[Cite as *Slaine v. Republic Waste Servs. of Ohio, L.L.C.*, 2006-Ohio-6443.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87801

CHRISTOPHER SLAINE

PLAINTIFF-APPELLANT

vs.

REPUBLIC WASTE SERVICES OF OHIO, LLC, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-567163

BEFORE: Corrigan, J., Cooney, P.J., and Calabrese, J.

RELEASED: December 7, 2006

JOURNALIZED:

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MICHAEL J. CORRIGAN, J.:

{¶ 1} Plaintiff Christopher Slaine filed this intentional tort against his employer, Republic Waste Services of Ohio, alleging that Republic committed an intentional tort against him by failing to "adequately instruct, inform and/or train" him in the operation of a garbage truck. It seems that the wheel of a garbage truck Slaine operated on Republic's behalf "unexpectedly" rolled over his foot. Republic filed a motion for summary judgment in which it claimed that Slaine caused the accident by not stopping his truck completely before exiting the truck. The court granted Republic's motion for summary judgment without opinion. The sole assignment of error contests that ruling.

{¶ 2} Since this is an appeal from a summary judgment, we view the facts in a light most favorable to Slaine. See Civ.R. 56(C). Republic hired Slaine to drive a garbage truck. The truck in question, a Mack LE (low entry), featured left and right-side drivers' positions. The left side driver's position has a seat and a standard layout of foot pedals and steering wheel. The right side driver's position has no seat. The driver stands behind a wheel and operates a traditional foot brake and gas pedal. The truck contains a unique feature called a "work brake." The work brake is designed to facilitate curbside pickups. A lever on the dashboard activates the brake, putting the automatic transmission into neutral and parking the chassis on its service brakes. When the brake is released, the transmission is automatically engaged.

{¶ 3} Mack's operator's manual and a warning sticker placed on the right side of the dashboard warns the driver to use the foot brake to bring the truck to a complete stop before engaging the work brake. Nevertheless, Slaine testified that he had not been trained to do so. Instead, he said that during training, and as a matter of practice in the field, he applied the foot brake to slow the vehicle, but not bring it to a complete stop, and then engage the work brake. In some circumstances, the application of the work brake while the truck was still rolling caused the tires to skid. Slaine conceded that it was possible that skid marks found near the site of the accident had been caused by him.

{¶ 4} Slaine testified that he had backed the truck into a cul-de-sac, and proceeded forward on the right side of the road. At this point, he operated the truck from the right-hand driver's position. After making the pickup on the right side of the street, he drove over to the left edge of the street for the next pickup. While operating the truck in the manner just described, Slaine slowed by using the foot brake and then applied the hand brake before the truck had come to a complete stop. Because the road ahead turned to the right, he turned the wheel of the truck to the right so as not to run off the road. He apparently did all of this in one motion, because he conceded that the truck was not only moving when he exited it, it was turning to the right as well.

{¶ 5} The Mack truck has front-wheel steering. Its wheels are positioned behind the cab of the truck. As Slaine's right foot hit the ground, the moving tire pinned it to the ground. The truck stopped with Slaine's foot pinned beneath the tire. Slaine could not positively say whether he exited the truck without incident or whether his foot slipped when exiting.

{¶ 6} Slaine's complaint alleged that Republic's "intentional" conduct was its failure "to adequately instruct, inform and/or train Plaintiff Christopher Slaine in the proper means of braking and subsequently disembarking from the aforementioned Mack Truck." He further alleged that Republic failed to provide "instruction and/or information regarding braking and disembarking despite their specific knowledge that

the truck would move following the engagement of the passenger side braking system of the Mack truck." All this, Slaine alleged, exposed him to dangerous instrumentalities or conditions.

{¶ 7} An extended discussion of the law relating to intentional torts is unnecessary in this case, as we find as a matter of law that Slaine offered no evidence to create a genuine issue of material fact as to whether Republic acted intentionally.

{¶ 8} In order to establish an intentional tort, an employee must demonstrate 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 the 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, acted 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.

{¶ 9} When an employer acts despite its knowledge of some risk, its conduct may be negligent. As the probability increases that particular consequences may follow, 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 it still proceeds, the employer is treated by the law as if it had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk – something short of a substantial certainty – is not intent. Id. at 118.

{¶ 10} The quoted portions of Slaine's complaint leaves us wondering exactly what constituted intentional conduct as opposed to that which is merely negligent. The basis for any intentional conduct is the knowledge that harm will be substantially certain to occur. However, Slaine's complaint is worded in classic negligence language. It is true that under some circumstances, a failure to warn can be considered intentional. But that situation occurs only when the employer knows that an injury is substantially certain to occur in light of the warning not having been given. Knowledge that an injury might result from a dangerous instrumentality or condition does not rise to the level of an intentional tort unless there is an intent to cause an injury.

{¶ 11} The best Slaine could muster in response to Republic's motion for summary judgment was his affidavit in which he stated that he was not trained in the use of the braking system, especially the work brake; was not given specific instruction to bring the vehicle to a complete stop before exiting; and was not instructed on the proper means of exiting the truck upon stopping.

{¶ 12} Slaine possessed a commercial driver's license and had over-the-road experience driving semi-trailers. He took auto body courses in high school, rode motorcycles and admitted to having worked on the brake system of at least one car. He acknowledged that there was a warning sticker placed on the right-side dashboard which stated, "Stop vehicle completely with foot brake before applying work brake," but said that he did not read it. He drove the truck without incident for more than two months, and candidly agreed that he knew before the accident occurred that if he fell while exiting a moving truck he could suffer a serious injury. Finally, he agreed that he had no evidence to show that any other Republic employee had been injured in the same manner.

{¶ 13} Despite this evidence, Slaine argues that Republic should have warned him about that which he knew. We are, of course, aware that contributory negligence is not a defense to an intentional tort. *Cremeans v. Willmar Henderson Mfg. Co.* (1991), 57 Ohio St.3d 145. Nevertheless, no reasonable trier of fact could find that Republic's failure to give Slaine specific training on how to exit the cab of the truck meant that his injuries were substantially certain to occur. Putting aside the ignored warning openly on display in the right-hand side of the cab, this was not a case where Slaine was unaware of the consequences of exiting a moving vehicle. He knew that he could be seriously injured if he were to lose his footing while exiting a moving truck. Slaine's argument has the logical consequence of lapsing into

absurdity. For example, we assume that Slaine would agree that driving into a concrete wall at a very high rate of speed could result in catastrophic injuries. Would he maintain that Republic's failure to advise him not to so drive his vehicle would rise to the level of an intentional tort?

{¶ 14} In the end, Slaine's complaint and evidence utterly fail to establish intentional conduct by Republic. At best, it alleged negligent conduct that is insufficient, as a matter of law, to prove an intentional tort. The court did not err by granting summary judgment.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN, JUDGE*

COLLEEN CONWAY COONEY, P.J., and
ANTHONY O. CALABRESE, JR., J., CONCUR

(*Sitting by Assignment: Judge Michael J. Corrigan, Retired, of the Eighth District Court of Appeals.)

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