[Cite as *Harris v. Benjamin Steel Co., Inc.*, 2015-Ohio-1499.]

COURT OF APPEALS RICHLAND
COUNTY, OHIO FIFTH
APPELLATE DISTRICT

ROOSEVELT HARRIS, et al.

Plaintiffs-Appellants

-vs-

BENJAMIN STEEL COMPANY, INC.

Defendant-Appellee

JUDGES:
Hon. John W. Wise, P. J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 14 CA 96

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 2013 CV 1025

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 20, 2015

APPEARANCES:

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Wise, P. J.

{¶1} Appellants Roosevelt and Margaret Harris appeal from the decision of the Court of Common Pleas, Richland County, which granted summary judgment in favor of Appellee Benjamin Steel Company, Inc. on Appellants' employer intentional tort claim.

STATEMENT OF THE FACTS AND CASE

{¶2} This case arises from an employer intentional tort action brought by Appellants Roosevelt Harris and his wife Margaret Harris against Appellee Benjamin Steel Company, Inc. The matter involved catastrophic personal injuries sustained by Appellant employee, Roosevelt Harris, on May 7, 2012, while working in the course and scope of his employment with Appellee employer, Benjamin Steel Company, Inc.

{¶3} The facts described herein are not in dispute:

{¶4} Benjamin Steel is a steel supplier headquartered in Springfield, Ohio, with warehouses and processing facilities in Springfield, Dayton, Mansfield, and Lima. Benjamin Steel's Mansfield facility consists of two buildings that are connected by a large overhead door that is large enough to drive a truck through. Each building has dedicated warehouse space where steel inventory is received on a daily basis, stored, maintained, and eventually transferred to customers or other Benjamin Steel locations.

{¶5} Roosevelt Harris worked for Benjamin Steel as a Warehouseman at the Mansfield location for approximately 18 years. As a Warehouseman, Harris was responsible for loading and unloading steel products on and off trucks, operating overhead cranes, forklifts, and grinders, managing inventory, storing steel product in the warehouse, and filling orders for customer shipments and shipments to oilier

Benjamin Steel facilities. As a first shift warehouse employee, Harris typically started his day pulling transfers in Building One until the shipments of new inventory arrived

mid-morning in Building Two. He would then unload the newly received inventory from the delivery trucks and stock that inventory in the warehouses. In the afternoons, Harris typically pulled inventory to fill transfer orders that were shipped to the Springfield facility.

{¶6} Warehouse employees are responsible for moving and re-arranging existing inventory within the warehouse in order to make room for the new shipments that are received daily.

{¶7} Both sides agree that Harris was an experienced and valued employee who was instrumental in the training of new employees. For more than ten (10) years, Benjamin Steel routinely placed new warehouse employees with Harris for on-the-job training before permitting them to work on their own.

{¶8} During his 18 years of employment in the warehouse, Harris never had a workplace accident, and no steel product that Harris ever unloaded and stacked had ever fallen, or caused an injury, until the accident that occurred on May 7, 2012. The accident that caused Harris' injuries was the first and only accident of that nature that Benjamin Steel had ever experienced in its 40-year corporate history.

{¶9} On the day of the accident, May 7, 2012, Harris, with the assistance of his co-workers, unloaded a mill truck of steel that had arrived at approximately 9:00 a.m. that morning. From that truck, Harris unloaded three (3) bundles of steel tubing and placed them in a single stack at the end of the row on the South side of Building Two, Bay 4. The first bundle contained 100 pieces of 1½ " square tubing measuring 24 feet long, 15" wide and 5" tall. This bundle weighed approximately 5,400 lbs. The second bundle contained 36 pieces of rectangular tubing measuring 21 feet long, 15" wide and 9" tall with a weight of approximately 3,266 lbs. The third bundle also contained 36 pieces of rectangular tubing, with the same dimensions and weight as the second

bundle. The steel bundles arrived already bound together with several 1¼" steel bands wrapped around each bundle.

{¶10} Later that afternoon, while Harris was assisting in chaining down Benjamin Steel's delivery truck loaded with steel product headed to another Benjamin Steel facility, two bundles of steel, each weighing over five thousand (5,000) pounds, fell on Harris' legs, and trapped him under a delivery truck. Workers scrambled to use the crane to lift enough of the steel off Harris to enable other co-workers to pull him under and through the undercarriage of the truck, and he was then taken to the local medical facility. (Hayes Depo. at 29). Harris subsequently suffered, among other injuries, bilateral leg amputations, one above, and one below each knee.

{¶11} During his deposition, Harris provided a detailed account of the process that he followed when unloading the mill truck on May 7, 2012. He testified that he had cleared an area in building 2, bay 4, due to the arrival of another mill truck loaded with steel. He testified that when the truck came into the building that morning, he went to the office, "because we had no cribbage, or whatever you want to call it, wood to lay the material down. We didn't have any. I went to the supervisor. I went to the superintendent. I told our safety man ... But they was always just telling me to stack it, stack it, stack it." (Harris Depo. at 39-44). Harris testified that the warehouse was “Full. Full. Everything was already leaning high. We had a lot of stuff in there." (Harris Depo. at 44). Harris testified that "they would say you gotta get that stuff in there. And I'm just only going to do my job because I'm not going to lose my job, so I'm putting it in there to the best of my ability as safely as I can. That's all I can say." (Harris Depo. at 55-56).

{¶12} In his deposition, Harris explained the unloading and stacking process:

Q: Okay. Did you place the cribbage wood under the first bundle of the stack?

A: Yeah. The one that went to the floor?

Q: Yes.

A: Yes, I helped to do that. I made sure that they were even.

Q: Okay. And then you would ensure that they were even. Did you feel that the first bundle that was placed was stable

A: Yes.

Q: Okay. And then did you assist them in placing the second bundle?

A: I was there, because I had to come with the crane and lower it down.

Q: Okay. This was the hand operated crane?

A: Hand control.

Q: So are you standing on the ground?

A: Yeah. I am coming off the truck and I'm probably right there beside the bundle and the other guy is standing on top of the- another bundle on some stuff. When I lay the bundle down, there's another guy standing on top of another bundle to unhook the chains and to hook them back up. Then I take the chain back to the truck and get another bundle.

Q: So when you say you're on the truck, you're on the truck you're unloading.

A: Yeah, I'm on the truck -

Q: The flatbed truck that brought the steel in.

A: Right. I climb the ladder, hook a bundle up, come back down, lay it down where they got the wood. Sometime they might have already had the wood laying out there, but they was getting it ready for me when I come back. Every time we did lay a bundle down we shook it.

Q: Okay. So you shook the first bundle that you placed.

A: All of them.

Q: Then you place cribbage in between the first bundle and the second bundle?

A: Yes.

Q: Okay. And you were confident that that was stable?

A: Yes.

Q: Was the cribbage wood even?

A: Yes, it was even.

Q: And then you laid the second bundle on top of the first.

A: Yes.

Q: And you shook it?

A: We shook it again.

Q: Did you shake it personally?

A: Yes. Right there.

Q: Teddy Rigsby, did he shake it?

A: Teddy was on top of it. You know, then when you taking the chains off the bundle, Teddy was standing on top of it like this, take the chains off, click, click, had to get off of it so I can come back with the crane. So it was sturdy. It hold him.

Q: Okay. And then did you assist with placing the cribbage wood between bundle two and bundle three?

A: Yes.

Q: Okay. Was it even?

A: Yes.

Q: Okay. Was it just like the others that you had stacked previously in the

past?

A: Yes.

Q: There was nothing different about this stack so far?

A: Nothing different.

Q: Okay. And then you then operated the crane to move the third bundle onto the stack, correct?

A: Yes.

Q: Okay. Then you went over and shook it?

A: Yes sir.

Q: And when I say shake it, you actually-

A: We shake it.

* * *

Q: Okay. So regardless of how many were stacked, whether it was three or four, the process was the same for each successive bundle. When you put the third one on, you shook it.

A: Yes.

Q: Then you placed cribbage- you would have placed cribbage between three and four if there was a fourth stack?

A: Yes.

* * *

Q: Okay. So once this was actually stacked, there was nothing in there- nothing gave you reason to believe that it was unstable or would fall.

A: No, sir.

Q: It was stacked like every other stack you had stacked in the last 18 years.

A: Like every other stack that I had ever stacked.

Q: For the 18 years you worked.

A: Yes, sir.

Q: Okay. In fact, you were in front of it when you were unloading the shuttle truck to Springfield when it fell obviously, correct?

A: Yeah. I had my back turned. It was stacked up there in the back of me. It was in the back of me like that and it fell. I went up under the truck like that.

Q: But when you were between the truck and that bundle, you had no concerns it was going to fall on you.

A: Didn't think it was, no.

{¶13} As to the specific place where the steel was stacked, some of which eventually fell, Harris testified that, "That's the place we've been sitting it for years. That wasn't just the first time. So don't say I thought it was a good place. We had been sitting it here ... Everybody in the building moves stuff. So even when I put stuff there, that morning, you could have came along and moved something .... and I never knew you moved it." (Harris Depo. at 56-57).

{¶14} Specifically with respect to the actual unloading of the steel which fell over, Harris testified that, "I might have been running the crane. They had other people, new people there. I can't remember who was laying the wood down, or whatever. There was other guys there too. I don't know who laid wood down or how it really occurred, whatever ... I might have helped put some, but other people was putting some too." (Harris Depo. at 62-63). As to directing others, Harris stated: "No. Because I was up on the truck. I hardly couldn't direct. Nope." (Harris Depo. at 63).

{¶15} On September 18, 2013, Roosevelt Harris and Margaret Harris, filed a Complaint in the Richland County Common Pleas Court raising claims for employer

intentional tort brought pursuant to R.C. §2745.01, loss of consortium by former spouse, Margaret Harris, and punitive damages.

{¶16} On October 18, 2013, Appellee employer, Benjamin Steel Company, Inc. filed its Answer.

{¶17} On September 11, 2014, Appellee filed a Motion for Summary Judgment as to all claims brought by Appellants. On September 29, 2014, Appellants filed their Brief in Opposition to the Motion for Summary Judgment. A Reply Brief was filed by Appellee on October 9, 2014.

{¶18} On November 24, 2014, the trial court granted Appellee's Motion for Summary Judgment, and entered an order, journalized on November 25, 2014, dismissing all claims of Appellants

{¶19} Appellants now appeal, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶20} "I. THE TRIAL COURT ERRED IN GRANTING APPELLEE BENJAMIN STEEL COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT AS GENUINE ISSUES OF MATERIAL FACT EXIST FROM WHICH REASONABLE MINDS COULD CONCLUDE THAT BENJAMIN STEEL ACTED WITH THE REQUISITE INTENT TO INJURE, OR WITH THE BELIEF THAT INJURY WAS SUBSTANTIALLY CERTAIN TO OCCUR, PURSUANT TO R.C. §2745.01. APPELLEE IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW."

STANDARD OF REVIEW - SUMMARY JUDGMENT

{¶21} Our standard of review is de novo, and as an appellate court, we must stand in the shoes of the trial court and review summary judgment on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987).

{¶22} Civil Rule 56(C) states in part:

{¶23} "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."

{¶24} Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 604 N.E.2d 138(1992).

{¶25} The party seeking 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 that 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*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), *citing Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶26} This appeal shall be considered in accordance with the aforementioned rules.

I.

{¶27} In their sole Assignment of Error, Appellants argue that the trial court erred in granting summary judgment in favor of Appellee on his employer intentional tort claim. We disagree.

{¶28} An intentional tort involves an act committed with the specific intent to injure or with the belief that injury is substantially certain to occur. *Jones v. VIP Dev. Co.,* 15 Ohio St.3d 90, 95, 472 N.E.2d 1046 (1984), citing 1 Restatement of the Law 2d, Torts, Section 8A (1965). When the employer proceeds despite knowledge that injuries are certain or substantially certain to result, "he is treated by the law as if he had in fact desired to produce the result." *Fyffe v. Jeno's, Inc.,* 59 Ohio St.3d 115, 118, 570 N.E.2d 1108 (1991). Under *Fyffe,* an employee could establish intent based on substantial certainty by demonstrating the following:

> (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (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*.

{¶29} R.C. §2745.01, which now governs employer intentional torts in Ohio, took effect on April 7, 2005, and provides as follows:

> (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.
>
> (C) Deliberate removal by an employer of an equipment safety guard * * * creates a rebuttable presumption that the removal * * * was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

{¶30} As defined by R.C. §2745.01(B), "substantially certain" means that an "employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." Acting with the belief that an injury is "substantially certain" to occur is not analogous to wanton misconduct, nor is it "enough to show that the employer was merely negligent, or even reckless." *Talik v. Fed. Marine Terminals, Inc.,* 117 Ohio St.3d 496, 2008-Ohio-937, 885 N.E.2d 204, ¶ 17; *Weimerskirch v. Coakley,* 10th Dist. Franklin No. 07AP–952, 2008-Ohio-1681, 2008 WL 928396, ¶ 8.

{¶31} Rather, as noted by the Ohio Supreme Court, one may recover "for employer intentional torts only when an employer acts with specific intent to cause an injury." *Kaminski v. Metal Wire Prods. Co.,* 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 56; *Houdek v. ThyssenKrupp Materials N.A., Inc.,* 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 25 (finding "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system").

{¶32} As noted by the court in *Kaminski v. Metal & Wire Products,* 175 Ohio App.3d 227, 2008-Ohio-1521, 886 N.E.2d 262, "R.C. 2745.01 codifies the common-law employer intentional tort and makes its remedy an employee's sole recourse for an employer intentional tort." *Id.* at paragraph 14.

{¶33} As further explained by the Ohio Supreme Court in *Hoyle v. DTJ Ents., Inc*., ___N.E.3d _____, 2015 WL 1244560, 2015-Ohio-843:

> R.C. 2745.01(A) incorporates the definition of an employer intentional tort from *Jones,* 15 Ohio St.3d at 95, 472 N.E.2d 1046, and requires a plaintiff to prove either deliberate intent to injure or a belief that injury was substantially certain. But R.C. 2745.01(B) equates "substantially certain" with "deliberate intent" to injure. Thus, the " 'two options of proof [under R.C. 2745.01(A)] become: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure.' " *Kaminski* at ¶ 55, quoting *Kaminski v. Metal & Wire Prods. Co.,* 175 Ohio App.3d 227, 2008-Ohio-1521, 886 N.E.2d 262, ¶ 31 (7th Dist.). "[W]hat appears at first glance as two distinct bases for liability is revealed on closer examination to be one and the same." *Rudisill v. Ford Motor Co.,* 709 F.3d 595, 602–603 (6th Cir.2013) (describing R.C. 2745.01 as "a statute at war with itself").
>
> The General Assembly's intent in enacting R.C. 2745.01 was to "significantly restrict" recovery for employer intentional torts to situations in which the employer "acts with specific intent to cause an injury." *Kaminski* at ¶ 57; *Stetter v. R.J. Corman Derailment Servs., L.L.C.,* 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 26, citing *Kaminski* at ¶ 56. "[A]bsent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system." *Houdek v. ThyssenKrupp Materials N.A., Inc.,* 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 2

{¶34} The Supreme Court further found in *Houdek, supra,* that, in the absence of deliberate removal (of a safety guard), a plaintiff must establish that the employer acted with specific intent to injure him. In *Houdek,* the Court rejected the argument that the intent inquiry was an objective one satisfied by an employer's mere knowledge of a hazardous condition, as such would be covered by workers' compensation. *See Broyles v. Kasper Machine Co.,* 6th Cir. No. 12–3464, 2013 WL 827713 (March 7, 2013). Even if an employer places an employee in a potentially dangerous situation, there must also be evidence that either management or the supervisor deliberately intended to injure the employee for R.C. 2745.01(C) to apply. *Houdek,* 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253.

{¶35} Simply stated, R.C. §2745.01 requires specific or deliberate intent to cause injury in order to recover on an employer intentional tort claim. R.C. §2745.01(C) establishes a rebuttable presumption that the employer intended to injure the worker if the employer deliberately removes a safety guard. *Houdek,* 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 12.

{¶36} In the instant case, Appellant argues that his injury was the result of crowded conditions and faulty cribbage wood, and that Appellee knew of these potential hazards.

{¶37} Initially, we note that R.C. §2745.01(C) is not applicable here as no safety guard was deliberately removed by Appellee.

{¶38} Upon review, even construing all facts in a light most favorable to Appellant, we find no evidence of deliberate intent on the part of Appellee to injury Appellant.

{¶39} As specifically stated in *Houdek, supra*, the Ohio Supreme Court rejected

the argument that the intent inquiry was an objective one satisfied by an employer's mere knowledge of a hazardous condition. As stated above, even if Appellee placed Appellant in a potentially dangerous situation, there must also be evidence that either management or the supervisor deliberately intended to injure the employee.

{¶40} Evidence that the shop was crowded and/or that the cribbage wood was faulty or scarce is not enough to establish the evidence of deliberate intent. Appellant himself stated in his deposition that he followed the same process of unloading and stacking the steel as he always did, and that he did not know why the steel fell on this particular day. (Harris Depo. at 76).

{¶41} Here, Appellant's injuries are the result of a tragic accident, and at most, the evidence shows that this accident may have been avoided had certain precautions been taken. However, because this evidence does not show that Appellee deliberately intended to injure Appellant, pursuant to R.C. §2745.01, Appellee is not liable for damages resulting from an intentional tort

{¶42} Appellants also argue that Appellee Benjamin Steel was substantially certain that injury would occur because it was subsequently cited with violating OSHA safety regulations.

{¶43} As noted by this Court in *Reising v. Broshco Fabricated Prods.,* Richland App. No. 2005CA0132, 2006-Ohio-4449 at paragraph 61: " 'OSHA citations, standing alone, do not demonstrate an intent to injure.' *Fleck v. Snyder Brick and Block* (Mar. 16, 2001), Montgomery App. No. 18368; *see, also, Vermett v. Fred Christen and Sons Co.* (2000), 138 Ohio App.3d 586, 603, 741 N.E.2d 954 (refusing to consider an OSHA violation issued after an accident in determining substantial certainty and stating that OSHA does not affect an employer's duty to an employee); *Cross v. Hydracrete Pumping Co*. (1999), 133 Ohio App.3d 501, 507 n. 1, 728 N.E.2d 1104 (stating that the

employee's 'attempt to impute actual knowledge through an OSHA violation is misplaced. An OSHA violation might present evidence of negligence'); *Neil v. Shook* (Jan. 16, 1998), Montgomery App. No. 16422 ('We conclude that the prior OSHA violations do not manifest the substantial certainty of harm required, but are only one of many factors to be considered). An employer's failure to follow proper safety procedures might be classified as grossly negligent or wanton, but does not constitute an intentional tort. *Neil, supra citing Young v. Miller Bros. Excavating, Inc.* (July 26, 1989), Montgomery App. Nos. 11306 and 11307."

{¶44} Appellants' sole Assignment of Error is overruled.

{¶45} For the forgoing reasons, the judgment of the Court of Common Pleas, Richland County, Ohio, is affirmed.

By: Wise, P. J.
Delaney, J., and
Baldwin, J., concur.

JWW/d 0408