[Cite as *Boes v. Cappadora*, 2004-Ohio-5235.]

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

Nancy A. Boes, Administrator
Estate of Patricia A. Smith,
deceased

Appellant

v.

William C. Cappadora, et al.

Appellee

Court of Appeals No. L-04-1027

Trial Court No. CI-01-1087

DECISION AND JUDGMENT ENTRY

Decided: September 24, 2004

* * * * *

Marc Williams-Young and Kevin Cooper, for appellant.

Jeffrey Charles, for appellee.

* * * * *

HANDWORK, P. J.

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas which granted the motion for summary judgment in favor of B & L Freight. For the reasons stated below, this court affirms the trial court's grant of summary judgment.

{¶ 2} Patricia A. Smith worked for B & L and delivered packages out of B & L-owned delivery vans. On January 15, 1999, Smith was riding in one of those vans when it was struck from behind by William Cappadora. A package slid forward and struck Smith's seat.

{¶ 3} Smith sued both Cappadora, alleging negligence, and B & L, alleging employer intentional tort. Cappadora was voluntarily dismissed and the trial court granted summary judgment for B & L regarding the employer intentional tort claim.

{¶ 4} Smith has since died of unrelated causes. Nancy Boes, Administrator of Smith's estate, appeals the grant of summary judgment assigning the following error:

{¶ 5} "The trial court erred in granting summary judgment to defendant-appellee B & L Freight, Inc."

{¶ 6} Upon thorough review of the record, applicable law, and the decision of the trial court, we find that the trial court correctly considered the pertinent facts and issues in dispute, correctly applied the law to the facts, and rendered judgment accordingly. We therefore adopt the well-reasoned decision of the trial court as our own. (See *Boes v. Cappadora* (Dec. 6, 2002), Lucas C.P. No. CI01-1087, pages 4-9, attached hereto as Appendix A.).

{¶ 7} The sole assignment of error is found not well-taken. On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. The estate of Patricia A. Smith is ordered to pay the costs of this appeal, pursuant to App.R. 24.

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.

Peter M. Handwork, P.J. _____

_____
JUDGE

Richard W. Knepper, J. _____

_____
JUDGE

Judith Ann Lanzinger, J. _____
CONCUR.

_____
JUDGE

the injured passenger and both drivers involved were domiciled in Ohio. A contrary decision was reached in *Cincinnati Ins. Co. v. Leeper* (1998), Lucas App. No. L-97-1265. In *Leeper*, the Ohio plaintiff was a passenger in an automobile owned and operated by a Michigan resident in Michigan when an accident occurred. The appellate court upheld the trial court's ruling that the presumption was not overcome, and that Michigan law applied.

While not directly on point with either of these cases, the facts in the instant case are most similar to those in *Callis*. In this case, as in *Callis*, the accident occurred in Michigan, and the plaintiff, Ms. Smith, was an injured passenger. Unlike *Callis*, Ms. Smith was a resident of Michigan when the accident occurred, however, she was in the course of her employment with an Ohio company, and was riding in a van owned by that Ohio company. As a result of the accident, Ms. Smith collected workers' compensation benefits from the State of Ohio. Further, Cappadora was a resident of Ohio, and was driving a vehicle registered in Ohio, and insured by an Ohio insurance company. Based on these facts, the court finds that Ohio has a more significant relationship to this lawsuit than the State of Michigan, therefore, Ohio law applies. Consequently, Cappadora's motion for partial summary judgment is denied.

B & L's Motion for Summary Judgment

Count two of plaintiffs' complaint asserts an employer intentional tort claim against B & L. In order to maintain an intentional tort claim against his employer, the plaintiff must show that: 1) the employer had knowledge of a dangerous process, procedure, instrumentality, or condition; 2) the employer had knowledge that if employees were subjected to that danger, harm was a substantial certainty; and 3) in spite of the knowledge of a danger and risk of harm, the employer required the employee to continue performing the dangerous task. *Fyffe v. Jeno's Inc.*

(1991), 59 Ohio St. 3d 115, paragraph one of the syllabus, (citation omitted). Proof exceeding that of negligence and recklessness must be established by plaintiff to prove knowledge and substantial certainty. *Id.* at paragraph 2 of the syllabus. "Mere knowledge and appreciation of a risk does not establish 'intent' on the part of the employer." *Estep v. Rieter Auto. N. Am.* (2002), 148 Ohio App. 3d 546, citing to *Cross v. Hydracrete Pumping Co., Inc.* (1999), 133 Ohio App.3d 501, 507, citing to *Fyffe,* supra, at 118.

B & L claims that plaintiff can point to no evidence showing that there was knowledge of a dangerous condition, or that there was knowledge that employees subjected to that dangerous condition were substantially certain to be injured. Plaintiff asserts that based on the testimony of Phillip Bailey ("Bailey"), B & L had knowledge of a dangerous process. Specifically, she claims that Bailey admitted to knowing that cargo in the back of delivery vans could fly forward and enter the passenger compartment without the use of a front-end guard such as a headerboard or protective screening. The actual testimony to which plaintiff refers, however, is as follows:

Q Are the boxes or packages tied down at all in the back?

A No. No.

Q So it's possible for boxes to shift during delivery?

A I don't know. Probably. Yes. Some instances.

* * *

Q There is a possibility that the boxes can move on the - -

A If the driver didn't slide - -yeah.

In further support of her assertion, plaintiff points to the written opinion of expert Robert

Cooksey ("Cooksey").[1] In his report, Cooksey states that B & L was in violation of major federal transportation safety standards at the time of the accident. Specifically, he states that under Title 49 of the Code of Federal Regulations the van should have had a front-end structure to prevent shifting cargo from penetrating the passenger compartment. Plaintiff "strongly asserts" that the Code of Federal Regulations imputes knowledge of a dangerous condition. The court does not agree with this assertion.

As defendant points out, there had never been any other incidents of this type, nor had there been complaints by anyone regarding the safety of the vans and shifting packages. However, as no one denies the *possibility* of boxes moving, an argument can be made for B & L having knowledge of a "dangerous condition." Having so found, the court will address the second prong of the *Fyffe* test.

The second prong of the *Fyffe* test requires plaintiff to show that the employer had knowledge that the dangerous process was substantially certain to injure, or that there was an intent to injure. In order to prove knowledge that injury was a substantial certainty in this case, plaintiff again points to the testimony of Bailey and the report of Cooksey. In her opposition to summary judgment, plaintiff claims that Bailey "stated affirmatively that he knew that boxes could fly forward in B & L delivery vans," and that "despite the knowledge of this unsafe condition, * * * he took no action to remedy this situation because there was 'no need.'"

The first part of plaintiff's assertion mischaracterizes Bailey's testimony. (See Bailey testimony cited at pg. 5) With respect to the second part of plaintiff's assertion, the actual

---

[1]The court is aware of the fact that a motion to strike with respect to Mr. Cooksey's statement has been filed. For the purposes of ruling on summary judgment, however, the court will consider his report.

testimony referred to was as follows:

Q Has B & L ever received any new vans that have come with safety netting in them?

A Yes. I believe so.

Q Have any of those been assigned to Toledo?

A I don't know. I couldn't say if they have. There's only like maybe one or two. It was because we bought them off of a driver/owner for God knows where and it was just that way.

Q Seeing that there's safety netting in some of these vans, has the decision ever been made to utilize safety netting in other vans?

A No.

Q Is there any reason behind this?

A I mean -- no need. I mean, there's been nothing to, I mean, state that we should put safety netting in or any kind of guards between them and the driver.

Q So from your standpoint there's been no need to install any sort of safety netting in the vans?

A Yes.

MR. CHARLES: Yes, there's been no need?

THE WITNESS: Yeah. There hasn't been any reason for that to be installed.

Plaintiff's characterization of the testimony suggests that B & L appreciated the danger and chose to ignore it. However, this is not what the witness said. Rather, what he said was that there has been nothing to indicate that safety netting was necessary.

The affidavit of Cooksey is even less helpful to the plaintiff's case. Plaintiff refers to two parts of this affidavit in her effort to show knowledge of a substantial certainty of injury. The

first reference is where Cooksey states that:

> "[t]he protections required by Title 49, Code of Federal Regulations constitute an industry standard. By reason of common sense and experience, the van in which Ms. Smith was a passenger should have had a front-end barrier installed to prevent any cargo from striking her seat in the driver-passenger area of the van."

Assuming for the moment that Cooksey is qualified as an expert and that this statement is correct, the inference the court is supposed to draw from plaintiff's reliance upon the statement is that any deviation from the Code of Federal Regulations, or from industry standards, shows "intent" and will result in an employer being liable for an intentional tort. The law does not support this inference. See, e.g., *Heyman v. Stoneco, Inc.* (August 2, 1991), Wood App. No. 90WD071, (Employer intentional tort claim in which the court stated that the disposition of an OSHA citation was irrelevant with respect to employer's intent.).

Plaintiff next cites to the portion of Cooksey's affidavit in which he says that "[t]he certainty of injury remains the same when the needed front-end structure is not utilized." Plaintiff claims that based upon this portion of Cooksey's opinion and Bailey's knowledge of the unsafe condition, there was also knowledge of a substantial certainty of injury. The court does not agree with this claim.

The only evidence before the court is that Bailey knew that cargo could possibly shift in some instances and that B & L was in violation of the Code of Federal Regulations based on the lack of front-end safety structure. There is no evidence of other similar accidents, no reports by employees of shifting cargo, no requests by employees for safety netting to be installed, and no complaints from drivers regarding their safety in the passenger compartment because of shifting cargo. Further, in his deposition, Bailey testified that other vans had been involved in accidents,

but that he had no knowledge of boxes shifting with respect to those accidents. Based on these facts, the court finds that the evidence does not show that B & L had knowledge of a substantial certainty of injury or an intent to injure.

As plaintiff has failed to show substantial certainty or intent, there is no need for the court to consider the third prong of the *Fyffe* test. Therefore, B & L's motion for summary judgment is granted.

JUDGMENT ENTRY

It is ORDERED that defendant B & L's motion for summary judgment is GRANTED.

It is further ORDERED that defendant Cappadora's motion for summary judgment is DENIED.

It is further ORDERED that the clerk of courts shall serve a copy of this Judgment Entry upon all parties.

December 4, 2002

Judge James D. Jensen

cc: Kevin J. Cooper, Esq.
Jeffrey B. Charles, Esq.
Stephen F. Ahern, Esq.