[Cite as *Warren v. Libbey Glass, Inc.*, 2009-Ohio-6686.]

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

Edward W. Warren	Court of Appeals No. L-09-1040
Appellant	Trial Court No. CI0200606305
v.	
Libbey Glass, Inc., et al.	**DECISION AND JUDGMENT**
Appellee	Decided: December 18, 2009

* * * * *

Kevin J. Boissoneault, Russell Gerney, and Michael D. Bell,
for appellant.

Scott G. Deller and Mechelle Zarou, for appellee.

* * * * *

BOYLE, J.

{¶ 1} This is an appeal from a summary judgment granted by the Lucas County Court of Common Pleas in an employer intentional tort case. Because we conclude that the trial court properly granted summary judgment, we affirm.

{¶ 2} Appellant, Edward W. Warren, was employed by appellee, Libbey Glass, Inc. in a manufacturing facility ("Libbey"). In October 2006, appellant sued appellee for injuries allegedly sustained while he was working at a cardboard baler machine. Appellant claimed that appellee had committed an employer intentional tort, alleging that appellee had required him to perform certain acts, with actual knowledge that he was substantially certain to be injured by a mechanism on the baler machine.

{¶ 3} Appellee answered and ultimately moved for summary judgment, arguing that, although appellant had been injured by the baler mechanism, appellant was never required to enter the area where he was injured. As a result, appellee asserted that appellant had failed to establish a prima facie case for employer intentional tort.

{¶ 4} Appellant responded in opposition to appellee's motion for summary judgment, contending that appellant's failure to place a guard on the machine caused appellant's hand to be pulled into the mechanism. Appellant also attached an affidavit and report from his expert witness, Gerald Rennell. Rennell opined that the failure to place a guard on the "dangerous pinch point" was in violation of certain OSHA regulations. In addition, Rennell's affidavit offered opinions that concluded that appellee knew that the baler was dangerous and that injury was substantially likely to occur.

{¶ 5} Appellee moved to strike Rennell's affidavit because it did not comport with the Civ.R. 56 requirements for affidavits. The trial court ultimately struck the affidavit in its entirety, stating that all of Rennell's statements were contrary to the

undisputed facts, lacked factual support, or were improper legal conclusions about ultimate issues in the case.

{¶ 6} In its ruling on the summary judgment motion, the court first found R.C. 2745.01 to be unconstitutional, and dismissed appellant's statutory claim. The court then determined that, even presuming the statute to be constitutional, no genuine issue of material fact had been demonstrated that appellee deliberately intended to harm appellant, as required within the definition of "substantially certain" under R.C. 2745.01(A) and (B). Moreover, the court determined that appellant had failed to address appellee's assertion that the "pinch point" was, in fact, guarded from unintended contact by appellee by: "1) its relative inaccessibility behind the vertical metal post; 2) the automatic shut-off feature of the bailer [sic] during wire-replacement; and 3) the operator having no actual job duties in that vicinity during wire-replacement." The court also found that appellant's contention that the "failure to guard" was not a substitution for "removal of [a] guard," the language provided in R.C. 2745.01(C).

{¶ 7} Addressing the *Fyffe*[1] three-prong test to determine "intent," the court granted appellee's motion for summary judgment as to appellant's common law employer intentional tort claim. The court determined that a genuine issue of material fact existed as to the first prong, that is, whether appellee had knowledge that the "point-of-operation" was "a dangerous * * * instrumentality or condition within [Libbey's] business operation." The court determined, however, that the second prong was not satisfied,

[1]*Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115.

since there was no genuine issue of fact that appellee was not substantially certain that appellant would be injured by or exposed to the point-of-operation during his normal job duties. Finally, the court concluded that the third prong of *Fyffe* was not satisfied because, "uncontroverted evidence indicates that [appellant's] trainer and supervisors told him never to reach [or] be near the inner-workings of the baler while the machine was operating or to place his hand into the point-of-operation of the energized machine."

{¶ 8} Appellant now appeals from that judgment, arguing the following two assignments of error:

{¶ 9} "First Assignment of Error – The trial court erred by incorrectly granting summary judgment in favor of appellee.

{¶ 10} "Second Assignment of Error – The trial court erred by striking the affidavit of Gerald Rennell."

I.

{¶ 11} We will address appellant's assignments of error in reverse order. In his second assignment of error, appellant essentially argues that the trial court erred in striking an affidavit of his expert witness, Gerald Rennell, because it "was not based on undisputed facts."

{¶ 12} A trial court has broad discretion in the admission or exclusion of evidence. *Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 113. An abuse of discretion connotes more than an error of judgment; it implies that the trial court's

attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 13} Expert affidavits offered in support of or in opposition to summary judgment must comply with Civ.R. 56(E), as well as the Rules of Evidence governing expert opinion testimony. See Evid.R. 702-705. *Fredrick v. Vinton Cty. Bd. of Edn.*, 4th Dist. No. 03CA579, 2004-Ohio-550, ¶ 23. Opinions in affidavits based on personal knowledge and upon facts shown by other evidence, such as depositions, may be considered, again, as long as the statements comply with Civ.R. 56(E) and the Rules of Evidence. See *Tomlinson v. Cincinnati* (1983), 4 Ohio St.3d 66, 67-68; *Case v. Norfolk & W. Ry. Co.* (1988), 59 Ohio App.3d 11, 13.

{¶ 14} Civ.R. 56(E) requires that supporting and opposing affidavits "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Thus, an affiant's statements must set forth facts admissible in evidence. Any individual statements which are inadmissible under the evidence rules should be excluded from an affidavit which otherwise complies with Civ.R. 56.

{¶ 15} Evid.R. 703 states that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Under Evid.R. 705, an "expert may testify in terms of opinion or inference and give his reasons therefore after disclosure of the underlying facts

or data." Therefore, Civ.R. 56(E) and the Evidence Rules require that an affidavit set forth facts, not legal conclusions. *Youssef v. Parr, Inc.* (1990), 69 Ohio App.3d 679, 689.

{¶ 16} We initially note that appellant claims that the trial court struck the expert's affidavit because its conclusions were not based on undisputed facts. Appellant has misunderstood the trial court's cite and parenthetical to *Wesley v. Northeast Ohio Regional Sewer Dist.* (Feb. 22, 1996), 8th Dist. No. 69008. In *Wesley*, the court actually struck an affidavit because the expert's conclusions were either not based on facts admitted in the record or were improper legal conclusions. These are valid reasons for striking statements in an expert's affidavit.

{¶ 17} In this case, the trial court's parenthetical about *Wesley* stated: "striking an expert opinion when conclusions are not based on the undisputed facts of the case." After reading *Wesley*, we interpret the court's parenthetical to mean that the expert's opinion was contradicted by and, consequently, unsupported by facts which were undisputed, not that an expert's affidavit *must be based on* undisputed facts.

{¶ 18} Contrary to appellant's contention, the trial court struck various parts of the expert's affidavit, based on different reasons, until, ultimately, the court determined that the affidavit was wholly comprised of improper statements. First, the trial court struck certain parts of the affidavit as being "improper legal conclusions going to the ultimate issues in this case and lack factual backing." The court struck the following statements:

{¶ 19} "3. [Libbey] was aware of a dangerous process, procedure, instrumentality or condition within its business operation, namely the unguarded cardboard baler.

{¶ 20} "4. [Libbey] knew the dangerous moving parts of the baler were substantially certain to cause injury.

{¶ 21} "5. [Libbey] failed to warn [Mr. Warren] of the danger of the unguarded cardboard baler.

{¶ 22} "6. [Libbey's] failure to guard the dangerous pinch point is a violation of OSHA 1910.212(a)."

{¶ 23} Our review of the record and these statements indicates that the trial court was correct in its assessment. As we noted, an expert may testify to certain opinions or to facts that are true, after looking through the admissible documents, but may not testify, as an ultimate issue, to a defendant's knowledge or awareness of the dangerous nature of a process or machine. Thus, Statements 3 and 4 were improper. Statement 5, that Libbey failed to warn appellant of the danger of the cardboard baler is, in fact, contradicted by deposition testimony by both appellant himself and his supervisor. Finally, without a finding that an OSHA violation had occurred or an explanation of how the machine violated the OSHA standard, we agree that Statement 6 is simply a bare legal conclusion going to an ultimate issue.

{¶ 24} Next, the trial court determined that the expert's report attached to the affidavit stated that the machine's lack of guarding required appellant to constantly be alert to protect himself against the danger of the "unguarded, moving machinery." Again, however, our review of the record reveals that it is undisputed that appellant was never

required or expected to even go near the allegedly unguarded area where his injury occurred, unless the machine was turned off.

{¶ 25} Third, the court determined that, although the expert stated that the unguarded baler violated OSHA Section 1910.212(a), there was no explanation as to how this area constituted a violation. Rather, as noted by the trial court, the expert's "opinion" was simply a legal conclusion and, again, did not comport with the undisputed evidence that appellant was advised never to go into the area where his injury occurred unless the machine was shut off.

{¶ 26} Finally, the trial court determined that the expert's conclusion that appellant was not "trained to stop the machine whenever he was close to the pinch point," was also an improper statement that was not supported by the facts. Once again, as we noted previously, appellant and his supervisor both testified that appellant was, in fact, trained to always stop the machine when entering that area. And, the only reason he would have to be in the "pinch point" area, during his employment duties on that machine, was to change wire spools and rethread the replacement wire into the machine. Appellant never stated that his employer required, requested, or even suggested that he enter the area where he was injured while the machine was running. Rather, the exact opposite was true.

{¶ 27} In this case, as we noted, it was "undisputed" that appellant was trained to always shut off the machine before entering the area where he was injured and was never

required to go into that area except to change the wire spools. Therefore, the trial court did not abuse its discretion in striking the affidavit by expert Rennell.

{¶ 28} Accordingly, appellant's second assignment of error is not well-taken.

II.

{¶ 29} In his first assignment of error, appellant asserts that the trial court erred in granting summary judgment in favor of the appellee, Libbey.

{¶ 30} The standard of review of a grant or denial of summary judgment is the same for both a trial court and an appellate court. Civ.R. 56(C); *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of facts, if any, * * * show that there is no genuine issue as to any material fact" and, "construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C).

{¶ 31} A motion for summary judgment first compels the moving party to inform the court of the basis of the motion and to identify portions in the record which demonstrate the absence of a genuine issue of material fact. See *Dresher v. Burt* (1996), 75 Ohio St.3d 280. If the moving party satisfies that burden, the nonmoving party must then produce evidence as to any issue for which that party bears the burden of production at trial. Civ.R. 56(C); *Dresher*, supra, limiting *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, paragraph three of the syllabus. Finally, it is well established

that an appellate court reviews summary judgments de novo; we review such judgments independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711.

A. Unconstitutionality of R.C. 2745.01

{¶ 32} We note that, although R.C. 2745.01 provides for employer intentional tort liability, the trial court dismissed any claims and, consequently, any defenses under that statute, citing *Kaminski v. Metal & Wire Prod. Co.*, 175 Ohio App.3d 227, 2008-Ohio-1521. This court has not yet addressed the issue of whether R.C. 2745.01 is unconstitutional.

{¶ 33} In *Kaminksi,* the Seventh District Court of Appeals held R.C. 2745.01 to be unconstitutional pursuant to "the Ohio Supreme Court's holdings in *Brady [v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624], supra, and *Johnson [v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, 306], supra, and consistent with Sections 34 and 35, Article II of the Ohio Constitution * * *." *Kaminski,* supra, ¶ 34. The *Kaminski* court further stated that, because of [the statute's] "excessive standard of requiring proof that the employer intended to cause injury," the statute clearly does not "further the * * * 'comfort, health, safety and general welfare of all employe[e]s.'" Id., citing to *Brady*, supra, and *Johnson*, supra. Additionally, because "R.C. 2745.01 is an attempt by the General Assembly to govern intentional torts that occur within the employment relationship, [it] cannot logically withstand constitutional scrutiny, inasmuch as it attempts to regulate an area

that is beyond the reach of constitutional empowerment." Id., quoting *Brady*, supra, at 634.

{¶ 34} Several other Ohio courts of appeals have also found R.C. 2745.01 to be unconstitutional. See *Guappone v. Enviro-Cote, Inc.*, 9th Dist. No. 24718, 2009-Ohio-5540, ¶ 10; *Fleming v. AAS Serv., Inc.*, 77 Ohio App.3d 778, 2008-Ohio-3908, at ¶ 40 (Eleventh District Court of Appeals); *Barry v. A.E. Steel Erectors, Inc.*, 8th Dist. No. 90436, 2008-Ohio-3676 (unconstitutional because it exceeds and conflicts with the legislative authority granted to the General Assembly pursuant to Sections 34 and 35 of the Ohio Constitution). After reviewing the instant case, and the previous cases which have held it to be unconstitutional, we agree with the Seventh District's reasoning in *Kaminski*, supra,[2] and with the Ninth District in *Guappone*, supra, ¶ 10, which stated:

{¶ 35} "The legislature has repeatedly attempted to codify this type of claim in R.C. 2745.01. The prior version of R.C. 2745.01 was held to be unconstitutional. *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, syllabus. The legislature modified the statute addressing employer intentional tort liability on April 7, 2005. Since then, at least three appellate district courts have held the current version of R.C. 2745.01 to be unconstitutional. *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App.3d 227, 2008-Ohio-1521, at ¶ 36 (Seventh District Court of Appeals); *Barry v. A.E. Steel Erectors, Inc.*, 8th Dist. No. 90436, 2008-Ohio-3676, at ¶ 21-27; *Fleming v. AAS Serv.*,

[2]At the time this decision was issued, the Supreme Court of Ohio had still not yet issued its decision in *Kaminski*.

Inc., 177 Ohio App.3d 778, 2008-Ohio-3908, at ¶ 40 (Eleventh District Court of Appeals). The issue has been certified to the Ohio Supreme Court, but has yet to be decided. *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App.3d 227, 2008-Ohio-1521, appeal allowed by *Kaminski v. Metal & Wire Prods. Co.*, 119 Ohio St.3d 1407, 2008-Ohio-3880; see, also, *Stetter v. R.J. Corman Derailment Servs ., L.L.C.*, 119 Ohio St.3d 1405, 2008-Ohio-3880."

{¶ 36} Therefore, the trial court did not err in dismissing the statutory claim on the basis that R.C. 2745.01 is unconstitutional.

B. Common-law Employer Intentional Tort Claim

{¶ 37} To overcome a motion for summary judgment, an employee must set forth "specific facts" to prove the existence of a genuine issue regarding the elements of an employer intentional tort claim. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 117. The employee must demonstrate all three of 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) 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.* (1991), 59 Ohio St.3d 115, paragraph one of the syllabus. The failure to provide

available safety devices may constitute negligence or recklessness, but does not constitute "substantial certainty." *Liechty v. Yoder Mfg., Inc.*, (2000), 141 Ohio App.3d 360, 364.

{¶ 38} "Expert testimony can be used to establish the necessary elements in an employer intentional tort case. However, simply because an expert concludes that an accident is substantially certain to occur does not necessarily establish that element as a legal conclusion. The expert's opinion must create a genuine issue of material fact from a legal standpoint." (Citations omitted.) *Tablack v. Bd. of Mahoning Cty. Commrs.*, 7th Dist. No. 07 MA 197, 2008-Ohio-4804, ¶ 47. See, also, *Teal v. Colonial Stair & Woodwork Co .*, 12th Dist. No. CA2004-03-009, 2004-Ohio-6246 (despite appellants' expert opinion to the contrary, facts presented did not rise to the level of substantial certainty that an accident would occur).

{¶ 39} In this case, even presuming that appellee was aware that the point-of-operation on the baler machinery was a dangerous process or condition that was unguarded, appellant has failed to establish the second and third elements of an employer intentional tort. First, there had never been any injuries or even "near misses" with this machinery, which would have provided indication that substantial injury was certain to occur. This comports with the undisputed fact that the employees were trained not to go into that area until the machine had been shut off.

{¶ 40} More importantly, however, as we previously noted in Assignment of Error No. 2, no evidence demonstrated that appellee ever required appellant to enter the area where the injury occurred while the machine was still running. It was undisputed that

appellant simply went into the area on his own initiative, against his training and the employer's operation policy. Therefore, appellant cannot satisfy the third prong of *Fyffe*, and summary judgment is proper.

{¶ 41} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 42} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant 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.

Peter M. Handwork, P.J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Mary J. Boyle, J. _____
CONCUR.
JUDGE

Judge Mary J. Boyle, Eighth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.