

**IN THE COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
DEFIANCE COUNTY**

**DONALD E. HOWARD**

**PLAINTIFF-APPELLANT**

**CASE NO. 4-04-24**

**-and-**

**TAMELA S. HOWARD**

**PLAINTIFF-APPELLEE**

**v.**

**DAVIDSON-BROWN CORPORATION**

**OPINION**

**DEFENDANT-APPELLEE**

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**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas  
Court**

**JUDGMENT: Judgment Affirmed**

**DATE OF JUDGMENT ENTRY: March 28, 2005**

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**ATTORNEYS:**

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**ROGERS, J.**

{¶ 1} Plaintiff-Appellant, Donald Howard, appeals a judgment of the Defiance County Court of Common Pleas granting summary judgment in favor of Appellee-Defendant, Davidson-Brown Corporation (“D.B.”). On appeal, Howard contends that the trial court erred in granting summary judgment, because there is a genuine issue of material fact. Finding that there is no genuine issue of material fact, we affirm the judgment of the trial court.

{¶ 2} In November and December of 2000, Howard was working on a General Motors Plant jobsite in Defiance, Ohio. Howard was working as an experienced ironworker and was employed by D.B. Howard and the other D.B. employees were working on erecting steel for a building.

{¶ 3} On December 4, 2000, at approximately 3:00 p.m., Howard and the rest of the D.B. crew were beginning to wrap up the job for the day. At that time, the crew was told by Robert Mapes, the crew foreman, that they were to extend the jib of the crane that the men had been using on the job. In the process of extending the jib, Howard and Brian Carder, another crew member, climbed onto

the crane and were standing on the boom, which was approximately thirteen feet in the air. Howard and Carder were on top of the boom to remove and reattach the necessary pins during the jib erection. While standing on the end of the boom, after the pins had been pulled out and the jib was ready to be assembled, Mapes held on to a rope connected to the end of the jib in order to maneuver the jib into place. While Mapes was trying to maneuver the jib into place, the jib swung out and struck a steel column. At that point, the entire crane was dislodged and Howard fell from the top of the boom. As a result of the fall, Howard was injured.

{¶ 4} In November of 2001, Howard filed a complaint against D.B., claiming that D.B. had caused his injuries through an intentional workplace tort.<sup>1</sup> In December of 2002, D.B. filed a motion for summary judgment. In January of 2003, Howard filed his motion in opposition to D.B.'s motion for summary judgment. In August of 2004, the trial court granted D.B.'s motion for summary judgment. It is from this judgment Howard appeals, presenting the following assignments of error for our review.

*Assignment of Error No. 1*

**THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THE TRIAL COURT DID NOT CORRECTLY APPLY THE OHIO ADMINISTRATIVE CODE.**

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<sup>1</sup> We note that Howard's wife filed a similar count for loss of consortium. However, no notice of appeal has been filed on the dismissal of her claim.

*Assignment of Error No. II*

**THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT GRANTED DEFENDANT-APPELLANT'S MOTION FOR SUMMARY JUDGMENT IN ITS JUDGMENT ENTRY DATED AUGUST 26, 2004, ON THE GROUNDS THAT A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER DEFENDANT-APPELLEE COMMITTED AN "INTENTIONAL TORT" WHICH CONSTITUTED THE PROXIMATE CAUSE OF PLAINTIFF-APPELLANT'S INJURIES.**

*Assignment of Error Nos. I & II*

{¶ 5} In the first assignment of error, Howard asserts that the trial court erred in granting summary judgment on the grounds that the trial court did not correctly apply Ohio Administrative Code 4121:1-3-03(J)(1). In the second assignment of error, Howard asserts that the trial court erred in granting D.B.'s motion for summary judgment, because a genuine issue of material fact remained as to whether D.B. had committed an intentional tort. Because both of these assignments of error deal with summary judgment, we will address them together.

*Standard of Review*

{¶ 6} An appellate court reviews a summary judgment order de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.* (1999), 131 Ohio App.3d 172, 175. Accordingly, a reviewing court will not reverse an otherwise correct judgment merely because the lower court utilized different or erroneous reasons as the basis for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib.*

*Co.*, 148 Ohio App.3d 596, 2002-Ohio-3932, at ¶ 25, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Ed.* (1994), 69 Ohio St.3d 217, 222. Summary judgment is appropriate when, looking at the evidence as a whole: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C); *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679, 686-687. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-59.

{¶ 7} The party moving for the summary judgment has the initial burden of producing some evidence which affirmatively demonstrates the lack of a genuine issue of material fact. *State ex rel. Burnes v. Athens City Clerk of Courts* (1998), 83 Ohio St.3d 523, 524; see, also, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; they may not rest on the mere allegations or denials of their pleadings. *Id.*

#### *Workplace Intentional Tort*

{¶ 8} In *Fyffe v. Jenos Inc.* (1991), 59 Ohio St.3d 115, 119, the Ohio Supreme Court held:

**[I]n order to establish ‘intent’ for the purpose of proving the existence of an intentional tort committed by an employer against an employee, the following must be demonstrated: (1) the employer had knowledge of the existence of a dangerous process, procedure, instrumentality, or condition within its business operation; (2) the employer had knowledge that if the employee is subjected by his employment to such danger then harm to the employee will be a substantial certainty; and (3) that the employer, with such knowledge and under such circumstances, did act to require the employee to continue to perform the dangerous task.**

{¶ 9} Additionally, the *Fyffe* Court outlined the proof necessary to establish intent on the part of the employer, stating that:

**To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the 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 the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially 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, the mere knowledge and appreciation of a risk--something short of substantial certainty--is not intent.**

{¶ 10} In the case sub judice, Howard asserts that D.B.’s actions rise to the level of a workplace intentional tort. Upon review of the record, we find that, even when viewing the evidence in the light most favorable to Howard, he is unable to show that D.B.’s actions, or failure to act, rise to such a level.

Specifically, we find that Howard is unable to meet the first, second or third elements of the *Fyffe* test.

{¶ 11} It is clear from the depositions, that Mapes, the crew foreman, did instruct the crew that they needed to erect the jib of the crane. However, it is also clear from the depositions, that Howard was not required to go about the task of erecting the jib in the manner that he did. In his deposition, Howard states that he could have preformed the task of erecting the jib of the crane by using a man lift, which is another piece of machinery that would lift him to the height of the jib, so that he would not have to walk out onto the boom of the crane. Additionally, several other members of the crew, including Brian Carder, Michael Hall, Andrew Jackson and Bob Mapes, all stated that the erection of the jib could be completed from either the man lift or a ladder. Finally, there was testimony that both a man lift as well as several ladders were available on the jobsite.

{¶ 12} Thus, while there is evidence showing that Howard was told to erect the jib, there is no evidence that he was required to perform that act in the manner in which he performed it. As he has himself admitted, there were several alternative ways to perform the task, which would have prevented him from ascending the boom. Based upon the above evidence, we find that even when viewing the evidence in the light most favorable to Howard, he has failed to establish any of the elements of the *Fyffe* test.

{¶ 13} Considering elements one and two together, Howard is, first, required to show that D.B. had knowledge of a dangerous process, procedure, instrumentality or condition within its business. Additionally, Howard must show that with such knowledge, D.B. knew that if an employee were subjected to such dangerous process, procedure, instrumentality or condition, then harm to the employee was substantially certain. As stated above, while knowledge that climbing out on a jib may have risen to such a level, we cannot find that D.B. had knowledge that erecting the jib, in and of itself, was a dangerous process nor that harm was substantially certain to result. Furthermore, based upon the safe alternative available to Howard at the time, we find further support for the finding that the erection of the crane was neither a dangerous process nor substantially certain to result in harm.

{¶ 14} Finally, we note that the Ohio Supreme Court recently held that “the third element of the *Fyffe* test can be satisfied by presenting evidence that raises an inference that the employer, through its actions and policies, required the employee to engage in that dangerous task.” *Gibson v. Drainage Products, Inc.*, 95 Ohio St.3d 171, 2002-Ohio-2008, ¶ 24. Based on the above finding that erecting the jib was not a dangerous task, due to the alternative methods available in this case, the third prong must also fail.

{¶ 15} Furthermore, Howard argues that D.B. should be liable for their failure to provide certain safety equipment. Here, Howard's own deposition provides that he did have the proper safety gear, but that he chose not to wear that safety equipment when performing this task. Additionally, there is no evidence that Howard was directed to work without using his safety equipment. Finally, there is no evidence that erecting the jib in one of the safer, alternative methods would have required such safety equipment. Therefore, based on the fact that in this case there were ample, alternative methods for performing the task, which would not have required Howard to utilize his safety equipment, we find that Howard's argument is without merit.

{¶ 16} Thus, having found that Howard is unable to establish the first, second or third elements of the *Fyffe* test, we find that Howard's claim must fail. As such, the second assignment of error is overruled.

{¶ 17} In the first assignment of error, Howard asserts that the trial court erred in granting summary judgment on the grounds that the trial court did not correctly apply Ohio Administrative Code 4121:1-3-03(J)(1).

{¶ 18} Ohio Administrative Code 4121:1-3-03(J)(1) requires that "[l]ifelines, safety belts or harnesses and lanyards shall be provided by the employer, and [that] it shall be the responsibility of the employee to wear such

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equipment when \* \* \* exposed to hazards of falling \* \* \* more than six (6) feet above the ground \* \* \*.”<sup>2</sup>

{¶ 19} According to Howard, D.B. failed to provide lifelines, which were required under the above code section. Furthermore, Howard argues that pursuant to *Slack v. Henry* (Dec. 1, 2000), 4th Dist. No. 00 CA 2704, unreported, the failure to comply with a safety regulation is relevant in showing that an employer required an employee to perform a dangerous task and that the employer had sufficient knowledge that such a task was substantially certain to cause injury. In other words, Howard claims that D.B.’s failure to comply with the Ohio Administrative Code section 4121.1-3-03(J)(1) raises an issue of fact under the first two elements of the workplace intentional tort standard.

{¶ 20} Based on our finding that Howard had alternative methods of performing the task, which would not have required the use of such safety equipment, we find it unnecessary to consider this issue. Accordingly, the first assignment of error is overruled.

{¶ 21} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

***Judgment Affirmed.***

**BRYANT and SHAW, J.J., concur.**  
/jlr

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<sup>2</sup> While Ohio Administrative Code 4121:1-3-03(J)(1) was in effect at the time of Howard’s accident, it has since been repealed and re-numbered as 4123:1-3-03(J)(1), effective November 1, 2003.

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