[Cite as *Woodrum v. Glassfloss Industries, Inc.*, 2004-Ohio-577.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBERT WOODRUM

Plaintiff-Appellant

-vs-

GLASSFLOSS INDUSTRIES, INC.

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. John W. Wise, J.
Hon. John F. Boggins, J.

Case No. 03CA42

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Court of Common Pleas, Case No. 02CV45
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 4, 2004

APPEARANCES:

For Plaintiff-Appellant

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Hoffman, P.J.

{¶1} Plaintiff-appellant Robert Woodrum appeals the May 2, 2003 Judgment Entry entered by the Fairfield County Court of Common Pleas, granting summary judgment in favor of defendant-appellee Glassfloss Industries, Inc. ("Glassfloss").

STATEMENT OF THE FACTS AND CASE

{¶2} In 1999, Glassfloss hired appellant as the second shift manager, overseeing all aspects of second shift operations at its Lancaster, Ohio facility. Appellant's responsibilities included supervision of twenty-five employees on his shift, determining how or if customer orders left by the first shift were to be completed and filling in for absent employees when necessary. As plant manager, appellant was responsible for taking machines out of service, if he felt they were in need of repair or unsafe for use.

{¶3} On January 18, 2001, appellant assisted his department in set up and starting operations with the guillotine cutter machine, one of two identical cutters in the Lancaster plant. The machine was used to cut cardboard in the production of specialty air filters. Prior to beginning the shift, appellant was informed a particular job had to be completed prior to the end of the second shift, requiring the use of the guillotine cutter. Appellant advised two first shift maintenance department employees, James Sparks and Paul Queen, he believed one of the guillotine cutter machines was not working properly. The maintenance employees advised appellant they would examine it the next morning upon returning to work. Despite his report to maintenance, appellant continued to use the machine in need of repair. Shortly after appellant began operating the machine, it malfunctioned and "double cycled" severing appellant's second, third, and fourth fingers.

{¶4} On January 17, 2002, appellant filed a Complaint for intentional tort against Glassfloss in the Fairfield County Court of Common Pleas. Glassfloss filed a Motion for Summary Judgment on October 15, 2002. On October 31, 2002, appellant filed a memorandum contra. Glassfloss filed a reply memorandum on December 16, 2002. Via Judgment Entry filed May 2, 2003, the trial court granted summary judgment in favor of Glassfloss, finding appellant could not establish Glassfloss knew with a substantial certainty appellant would be harmed. It is from this judgment entry appellant now appeals raising the following as assignments of error:

{¶5} "I. THE FAIRFIELD COUNTY COMMON PLEAS COURT ERRED BY GRANTING SUMMARY JUDGMENT WHEN GENUINE ISSUE OF MATERIAL FACT EXISTED.

{¶6} "II. THE FAIRFIELD COUNTY COMMON PLEAS COURT ERRED BY FAILING TO STATE THE REASONS FOR ITS ACTIONS ON THE RECORD AND THUS DID NOT COMPLY WITH ITS OBLIGATION UNDER CIV. R. 50(E) TO STATE IN WRITING THE BASIS FOR ITS DECISION.

{¶7} "III. THE FAIRFIELD COUNTY COMMON PLEAS COURT ERRED BY MISTAKENLY APPLYING THE LAW IN ANALYZING THE THREE-PRONGED TEST THAT AN EMPLOYEE MUST SATISFY IN ORDER TO PREVAIL AGAINST AN EMPLOYER FOR AN INTENTIONAL TORT."

I, III

{¶8} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36.

{¶9} Civ.R. 56(C) states, in pertinent part:

{¶10} "Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, 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....A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that 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, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶11} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280.

{¶12} It is based upon this standard we review appellants assignments of error.

{¶13} Appellant's first and third assignments of error raise common and interrelated issues; therefore, we will address the assignments together.

{¶14} In *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, the Ohio Supreme Court set forth a three part test to establish an employer intentional tort. First, the employee must prove the employer had knowledge of the existence of a dangerous process, procedure, instrumentality, or condition within its business operation. Id. Second, the employer must have knowledge if the employee is subjected by the employment to such dangerous process, procedure, instrumentality, or condition, then harm to the employee will be a substantial certainty. Id. Third, the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. Id. The substantial certainty standard in an employer intentional tort cause of action is "a significantly higher standard than even gross negligence or wantonness." *Zink v. Owens-Corning Fiberglas Corp.* (1989), 65 Ohio App.3d 637. The mere knowledge and appreciation of a risk or hazard, something short of substantial certainty, is not intent.

{¶15} Assuming, *arguendo,* the machine presented a dangerous condition, appellant has not presented sufficient evidence to satisfy the second prong of the *Fyffe* test. Appellant, in his role of shift manager, possessed the best, most current information about the cutter's condition and yet necessarily determined the machine was safe for use notwithstanding his report to maintenance. He had the authority to take the machine out of service, if he determined it needed repair or was unsafe to operate. Accordingly, knowledge cannot be imputed to Glassfloss of harm substantially certain to occur, where appellant himself had the authority to discontinue use of the machine, but chose to proceed. It would seem axiomatic appellant would not have chosen to put himself in harm's way if he was substantially certain he would be injured.

{¶16} Accordingly, appellant is unable to establish Glassfloss knew with substantial certainty appellant would be harmed while operating the machine. Because appellant cannot establish all three prongs of the *Fyffe* test, we find the trial court did not err in granting summary judgment in favor of Glassfloss. Due to our finding of the failure to satisfy the second prong of the *Fyffe* requirements, we find it unnecessary to address appellant's arguments regarding the first and third requirements.

{¶17} Appellant's first and third assignments of error are overruled.

II

{¶18} Appellant further maintains the trial court erred in failing to state the reasons for its actions on the record and, thus, did not comply with its Civil Rule 50(E) obligation to state in writing the basis for its decision.

{¶19} Specifically, appellant asserts Civil Rule 50 requires the trial court provide the basis for its determinations. However, Civil Rule 50(E) reads:

{¶20} Statement of basis of decision.

{¶21} When in a jury trial a court directs a verdict or grants judgment without or contrary to the verdict of the jury, the court shall state the basis for its decision in writing prior to or simultaneous with the entry of judgment. Such statement may be dictated into the record or included in the entry of judgment.

{¶22} Rule 50 does not apply to motions for summary judgment. Accordingly, appellant's argument is misplaced.

{¶23} Appellant's second assignment of error is overruled.

{¶24} The May 2, 2003 Judgment Entry of the Fairfield County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Wise, J. and

Boggins, J. concur