[Cite as *Wilcox v. Paygro Co., Inc.*, 2007-Ohio-315.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

DEBRA WILCOX	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2006 CA 10
v.	:	T.C. NO. 04 CV 274
PAYGRO COMPANY, INC., et al.	:	(Civil Appeal from Common Pleas Court)
Defendants-Appellees	:	
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O P I N I O N

Rendered on the 26th day of January, 2007.

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FAIN, J.

{¶ 1} Plaintiff-appellant Debra Wilcox appeals from a summary judgment rendered against her on her employer-intentional-tort complaint against her employer, Paygro Company, Inc. Wilcox was injured in 1999 while she was inside a palletizer machine, trying to clear a jammed bag, and the machine activated. Wilcox brought this action alleging that her employer committed an intentional

tort against her by directing her to operate the palletizer after an alarm had been de-activated. She contends that the trial court erred by rendering summary judgment against her, because there is a genuine issue of material fact precluding summary judgment. Although the issue is close, we agree. Consequently, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 2} Wilcox testified that on the day she was injured she hit the emergency stop button to stop the palletizer before climbing up and then down into the machine to clear a jam. There is testimony that getting into the palletizer to clear a jam was a common occurrence, sometimes occurring five to fifteen times a day. A reasonable jury could infer that getting into the palletizer to clear a jam was a part of the job that the operators of the machine were required to do. While Wilcox was in the machine clearing the jam, the machine activated, injuring her. She does not know why the machine activated.

{¶ 3} The palletizer came with an alarm that would sound a warning ten to fifteen seconds prior to reactivation when the machine was reactivated after having been shut off by the emergency stop button. That alarm had been disconnected at least ninety days before Wilcox's injury. There is evidence in the record from which a reasonable jury might infer that the management of Paygro was aware that the alarm had been disconnected. This evidence is Wilcox's following deposition testimony:

{¶ 4} "Q. Is there anyone else that works out there that you think will testify that the alarm was unhooked?

{¶ 5} "A. Oh, a lot of people know that alarm was unhooked.

{¶ 6} "Q. Can you name any who knew that?

{¶ 7} "A. I had a conversation with Mark.

{¶ 8} "Q. Mark?

{¶ 9} "A. I had a conversation with Harley about the alarm.

{¶ 10} "Q. West?

{¶ 11} "A. The old foreman, John Certain. We had a conversation. He knew the alarms wasn't hooked up. Other people that got in that machine. There's all kinds of employees.

{¶ 12} "Q. Okay.

{¶ 13} "A. They had taken other machines in the building and because they couldn't unhook them, they stuffed bags up in them so they wouldn't have to listen to them."

{¶ 14} Wilcox testified that if she had heard the alarm, she would have been able to get out of the palletizer before it reactivated, thereby preventing her injury.

{¶ 15} Wilcox brought this action against Paygro, alleging that Paygro committed an employer intentional tort. Paygro moved for summary judgment, contending that the evidence, even when viewed in a light most favorable to Wilcox, establishes that Paygro had not exposed Wilcox to a situation in which injury was substantially certain to occur. The trial court agreed, and rendered summary judgment in favor of Paygro. From the summary judgment rendered against her, Wilcox appeals.

II

{¶ 16} Wilcox's sole assignment of error is as follows:

{¶ 17} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT, AGAINST THE PLAINTIFF IN THAT REASONABLE MINDS COULD CONCLUDE THAT PLAINTIFF'S INJURIES WERE THE RESULT OF AN INTENTIONAL TORT OF HER EMPLOYER AND THERE ARE SPECIFIC FACTS THAT RAISE A GENUINE ISSUE OF A MATERIAL FACT THAT THE EMPLOYER COMMITTED AN INTENTIONAL ACT AND THESE ARE QUESTIONS OF FACT FOR A JURY DETERMINATION."

{¶ 18} "An appellate court reviews an award of summary judgment de novo. (Citations omitted). We apply the same standard as the trial court, viewing the facts in the case in a light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. (Citations omitted).

{¶ 19} "Pursuant to Civil Rule 56(C), summary judgment is proper if '(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, (19996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The non-moving party must then present evidence that some issue of material fact remains for the trial court to resolve. Id."

Doe v. Choices, Inc., Montgomery App. No. 21350, 2006-Ohio-5757.

{¶ 20} The Ohio Supreme Court "first recognized an intentional tort exception to the workers' compensation exclusivity doctrine by allowing employees to bring an intentional tort lawsuit against their employers." *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 484,696 N.E.2d 1044, 1998-Ohio-408. An intentional tort "'is an act committed with the intent to injure another, or committed with the belief that such an injury is substantially certain to occur." Id. "An intentional tort by an employer is defined very narrowly where the employee is covered by Ohio's workers' compensation laws. Worker's compensation laws were implemented to compensate employees for injuries sustained in the workplace." *Spates v. Richard E. Jones & Associates* (July 12, 1995), Montgomery App. No. 15057.

{¶ 21} "In *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 1000, 522 N.E.2d 489, [the Ohio Supreme Court] held that the proof required to establish an intentional tort must be beyond that required to prove negligence or recklessness. Id. at paragraph six of the syllabus. [The Court] set forth a three-part test an employee must satisfy in order to prevail against his or her employer for an intentional tort. Id. at paragraph five of the syllabus. This test was modified in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, where [the Court] held that the employee must prove '(1) knowledge by the employer of the existence of a dangerous process, (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.' Id. at paragraph one of the syllabus." *Hannah*, supra.

{¶ 22} "Where an employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As a probability that the consequences will follow further increases, and the employer knows that the injuries to the employee are certain to result from the process, procedure, or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent." *Fyffe*, at paragraph two of the syllabus.

{¶ 23} "'[E]ven if an injury is foreseeable, and even if it is probable that the injury would occur if one were exposed to the danger enough times, 'there is a difference between probability and substantial certainty.' (Internal citations omitted). * * * Accordingly, an intentional-tort action against an employer is not shown simply because a known risk later blossoms into reality. (Internal citations omitted). Rather, 'the level of risk-exposure [must be] so egregious as to constitute an intentional wrong.'" *Berge v.Columbus Community Cable Access*, 136 Ohio App.3d 281, 309, 736 N.E.2d 517.

{¶ 24} Paygro cites *Miko v. Delphi Chassis* (Jan. 25, 2002), Montgomery App. No. 18940, for the proposition an employer's failure to equip a device – in that case, a forklift – with an audible warning device does not subject employees working near the forklift to a substantial certainty of injury where there is no evidence of prior injuries. In our view, that case is distinguishable. In the first place, that case involved an alleged failure to install a warning device, not the removal of a warning device. Furthermore, there was evidence in that case that no previous injuries had occurred, despite the fact that forklifts had been operated for years without audible warning alarms that would automatically sound upon the forklift being operated in reverse. In the case before us, the evidence

establishes that the palletizer had been operated for at least ninety days after the deactivation of the audible alarm, without accident, but the evidence fails to establish a longer, accident-free period.

{¶ 25} The issue in these cases is not whether an employer has exposed an employee to a substantial certainty of injury on a particular occasion, but whether it has exposed its employees to the substantial certainty of injury occurring at some point over a reasonable period of time. In our view, a reasonable fact finder, construing the evidence in this record in a light most favorable to Wilcox, could find that once the audible alarm signaling the reactivation of the palletizer was disabled, injury was substantially certain to occur to an employee, considering the ever-present danger of reactivation, and the fact that employees were required to hit the emergency stop button to clear a jam in the palletizer five to fifteen times a day. The fact that it could not be predicted on which particular day an unsignaled reactivation would occur does not mean that an unsignaled reactivation during the clearing of a jam was not substantially certain to occur at some time within the reasonable future, after the alarm was disabled, and a tragic injury was the all-but-inevitable consequence.

{¶ 26} In this respect, we conclude that this case is similar to *Moebius v. General Motors Corporation*, 2002-Ohio-3918, Montgomery App. No. 19147, in which a five-second delay was instituted, without the knowledge of the employees operating a production line involving rotating spindles, between the time a safety cord was pulled, and the stopping of the line. An employee, accustomed to the immediacy of the stopping of the line, pulled the cord and reached in to purge a clogged spray paint gun. She was injured by the rotating spindles. As originally designed, the immediate stoppage of the line was a device that employees could use to protect themselves when it became necessary to reach into the production line of rotating spindles to purge a spray paint gun.

Eliminating the immediate stoppage, without informing the employees, removed this safety feature.

{¶ 27} In the case before us, it appears that Wilcox knew that the audible alarm had been disabled. There was nothing she could do about that to protect herself, however. It was a necessary part of her job to clear jams in the palletizer, and she testified that she did not know that she had the authority to cause a supervisor to effect a shutdown of the main power to all the machines in the vicinity, which was apparently her only alternative to relying upon the emergency stop button.

{¶ 28} We view the case before us as also analogous to *Howard v. Jet Corr Classic, Inc.*, 2006-Ohio-415, Clark App. No. 05CA0068, in which we reversed a summary judgment for an employer who required a "catcher" at a band-saw to stand closer to the saw blade. We analogized that case to cases involving removal of a safety device, because the place the catcher had previously been trained to stand was a safe distance away from the blade. The plaintiff in that case presented an expert witness on the issue of substantial certainty that an injury would occur, perhaps to assist the finder of fact on the causal significance of the distance that the catcher was placed from the saw blade. In the case before us, a lay jury could be expected to understand the significance of the disabling of the audible alarm signaling the reactivation of the palletizer for an employee who was in the machine clearing a jam.

{¶ 29} In short, we conclude that when the evidence in this record is viewed in a light most favorable to Wilcox, a reasonable mind might conclude that the disabling of the audible alarm signaling reactivation of the palletizer after its having been deactivated by the emergency stop button exposed an employee in Wilcox's position, who was required to enter the palletizer frequently to clear jams, to the substantial certainty of injury.

{¶ 30} Wilcox's sole assignment of error is sustained.

III

{¶ 31} Wilcox's sole assignment of error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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BROGAN, J., concurs.

DONOVAN, J., dissenting:

{¶ 32} I agree with the trial court that the facts establish that Wilcox's injury was not substantially certain to occur. Wilcox testified that she performed the very task she performed when her injury occurred approximately 25 times before her injury, without incident. She testified that she knew that she could be injured were the machine to be reactivated while she was inside it. I cannot agree that Wilcox's testimony makes clear, as does the majority, that, in the absence of the alarm, there was nothing she could do to protect herself in the event the machine was reactivated while she was inside it. Wilcox testified as follows on the subject:

{¶ 33} "Q. * * * Now, what we're looking at in the exhibit is the walkway. That's what I would refer to as the second level of the palletizer machine, but are you aware of the fact that on the first floor there's a main control switch alarm? It can be completely shut off?

{¶ 34} "A. Yes.

{¶ 35} "Q. And did you know that before you were injured?

{¶ 36} "A. No.

{¶ 37} "Q. Okay.

{¶ 38} "A. Well, I can say that I knew. We wasn't allowed in there. We didn't have the keys. The only people that were allowed in there was Harley and Jay.

{¶ 39} "Q. Okay.

{¶ 40} "A. And we were not allowed to get near that. So I knew they could shut off the main power in there, but we wasn't allowed to do it ourselves.

{¶ 41} * * *

{¶ 42} "Q. Is there anything about how to turn the machine off or how to turn the machine on that you didn't know on November 18th, 1999?

{¶ 43} "A. No.

{¶ 44} * * *

{¶ 45} "Q. * * * And there is, right on the ground floor of the palletizer you were injured on, there's a big control box that has the main switch, isn't there?

{¶ 46} "A. Yes.

{¶ 47} "Q. * * * And if someone were to lock that switch off –

{¶ 48} "A. They couldn't turn it on up there.

{¶ 49} "Q. – you can press all the buttons you want?

{¶ 50} "A. That's right.

{¶ 51} "Q. But if it's shut off, it's shut off?

{¶ 52} "A. That's right.

{¶ 53} "Q. And you've told me you weren't trained, did you know you could do that even though they didn't train you?

{¶ 54} "A. I knew that was the main power to the machines, but I didn't know as an

employee that you could just, we wasn't allowed in them boxes at all. We was not allowed to touch them in no way. There were only a few people that they allowed to get in those boxes.

{¶ 55} "Q. Could you just ask Jay to do it?

{¶ 56} "A. Yes, probably."

{¶ 57} Wilcox knew where the main power switch was, knew that if someone locked it off that the machine could not reactivate, knew who had the authority to lock off the main switch and conceded that she could have asked "Jay" to lock it off.

{¶ 58} I also find the cases upon which the majority relies to be distinguishable from the matter herein. In *Moebius v. General Motors Corp.*, Montgomery App. No. 19147, 2002-Ohio-3918, we determined that "it is arguable that when this safety device was altered to stop after a five-second delay, injury would be substantially certain to occur to those employees who were not educated and trained on the presence of this delay." Moebius placed her hand into a machine that did not stop running as it had in the past, due to the newly instituted delay, of which Moebius was unaware. Unlike in *Moebius*, Wilcox knew that the alarm had been disabled, she knew that she could be injured if the machine were reactivated, and she knew the location of, and who had access to, the main power switch. Further, Moebius' injury occurred immediately, the first time she placed her hand into the machine after her employer added the delay, confirming her injury's substantial certainty. Finally, Moebius' employer added the delay to increase production, while a Paygro employee deactivated the alarm because it annoyed him.

{¶ 59} In *Howard v. Jet Corr Classic, Inc.*, Clark App. No. 05CA0068, 2006-Ohio-415, we determined that the employer acted deliberately in exposing Howard to a greater danger, and that directing the employee to stand close to the saw amounted to the removal of a safety device. Unlike

Howard, Wilcox did not provide the court with expert testimony on the issue of the substantial certainty of her injury. The immediacy of Howard's injury, as in *Moebius*, further confirmed that it was substantially certain to occur. I agree with the majority that a lay jury would indeed understand that the disabling of the alarm is significant. The absence of expert testimony that Paygro acted with intent, and not simply negligence or recklessness, and the absence of expert testimony that Wicox's injury was not merely foreseeable or even probable, but substantially certain to occur, however, distinguishes our decision in *Howard* from the matter herein.

{¶ 60} I agree that directing an untrained employee to place her hands close to a moving blade, and altering the function of a machine without an employee's knowledge, both rise to the level of intentional torts, but I cannot conclude that Paygro's conduct does so. The alarm had been disabled for 90 days without incident, suggesting that Wilcox's injury was arguably foreseeable and perhaps even probable, but not substantially certain to occur.

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