

# COMP CONNECTION

BUGBEE &amp; CONKLE | v15 | JANUARY 2015

## BURDEN OF PROOF REMAINS HIGH TO ESTABLISH PRESUMPTION OF INTENTIONAL TORT

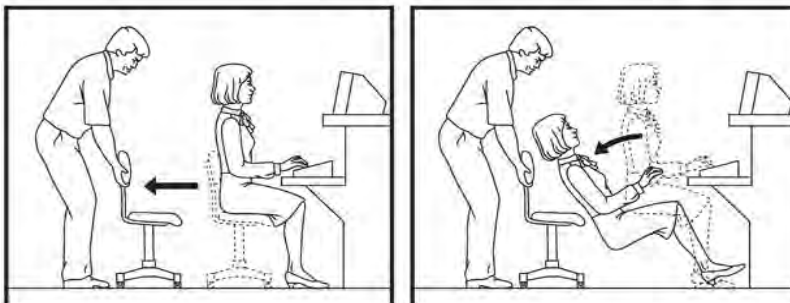
Last month, the Ohio Supreme Court held in [Pixley v. Pro-Pak Industries, 2014-Ohio-5460](#), that an intentional tort claim will fail if there is no evidence the employer deliberately removed an equipment safety guard. Under R.C. 2745.01(C), there is a rebuttable presumption that the employer acted with the intent to injure another if an injury occurs as a direct result of the deliberate removal of an equipment safety guard.

### Background

Pixley, a maintenance worker, suffered a severe degloving injury to his right leg. As he was kneeling in the path of a transfer car, Pixley's leg was pinned between the end of a conveyor line and the car. The safety bumper did not stop the car. After realizing he had struck Pixley, the operator manually stopped the car. Post-accident tests revealed the safety bumpers functioned properly. Pixley filed an intentional tort action against Pro-Pak, alleging Pro-Pak deliberately bypassed the safety bumper, thereby causing Pixley's injury.

In the trial court, Pro-Pak filed for summary judgment on the ground there was no evidence the company deliberately removed an equipment safety guard or otherwise intentionally injured Pixley. Pixley submitted

[Intentional Tort continued on page 2...](#)



"Torts Illustrated"

*"An employer intentional tort claim brought pursuant to R.C. 2745.01 requires proof of the employer's deliberate intent to cause injury to an employee"*

*- Pixley v. Pro-Pak Industries,  
Ohio Supreme Court, 2014-  
Ohio-5460*

### In This Issue

- Intentional Tort Ruling
- Independent Contractor Status
- Bugbee & Conkle's Annual Workers' Compensation Registration

## REGISTER NOW!

Our Free Workers' Compensation Seminar is 6 weeks away. Click [here](#) to register.

The seminar is March 5, 2015 from 12:30-4:30 p.m. at the Hilton Garden Inn, Perrysburg, OH.

This year we will be examining the various legal issues which may arise from an early morning motor vehicle collision. You can read the fact scenario surrounding the collision [here](#).

## Intentional Tort continued...

affidavits of two experts who opined the proximity switch in the safety bumper had been deliberately bypassed causing the safety bumper to be inoperable. The trial court granted summary judgment finding no evidence Pro-Pak had specific intent to harm Pixley or that Pro-Pak deliberately removed an equipment safety guard.

The court of appeals reversed. Relying on expert affidavits, the court of appeals held there was a question of fact whether Pro-Pak deliberately removed an equipment safety guard. The court also held an "equipment safety guard" is a device designed to shield not only the operator, but also any employee from exposure to or injury by a dangerous aspect of the equipment. The Ohio Supreme Court accepted Pro-Pak's discretionary appeal.

### Ohio Supreme Court

Pro-Pak's appeal to the Supreme Court garnered significant interest from both employer and plaintiff advocacy groups. The Ohio Chamber of Commerce, Ohio Self-Insurers Association, Ohio Association of Claimant's Counsel, and Ohio Association for Justice were among the groups filing "friends of the court" briefs.

On December 18, 2014, the Supreme Court issued its decision reversing the court of appeals. The Court held Pixley failed to establish his intentional tort claim because he provided no evidence Pro-Pak deliberately removed an equipment safety guard on the transfer car. Although the experts concluded the proximity switch in the safety bumper must have been bypassed, there was no evidence that Pro-Pak bypassed the switch. Because Pixley failed to establish Pro-Pak deliberately removed an equipment safety guard, the Court found it unnecessary to address whether an equipment safety guard is designed to protect only the operator, as opposed to all employees, for purposes of the rebuttable presumption under the statute.

### Status

On December 29, 2014, Pixley moved the Court for reconsideration. The Court rarely grants motions for reconsideration because the motion must show an obvious error in the court's decision or raise a new issue that was not considered by the Court.



For more information on Intentional Tort see the brief video above

## Independent Contractor Status Determined by Common Law Test

The 10<sup>th</sup> District Court of Appeals held that inde-

pendent contractor status in workers' compensation claims should be determined by the common law test in non-construction cases. In [\*State ex rel. Ugicom Ents., Inc. v. Buehrer\*, 2014-Ohio-4942](#), a company, which provided cable installation had classified its cable line installers as independent contractors and paid premiums to the Bureau accordingly. Pursuant to the Bureau audit, the Bureau determined the installers were employees and retroactively assessed premiums to the company in the amount of almost \$350,000. The Bureau utilized the 20 factor independent contractor test set forth in R.C. 4123.01(A)(1)(c), which applies to construction work. The employer's protest to the Bureau was denied, causing the employer to file a mandamus action in the court of appeals.

The court of appeals determined R.C. 4123.01(A)(1)(c) applies only to construction

contracts. The court wrote: "if the General Assembly had intend-

ed for the twenty factor test to apply to or be considered in non-construction type cases, the legislature would not have limited the application of R.C. 4123.01(A)(1)(c) solely to construction contracts." Because the statute is inapplicable to non-construction cases, the court held the proper test is the common law control test, which weighs who controls the means and manner of the work.

*Ugicom* is an important case for state fund employers in premium disputes before the Bureau, as well as all employers challenging the employer/employee relationship in claim allowances before the Industrial Commission. Generally, the Commission has followed the 20 factor test in R.C. 4123.01(A)(1)(c). If you have any questions regarding independent contractor status in workers' compensation matters, please contact a workers' compensation attorney in our office by clicking [here](#).

If you have any questions concerning any of the topics

in this issue of *Comp Connection*, please contact a member of our

Workers' Compensation practice group at (419) 244-6788.

COMP CONNECTION is not intended to provide legal advice, but is intended as a service to the clients of Bugbee & Conkle, LLP and to alert them to recent developments affecting the employment relationship, with a particular emphasis on the perspective of the employer.

[www.bugbeelawyers.com](http://www.bugbeelawyers.com)