[Cite as *Wenner v. Ohio Bldg. Auth.*, 2005-Ohio-6307.]

IN THE COURT OF CLAIMS OF OHIO
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DENNIS WENNER, et al. :

Plaintiffs : CASE NO. 2004-08219
John W. McCormac

v. :

DECISION

OHIO BUILDING AUTHORITY :

Defendant :
: : : : : : : : : : : : : : : : :

{¶ 1} Plaintiffs, Dennis and Rosemary Wenner, brought this action against defendant, the Ohio Building Authority, alleging claims of negligence, intentional infliction of emotional distress, and loss of consortium. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

REVIEW OF EVIDENCE PRESENTED

A. Undisputed Evidence

{¶ 2} 1) At all times pertinent hereto, defendant was in possession, custody or control of the Ocasek State Office Building (Ocasek Building) located in Akron, Ohio, Summit County;

{¶ 3} 2) Defendant maintained and operated a trash compactor as part of its operation of the Ocasek Building. Defendant employed Waste Management, a private corporation, to maintain, service, and empty its trash compactor;

{¶ 4} 3) Plaintiff[1] was employed by Waste Management as a refuse truck driver. As part of his duties, he collected trash at the Ocasek Building five days per week. In order to collect the trash,

[1]For the purposes of this writing, "plaintiff" refers to Dennis Wenner.

a hopper that was connected to the trash compactor had to be uncoupled and moved away so that the hopper could be raised on a power lift, overturned, and emptied into the truck;

{¶ 5} 4) After uncoupling the hopper from the compactor, a side door that allowed trash to pass from the compactor to the hopper had to be dropped to a closed position so that trash would not spill out while the hopper was being raised and emptied into the truck. Once the hopper was emptied, the door had to be returned to the raised position before the two units were re-coupled;

{¶ 6} 5) On September 21, 2001, plaintiff sustained substantial injury to his right thumb while collecting trash at the Ocasek Building. The injury occurred when plaintiff was moving the hopper back into position after emptying it of its contents and the side door of the hopper had been returned to the raised position.

B) Testimony and evidence presented:

{¶ 7} 1) According to plaintiff, in order to position the hopper unit properly, he was required to place his right hand in a channel located toward the top of the unit where the door pivoted and, in so doing, his thumb would naturally curl around the front edge of the hopper where the door rested in its closed position. As plaintiff was guiding the hopper into position, it suddenly slammed shut on his thumb. The injury resulted in the amputation of the first joint of plaintiff's right thumb;

{¶ 8} 2) Plaintiff presented a series of photographs depicting the compactor and hopper units and showing plaintiff moving the hopper into position with his hand located in the channel near the top of the hopper unit. (Plaintiff's Exhibits 1 through 4.) The photographs were taken after plaintiff sustained his injury;

{¶ 9} 3) Plaintiff testified that there were three factors that contributed to his injury: a) the door of the hopper was designed such that it rested in a position that was perpendicular to the hopper opening when raised and there was no retention chain to secure it in place during movement; b) the wheels of the hopper were defective, causing it to make jerking movements as it was guided into position; and c) the bay area where the compactor was located caused a "wind tunnel" effect when the trash was being collected and the bay doors were opened;

{¶ 10} 4) Plaintiff testified that, prior to September 21, 2001, he repeatedly notified security guards on defendant's premises that the trash compactor was in an unsafe condition for its normal use;

{¶ 11} 5) Plaintiff testified that he notified security guards because, other than the bay area of the building where the compactor was located, he had no access to defendant's premises or management personnel. He also stated that there was a different security guard on duty almost every day;

{¶ 12} 6)Plaintiff testified that he notified two of his supervisors at Waste Management of the unsafe condition;

{¶ 13} 7) Plaintiff testified that despite his warnings, which occurred over a six-month period of time, defendant took no action to correct the condition. He further testified that it was only after his injury on September 21, 2001, that defendant installed a retention chain on the side door of the hopper;

{¶ 14} 8) In addition to his own testimony, plaintiff presented the testimony of a qualified safety expert, Daniel E. Gleghorn, Vice President of American Safety and Health Management Consultants, Inc.;

{¶ 15} 9) Gleghorn testified that the lack of a retention chain was the key concern. He stated that had there been a retention chain, none of the other factors cited by plaintiff would have been of any import. Gleghorn opined that the way that plaintiff moved the hopper into position against the compactor was the only way that the job could be performed. He also opined that defendant was negligent in failing to provide a trash hopper with a retention chain;

{¶ 16} 10) In response to plaintiff's claims, defendant called two witnesses; Jim Daymut, General Manager of the Ocasek Building, and Rudy Christian, the head of the Ocasek maintenance department;

{¶ 17} 11) Daymut testified that, from the time he began his employment at the Ocasek Building in 2000, there had always been a retention chain in place on the hopper door. He also testified that when Waste Management supervisors had health or safety concerns about equipment its employees were using, they would contact him and defendant would arrange and pay for correction of the problem. Daymut stated that no problems associated with the compactor/hopper units had ever been brought to his attention by either Waste Management supervisors or the security guards who opened the bay area to allow the Waste Management trucks entrance onto the premises;

{¶ 18} 12) With respect to the change of security guards, Daymut testified that there was very little turnover of personnel in those positions and that there had been no significant change in staff during the time period when plaintiff alleged that he reported the unsafe condition of the trash hopper;

{¶ 19} 13) Christian testified that, since the time he began his employment at the Ocasek Building in 1998, there had always been a retention chain in place on the hopper door. He stated that as part of his duties he was required to uncouple the two units and clean them at least once a month. Christian stated that the way plaintiff guided the hopper into position with his hand in the channel opening was not the only way to perform the task.

{¶ 20} 14) Christian presented a series of photographs depicting the compactor and hopper units and showing the manner in which Christian would move the hopper unit. Christian moved the hopper by gripping a metal bar located along the top, side edge of the unit. (Defendant's Exhibits C through F.) The photographs were taken after plaintiff sustained his injury;

{¶ 21} 15) Both Daymut and Christian testified that other than plaintiff's accident on September 21, 2001, no one that they were aware of had ever been injured while working with the compactor and hopper units.

{¶ 22} Upon review of the evidence, testimony, and arguments of counsel, this court makes the following findings of fact and conclusions of law.

{¶ 23} FINDINGS OF FACT

{¶ 24} 1) The undisputed evidence set forth above is adopted as fact;

{¶ 25} 2) Plaintiff's status on defendant's premises was that of a business invitee;

{¶ 26} 3) Other than plaintiff's own testimony, there was no evidence to support the contention that defendant installed the retention chain on the hopper side door after plaintiff's injury;

{¶ 27} 4) Because none of the photographs offered by either party depicted the condition of the hopper prior to the date of plaintiff's injury, determination of the issue turns on witness credibility;

{¶ 28} 5) The weight of the evidence demonstrates that the retention chain was installed on the hopper door at the time of the accident but that plaintiff did not notice it or chose not to use it;

{¶ 29} 6) There was no corroborating testimony to support the contention that plaintiff repeatedly notified defendant's security guards or that he notified his supervisors of the condition of the trash hopper. The determination of this issue also turns on witness credibility;

{¶ 30} 7) The weight of the evidence demonstrates that defendant was not on notice of any defective or unsafe condition of the trash hopper prior to plaintiff's accident.

CONCLUSIONS OF LAW

{¶ 31} 1) In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77;

{¶ 32} 2) The duty owed by defendant to a business invitee is that of ordinary care. *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 68;

{¶ 33} 3) Defendant exercised ordinary care for the safety of its invitees by providing a retention chain on the trash hopper door. Thus, there was no breach of any duty owed to plaintiff with respect to the safety of equipment he used while on defendant's premises;

{¶ 34} 4) The sole proximate cause of plaintiff's injury was his failure to use the retention chain while guiding the hopper with his hand placed in a vulnerable position;

{¶ 35} 5) Accordingly, plaintiff failed to prove his claim of negligence by a preponderance of the evidence;

{¶ 36} 6) In order to prove a claim of intentional infliction of emotional distress plaintiff must show, among other things, that defendant's agent(s) intended to cause emotional distress or that it was known or should have been known that the actions taken would result in serious and debilitating emotional distress. See *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 375. Given that plaintiff has failed to prove that there was any misconduct on the part of defendant, it follows that he cannot prevail on a claim of intentional misconduct.

{¶ 37} 7) As a result of plaintiff having failed to prove his claims, the derivative claim for loss of consortium asserted by plaintiff Rosemary Wenner must also fail. See *Greenwood v. Delphi Automotive Systems, Inc.*(2003), 257 F.Supp.2d 1047.

{¶ 38} For these reasons, judgment shall be entered in favor of defendant.

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JUDGMENT ENTRY

OHIO BUILDING AUTHORITY :

Defendant :
: : : : : : : : : : : : : : : : :

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
JOHN W. MCCORMAC
Judge

Entry cc:

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