[Cite as *Cantu v. Irondale Indus. Contr., Inc.*, 2012-Ohio-6057.]

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

Yolanda Cantu, et al.	Court of Appeals No. F-11-018
Appellant	Trial Court No. 08CV000135
v.	
Irondale Industrial Contractors, et al.	**DECISION AND JUDGMENT**
Appellee	Decided: December 21, 2012

* * * * *

Kevin J. Boissoneault and Jonathan M. Ashton, for appellant.

David T. Andrews, Thomas R. Wyatt and Jerry P. Cline, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a summary judgment issued by the Fulton County Court of Common Pleas in favor of an employer in an employer intentional tort suit. Because we conclude that questions of material fact precluded summary judgment, we reverse.

{¶ 2} A baghouse is part of an industrial dust collection/pollution control system that filters exhaust particles from gasses. The baghouse contains a filter medium and a

hopper into which particles can fall. In large applications, the baghouse may contain multiple bag hoppers, each so large that it must be assembled on site.

{¶ 3} On April 27, 2006, a crew employed by appellee, Irondale Industrial Contractors, Inc., was installing a steel baghouse at a Delta, Ohio steel mill. The five person crew was assembling a bag hopper. The first two of four panels, "A" and "B," had been bolted together. A crane held this assembly upright while workers attempted to maneuver the "C" panel, suspended from a forklift, into place. Ironworker Miguel Cantu, Sr., standing atop and tethered to the "C" panel by a fall protection harness, had managed to make a temporary connection to the top of the "A" panel. The rest of the connecting seam, however, was not aligning, even with the aid of a "come-along" applied by ironworker Estaban Mendez.

{¶ 4} After some discussion between the ironworkers and job supervisor Jim Wheeler, there was apparent agreement that the misalignment was the result of improper positioning of the forklift. The workers planned to place the "C" panel on the ground and reposition the forklift. There is evidence to suggest that at this point supervisor Wheeler directed ironworker Cantu to remove the clamp that held together the seam at the top of panels "A" and "C."

{¶ 5} When Cantu removed the clamp, the "C" panel flipped, causing Cantu to fall through a hatch opening in the panel and dangle above the ground. The panel continued to move, striking Cantu and causing severe head injuries that would prove fatal.

{¶ 6} On April 25, 2008, appellant, Yolanda Cantu, on behalf of herself and as administrator of her husband's estate, brought suit against several defendants, including an employer intentional tort claim against appellee.[1] Appellee answered, denying liability and asserting, inter alia, that Miguel Cantu's death occurred when he was working within the scope of his employment.

{¶ 7} On December 6, 2010, following discovery, appellee moved for summary judgment on the employer intentional tort claim. Appellee argued that R.C. 2745.01 (effective April 7, 2005) barred employer intentional tort claims absent an employer's deliberate intent to injure an employee. Since the record is devoid of evidence that appellee intended to cause the injury or death of Miguel Cantu, appellee argued, it was entitled to judgment as a matter of law.

{¶ 8} Appellant responded with a memorandum in opposition, conceding that the amended R.C. 2745.01 narrowed the circumstances by which an employer intentional tort action could succeed. Appellant noted, however, that the amendment clearly did not eliminate the cause of action. Supervisor Wheeler was untrained and inexperienced in bag hopper assembly, according to appellant, yet the evidence, construed most favorably to appellant, suggests that he ordered Cantu to unclamp the two panels—even after having been previously warned of the likely consequences. This, appellant argued, was sufficient evidence to create a question of fact as to whether Wheeler's conduct created a

[1] The designer and manufacturer of the equipment being assembled, Menardi Mikropulo, L.L.C., remains in the suit. This matter is on appeal on the trial court's determination that there is no just cause for delay.

circumstance by which it was substantially certain that Cantu would be injured. Moreover, the clamp Wheeler ordered removed, appellant insisted, was an "equipment safety guard," the removal of which created a statutory presumption of intent to injure.

{¶ 9} The trial court found questions of material fact and denied appellee's summary judgment motion.

{¶ 10} On September 15, 2011, appellee asked the trial court to reconsider its summary judgment motion in light of intervening decisions from this court. These decisions, appellee maintained, clarified the definition of an "equipment safety guard" to the exclusion of the clamping device Wheeler purportedly ordered removed. Over appellant's opposition, the court reconsidered appellee's motion, resulting in an award of summary judgment to appellee.

{¶ 11} From this judgment, appellant now brings this appeal. Appellant sets forth the following single assignment of error:

> I. The trial court erred where in granted summary judgment in favor of Appellee Irondale Industrial Contractors, Inc.

Summary Judgment

{¶ 12} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 13} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

Workers' Compensation/Employer Immunity

{¶ 14} An employee injured in the workplace is ordinarily compensated for that injury through the state workers' compensation system, irrespective of fault. *Kaminski v. Metal and Wire Prod. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 21. As part of the bargain, employers cede many of their common law tort defenses while employees receive rapid and reasonably certain compensation for their injuries, but lose the right to obtain civil damages for an employer's ordinary negligence. *Id.* at ¶ 17.

{¶ 15} At the outset of workers' compensation in the early twentieth century, the legislature made an exception to the workers' compensation employer immunities when the employee's injury resulted from more than mere negligence. An employer's "willful act" that caused employee injury would take the claim out of workers' compensation and allow suit at common law. *Id.* at ¶ 18, *citing* 102 Ohio Laws 524, the original 1911 workers' compensation enactment. There followed a prolonged period during which competing forces tinkered with the exact scope of this right.

{¶ 16} In 1982, the Supreme Court of Ohio held that nothing in the workers' compensation scheme precluded an employee from enforcing a common law remedy against an employer for an intentional tort. *Blankenship v. Cincinnati Milacron Chem.*, 69 Ohio St.2d 608, 433 N.E.2d 572 (1982), syllabus. This was because the workers' compensation system only protects workers from the natural risk of employment. An employer's intentional conduct does not arise out of employment and, therefore, does not invoke the employer's immunity from civil liability. *Id.* at 613. The court subsequently

defined the intent necessary to negate employer immunity as the intent to injure another or an act committed with the belief that such injury is substantially certain to occur. *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90, 472 N.E.2d 1046 (1984), paragraph one of the syllabus.

{¶ 17} The proof necessary to establish the requisite intent for an actionable employer intentional tort was subsequently set out. The employee must show:

> (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 not just a high risk; 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. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (1988), paragraph five of the syllabus.

{¶ 18} With minor modification and explanation, *see Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115, 522 N.E.2d 489 (1991), paragraphs one and two of the syllabus, this standard continued until the legislature enacted the present R.C. 2745.01. *Kaminski*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 33.

R.C. 2745.01

{¶ 19} The most recent statutory employer intentional tort statute, R.C. 2745.01, provides in pertinent part:

> (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased 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 or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

{¶ 20} Within this context, appellant asserts that the trial court simply failed to consider her claim under R.C. 2745.01(A) and (B). Appellant contends that the court was so intent on applying the narrower definition of removing a "safety equipment guard" that it wholly omitted any consideration of the evidence appellant put forth in support of

intent to injure or a belief that injury was substantially certain to occur. Appellant maintains that construing the facts in her favor and applying a reasonable construction of R.C. 2745.01, she has put forth evidence showing that appellee intended to harm Miguel Cantu.

Construction

{¶ 21} We must admit that the language of the statute is somewhat circular. To prove an employer intentional tort, the employee must prove, and to prevent summary judgment must present evidence, 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." R.C. 2745.01(A). "Substantially certain" means with a "deliberate intent to cause * * * injury." R.C. 2745.01(B). So, aside from the safety guard presumption in R.C. 2745.01(C), there are two ways to an employer intentional tort: intend to injure or deliberately intend to injure. The result of this awkward statutory phrasing is that "an employee does not have two ways to prove an intentional tort * * * the only way an employee can recover is if the employer acted with the intent to cause injury." *Kaminski, supra,* 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 55, *citing with approval, Kaminski,* 175 Ohio App.3d 227, 2008-Ohio-1521, 886 N.E.2d 262 (7th Dist.).

{¶ 22} "As used in intentional torts, 'intent' is [the] desire to bring about [a] result that will invade the interests of another. * * * Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." (Citations omitted.) Black's Law

Dictionary 810 (6th Ed.1990). The word "intent" is used to "denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." 1 Restatement of the Law 2d, Torts, Section 8(A) (1965):

> All consequences which the actor desires to bring about are intended * * *. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than a substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness * * *. *Id*., Comment b.

{¶ 23} "The actor who fires a bullet into a dense crowd may fervently pray that the bullet will hit no one, but if the actor knows that it is unavoidable that the bullet will hit someone, the actor intends that consequence." Keeton, *Prosser and Keeton on Torts*, Section 8, 35 (5th Ed.1984).

{¶ 24} Substantial certainty is a part of intent and vice versa. When the legislature redefined "substantially certain" to mean "deliberate intent," the only thing added to this equivalency was the adjective "deliberate," meaning "to carefully consider * * * characterized by awareness of the consequences." *Merriam Webster's Collegiate Dictionary* 305 (10th Ed.1996).

{¶ 25} Subsequent to the submission of this matter for decision, the Supreme Court of Ohio released another opinion concerning the application of R.C. 2745.10. In *Houdek v. ThyssenKrupp Materials N.A., Inc.*, Slip Opinion No. 2012-Ohio-5685, ¶ 24, the court rejected the characterization of the Eight District Court of Appeals that R.C. 2745.10(B) was a "scrivener's error."

{¶ 26} The court defined "deliberate intent" as "specific intent," *id.*, a term ordinarily used in criminal law meaning "[a] subjective desire or knowledge that the prohibited result will occur." *Black's Law Dictionary* 1399 (6th Ed.1990), *quoting People v. Owens*, 131 Mich.App. 76, 85, 345 N.W.2d 904 (1983). We do not believe that the substitution of this phrase for the statutory language materially varies our analysis.

{¶ 27} In the present matter, it is not refuted that appellee's supervisor Wheeler knew that Miguel Cantu was on top of the suspended panels. According to the deposition testimony of ironworker Mendez, Mendez had warned Wheeler the day before that the assembly lift-method being used was improper. Mendez also testified that he heard an English speaking person without an accent direct Cantu to remove the only clamp that held panel "C" to panel "A."

{¶ 28} Construing this evidence most favorably to the non-moving party, it could reasonably be found that Wheeler was aware that the assembly method was unsafe, having previously been warned. It may also be inferred that Wheeler, as the English speaking supervisor on the scene, ordered Cantu to remove the only attachment that kept the panel from swinging, in circumstances in which it was substantially certain that Cantu

and/or one of the other workers would sustain injury. It is possible that a trier of fact could find Wheeler's acts only reckless, but that is matter that cannot be determined on summary judgment.

{¶ 29} Construing the facts most favorably to the non-moving party, we conclude that there is a question of material fact as to whether appellee's agent deliberately or specifically intended to cause harm to Miguel Cantu. Accordingly, appellant's sole assignment of error is well-taken.

{¶ 30} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings in conformity with this decision. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE