[Cite as *Delboccio v. Main Steel Polishing Co.*, 2009-Ohio-5912.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

EDWARD A. DELBOCCIO PLAINTIFF-APPELLANT	)	CASE NO. 08 MA 37
VS.	)	OPINION
MAIN STEEL POLISHING CO., INC. DEFENDANT-APPELLEE	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 05 CV 2588

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

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For Defendant-Appellee:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: October 28, 2009

WAITE, J.

{¶1} Appellant, Edward Delboccio, appeals the entry of summary judgment against him and in favor of Appellee, Main Steel Polishing Company, Inc. by the Mahoning County Court of Common Pleas on January 7, 2008. Appellant contends that genuine issues of fact are present and the trial court erred in granting summary judgment in this employer intentional tort case. Because Appellant cannot show that Appellee possessed actual knowledge that Appellant's injury was substantially certain to occur, the judgment of the trial court is affirmed.

{¶2} At the time of its decision, the trial court had before it as evidence Appellant's deposition, the deposition of Daniel D. DeNicholas, operator and laborer at the plant at the time of Appellant's injury, the deposition and affidavit of Roger T. Ben, plant manager at the time of Appellant's injury, and the record of proceedings before the Industrial Commission in Claim No. 04-307522. It is from this evidence that the facts can be gleaned.

{¶3} On January 27, 2004, Appellant was setting up the sheet polishing machine at Appellee's factory. (Delboccio Depo., pp. 22-23.) Typically, three to four employees worked on the machine at a given time: the machine operator, an employee on the front end of the machine responsible for loading the metal sheets, a third employee who cuts the polyvinyl chloride ("PVC") after the metal has passed through the PVC applicator, and a fourth employee responsible for stacking the coated sheets. (Delboccio Depo., pp. 17-18.)

{¶4} The PVC applicator has two vertically-opposed rollers that are manually operated with a toggle switch, which has three positions, reverse, neutral, and

forward. (DeNicholas Depo., pp. 13-14, 44.) The operator's main responsibility was to activate the toggle switch each time a metal sheet was ready to pass through the PVC applicator. (DeNicholas Depo., p. 15.) At his deposition, Appellant likened the machine to, "the old wringer washers that your mother and grandmother used to wring out the clothes." (Delboccio Depo., p. 26.)

{¶5} In the event of a jam, any employee could stop the rollers by using the emergency stop ("e-stop") button on the machine, but it was the operator's responsibility to clear the jam and press the reset button, which was located next to the e-stop button. (DeNicholas Depo., pp. 33-34, Ben Depo., pp. 28-29.) The policy at the factory was that an employee must power down any machine that required maintenance, although this policy was not in writing. (Ben Depo., p. 30.)

{¶6} Appellant's job was to cut the PVC and stack the sheets. (Delboccio Depo., p. 16.) Appellant explained that it was important that the PVC have no creases in it, because a crease in the PVC could dent the metal sheet. (Delboccio Depo., pp. 16-17.) Appellant had worked on the machine for approximately six months before the accident.

{¶7} On the day of the accident, Appellant and DeNicholas had been assisting on the slitter line when the supervisor, Joe Corona, asked them to set up the sheet polisher. (Delboccio Depo., pp. 22-23.) According to Appellant, he and DeNicholas were setting up the machine when the accident occurred and there was no metal, only PVC, in the machine. (Delboccio Depo., pp. 23, 25.)

{¶8} When the men were installing the PVC roll, DeNicholas was on the operator's side of the machine, and Appellant crawled underneath the machine to straighten the PVC. Appellant explained that he had to, "pull the PVC off of the roll down to the rolls and below." (Delboccio Depo., p. 24.) DeNicholas, at the same time, was pulling up on the PVC in order to make it taut. He accidentally hit the toggle switch and started the machine in reverse mode. As a result, Appellant's hand was drawn into the rollers. (Delboccio Depo., pp. 24-25.) When DeNicholas heard Appellant scream, he ran to the other side of the machine. (DeNicholas Depo., p. 25.) Upon seeing that Appellant's hand had been pulled into the machine, he ran back around the machine and put the toggle switch into the forward position to release Appellant's hand.

{¶9} Delboccio suffered permanent damage to his hand and has had to undergo two surgeries. (Delboccio Depo., p. 50.) A third surgery is necessary, which will require a recovery period of three months, so he has chosen to delay that surgery until he has a "good foot in the door" at his new job before taking leave. (Delboccio Depo., p. 54.)

{¶10} Appellant explained that he had straightened the PVC roll by crawling underneath the PVC applicator six to ten times in the past without incident. (Delboccio Depo., p. 33.) He conceded that he was aware that the power was on when he was adjusting the PVC, the power could have been shut off, and if the power had been shut off he would not have been injured. (Delboccio Depo., pp. 33, 40.) However, he stated that it was not his responsibility to operate the machine or to

activate those switches. (Delboccio Depo., p. 41.) He further stated that, at the time, he did not think that it was necessary to shut down the main power line in order to align the PVC. (Delboccio Depo., p. 61.)

{¶11} According to DeNicholas, he and Appellant were running sheets when Appellant was injured. (DeNicholas Depo., p. 9.) A thin metal sheet jammed under one of the rollers and bent around it. (DeNicholas Depo., p. 11.) DeNicholas explained that the lighter gauge sheets were more likely to jam the machine. (DeNicholas Depo., p. 12.) The machine typically jammed between five and ten times a day when running light gauge metal sheets.

{¶12} Because jams occurred as a regular part of the operation, DeNicholas stated that he believed that he knew how to dislodge the damaged sheets. (DeNicholas Depo., p. 13.) He instructed the employee feeding the sheets to stop, and then he cut the PVC off the top of the machine and tried to remove the sheet.

{¶13} As DeNicholas struggled to remove the sheet, his hip, which was resting on the toggle switch, activated the PVC rollers into reverse mode. (DeNicholas Depo., pp. 14, 25.) As a consequence, Appellant's hand was drawn into the rollers. (DeNicholas Depo., p. 25.) DeNicholas claims that he told Appellant prior to the accident, "[j]ust leave everything go, I will take care of it." (DeNicholas Depo., pp. 18, 25-26.)

{¶14} According to DeNicholas, the operator is in charge of the line and it is common practice for the operator to address problems. Prior to his attempts to dislodge the metal sheet, DeNicholas saw Appellant standing at the back of the

machine, but he did not see Appellant go under the machine. (DeNicholas Depo., p. 22.)

{¶15} Another employee, George Hawes, suffered a similar injury a few months before Appellant. (DeNicholas Depo., p. 22.) DeNicholas was the operator of the sheet polishing line and Hawes was the stacker the day that he was injured. Hawes had his hands on a metal sheet that had jammed when Eric Smith, the assistant plant manager, attempted to clear the jam by hitting the toggle switch in reverse mode. (DeNicholas Depo., pp. 29, 31.) DeNicholas explained that he was a new employee at the time, and Smith had more experience with the machine. (DeNicholas Depo., p. 30.) Hawes' hand was drawn into the machine, and the metal sheet "actually just laid his hand wide open." (DeNicholas Depo., p. 31.) There were no other accidents involving the PVC applicator. (DeNicholas Depo., pp. 49-50.)

{¶16} After Hawes was injured, Ben moved the reset button from the PVC applicator, where the e-stop button was located, to another panel approximately 20 feet away from the applicator, so the machine operator would have to walk away from the machine to reset it. (Ben Depo., p. 31.) He conceded that the modification served no purpose unless the operator powered down the machine for servicing. In other words, if the machine was not powered down, there would be no reason to activate the reset button.

{¶17} After Appellant's accident, Ben replaced the e-stop button with electric eyes situated on both sides of the rollers on the PVC applicator. (DeNicholas Depo., p. 39.) The machine automatically shuts down when the beam between the eyes is

broken. Based on the previous modification, the operator must then walk away from the machine to reset it. Also, the toggle switch, which previously stayed in place once it was moved into a particular position, is now spring-loaded and must be held in place by the machine operator for the rollers to move forward or in reverse. (DeNicholas Depo., p. 44.) Ben relied upon his twenty years of experience in working around similar equipment in choosing the modifications to the PVC applicator. (Ben Depo., p. 22.)

{¶18} As a part of Appellant's workers' compensation claim, the Industrial Commission found that Appellee violated a specific safety requirement, O.A.C. 4123:1-5-11(D)(10)(a), which requires employers to provide means to protect employees exposed to contact with nip points created by power-driven in-running rolls. (Record of Proceedings, p. 4.)

ASSIGNMENT OF ERROR

{¶19} "I. The Trial Court committed error in granting summary judgment to the Defendant-Appellee."

{¶20} An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court as set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains 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 to but one conclusion, and viewing the

evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 364 N.E.2d 267. When a court considers a motion for summary judgment the facts must be taken in the light most favorable to the non-moving party. Id.

{¶21} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim*." (Emphasis in original.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264. If the moving party carries its burden, the nonmoving party has the reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. Id. at 293, 662 N.E.2d 264. In other words, in the face of a properly supported motion for summary judgment, the nonmoving party must produce some evidence that suggests that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 386, 701 N.E.2d 1023. "In order to overcome an employer-defendant's motion for summary judgment on an intentional tort claim, the plaintiff must set forth specific facts showing there is a genuine issue as to whether the employer committed an intentional tort." *Burgos v. Areway, Inc.* (1996), 114 Ohio App.3d 380, 383, 683 N.E.2d 345.

{¶22} While Ohio's workers' compensation provisions provide employees with the primary means of compensation for injury suffered in the scope of employment,

an employee may institute a tort action against the employer when the employer's conduct is sufficiently "egregious" to constitute an intentional tort. *Sanek v. Duracote Corp*. (1989), 43 Ohio St.3d 169, 172, 539 N.E.2d 1114. When an employer's conduct rises to that level, the employer's act occurs outside the scope of employment and, thus, the employee's recovery is not limited to the workers' compensation provisions. *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 613, fn. 7, 433 N.E.2d 572.

{¶23} In order to recover against an employer for an intentional tort, an employee must prove three elements described in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108:

{¶24} "[I]n order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (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. (*Van Fossen v. Babcock & Wilcox Co*. [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)" Id. at paragraph one of the syllabus.

{¶25} The General Assembly has made several efforts to codify the common law governing employer intentional torts. Each time, the legislature has attempted to effectively immunize employer conduct by defining the term of art "substantial certainty" as requiring deliberate intent to cause injury on the part of the employer. See R.C. 2745.01, former R.C. 2745.01, former R.C. 4121.80. Ohio courts have flatly rejected as unconstitutional the General Assembly's repeated efforts to immunize employer conduct. *Brady v. Safe-Kleen Corp.* (1991), 61 Ohio St.3d 624, 634, 576 N.E.2d 722 (former R.C. 4121.80); *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, 308, 707 N.E.2d 1107 (former R.C. 2745.01). Because the injury in this case was sustained following the Ohio Supreme Court's decision in *Johnson*, supra, but prior to the enactment of the current statute, the common law requirements announced in *Fyffe*, supra, govern this case.

{¶26} Appellant contends that Ben's admission at his deposition that the modifications made following Hawes' accident would not have prevented Hawes' injuries, coupled with the findings of the Industrial Commission, are sufficient evidence to preclude summary judgment.

{¶27} In order to satisfy the first prong of the *Fyffe* test, Appellant must show there was a dangerous process and the employer had actual knowledge of the consequences of the exact dangers which ultimately caused the injury. *Sanek,* 172; *Dailey v. Eaton Corp.*, 138 Ohio App.3d 575, 582, 741 N.E.2d 946. " '[D]angerous work must be distinguished from an otherwise dangerous condition within that work. It is the latter of which that must be within the knowledge of the employer before

liability could attach.' " *Dailey* at 582, 741 N.E.2d 946, quoting *Naragon v. Dayton Power & Light Co.* (Mar. 30, 1998), 3d Dist. No. 17-97-21. A dangerous condition exists when the danger, " 'falls outside the "natural hazards of employment," which one assumes have been taken into consideration by employers when promulgating safety regulations and procedures.' " *Youngbird v. Whirlpool Corp.* (1994), 99 Ohio App.3d 740, 747, 651 N.E.2d 1314." *Hubert v. Al Hissom Roofing & Constr., Inc.*, 7th Dist. No. 05-CO-21, 2006-Ohio-751, ¶19.

{¶28} The Fourth District has found that operating dangerous machinery may be a necessary incident of an employment situation, barring an injured employee from recovering in intentional tort for injuries suffered. *Goodin v. Columbia Gas of Ohio, Inc.* (2000), 141 Ohio App.3d 207, 216, 750 N.E.2d 1122. On the other hand, operating the same dangerous machinery without proper safety mechanisms in place may not constitute a necessary incident of the employment, thus permitting recovery for intentional tort. Id. Therefore, the question presented in this case is whether Appellee was substantially certain that Appellant would be injured due to the absence of (later-installed) safety features. *Fyffe*, 59 Ohio St.3d at 118, 570 N.E.2d 1108.

{¶29} "In establishing whether an employer knew that an injury was substantially certain to occur, prior accidents are probative." *Gibson v. Precision Strip, Inc.*, 12th Dist. No. CA2007-08-201, 2008-Ohio-4958, ¶13. "Courts should focus not only on the existence of prior similar accidents, but also 'on the employer's knowledge of the degree of risk involved.' " Id. To demonstrate that the employer committed an intentional tort, the employee must show that the employer possessed

actual knowledge that injury was a substantial certainty. *Sanek*, 43 Ohio St.3d at 172, 539 N.E.2d 1114.

{¶30} Ben conceded that, in retrospect, the modification that was made to the PVC applicator after Hawes' accident would not have prevented Hawes' injuries, and, obviously, did not prevent Appellant's injuries. Ben testified that the original modification could only have prevented injury if the machine has properly been powered down. In both accidents, the PVC applicator was not powered down, despite the fact that Ben testified that it was Appellee's policy to power down machinery prior to servicing.

{¶31} As a consequence, Appellee contends that the injuries of Hawes and Appellant were attributable to the failure of Appellee's employees to follow the safety policy requiring them to power down machinery before servicing, not the unguarded rollers on the PVC applicator. The evidence in the record establishes that, on several occasions, Appellant straightened the PVC without having the operator power down the machine. However, there was no evidence to establish that Appellee knew that employees were not following this protocol.

{¶32} Several Ohio appellate courts have concluded that, even if an employer is aware that safety procedures are not being followed prior to a workplace injury, the employer does not commit an intentional tort. The Tenth District Court of Appeals reasoned that where an employer knows that employees are not following safety guidelines, the employer is negligent or reckless, but his awareness of potential injury would not rise to a substantial certainty. *Foust v. Magnum Restaurants, Inc.* (1994),

97 Ohio App.3d 451, 456, 646 N.E.2d 1150; see also *Robinson v. Icarus Industrial Construction and Painting Inc.* (2001), 145 Ohio App.3d 256, 762 N.E.2d 463.

{¶33} "[T]o impose liability for an employer's intentional tort, a plaintiff must establish proof *beyond* that required for negligence and recklessness. While the caselaw does not indicate that this standard is tantamount to the reasonable-doubt standard of criminal law, a plaintiff nevertheless shoulders a heavy burden." (Emphasis in original.) (Citations omitted.) *Young v. Indus. Molded Plastics*, 160 Ohio App.3d 495, 2005-Ohio-1795, 827 N.E.2d 852, ¶29.

{¶34} In its effort to define the lines between negligence, recklessness, and intent, the Ohio Supreme Court has stated:

{¶35} "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 recklessness. As the probability that the consequences will follow further increases, 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 118, 570 N.E.2d 1108.

{¶36} A foreseeable risk, in this context, is not one that is merely possible or probable, but rather, a highly probable risk of harm. *Young*, supra, 160 Ohio App.3d 495, 2005-Ohio-1795, 827 N.E.2d 852, at ¶29. While the risk in this case was

possible, and may have even been probable, it is clear that the risk was not highly probable. The Twelfth District has ruled that, "[a]n employer cannot be held to know that a dangerous condition exists and that harm is substantially certain to occur when he has taken measures that would have prevented the injury altogether had they been followed. * * * [W]hen safety devices or rules are available but are ignored by employees, the requisite knowledge of the employer is not established." *Vance v. Akers Packaging Serv., Inc.*, 12th Dist. No. CA2006-05-105, 2006-Ohio-7032, ¶31.

{¶37} To further bolster his claim, Appellant cites the Industrial Commission's finding that Appellee violated Ohio Administrative Code 4123:1-5-11(D)(10)(a), as evidence of Appellee's intentional conduct. However, administrative code violations are only one of many factors to be taken into consideration in determining whether harm was substantially certain to occur. *Gibson* at ¶38, citing *Maddox v. L.O. Warner, Inc.* (Feb. 7, 1996), 2d Dist. No. 15468.

{¶38} There is no evidence that prior to Appellant's accident, Appellee was cited by the Industrial Commission for failing to provide a guard for the pinch point rollers. See *Gibson*, supra, citing *Sanek*, 43 Ohio St.3d at 172, 539 N.E.2d 1114. An administrative violation does not evidence the requisite intent unless there is an actual pre-accident citation. *Sanek* at 172, 539 N.E.2d 1114.

{¶39} In summary, Appellee instituted several safety measures following Hawes' accident, which included stressing the company policy that employees must power down the PVC applicator for service. The record in this case demonstrates that the safety measures instituted after Hawes' accident would have prevented

Appellant's injury if the machine had been powered down. While Appellee's conduct in this case may have constituted negligence or recklessness, Appellant cannot show that Appellee committed an intentional tort. Likewise, evidence of a post-accident administrative code violation does not, of itself, prove the requisite intent in this case. Accordingly, Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.