[Cite as *Head v. Reilly Painting & Contracting, Inc.*, 2015-Ohio-688.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101718

SABRINA HEAD, ET AL.

PLAINTIFFS-APPELLANTS

vs.

REILLY PAINTING AND CONTRACTING, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-793702

BEFORE: Stewart, J., S. Gallagher, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: February 26, 2015

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MELODY J. STEWART, J.:

{¶1} Decedent William Head ("Head") died from injuries he suffered after falling from the roof of a residential garage while working for defendant Reilly Painting & Contracting, Inc. Sabrina Head, the executor of his estate, filed this intentional tort action against Reilly Painting, Michael Reilly (the owner of Reilly Painting), and Peter Lukas (the job foreman), on grounds that they failed to provide Head with a safety harness in violation of Occupational Health and Safety Administration rules. In granting summary judgment, the court found that although Reilly Painting deliberately failed to provide Head with a safety harness, it did not do so with a deliberate intent to cause Head injury because it thought the job was safe: the job site was on a flat roof. The court also rejected common law intentional tort claims against Reilly and Lukas, finding that there was no evidence that the individual defendants knew that Head was substantially certain to be injured while working on the roof. Although there were other legal theories mentioned in the court's summary judgment, these are the only two presented on appeal.

{¶2} We first consider whether the court erred by granting summary judgment to Reilly Painting on the statutory intentional tort claim. The estate maintains that the court erred by finding that it had to offer direct proof of Reilly Painting's subjective intent to injure Head. The estate argues that the evidence showed that Lukas, the job foreman, testified in deposition that he "deliberately" did not require Head to use a safety harness while working on the roof, so reasonable minds could differ on whether Reilly Painting acted with deliberate intent to injure Head.

{¶3} Because Reilly Painting was Head's employer, the intentional tort claim is governed by R.C. 2745.01. That section states that an employer is not liable for injuries suffered by an employee during the course of employment "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." R.C. 2745.01(A). The statute defines the term "substantially certain" to mean "that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." R.C. 2745.01(B).

{¶4} It is important to understand R.C. 2745.01(B) in context. This section of the statute was a legislative response to a line of Ohio Supreme Court decisions that had created an exception to the Workers' Compensation Fund as being the sole avenue of recovery for workplace injuries. In *Blankenship v. Cincinnati Milacron Chems., Inc*., 69 Ohio St.2d 608, 433 N.E.2d 572 (1982), the Supreme Court recognized a cause of action for an employer's intentional tort against its employee, holding that, because intentional tort claims do not arise out of the employment relationship, the workers' compensation laws do not provide immunity from suit. *Id*. at 613. In subsequent decisions, the Supreme Court arguably construed the "substantially certain to occur" intentional tort standard of harm as being coextensive with mere recklessness. *See Magda v. Greater Cleveland Regional Transit Auth*., 8th Dist. Cuyahoga No. 92570, 2009-Ohio-6219, ¶ 32-47. Thus, case decisions like *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90, 472 N.E.2d 1046 (1984), were criticized for focusing not on whether employers had acted with an intent to harm an employee, but on whether employers' deliberate actions created safety hazards, the injuries from which were substantially certain to occur as a result of the hazard, regardless of a specific intent to cause injury. *See, e.g.*, Washam, *The New Workers' Compensation Law in Ohio: Senate Bill 307 Was No Accident,* 20 Akron L.Rev. 491, 493-494 (1987); West, *In the Wake of Blankenship: Following Footprints Into the Mire of Intentional Torts in the Workplace in Ohio,* 12 N.Ky.U.L.Rev. 267, 286-287 (1985).

{¶5} Addressing what it perceived as an unwarranted expansion of the employer/employee intentional tort standard, the General Assembly enacted R.C. 2745.01.

Stetter v. R.J. Corman Detailment Servs., L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 27. As acknowledged by the Ohio Supreme Court, R.C. 2745.01 showed that "the General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), [was] to permit recovery for employer intentional torts only when an employer acts with *specific intent* to cause an injury, subject to subsections (C) and (D)." (Emphasis sic.) *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 56. In other words, "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system." *Houdek v. Thyssenkrupp Materials, N.A.*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 25.

{¶6} We review the facts forming the basis of the court's summary judgment most favorably to the estate, the non moving party. Civ.R. 56(C).

{¶7} The facts are largely uncontested. Head, an experienced laborer working for Reilly Painting, was on the flat roof of a residential garage removing shingles in preparation for installing a new roof. The roof was approximately 11 feet above ground level. Lukas, who was on the ground, asked Head to hand him a broom. Head leaned over to hand the broom to Lukas, but lost his balance and fell to the ground. The fall left him paralyzed, and he later died from complications resulting from injuries suffered in the fall.

{¶8} In statements made to OSHA investigators following the accident, Reilly Painting admitted that Head was not wearing a safety harness contrary to OSHA regulations, which require safety harnesses for work performed more than six feet above the ground. Reilly Painting had safety harnesses available, but Lukas, the foreman on the job, did not believe they

were necessary because the roof was flat and not pitched. OSHA cited Reilly Painting for safety violations.

{¶9} The court cited our decision in *Schiemann v. Foti Contracting, L.L.C.*, 8th Dist. Cuyahoga No. 98662, 2013-Ohio-269, for the proposition that "under current Ohio law, that without showing evidence of a history of animosity or ill-will between the employer and employee that would support evidence of a subjective intent by the employer to injure the employee, an intentional tort claim will not lie."[1] *Id*. at ¶ 17. The facts in *Schiemann* are very similar to those in this case: Schiemann, a stone mason who had been working without a safety harness on an 18-foot high platform, suffered injuries when he fell. Schiemann brought an intentional tort action against his employer on grounds of failing to provide him with a safety harness in violation of OSHA standards for "fall protection." We affirmed a summary judgment, specifically rejecting Schiemann's argument that R.C. 2745.01 contained two different types of "intent": one that requires the employer to have a "deliberate intent" to injure, and one that only required that the employer have an "intent to injure." Finding no direct evidence of animosity or ill-will that supported a finding that the employer subjectively intended to injure Schiemann, we noted that the evidence tended to show the contrary — Schiemann admitted that he would not have worn a safety harness if one had been made available to him and that, in any event, there was no evidence of any other person being injured while performing the same type of

[1] Although the court cited our decision in *Schiemann* for this proposition, such was not a holding in that case. It was merely dicta. After a discussion on Ohio Supreme Court cases analyzing "intent to injure," we noted that "*it appears* under current Ohio law, that without showing evidence of a history of animosity of ill-will * * *, an intentional tort claim will not lie." *Id*. (Emphasis added.) We did not then, nor do we now, hold that such a showing is the exclusively required evidence that an employee must present to support an intentional tort claim against his employer.

work, so the employer had no reason to believe that Schiemann, or anyone else for that matter, would be injured while working without a harness. *Id*. at ¶ 18-19.

{¶10} The estate concedes that *Schiemann* is binding on us, but suggests that we instead follow *Smith v. Ray Esser & Sons Inc*., 9th Dist. Lorain No. 12CA010150, 2013-Ohio-1095. In *Smith*, the Ninth District Court of Appeals held that summary judgment had been improperly granted in an employee intentional tort case because reasonable minds could conclude that an employer who disregarded OSHA safety regulations was substantially certain that sending the employee into a work situation would result in injury. *Id.* at ¶ 24.

{¶11} We disagree with *Smith's* analysis of the employer intentional tort standard because it, like the estate in this case, improperly equates the deliberate denial of safety equipment to an employee as showing a deliberate intent to injure. The fallacy of this position is that it relies on the proposition that but for the issuance of safety equipment, an injury is substantially certain to occur. The proposition that an injury is substantially certain to occur is not equivalent to the proposition that a person acted with deliberate intent to injure. While it may be true that safety equipment might prevent an injury, that says nothing about the employer's intent to harm an employee; that is, whether the employer knew that the circumstances were such that some injury would occur.

{¶12} In this case, there was no evidence that Reilly Painting acted with deliberate intent to injure Head. Reilly Painting knew that injuries were substantially certain to occur in the event an employee fell from a roof without wearing a safety harness, but that knowledge begs the question of whether Reilly Painting knew that Head would fall. Lukas, the job foreman, testified at deposition that he did not believe there was any need for the safety harness because he

felt safe working on a flat roof. Also, there was no indication that Head believed he was in danger without a safety harness.

{¶13} The estate makes much of Lukas's statement that he made a "deliberate" decision not to use safety harnesses on the job. It argues that R.C. 2745.01(A) "imposes liability where the conduct is intentional *or* deliberate." The difficulty with the argument that R.C. 2745.01(A) imposes liability for either deliberate or intentional acts is that the legislature defined the term "substantial certainty" to mean that the employer acts with "deliberate intent" to cause an injury. All intentional acts are, by definition, deliberate. *Kaminski*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, recognized this point, finding that the two definitions were essentially the same and showed the legislature's intent was "to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury * * *." *Id*. at ¶ 56. Making a deliberate decision not to use a piece of safety equipment does not by itself show a specific intent to cause an injury. To find otherwise would reinstate the past employer intentional tort paradigm that the legislature so clearly rejected.

{¶14} Civ.R. 56(C) states that summary judgment may issue when reasonable minds could come to but one conclusion on the evidence. We agree with the court that Reilly Painting's OSHA violations do not, standing alone, create an issue of fact as to whether those violations were made with the specific intent to injure Head. The undisputed evidence showed that the job foreman considered it safe to work on a flat roof and that safety harnesses were unnecessary. There is no evidence that Reilly Painting intended to harm Head.

{¶15} We next consider whether the court erred by granting summary judgment in favor of Reilly and Lukas on the estate's claims for common law intentional tort. The estate argues that R.C. 2745.01 applies only to employers, so its intentional tort claims against Reilly and Head

are "common law" claims that should be reviewed under the standard set forth in *Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991). Reilly and Lukas agree that R.C. 2745.01 applies only to employers, but rely on precedent for the proposition that a fellow employee cannot be sued for a common law workplace intentional tort. The court rejected the proposition that the enactment of R.C. 2745.01 superseded all common law intentional tort claims against fellow employees, but held that the estate failed to show under the common law that either individual defendant knew that harm to Head was substantially certain to occur by sending him to work on the roof without a safety harness.[2]

{¶16} Under *Fyffe* (the terms of which we modify in this action by an employee against a co-employee), a plaintiff seeking to prevail on a claim of co-employee intentional tort must show (1) knowledge by the co-employee of the existence of a dangerous process, procedure, instrumentality, or condition within its business operation; (2) knowledge by the co-employee 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 co-employee, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. The *Fyffe* test is conjunctive — the failure to establish any one of the elements is grounds for summary judgment. *Fleming v. AAS Service, Inc.*, 177 Ohio App.3d 778, 2008-Ohio-3908, 896 N.E.2d 175, ¶ 62 (11th Dist.).

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[2] Although Reilly and Lukas argued in their reply brief to the estate's brief in opposition to the motion for summary judgment that R.C. 2745.01 superseded all common law intentional tort claims against fellow employees, they limit their argument on appeal, consistent with the court's summary judgment, to applying the common law to co-employee intentional tort claims filed by the estate. Like the Ohio Supreme Court, we find that the issue is not properly before us. *See State ex rel. Yeaples v. Gall*, 141 Ohio St.3d 234, 2014-Ohio-4724, 23 N.E.3d 1077, ¶ 18 ("we need not tread into the complex workers' compensation milieu to determine whether Ohio recognizes the workplace intentional tort against a co-employee").

{¶17} The elements of the *Fyffe* test must not be construed in a way that blurs the distinction between intentional conduct on the one hand and reckless or negligent conduct on the other hand. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 116, 522 N.E.2d 489 (1988), citing *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 178, 501 A.2d 505 (1985). In this context, the law acknowledges that establishing that a co-employee's conduct was more than negligence or recklessness "'is a difficult standard to meet.'" *Goodin v. Columbia Gas of Ohio, Inc.*, 141 Ohio App.3d 207, 220, 750 N.E.2d 1122 (4th Dist.2000), quoting *McGee v. Goodyear Atomic Corp.*, 103 Ohio App.3d 236, 246, 659 N.E.2d 317 (4th Dist.1995).

{¶18} There is no dispute on the first element of the *Fyffe* test — that both Reilly and Lukas were aware of the obvious danger in falling while working on a roof. The dispute centers on the application of the second element: knowledge by either defendant of the substantial certainty of harm to Head.

{¶19} The court found that there was "no evidence to show, despite the risk of falling, that Lukas or Reilly had any reason to know that Head was substantially certain to be injured while working on the roof." Judgment Entry at 9. In reaching this conclusion, the court cited our opinion in *Magda*, 8th Dist. Cuyahoga No. 92570, 2009-Ohio-6219. In *Magda*, we addressed the second element of the *Fyffe* test and stated:

> [T]he employee must show more than just a dangerous condition in order to establish the existence of a genuine issue of material fact regarding whether an employer knew that injury to its employee was substantially certain to occur — the employee must "prove that the employer knew that, because of the exact danger posed, the employee would be harmed or was substantially certain to be harmed in some manner similar to the injury the employee sustained." *Ford v. Complete Gen. Constr. Co.*, Franklin App. No. 06AP-394, 2006-Ohio-6954, at ¶ 16, citing *Yarnell v. Klema Bldg., Inc.* (Dec. 24, 1998), Franklin App. No. 98AP-178, 1998 Ohio App. LEXIS 6249.

Id. at ¶ 61.

{¶20} Although Reilly and Lukas appreciated the risk of injury resulting from a fall from the roof, there was no evidence that they knew it to be a substantial certainty that Head would fall because he was not wearing a safety harness. Lukas testified in deposition that he did not require the use of a safety harness because he did not believe there was a risk of falling while working on a flat roof. There was no evidence that Head, an experienced roofer, believed that he should be wearing a safety harness while working on the flat roof or that he expressed any unease in doing so. Finally, there was no evidence that either Reilly or Lukas had a specific intent to injure Head by failing to issue him a safety harness.

{¶21} In the end, there was no evidence to show that either Reilly or Lukas knew that Head would fall because he was not wearing a safety harness. The court's conclusion that the increased risk of injury resulting from not wearing a safety harness did not mean that Head's injury was substantially certain to occur was consistent with our holding in *Magda*, and thus not in error.

{¶22} Judgment affirmed.

It is ordered that appellees recover of appellants their 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 Court of Common Pleas 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.

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MELODY J. STEWART, JUDGE

EILEEN T. GALLAGHER, J., CONCURS;
SEAN C. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION)

SEAN C. GALLAGHER, P.J., CONCURRING IN JUDGMENT ONLY:

{¶23} Although the majority opinion accurately outlines the existing state of intentional tort law in this district from *Schiemann*, 8th Dist. Cuyahoga No. 98662, 2013-Ohio-269, I reluctantly concur in judgment only. I respectfully question this court's restrictive application of R.C. 2745.01 under the summary judgment standards.

{¶24} First, the trial court found that Reilly Painting (and by implication Michael Reilly and Peter Lucas) violated safety rules by failing to provide Head with a safety harness that the employer had readily available. Despite this, the conclusion is that there was no deliberate intent to cause injury because Reilly and Lucas "thought" the job was safe. Evidently, the job was not as safe as they presumed. Why should the employer's unilateral decision to violate safety rules create an almost unrebuttable presumption that there is no deliberate intent to injure? If this were not a flat roof, but severely pitched, would the employer's statements be given the same weight? Further consideration should be given to the circumstances of each case.

{¶25} I recognize that unlike the deliberate removal of an equipment safety guard, there is no rebuttable presumption of deliberate intent for a failure to provide safety equipment. *See* R.C. 2745.01(C). I also recognize that the violation of an OSHA regulation does not in itself create an intentional tort. *Hernandez v. Martin Chevrolet, Inc.*, 72 Ohio St.3d 302, 303, 1995-Ohio-200, 649 N.E.2d 1215. However, there may be circumstances under which a conscious decision to violate safety rules would create a factual question of whether there was a

deliberate intent to injure. Safety rules are adopted and safety equipment is issued because injuries, in fact, do occur.

{¶26} I see no fallacy in the approach taken in *Smith*, 9th Dist. Lorain No. 12CA010150, 2013-Ohio-1095. In *Smith*, the incident involved an inexperienced worker who was injured during an excavation project with dangerous conditions that were exacerbated by a muddy trench that was not properly sloped. Further, the employer previously had been cited for failing to comply with OSHA regulations pertaining to excavations. Under such circumstances, the court found reasonable minds could conclude the employer was substantially certain that sending the employee into the trench would result in injury. *Id*. at ¶ 24.

{¶27} I do not believe that for an intentional tort claim to lie there must be evidence showing "a history of animosity or ill-will between the employer and employee that would support evidence of a subjective intent by the employer to injure the employee[.]" *See Schiemann*, 8th Dist. Cuyahoga No. 98662, 2013-Ohio-269, at ¶ 17. There may be circumstances such as in *Smith* where a blatant disregard for safety along with knowledge of conditions that pose a substantial risk for injury create an issue of material fact as to whether an employer acted with a deliberate intent to cause an employee to suffer an injury. Although the failure to provide safety equipment may not in itself demonstrate a deliberate intent to injure, the circumstances surrounding that decision should not be overlooked.

{¶28} In the end, I agree with the majority's conclusion that in this case, there was no evidence that Reilly and Lukas knew that the injury to Head was substantially certain to occur. For these reasons, I concur in judgment only.