G on Knight’s intentional tort claim and on his wife’s and children’s derivative claims for loss of consortium. This appeal followed.

II. Standard of Review

{¶11} Summary judgment is appropriate if (1) no genuine issue of material fact exists for trial, (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, who is entitled to have the evidence construed most strongly in his or her favor. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977); *Greene v. Whiteside*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, ¶ 23 (1st Dist.). The trial court has an absolute duty to consider all pleadings and evidentiary materials when ruling on a motion for summary judgment. It should not grant summary judgment unless the entire record shows that summary judgment is appropriate. *Greene* at ¶ 23.

III. Intentional Torts Generally

{¶12} Three of Knight’s four assignments of error address various aspects of R.C. 2745.01, which governs an employer’s liability for intentional torts. It 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 occupational disease or condition occurs as a direct result.

{¶13} The General Assembly’s intent in enacting this statute was to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsection (C). *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 56. An employee must present proof beyond that necessary to establish negligence or recklessness. Mere knowledge and appreciation of the risk do not establish that an

employer knew with substantial certainty that an injury was likely to occur. *Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991), paragraph two of the syllabus; *Wadley v. Knowlton Mfg. Co.*, 1st Dist. No. C-061045, 2007-Ohio-5739, ¶ 10. This is a difficult standard to meet, as an intentional tort claim is intended to be a narrow exception to the workers' compensation system's prohibition against an employee's ability to sue his or her employer for a workplace injury. *Blanton v. Internatl. Minerals & Chem. Corp.*, 125 Ohio App.3d 22, 25, 707 N.E.2d 960 (1st Dist.1997).

IV. Removal of Equipment Safety Guard/Rebuttable Presumption

{¶14} In his first assignment of error, Knight contends that the trial court erred in determining that the presumption of intent under R.C. 2745.01(C) had been rebutted. He argues that P&G's deliberate removal of the sample box entitled him to the rebuttable presumption that P&G intended to injure him. He further argues that issues of fact existed as to whether P&G took steps to make the site safe after the sample box had been removed, or required employees to work around the pump even though the sample box had been removed. This assignment of error is not well taken.

{¶15} A court must ascertain the meaning of the terms "equipment safety guard" and "deliberate removal" in R.C. 2745.01(C) as a matter of law. *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, ¶ 28. The General Assembly did not define those terms. Therefore, courts should give them their plain and ordinary meaning. *Hewitt v. The L.D. Myers Co.*, 8th Dist. No. 96138, 2011-Ohio-5415, ¶ 20-22, *discretionary appeal allowed*, 131 Ohio St.3d 1456, 2012-Ohio-648, 961 N.E.2d 1135; *McKinney v. CSP of Ohio, LLC*, 6th Dist. No. WD-10-070, 2011-Ohio-3116, ¶ 14-15.

{¶16} The Sixth Appellate District, after considering the dictionary definitions for “deliberate” and “remove,” stated that “deliberate removal” means “a considered decision to take away or off, disable, bypass or eliminate, or to render inoperable or unavailable for use.” *Fickle* at ¶ 32. That court also held, after considering dictionary definitions, that an “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.” *Id.* at ¶ 43. *Accord Roberts v. RMB Ent., Inc.*, 197 Ohio App.3d 435, 2011-Ohio-6223, 967 N.E.2d 1263, ¶ 22 (12th Dist.); *Hewitt* at ¶ 25-27.

{¶17} Although the sample box’s primary function was to prevent contamination, the record is clear that it also shielded an operator from exposure to the hot glycerin. The record also shows that P&G deliberately removed the sample box. As the trial court stated:

Viewing the evidence in a light most favorable to the Plaintiffs, the sample box must be viewed as a safety guard. Although Knight’s injuries occurred four years after the sample box was removed, Knight would not have been injured had the sample box covered the pipe. As a result, for summary judgment purposes, Knight was injured as a direct result of the removal. Therefore, under R.C. 2745.01(C), Plaintiffs are entitled to a rebuttable presumption that the sample box was removed with the intent to injure Knight.

{¶18} The trial court went on to hold that P&G had rebutted that presumption as a matter of law. We agree. “[W]here a rebuttable presumption exists, a party challenging the presumed fact must produce evidence of a nature that counterbalances the presumption or leaves the case in equipoise.” *Myocare Nursing Home, Inc. v. Fifth Third Bank*, 98 Ohio St.3d 545, 2003-Ohio-2287, 787 N.E.2d

1217, ¶ 35. Upon the production of sufficient rebutting evidence, the presumption disappears. *Id.*

{¶19} Knight argues that the evidence showed that P&G, knowing that the sample box had been removed and that the ball valves could be inadvertently opened, still directed employees to work and take samples at that location. The record shows that the sample box was removed when the pump was redesigned in 2003, four and a half years before Knight’s accident, as a necessary part of physically repositioning the pump. Knight acknowledged that he knew that the sample box had been removed and that the new configuration of the pump was not designed to “create a problem” for him. Knight presented some evidence that P&G still required some employees to take samples at the site. But Knight was a machinist, and he did not take samples as part of his job, although his job duties required him to work on the pump that caused his injuries.

{¶20} The record also shows that P&G took steps to ensure safety and to prevent accidental contact with the hot glycerin. Its standard operating procedure required caps to be placed on all uncapped pipes. It divided the plant into zones and employees were designated as “zone owners” who were responsible for ensuring the safety of their zones. Quality assurance and management personnel conducted monthly audits of each zone to look for safety issues. As part of those audits, managers would look to see if lines were capped. Other than a minor head-scrrape, the plant had had no reportable injuries for almost six years before Knight’s accident.

{¶21} Further, Knight was an experienced employee and had received extensive and ongoing training on using the equipment and personal safety, including the P&G policies that required that he do a mental risk assessment before performing work and that he cap all uncapped pipes. In Knight’s employment file

was a document which discussed “his personal action plan,” in which he had written “Risk prediction before any and all work.” Yet, he did not do a risk assessment before attempting to find the leak. The uncapped pipe was in plain sight. If Knight had performed the risk assessment, he would have seen that the pipe was not capped and he would not have been injured.

An employer cannot be held liable to know that a dangerous condition exists and that harm is substantially certain to occur when he has taken measures that would have prevented the injury altogether had they been followed. * * * When safety devices or rules are available but are ignored by employees, the requisite knowledge of the employer is not established.

Robinson v. Icarus Indus. Constructing & Painting Co., 145 Ohio App.3d 256, 262, 762 N.E.2d 463 (3d Dist.2001).

{¶22} Because P&G presented evidence that the sample box was not removed with the intent to cause injury, it rebutted the presumption, and left the case “in equipoise.” See *Shanklin v. McDonald’s USA, LLC*, 5th Dist. No. 2008 CA 00074, 2009-Ohio-251, ¶ 40-42. No material issues of fact existed for trial and P&G was entitled to judgment as a matter of law. Therefore, the trial court did not err in granting summary judgment in favor of P&G. See *Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267; *Greene*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, at ¶ 23.

{¶23} Knight also argues that the cap was a safety guard and that its removal also triggered the presumption. While the cap could have been considered a safety guard, the evidence showed that P&G did not deliberately remove it. P&G’s official policies required employees to cap all uncapped lines. Though it knew that employees sometimes left lines uncapped, the record contains no evidence that

employees ever did so at P&G's direction. To the contrary, they were directed to make sure that the lines were capped. Therefore, P&G did not deliberately remove the caps, and Knight was not entitled to the presumption for the removal of the cap. *See Smith v. Inland Paperboard & Packaging, Inc.*, 11th Dist. No. 2008-P-0072, 2009-Ohio-3148, ¶ 39, *affirmed*, 126 Ohio St.3d 64, 2010-Ohio-3133, 930 N.E.2d 319. We overrule Knight's first assignment of error.

V. Failure to Install a Protective Device

{¶24} In his third assignment of error, Knight contends that the trial court erred when it determined that P&G's "knowing installation of unsafe valves did not create a rebuttable presumption of intent." He argues that P&G deliberately used unsafe valves that it knew could easily be bumped open by mistake, and that instead of using a locking mechanism, it relied upon the use of caps that it knew employees frequently failed to replace. Therefore, he contends, P&G's failure to install a primary protective device was equivalent to its direct removal. This assignment of error is not well taken.

{¶25} Knight relies on *Walton v. Springwood Products, Inc.*, 105 Ohio App.3d 400, 663 N.E.2d 1365 (11th Dist.1995). In that case, the employer modified a saw, basing the modifications on another saw that it had purchased. The employer failed to duplicate a safety guard over the saw blade. The court held that "where the safety feature omitted is not a secondary or ancillary guard, but the primary protective device, the failure of the employer to attach such a guard creates a factual issue which would be sufficient to overcome a summary judgment exercise[.]" *Id.* at 405.

{¶26} The trial court found this case to be distinguishable. We agree with the court when it stated:

In *Walton*, it was significant that the employer modified a piece of equipment and failed to install a primary safety feature that accounted for the modifications. This failure created a dangerous condition, sufficient to overcome a motion for summary judgment * * *. P&G did not modify equipment; the sample box was completely removed and replaced with a ball valve. In addition, there was not a failure to install a manufacturer's safety guard. The safety procedures, such as capping, zone owner exams, risk assessment, and autonomous maintenance were sufficient to make the location safe after the sample box was removed. As a result, Plaintiffs are not entitled to a rebuttable presumption for the failure to install a safer valve or safety mechanisms on the ball valve.

{¶27} Further, *Walton* is a narrow case, based on unique facts. Knight attempted to expand its holding beyond its facts, contrary to the unambiguous language of R.C. 2745.01(C). As a general rule, that statute states that only the “deliberate removal” of a safety guard creates the presumption. In *Walton*, the modification of the saw without the safety guard was functionally equivalent to the deliberate removal of the guard. But to hold that in general, the failure to install a protective device creates the presumption would be to rewrite the statute by adding words to the statute that the legislature did not use. *See Bernardini v. Bd. of Edn.*, 58 Ohio St.2d 1, 4, 387 N.E.2d 1222 (1979); *Cincinnati v. Ohio*, 1st Dist. No. C-110680, 2012-Ohio-3162, ¶ 9.

{¶28} Consequently, we hold that the trial court did not err in holding that Knight was not entitled to a rebuttable presumption of intent to injure based on the failure to install safer valves. We overrule Knight's third assignment of error.

VI. No Intentional Tort without the Presumption

{¶29} In his second assignment of error, Knight contends that the trial court erred in granting summary judgment in favor of P&G. He argues that even without the presumption, he presented evidence showing that issues of fact exist for trial. This assignment of error is not well taken.

{¶30} Specifically, he argues that the evidence showed that the removal of the sample box, the lack of a cap on the pipe, the installation of incorrect valves with the knowledge of their propensity to be inadvertently opened, the placement of the valve on top of insulation that must be removed on occasion, the direction of employees to work and take samples from the location, the refusal to install locking mechanisms on easily-opened valves, the refusal to create needed safety protocols, the failure to provide adequate personal protective equipment, and the failure to implement its own safety policies show that P&G acted with knowledge that injury was substantially certain to occur. Even if we construe all the evidence in Knight's favor, it does not, without the statutory presumption, show that P&G acted with deliberate intent to injure Knight or with the belief that injury was substantially certain to occur.

{¶31} P&G's conduct may have been negligent or even reckless, but it does not rise to the level of an intentional tort as a matter of law. *See McCarthy v. Sterling Chemicals, Inc.*, 193 Ohio App.3d 164, 2011-Ohio-887, 951 N.E.2d 441, ¶ 13-15 (1st Dist.); *Wadley*, 2007-Ohio-5739, at ¶ 12-23. "[I]n view of the overall purposes of our Worker's Compensation Act, such conduct should not be classified as an 'intentional tort.'" *Wadley* at ¶ 20. Consequently, we overrule Knight's second assignment of error.

VII. Discovery

{¶32} Finally, in his fourth assignment of error, Knight contends that the trial court erred in limiting his request for discovery. The record shows that Knight sought to have P&G disclose information about (1) any complaints of injuries, accidents, or other incidents that occurred before the date of Knight’s accident at any of its plants related to the discharge of chemicals; (2) any injuries caused by the release of chemicals at any P&G plant; and (3) any complaints or notice of ball valves being unclamped or lines being uncapped after the incident.

{¶33} When P&G objected to those requests, Knight filed a motion to compel. The trial court denied the motion, but required P&G to disclose “whether there were any glycerin burn injuries at any P&G facility in the United States over the last ten years.” Knight argues that the information he sought was important to show P&G’s knowledge and intent, and that the court arbitrarily limited the scope of discovery. This assignment of error is not well taken.

{¶34} The trial court has broad discretion to regulate discovery. *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶ 11; *Chomczynski v. Cinna Scientific, Inc.*, 1st Dist. No. C-010170, 2002-Ohio-4605, ¶ 22. Knight’s discovery request was broad and unduly burdensome, and the trial court’s decision to limit the scope of discovery to accidents of a similar type was not so arbitrary, unreasonable or unconscionable as to connote an abuse of discretion. Therefore, we will not disturb it. *See Blakemore v. Blakemore*, 5 Ohio St.3d 217, 218, 450 N.E.2d 1140 (1983); *Cinna* at ¶ 22. We overrule Knight’s fourth assignment of error.

VIII. Summary

{¶35} In sum, we find no issues of material fact. Construing the evidence most strongly in Knight's favor, reasonable minds could come to but one conclusion—that P&G did not act with the intent to injure Knight or with the belief that injury was substantially certain to occur. P&G was entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment in its favor. *See Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267; *Greene*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, at ¶ 23. Consequently, we overrule Knight's four assignments of error and affirm the trial court's judgment.

Judgment affirmed.

CUNNINGHAM, P.J., and **FISCHER, J.**, concur.

Please note:

The court has recorded its own entry this date.