[Cite as *Hicks v. Toledo Blade Co.*, 2004-Ohio-5241.]

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

Howard Hicks

Appellant

v.

Toledo Blade Co.

Appellee

Court of Appeals No. L-03-1317

Trial Court No. CI-01-5118

DECISION AND JUDGMENT ENTRY

Decided: September 30, 2004

* * * * *

Michael D. Portnoy, for appellant.

Donald E. Theis, for appellee.

* * * * *

HANDWORK, P. J.

{¶ 1} In this appeal we must consider whether the Lucas County Court of Common Pleas erred in granting summary judgment to defendant-appellee, the Toledo Blade Company ("Blade").

{¶ 2} The Blade is a daily newspaper with its principal place of business located in Toledo, Lucas County, Ohio. Plaintiff-appellant, Howard S. Hicks, works for the Blade as a paper handler. On December 14, 2000, appellant was injured during the course of his employment. As a consequence, appellant filed, pursuant to *Fyffe v.*

Jeno's, Inc. (1991), 59 Ohio St.3d 115, the instant employer intentional tort action against the Blade.

{¶ 3} The Blade answered and subsequently filed a motion for summary judgment. The following facts are derived from the depositions, affidavits, and documentary evidence offered in support of and in opposition to that motion for summary judgment.

{¶ 4} In his deposition, appellant testified that he started working, part-time, at the Blade in 1985. He became a full-time employee in June of 1995. His job as a "paper handler" requires him to prepare the paper for the presses and to ensure that "the presses don't run out of paper throughout the night." Appellant also is required to take deliveries from outside vendors and transport them to the appropriate department, to transport ink drums and the plates engraved with the news to the presses, and to bale any "bad" paper.

{¶ 5} During the course of his employment, appellant sometimes uses a freight elevator between 10 and 15 times per shift to convey rolls of paper, which sometimes weigh as much as 1,100 to 1,200 pounds, to the presses. He also takes bales of paper, weighing between 1,100 and 1,500 pounds on a freight elevator from the baling area up to the first floor. On the days that appellant acts as a delivery person he uses a freight elevator approximately ten times during his shift. When moving all of the items associated with his individual duties, appellant uses the Blades' electric tow motor.

{¶ 6} On December 14, 2000, appellant was delivering items to various departments and had used the freight elevator in question "3 to 5 times" before the

accident that allegedly led to his injuries. He unloaded a delivery of computer paper that arrived on two pallets. He then had to transport some of the computer paper from the first floor to the second floor. In doing so, he placed one full pallet of paper and one pallet that was only one-half full on the elevator. Because the load limit for the freight elevator is 5,000 pounds, appellant said that he had to calculate the weight of the computer paper, including each pallet, his own weight, and the alleged weight, 1,770 pounds, of the tow motor. Appellant stated that, according to his calculations, the total weight of these items was less than 5,000 pounds.

{¶ 7} Appellant testified that he noticed nothing out of the ordinary after placing the pallets, paper, and the tow motor on the freight elevator. However, when he pressed the second floor button, nothing happened. Appellant pushed the second floor button again, and, again, nothing happened. Before he could open the elevator doors, the elevator started to drop.

{¶ 8} Appellant described a sound that he heard as "something like letting loose." Appellant then tried, without any success, every switch in the elevator to try to stop it. The elevator dropped one and one-half floors to the subbasement. In his deposition, appellant estimated that this was a 25 foot to 35 foot drop. When the elevator stopped, appellant fell to the floor of the elevator. Due to the fact that it was below the basement level when it stopped, appellant had to climb up to get out of the elevator.

{¶ 9} Appellant indicated that, on previous occasions, the movement of the elevator was erratic at times. Specifically, he stated that sometimes the elevator would

stop ten to twelve inches below the desired floor level or above the desired floor level. Hicks also said that the elevator would usually drop about ten inches before either going up or down to the desired floor. While he claimed that many of the workers complained to the Blade's Building Superintendent, Larry Geis, about the problems with the elevator, appellant admitted that this was the only time that the elevator dropped and did not "catch." He was also unaware of any complaints being made shortly before the accident.

{¶ 10} Subsequent to reporting the incident to Geis and to his supervisor, Larry Carter, appellant drove to the hospital where he was diagnosed as having a "strained neck, back and knees." Appellant returned to work on March 14, 2001, but underwent arthroscopic surgery on his right knee in September 2001. He did not return to his employment until March 18, 2002.

{¶ 11} Larry Geis has worked for the Blade for 40 years. In his deposition, Geis testified that the Blade does not maintain or repair the elevators in the Blade building. Instead, the newspaper has a service agreement with the Toledo Elevator & Machine Company ("Toledo Elevator"). He stated that as soon as he heard that there was a problem with the freight elevator, he contacted Toledo Elevator.

{¶ 12} Toledo Elevator immediately dispatched a crew to examine and repair the elevator. The report of the incident filed by the elevator service indicates that the elevator dropped because it was overloaded. Geis testified that he does not keep track of any complaints concerning the Blade's elevators because any problems/repairs to the elevators would be noted in the monthly reports generated by Toledo Elevator. To

Geis's knowledge, no one ever informed him of an incident with the freight elevator similar to that experienced by appellant.

{¶ 13} In his deposition, Brian Coyle, the Blade's Facility Manager, stated that the freight elevator, which was manufactured in 1926, was designed to be "jogged" or "toggled" by the operator to the proper level when it stopped either lower or higher than a particular floor. Coyle, in reviewing the invoices submitted by Toledo Elevator to the Blade, testified that most of the reported problems with the freight elevator involved a "loose gate" or "misaligned door." Although the brakes on the elevator were replaced in February 2000 and required adjustment over the next several months, Coyle declared that the braking system on the freight elevator was not "unsafe."

{¶ 14} Larry Carter, a foreman in the Blade's Paper Handling Department, was also deposed. Carter started working in this department in 1985. He was asked whether he knew of any previous problems with the elevator, specifically, problems with the brakes on the freight elevator. He replied that there were "minor instances" where the elevator would not stop at a designated floor. Carter said that in those instances, the occupant would try to "toggle" the elevator back to the designated floor. If this did not work, Toledo Elevator was called. Carter testified that he also used the freight elevator and that, prior to December 14, 2000, it went past his desired floor "3 or 4 times."

{¶ 15} In answer to the question of whether anyone else, other than appellant and himself, ever experienced the freight elevator going past a floor prior to December 14,

2000, Carter provided four names[1]. He explained, however, the problem generally occurred "when we're going to the basement and then once it settles in it will continue past maybe 6 inches to a foot past a floor."

{¶ 16} In his deposition, David Walz, part owner and a vice-president of Toledo Elevator, testified that all of the elevators at the Blade building are inspected by Toledo Elevator on a monthly basis and that a safety test is performed once per year. In addition, he stated that if there was a problem with one of the elevators during the interim, Toledo Elevator would be called, would repair or replace the part that was malfunctioning, and authorize the use of the elevator. Walz stated that the elevator never failed a safety test, and that he could not recall that a problem similar to one experienced by appellant ever occurred during the 20 years that the Blade had a service contract with his company.

{¶ 17} The documents filed in support of the Blade's motion for summary judgment also show that a second company, NEIS, makes independent inspections of the Blade's elevators. These include the annual inspections required by the Ohio Department of Commerce. The most recent inspection, which was conducted on November 10, 2000, showed no violations. It is also undisputed that at the time of the accident, the Blade held a certificate of operation issued by the Ohio Department of Commerce.

[1]None of these men were ever deposed nor was an affidavit from any of these men ever filed.

{¶ 18} Appellant filed a memorandum in opposition to the Blade's motion for summary judgment. The arguments in this memorandum not only relied on the evidence offered by the Blade but also relied on appellant's affidavit and the affidavit of appellant's expert, Robert Mierzwa.

{¶ 19} In his affidavit, appellant contradicted his deposition testimony on the question of whether any incidents comparable to the "drop" of the freight elevator on December 14, 2000, had ever occurred. In paragraph 16 of his affidavit, appellant averred: "I am aware of at least seven other incidents with this elevator dropping like it did. The elevator had several brake problems prior to my accident." Appellant also stated that, on December 14, 2000, the elevator fell "30 to 40 feet."

{¶ 20} Robert Mierzwa, who is an independent elevator consultant, based his expert opinions on (1) the Blade's responses to interrogatories; (2) on the depositions of Geis, Carter, and Walz; (3) on appellant's affidavit; and (4) on documents, including invoices, produced by the Blade. It was his opinion "to a reasonable degree of elevator certainty and scientific certainty" that the freight elevator was extremely dangerous to use because of a dangerously defective braking system, that the Blade knew about this danger, and that the Blade was substantially certain that injury would occur to any employee who used the elevator. This opinion was based, to a large degree, on appellant's affidavit and Larry Carter's deposition.

{¶ 21} In particular, and allegedly based upon Carter's deposition, Mierzwa determined that there were seven other "brake failures with different employees at the Toledo Blade." He further stated that: "Based upon Mr. Hick's affidavit, specifically

his description of how the accident, Mr. Hick's December 14, 2000 accident, was caused by another brake system failure like the previous one many times prior to Mr. Hick's December 14, 2000 accident."

{¶ 22} In response to appellant's memorandum in opposition to its motion for summary judgment, the Blade filed a reply and a motion to strike Mierzwa's affidavit and to strike Paragraph 16 of appellant's affidavit. In support of its reply, the Blade filed the affidavit of David Walz. In his affidavit, Walz stated that he measured the distance that the freight elevator would "fall" if, indeed, an elevator does "fall" due to a brake failure. That distance was 12 feet. Walz also explained that, in reality, elevators do not "free fall" due to the safety devices that are designed to activate "in the event the freight elevator should fail."

{¶ 23} In addition, Walz described how the freight elevator in this case was built and designed to carry different weights through its "toggle" ability. He stated that with this system, and depending on the weight in the elevator, it may not stop even or level with the desired floor. Thus, an "inching button" allows the operator to inch or toggle either up or down to that level. According to Walz, this process is not "an indication of an operation problem or safety concern with the elevator or the operation of its brakes." Walz opined that the December 14, 2000 incident was not due to a brake failure "or had anything to do with the brakes on this freight elevator."

{¶ 24} On October 16, 2003, the trial court granted the Blade's motion to strike Mierzwa's affidavit and Paragraph 16 of appellant's affidavit. The court then granted the newspaper's motion for summary judgment.

{¶ 25} Appellant appeals that judgment and sets forth the following assignments of error:

{¶ 26} "The trial court erred to the prejudice of appellant when concluding that appellant had not satisfied the second element of the intentional tort standard requirement pursuant to *Fyffe v. Jeno's*, Ohio St.3d 115 (1991) [sic]."

{¶ 27} "The trial court erred to plaintiff's prejudice by striking both appellant's affidavit and Robert Mierzwa's affidavit."

{¶ 28} Because it impinges upon our disposition of appellant's first assignment of error, we shall initially address his second assignment of error. In that assignment, appellant contends that Mierzwa's affidavit relied on appellant's affidavit solely for the purpose of establishing the fact that the freight elevator was not overloaded at the time of the incident. He also maintains that Mierzwa's opinion is based upon all of the evidence supporting and opposing the Blade's motion for summary judgment.

{¶ 29} A trial court's decision to grant a motion to strike is within its discretion and will not be overturned on appeal unless the trial court abuses its discretion. *Early v. Toledo Blade* (1998), 130 Ohio App.3d 302, 318. An abuse of discretion implies more that an error of law or judgment, it signifies that the trial court's attitude in reaching its judgment is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 30} Although appellant does not directly address the issue of whether the trial court abused its discretion in striking Paragraph 16 his affidavit, this question is raised in the body of his second assignment of error. Furthermore, appellant's expert witness

bases his opinion on statements made by appellant in his deposition. We shall, therefore, consider whether any abuse of discretion occurred in striking Paragraph 16.

{¶ 31} A nonmoving party may not defeat a motion for summary judgment by creating an issue of fact by filing, without explanation, an affidavit that contradicts an earlier deposition. *Linder v. American Nat'l Ins. Co.*, 155 Ohio App.3d 30, 2003-Ohio-5349, at ¶14, citing *Pain Enterprises, Inc. v. Wessling*, (Mar. 22, 1995) 1st Dist. No. C-30888; *Alapi v. Colony Roofing, Inc.*, 8th Dist. No. 83755, 2004-Ohio- 3288, at ¶24; *Schaeffer v. Lute* (Nov. 22, 1996), 6th Dist. No. L-96-045.

{¶ 32} As applied to the present case, appellant's statements in his affidavit concerning the number of incidents involving the freight elevator that were comparable to the one he experienced directly contradict, without explanation, his earlier deposition testimony. Thus, we find that the trial court's attitude in striking Paragraph 16 was not unreasonable, arbitrary, or unconscionable.

{¶ 33} We also find that the trial court did not abuse its discretion in striking the affidavit of Robert Mierzwa. Evid. R. 702(A) requires that an expert's testimony must either relate to "matters which are beyond the knowledge or experience possessed by lay persons." Evid.R. 702(C) provides that the expert witness' testimony must be based upon "scientific, technical, or other specialized information." Evid.R. 703 allows the admission of expert's opinion or inference when it is based upon facts or data either perceived by him or admitted into evidence.

{¶ 34} Assuming that Robert Mierzwa is an expert in his field as an "elevator consultant," his opinion was unreliable because he did not have all of the necessary facts

upon which to base that opinion. See *Early v. Toledo Blade*, 130 Ohio App.3d at 318-319. For example, Mierzwa did not have the benefit of Brian Coyle's deposition. In that deposition, Coyle explained that those instances when the freight elevator stopped either below or above the level of the door to the designated floor were not, as phrased by Mierzwa, "brake failures." Rather, the "stops" were a mechanism built into the elevator's design.

{¶ 35} Additionally, Mierzwa did not have the benefit of appellant's deposition in which he admitted that he knew of no other incident comparable to his experience on December 14, 2000. Finally, it appears that Mierzwa's opinions are based upon a misconstruction of Larry Carter's deposition concerning problems with the elevator and of the invoices submitted by Toledo Elevator. In particular, Carter never testified that there were "at least seven other brake failures with this elevator with different employees." Further, none of the invoices state that "many brake failures" occurred. Instead, they reflect problems with the brakes that were remedied by Toledo Elevator.

{¶ 36} Because Mierzwa's opinions are not based upon a complete record and are based, in part, on the distortions of certain facts that are in the partial record he reviewed, we conclude that the trial court's attitude in striking his affidavit was not unreasonable, arbitrary, or unconscionable. Appellant's second assignment of error is, therefore, found not well-taken.

{¶ 37} In his first assignment of error, appellant maintains that the trial court erred in granting summary judgment to the Blade on the second prong of the test set forth in *Fyffe v. Jeno's, Inc.*, supra.

{¶ 38} Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491. Civ.R. 56 (C) provides that summary judgment may be granted only after the trial court determines: (1) no genuine issues as to any material fact remain 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 but to one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 39} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. Id. Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id.

{¶ 40} In order to prevent a summary judgment motion in favor of an employer in an intentional tort action, the employee must present evidence which shows a genuine issue of material fact on each of the following elements: (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. *Fyffe v. Jeno's, Inc., 59 Ohio St.* at paragraph one of the syllabus. All three parts of the standard provided in Fyffe must be satisfied to establish an employer's intent to commit an intentional tort against the injured employee. *Adams v. Casey Sales & Serv.* (Dec. 6, 1996), 6th Dist. No. WD-96-030.

{¶ 41} An employee cannot establish the "substantial certainty" element simply by demonstrating that the employer acted negligently or recklessly. Id. at paragraph two of the syllabus. Instead, the employee must show that the employer's conduct was more than mere negligence or recklessness. Id. The *Fyffe* court explained:

{¶ 42} "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." Id.

{¶ 43} Initially, we must note that the trial court erred in finding that the Blade had knowledge of the fact that it had a dangerous instrumentality, a freight elevator, operating within its business. The basis for the lower court's finding was the fact that the elevator was required to pass annual inspections and "be certified by the State Department of Commerce."

{¶ 44} An elevator, in and of itself, is not a dangerous instrumentality. See *Norman v. Thomas Emery's Sons, Inc.* (1966), 7 Ohio App.2d 41, 43. Indeed, the fact that the elevator in this case passed all inspections and was certified by the Ohio Department of Commerce indicates that it was not a dangerous instrumentality. Thus, appellant was required to offer evidence to create a genuine issue of material fact on the question of whether the elevator was a dangerous instrumentality and that the Blade knew it. He did not do so. The undisputed evidence demonstrated that the elevator was regularly maintained and repaired by Toledo Elevator, that it passed all state inspections and was certified, and that there were safety devices built into the freight elevator to prevent incidents of the type experienced by appellant. Thus, based on this unrefuted evidence, this court finds that the Blade was entitled to summary judgment on the first prong of the *Fyffe* test as a matter of law.

{¶ 45} Moreover, under the second prong of *Fyffe*, appellant was required to set forth facts showing that the Blade had knowledge that if he was subjected by his employment to the dangerous condition, then harm to appellant would be a substantial certainty. Id. at 118. The absence of prior accidents strongly suggests a lack of knowledge by an employer that injury from a particular procedure or process was

substantially certain to occur. *Foust v. Magnum Restaurants, Inc.* (1994), 97 Ohio App.3d 451, 455.

{¶ 46} Here, appellant failed to offer any facts showing that the Blade knew that appellant's continued use of the freight elevator was substantially certain to cause him harm. To repeat, all of the evidence adduced in support of and contra to the Blade's motion for summary judgment showed that this employer had the elevator maintained on a monthly basis and had no knowledge of any prior accidents comparable to that experienced by appellant. Accordingly, it is difficult for this court to deem the Blade's actions as appellant's employer as either negligent or reckless, much less find that they rose to the level of substantial certainty that injury would result from appellant's use of the elevator. Because two of the prongs set forth in *Fyffe* are not satisfied, we need not address the third prong of that standard, and appellant's first assignment of error is found not well-taken.

{¶ 47} On consideration whereof, this court finds that substantial justice was done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal. See App.R. 24.

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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. _____

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JUDGE

Mark L. Pietrykowski, J. _____

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Arlene Singer, J. _____ JUDGE
CONCUR.

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JUDGE