[Cite as *Johnson v. Cincinnati Ins. Co.*, 2013-Ohio-2749.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Delores Johnson, Administrator,	:	
Plaintiff-Appellant,	:	
The Cincinnati Insurance Company,	:	
Intervenor-Plaintiff-Appellee,	:	No. 12AP-966 (C.P.C. No. 11CVC11-13800)
v.	:	(ACCELERATED CALENDAR)
International Masonry, Inc.,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 8, 2013

William W. Johnston, for appellant.

J. Richard Brown; Michael M. Neltner, for appellee The Cincinnati Insurance Company.

Kegler, Brown, Hill & Ritter, Timothy T. Tullis and *Timothy A. Kelley*, for appellee International Masonry, Inc.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} In this employer intentional-tort case, plaintiff-appellant, Delores Johnson ("appellant"), who is administrator of the estate of her husband, Wilbur Lee Johnson, ("Johnson"), appeals from a summary judgment entered by the Franklin County Court of Common Pleas in favor of defendant-appellee, International Masonry, Inc. ("employer") and intervenor plaintiff-appellee, The Cincinnati Insurance Company. Because we conclude that no genuine issue of material fact is present; that the employer was entitled

to judgment as a matter of law; and that the claim of appellee Cincinnati Insurance Company is moot, we affirm.

{¶ 2} Johnson died after a workplace incident that occurred on July 1, 2009. Johnson and two co-workers were installing brick and stone veneers on the exterior of a building. Upon finishing one phase of their assigned masonry work, the workers proceeded to the next section of the building. The workers used scaffolding that had not been secured to the building. Their supervisor had not instructed them to perform work in that area, nor had he told them not to work there. The two surviving workers testified, however, that they believed it was their responsibility to "keep busy," even if they finished their assigned tasks, and that they therefore continued working by installing flashing in the area of the unsecured scaffold. The supervisor had no knowledge that the workers were on the unsecured scaffold and had not approved the scaffold for use prior to the time the workers used it. Within five minutes, the scaffolding collapsed when a corner outrigger bracket, which is designed to support the scaffold platform, gave way. The bracket had been inspected multiple times before the accident, and no problems had been reported or observed with the part.

{¶ 3} Citing extensive precedent, the trial court concluded that, pursuant to R.C. 2745.01, appellant could recover under a theory of employer intentional tort only "when an employer acts with specific intent to cause an injury" and that proof of negligence or even recklessness does not suffice. (Oct. 30, 2012 Entry, 4.) The court noted that there was no dispute that the employer had not assigned Johnson to work on the scaffold that fell. To the contrary, the workers had entered the area on their own initiative. The court acknowledged that the employees had never been specifically advised not to use the scaffold. It further observed that the record is devoid of any evidence demonstrating that the employer knew, or should have known, that the scaffold bracket was defective. The court concluded that the appellant had failed to prove that the employer deliberately intended to cause injury.

{¶ 4} The trial court further found moot any issues relative to insurer's duty to indemnify the employer for claims sounding in employer intentional tort.

{¶ 5} Appellant appeals from the common pleas court's judgment and asserts that the trial court erred in granting summary judgment.[1]

{¶ 6} We review a grant of summary judgment de novo. *Capella III, L.L.C. v. Wilcox,* 190 Ohio App.3d 133, 2010-Ohio-4746, ¶ 16 (10th Dist.), citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State,* 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9 (internal citations omitted). Summary judgment is appropriate where "the moving party demonstrates that (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 party against whom the motion for summary judgment is made." *Capella III* at ¶ 16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6. Therefore, we undertake an independent review to determine whether appellees were entitled to judgment as a matter of law.

{¶ 7} Appellant argues that a genuine question of material fact exists warranting submission of the case to a jury. She contends that the trial court made three inaccurate findings of fact, as discussed below.

{¶ 8} Appellant first suggests that the trial court incorrectly found that the employer instructed its employees to work only in a specific area of the project, that being on a part of the building with a separate scaffold. Appellant notes that Johnson's co-workers testified that no company employee told them they should not use the scaffold that ultimately fell and that their supervisor had not told them that they should not work beyond their assigned area on the building.

{¶ 9} Similarly, appellant disputes the trial court's conclusion that Johnson and his co-workers entered the area of the unsecured scaffolding on their own initiative. She suggests that Johnson's co-workers testified that they were not told not to work in the

[1] Appellant did not expressly state an assignment of error in her brief as mandated by App.R. 16 but, instead, posited a "proposition of law," i.e., that "[a] motion for summary judgment cannot be granted when there is a genuine issue of material fact." It is clear from her brief, however, that appellant believes that the trial court violated that premise in granting the employer's motion for summary judgment. Although not expressly identified as such, we therefore construe appellant's proposition of law as stating an assignment of error that the trial court erred in granting the employer summary judgment in its favor.

area of the scaffold from which they fell, nor were they told to stay off that scaffold, nor were they told to stop working when they finished their express assignment.

{¶ 10} Finally, appellant contends that the evidence established that another company employee, scaffold builder Stephen Tucker, knew that the scaffold was incomplete and that he did not intend for it to be used. Moreover, appellant suggests that Johnson's superviser had expressly told Johnson that there were no safety issues with the scaffold, even though the scaffold had not been released for use at the project.

{¶ 11} In summary, appellant argues that the fact that some of the company's employees knew that the scaffold had not been released for use and did not expressly tell Johnson or his co-workers not to use the scaffold suffices to demonstrate that the employer deliberately intended to harm the three workers. She argues that the employer knew or should have known that there was a dangerous instrumentality or a potential for severe injury and, nevertheless, placed Johnson in a position of risk that led to his death.

{¶ 12} Ohio courts have recognized employer intentional tort as a common law theory of recovery for injured workers in a line of cases beginning with *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St.2d 608 (1982), and including *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90 (1984); *Fyffe v. Jeno's Inc.*, 59 Ohio St.3d 115 (1991); *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624 (1991); and *Johnson v. BP Chems., Inc.*, 85 Ohio St.3d 298 (1999).[2] In 2004, however, the General Assembly enacted R.C. 2745.01, effective April 7, 2005, which 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.

[2] The history and development of the common-law doctrine of employer intentional tort is extensively discussed in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 14-46 and ¶ 78-87.

> (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.
>
> (D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

(Emphasis added.)

{¶ 13} The Supreme Court of Ohio has recognized that "the General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D)." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 56. R.C. 2745.01 thereby restricts recovery for employer intentional torts to cases where the worker proves that the employer deliberately intended to harm the worker. The Supreme Court has expressly upheld the constitutionality of R.C. 2745.01. *Kaminski*; *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029.

{¶ 14} More recently, the Supreme Court of Ohio reaffirmed the authority of the General Assembly to limit claims sounding in employer intentional tort to cases in which the circumstances demonstrate a deliberate intent to cause injury to an employee. *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685. In *Houdek*, the employer instructed an employee to work in a narrow aisle of a warehouse where supervisors knew another employee was operating a piece of equipment known as a sideloader. Houdek was injured when the sideloader pinned him against a scissor lift.

{¶ 15} The Supreme Court held that the employer was entitled to summary judgment on Houdek's employer intentional-tort claim. It rejected Houdek's argument that the deliberate-intent requirement of R.C. 2745.01(A) was satisfied in that the employer had directed Houdek "to work in the aisle with knowledge that injury would be certain or substantially certain to occur." *Id.* at ¶ 9. The company had been warned only

days before the accident that a danger existed to workers in the aisles while sideloaders were also being used in the aisles. That fact did not, however, create a genuine issue of material fact as to whether the employer deliberately intended that Houdek be hurt. *Id.* at ¶ 12. Summary judgment in favor of the employer was therefore justified.

{¶ 16} The Supreme Court reaffirmed in *Houdek* that "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system." *Id.* at ¶ 25. Moreover, even though "the evidence shows that [the employer] may have placed Houdek in a potentially dangerous situation, it does not demonstrate that either management or [the sideloader operator] deliberately intended to injure him." *Id.* at ¶ 26. Houdek's injuries were, instead, the "result of a tragic *accident*, and at most, the evidence show[ed] that this accident may have been avoided had certain precautions been taken." (Emphasis sic.) *Id.* at ¶ 28. Because the evidence did not show deliberate intent to injure Houdek, the employer was not liable for damages resulting from an intentional tort.

{¶ 17} In the case before us, we have reviewed the evidence submitted in support of and in opposition to the employer's motion for summary judgment. We acknowledge that an intent to injure may, in theory, be inferred from the facts and circumstances in a particular case. However, the discrepancies in the testimony identified by appellant in this case, even when construed in favor of the appellant, do not justify the inference that Johnson's employer intended that Johnson be harmed. To the contrary, even when interpreted in a light most favorable to appellant, no more can be inferred from the evidence before the court than that the employer knew, or should have known, that Johnson might extend his work activities on the day of his fall to the area where the unsecured scaffolding was present (even though not affirmatively instructed to do so) and that the employer did not affirmatively tell Johnson or the other two workers to avoid using the scaffolding, although aware that the scaffolding was not ready for use. At most, as in *Houdek*, those circumstances may create a genuine issue of material fact as to negligence or recklessness; they do not as to deliberate intent to harm.

{¶ 18} As in *Houdek,* the trial court in this case did not err by granting summary judgment in favor of the employer. Johnson's employer is entitled to judgment as a

matter of law due to the absence of any genuine issue as to the lack of deliberate employer intent to harm Johnson.

{¶ 19} Accordingly, appellant's assignment of error is not well-taken.

{¶ 20} The trial court's entry of summary judgment to the employer having been affirmed, issues raised by appellee Cincinnati Insurance Company concerning its duty to indemnify the employer, if any, are moot, as correctly observed by the trial court.

{¶ 21} For the foregoing reasons, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).
