

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

LISLE WENDEL, ET AL.,

PLAINTIFFS-APPELLANTS,

CASE NO. 2-08-19

v.

OMNI MANUFACTURING, INC.,
ET AL.,

OPINION

DEFENDANTS-APPELLEES.

Appeal from Auglaize County Common Pleas Court
Trial Court No. 2008-CV-19

Judgment Affirmed

Date of Decision: March 2, 2009

APPEARANCES:

Kevin J. Boissoneault for Appellants

Timothy C. James and Timothy E. Cowans for Appellee,
Omni Manufacturing, Inc.

WILLAMOWSKI, J.

{¶1} Plaintiff-appellant Lisle Wendel (“Wendel”) brings this appeal from the judgment of the Court of Common Pleas of Auglaize County granting summary judgment to defendant-appellee Omni Mfg., Inc. (“Omni”). For the reasons set forth below, the judgment is affirmed.

{¶2} On January 13, 2006, Wendel was employed by Omni. Wendel was directed by his supervisor, Gerald Freewalt (“Freewalt”) to adjust the CAM drive gear which is located on the top of a 500 ton stamping press being rebuilt by Omni. Wendel claims that he observed the power switch for the press to be in the “off” position before going on top of the press to perform the repair. While Wendel was working on the press, Freewalt and another employee, Mark Kuhr (“Kuhr”), had a discussion concerning the press. The power switch was activated and the motor start button on the control panel was engaged. Wendel was pulled into the flywheel of the press and suffered serious injuries.

{¶3} On January 11, 2008, Wendel filed a complaint alleging an employer intentional tort against Omni. Omni filed its answer on February 11, 2008. Omni then filed a motion for summary judgment on July 24, 2008. On October 10, 2008, the depositions of Ronald Snider (“Snider”), Kuhr, and Freewalt were filed. Wendel also filed its memorandum contra the motion for summary judgment on that same day. On October 20, 2008, the trial court granted Omni’s motion for

summary judgment. Wendel appeals from this judgment and raises the following assignment of error.

The trial court erred by granting summary judgment where there remain genuine issues of material fact in dispute, where the moving party failed to prove it was entitled to judgment as a matter of law and by failing to examine the evidence in the light most favorable to the non-moving party.

{¶4} When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408, 672 N.E.2d 245. “Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issues 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 the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.” *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589, 639 N.E.2d 1189. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks, supra*.

{¶5} This case involves a claim for an employer’s intentional tort.

(A) In an action brought against an employer by an 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.

R.C. 2745.01. This court has addressed the issue of what constitutes a deliberate intent and substantial certainty since the April 7, 2005, effective date of the current version of the statute, which was in effect when the incident at issue here occurred. In *Klaus v. United Equity, Inc.*, Klaus was injured while replacing shear bolts on an auger. 3d Dist. No. 1-07-63, 2008-Ohio-1344. Although the company had a written lock-out/tag-out procedure, Klaus did not receive the policy. *Id.* Before making the replacement, Klaus turned off the power and asked another employee to keep an eye on the switch. *Id.* Klaus then proceeded to make the repair. While Klaus was doing this, another employee, thinking Klaus was done, turned on the power to the auger which caused serious injury to Klaus. *Id.* Klaus subsequently filed a complaint alleging an employer intentional tort. *Id.* The trial court granted summary judgment to United Equity and Klaus appealed to this court. *Id.*

{¶6} Upon review of the standard to establish an employer intentional tort, this court held as follows.

To establish an employer-employee intentional tort, plaintiff must show: (1) the employer has knowledge of a dangerous process, procedure, instrumentality or condition within its business operation; (2) the employer knows 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. * * * These elements are collectively referred to as the *Fyffe* elements.

Id. at ¶17.

{¶7} The first prong to be satisfied is whether the employer had knowledge of the dangerous condition.

The availability and use of safety features is part of the analysis in determining whether a dangerous condition existed. * * * The use of safety features demonstrates an appreciation of the potential for danger and an effort to avoid harm to employees.

Moore v. Ohio Valley Coal Co., 7th Dist. No. 05 BE 3, 2007-Ohio-1123, ¶27 (citations omitted). “An employer simply cannot be held to know that a dangerous condition exists and that harm is substantially certain to occur when he has taken measures that would have prevented the injury altogether had they been followed.” *Robinson v. Icarus Indus. Constructing & Painting Co.*, 145 Ohio App.3d 256, 262, 2001-Ohio-2207, 762 N.E.2d 463.

{¶8} In *Robinson*, the employee was an experienced commercial painter assigned to paint bridges. Id. The employee was trained in using fall protection gear, which was issued to him, and signed the mission statement that he had received the training. Id. On September 12, 1994, the employee was not wearing his safety equipment and fell from scaffolding to his death. Id. His estate brought

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a claim for an employer intentional tort. Id. This court held that since the employer supplied the employee with safety gear and trained the employee in its use, the employer was not at fault when the employee was tragically killed when he chose not to use the safety equipment. Id.

{¶9} Here, the facts are fairly straightforward. Wendel was ordered to work on top of the press. He admits that he was trained in the lockout/tagout procedures and that he had the tags and locks supplied to him by Omni. The policy provides in pertinent part as follows.

To meet OSHA requirements and provide equipment capable of being locked out effectively and safely, controls that can accept locks and lockout devices must be installed, as needed, whenever:

New equipment is purchased and installed

Existing equipment is rebuilt or undergoes modification

* * *

This policy applies to production machinery, auxiliary equipment, and any other devices or machines that must be locked out during servicing or repair to prevent accidental machine movement or start up that could injure employees.

Policy, 3. In addition the policy provides as follows.

Locks are to be used on all equipment that is capable of being locked out. Tags only serve as a warning to others that the equipment is being repaired or serviced and does not provide the full protection of being locked out. Extra safety precautions (such as removing the control fuse) must be taken when only tagout procedures are used.

A combination of lockout/tagout must be used whenever possible. * * *

Each person working on the equipment must apply their own personal lock or tag to the energy control devices.

Policy, 7.

{¶10} When Wendel went up on the press he checked and saw the power panel was off. However, Wendel did not follow the lockout/tagout procedures. He did not apply his locks or even tag the machine and take the extra caution of removing the fuse from the control panel. Wendel then went up on the press and used the safety harness supplied by Omni. However, for convenience sake, Wendel chose to attach the harness to the fly wheel rather than the overhead safety bar because his movement was not as limited. While Wendel was working on the press, another employee turned on the machine and then Kuhr activated it. Kuhr turned it off when Freewalt immediately told him that Wendel may be on the machine, but by then the flywheel had pulled Wendel's leg into the machinery because the harness was attached to it. Although this court is mindful of the serious injury which Wendel suffered, a review of the evidence viewed in a light most favorable to Wendel leads us to one conclusion: Wendel himself placed himself in danger by not following the proper safety procedures. This was a choice made by Wendel, not a requirement of employment. Thus, Wendel cannot recover for an employer intentional tort. The assignment of error is overruled.

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{¶11} The judgment of the Court of Common Pleas of Auglaize County is affirmed.

Judgment Affirmed

ROGERS and SHAW, J.J., concur.

/jlr