[Cite as *Hristovski v. Bard Mfg. Co.*, 2004-Ohio-3984.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

John Hristovski

Appellant

v.

The Bard Manufacturing Co.

Appellee

Court of Appeals No. WM-03-022

Trial Court No. 02-CI-254

DECISION AND JUDGMENT ENTRY

Decided: July 30, 2004

* * * * *

Thomas B. Pyle, for appellant.

Gregory A. Williams, for appellee.

* * * * *

LANZINGER, J.

{¶1} John Hristovski appeals the decision of the Williams County Court of Common Pleas granting summary judgment to Bard Manufacturing Co. ("Bard"). Because Hristovski failed to establish that the company knew his injury would occur with substantial certainty, we affirm.

{¶2} Hristovski worked for Bard in its spot welding department. Occasionally, he would work overtime in other departments. Hristovski was injured on March 24, 2001, when he tripped over an air hose laying on the floor of his work station in the insulation department, where he had worked at least five times. He filed a complaint

with the Lucas County Court of Common Pleas for intentional tort.[1] In the first amended complaint, Hristovski alleged that Bard "knew, or should have known with substantial certainty, that allowing air hoses to lay on the work place floor was hazardous *** and would cause serious injury to an employee." After the matter was transferred to the Williams County Court of Common Pleas, Bard filed a motion for summary judgment. The trial court, stating that Bard's conduct did not rise to the level of an intentional tort as required by *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, granted Bard's motion. Hristovski now appeals the lower court's decision, and raises a single assignment of error:

{¶3} "The trial court erred in finding that the actions and/or omission of defendant did not rise to the level of an intentional tort."

{¶4} A review of the trial court's ruling on a motion for summary judgment is de novo, and thus, we apply the same standard as the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. However, once the movant supports his

[1]Hristovski also pleaded a claim under R.C. 4101.11, Ohio's frequenter statute. Bard filed a motion for summary judgment on this claim, and the trial court apparently granted it. No appeal was taken on this issue.

or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon mere allegations or denials of [his] pleadings, but [his] response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111.

{¶5} Hristovski contends that the trial court should not have granted summary judgment to Bard because he has raised genuine issues of material fact. He claims that whether Bard knew allowing air hoses to lie on the floor constituted a hazardous condition is a question because air hoses were hung from the ceiling in other areas of the factory and because the factory foreman, John Muehlfield, admitted in deposition that they "could" present a danger. He maintains there is a question over whether the substantial certainty element is also satisfied because: Bard had removed the "tripping" hazard in other parts of the factory; his affidavit states that Bard knew positioning air hoses on the floor was substantially certain to cause injury; and Walter Cygan, his accident investigations expert, by affidavit stated Bard was substantially certain injury would occur and was guilty of OSHA violations.[2] Finally, he contends there is an issue over whether Bard required him to work in an environment which it knew was hazardous when it failed to properly train him and did not provide safety instruction in the insulation department.

[2]Bard filed a motion to strike the affidavits of Hristovski and Cygan because they stated nothing more than conclusory statements and legal conclusions without adequate factual basis. The trial court denied the defendant's motion, but stated it would disregard the affidavits for the reasons Bard stated.

{¶6} The Supreme Court of Ohio has discussed the development of the employer intentional tort in *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482: "In *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 60, this 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. We later defined the term 'intentional tort' in *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90. Adopting 1 Restatement of the Law 2d, Torts (1965), Section 8A, and Prosser & Keeton, Law of Torts (5 Ed. 1984), we stated that an intentional tort is 'an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.' *Jones* at paragraph one of the syllabus." Id. at 484. In the context of employer intentional torts, "intent" focuses primarily on whether an employer is substantially certain a particular condition will cause injury to an employee.

{¶7} The test for an employer intentional tort was set forth in *Fyffe v. Jeno's, Inc.*, supra., identifying three elements an employee must prove: "(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."[3] *Fyffe*, 59 Ohio St.3d at paragraph

[3]This test modified the earlier test introduced in *VanFossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100.

one of the syllabus. To withstand a motion for summary judgment, the injured employee must set forth specific facts that raise a genuine issue as to each part of the *Fyffe* three-prong test. See *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, paragraph seven of the syllabus.

{¶8} During his deposition, Muehlfield, the factory foreman, stated that the air hoses "could" present a trip hazard. Assuming arguendo that this does establish that Bard was aware of a danger to employees, Hristovski has failed to establish a genuine issue on the second and third parts of the *Fyffe* test. There is no evidence offered that Bard knew with substantial certainty that Hristovski would be harmed by an air hose laying on the floor, and no evidence that he was required to work with the hose placed as it was. Without employee complaints, previous similar injuries, or the motives for hanging hoses in other parts of the factory, Muehlfield's deposition and the affidavits of Hristovski and Cygan are insufficient to raise a question of substantial certainty.

{¶9} An employee cannot demonstrate the "substantial certainty" element simply by illustrating that the employer acted negligently or recklessly. *Van Fossen*, 36 Ohio St.3d at paragraph six of the syllabus. In *Fyffe*, the Court explained: "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 reckless. As the probability that the consequences will follow further increase, 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." *Fyffe*, 59 Ohio St.3d at paragraph two of the syllabus.

{¶10} Furthermore, the Court has noted: "There are many acts within the business or manufacturing process which involve the existence of dangers, where management fails to take corrective action, institute safety measures, or properly warn the employees of the risks involved. Such conduct may be characterized as gross negligence or wantonness on the part of the employer. However, in view of the overall purposes of our Worker's Compensation Act, such conduct should not be classified as an 'intentional tort' ***." *Van Fossen*, 36 Ohio St.3d at 117.

{¶11} Summary judgment has been affirmed in cases where evidence of substantial certainty is lacking. In *Lamb v. Goodyear Tire & Rubber Co.* (Dec. 16, 1998), 9th Dist. No. 19039, an employee was injured when he slipped on a silicon lubricant that had leaked onto the floor from a press machine. The plaintiff argued that an earlier injury and the plant supervisors' awareness that silicon accumulated on the floor indicated the defendant's substantial certainty that injury would occur. The plaintiff also argued that the employer appreciated the serious risk of injury to employees because there were drip pans beneath several, but not all, of the presses and the employer had tried to find a new lubrication system for the machines. The Ninth Appellate District upheld summary judgment for the employer, stating that mere knowledge and appreciation of a risk is not intent. The plaintiff had failed to establish his employer

knew with substantial certainty such an injury would occur because the plaintiff had not voiced any concerns, and because of the absence of similar injuries over time. See, also, *Foust v. Magnum Restaurants, Inc.* (1994), 97 Ohio App.3d 451, 455 (while evidence of no prior accidents, standing alone, is not conclusive, it strongly suggests that injury from the procedure was not substantially certain to result); *Knott v. Bridgestone/Firestone Tire and Rubber Co.* (Sep. 25, 1996), 9th Dist. No. 17829 (affirming summary judgment in favor of employer based on lack of prior accidents from hydraulic lifts malfunctioning); *Clark v. Cargill, Inc.* (Feb. 12, 1999), 6th Dist. No. L-98-1225 (lack of previous injuries considered as a factor in determining substantial certainty).

{¶12} Here, Muehlfield testified at deposition that neither Hristovski nor any other employee ever complained about the air hoses being a trip hazard and that no similar injuries had occurred in the past. Although Hristovski's affidavit suggests "allowing the subject air hose to be positioned on the floor is, with substantial certainty, a trip hazard to any and all employees working in that area," his affidavit does not establish a genuine issue of fact because it is self-serving and merely states a legal conclusion without supporting evidence. While the existence of safety features in some areas, but not others, may be a factor in determining substantial certainty, it is not dispositive evidence of intent. See *Lamb*, supra. At most, Muehlfield's deposition testimony indicates an awareness that the air hoses could pose a trip hazard. Mere awareness of such a risk, however, does not raise Bard's conduct to the level of an intentional tort. *Fyffe*, supra.

{¶13} Walter Cygan's affidavit testimony that "Defendant knew or should have known, that with substantial certainty, the air hose, being positioned on the floor is a safety hazard," and his OSHA violation allegation also does not establish a genuine issue of material fact. Like Hristovski's affidavit, Cygan has no evidentiary basis to offer a legal conclusion. Regarding the alleged OSHA violation, the Supreme Court of Ohio has clearly held: "Congress did not intend OSHA to affect the duties of employers owed to those injured during the course of their employment." *Hernandez v. Martin Chevrolet, Inc.* (1995), 72 Ohio St.3d 302, 303. As such, any OSHA violation does not weigh into our consideration of whether Bard knew Hristovski's injuries were a substantial certainty. *Vermett v. Fred Christen & Sons Co.* (2000), 138 Ohio App.3d 586, 603. Without any previous complaints, injuries, or evidence showing Bard hung air hoses in other parts of the factory for the purpose of alleviating a dangerous condition, reasonable minds could only conclude Bard was not substantially certain Hristovski's injury would occur.

{¶14} Hristovski also cannot establish a genuine issue of material fact regarding whether Bard required him to work under dangerous conditions. While he alleges that observing and assisting a coworker was not adequate training or safety instruction, the placement of the air hose was a matter of common sense, not specialized knowledge. Muehlfield stated employees using the air hoses had discretion in choosing where to place them. Some employees would place the air drill attached to the air hose on the ground, but off to the side of the work station where it would not pose a tripping hazard. Hristovski, however, chose to place the hose on a lower shelf of the workstation, leaving the air hose in his immediate working area. Bard did not require him to put the hose

where it could become a trip hazard; it did not require him to operate it in a way which was likely to cause injury. Considering the discretion of each employee at the work station, reasonable minds could only conclude Bard did not require Hristovski to work under conditions which constituted a trip hazard. Therefore, the standard for intentional tort was not met.

{¶15} Appellant's sole assignment of error is found not well-taken. The judgment of the Williams County Court of Common Pleas is affirmed. Costs of this appeal are assessed to the appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Mark L. Pietrykowski, J. _____
JUDGE

Judith Ann Lanzinger, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE