[Cite as *Pettit v. Ohio Dept. of Rehab. & Corr.*, 2005-Ohio-3958.]

IN THE COURT OF CLAIMS OF OHIO
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DAVID PETTIT, et al.	:	
Plaintiffs	:	CASE NO. 2003-11798 Judge Fred J. Shoemaker
v.	:	DECISION
DEPARTMENT OF REHABILITATION AND CORRECTION	:	
Defendant	:	

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{¶ 1} Plaintiff, David Pettit, brought this intentional tort action against defendant, Department of Rehabilitation and Correction (DRC), alleging that he sustained injury as a result of a dangerous workplace condition that defendant knowingly allowed to exist. Plaintiff's spouse, Tammy Sue Pettit, alleges loss of consortium.

{¶ 2} This case was tried in conjunction with Case No. 2003-11780, in which plaintiff, Carson Duffey, and his spouse, Kimberly Duffey, assert the same causes of action against DRC.[1] The issues of liability and damages were bifurcated and the cases proceeded to trial on the issue of liability.

{¶ 3} Plaintiffs were employed as Corrections Officers (COs) at defendant's Noble Correctional Institution (NCI). At the time of their injuries, both were working third shift, 10:00 p.m to 6:00 a.m., and had duties at Housing Unit C. Both were injured on a set of stairs that was located outside of Unit C, leading to the second

[1]For the purposes of this decision, "plaintiffs" shall refer to Carson Duffey and David Pettit.

floor of the unit. The stairs were illuminated by two 100-watt sodium bulbs; one located at the top of the stairwell and one, at the bottom. Plaintiffs contend that the stairs were in a state of disrepair, that they were poorly lit, and that defendant was on notice of the hazard created by such conditions. Duffey was injured on February 19, 2001. At the time, the light bulb at the top of the stairs was not lit. No repairs to the stairs were undertaken after his injury. Pettit's injury occurred on September 22, 2001.

{¶ 4} The stairs in question, like those of all four of the other housing units at NCI, abutted a side wall of the unit and were composed of a flight of 22 stairs with a landing at the midway point (i.e., 11 stairs, a landing, and 11 more stairs). The side of the stairs that did not abut the wall was enclosed by a frame and chain-link fence structure, inside of which was a handrail. (Defendant's Exhibit N.) There were also a handrail in the center of the stairs, which divided the flight into two "pathways," and a third handrail on the side attached to the concrete wall of the housing unit.

{¶ 5} The stairs were constructed with a steel frame overlaid by an epoxy concrete coating approximately one-half inch thick on each stair tread. It is not disputed that there were persistent problems with the concrete chipping and cracking. Kenneth Spencer, the health and safety coordinator for NCI, and his assistant David Milligan, were responsible for monitoring safety conditions at the institution, including the stairwells. According to their testimony, the chipping and cracking problems developed within the first two years after NCI opened in 1996. Milligan stated that the construction work was under warranty at the time and that he recalled that repairs were made in 1998 or 1999. He also related

that the problems recurred. After the warranty period expired, any repair work was performed by outside contractors.

{¶ 6} There was no expert testimony as to the cause of these problems; however, Milligan stated that, to the best of his knowledge, the metal base of the stairs could bow and cause the concrete to crack; and that, over time, water would get into the cracks, the water would freeze and thaw, concrete would chip away, and the metal lip at the front edge of a step would begin to protrude. Although he was not an engineer or an architect, the court finds for the purposes of this decision, that Milligan's testimony provided a logical and credible explanation for the problems encountered with the steps.

{¶ 7} Both plaintiffs' injuries occurred in similar fashion. Duffey's accident happened as he was descending the stairs at Unit C, approximately one hour after beginning his work shift. He testified that, at the time, the light bulb at the top of the stairs was burned out and that his visibility was limited. He also testified that he knew that there was a crack in one of the steps near the top of the stairway. He stated that, relying on his memory about where the crack was located, as he attempted to step down over it to the next step, his foot caught on a piece of protruding metal, causing him to lose his balance and fall. Duffey hyperextended one of his knees and was off work for three months.

{¶ 8} Pettit's accident also happened as he was descending the stairs at Unit C; however; the light at the top of the stairs was not burned out at the time. Pettit did not work third shift regularly and had been doing so for only a short period of time on a rotating, relief basis. He had no prior knowledge of Duffey's accident. The stairs had not been repaired since that accident. Pettit also caught his foot on a protruding piece of metal, at approximately the second step from the top, and fell. He also

hyperextended one of his knees. At the time of trial, Pettit was on disability separation from DRC.

{¶ 9} Plaintiffs contend that defendant had ample notice of the dangerous condition of the stairs, beginning from the time that NCI opened. Additionally, several reports had been filed in the form of work orders[2] regarding the condition of the steps. Plaintiff Duffey filed three work orders prior to the time of his fall and another CO, Michael Attaway, filed two. Duffey also filed an accident report after his fall. Other COs testified at trial that they had used the stairs and observed their condition both before Duffey's fall and afterward, up to the time of Pettit's fall. Up until Pettit's accident, no repair work was undertaken in response to either the work orders or Duffey's accident report.

{¶ 10} The necessary elements and the level of proof required to demonstrate an intentional workplace tort are well-established. *Gibson v. Drainage Products Inc.*, 95 Ohio St.3d 171, 174; 2002-Ohio-2008. "[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." Id. at 175 quoting *Fyffe v. Jeno's Inc.*(1991), 59 Ohio St.3d 115, paragraph one of the syllabus.

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[2]COs were permitted to file work orders if in the course of their duties they observed a condition that needed repair.

{¶ 11} In *Gibson*, the Supreme Court of Ohio made clear that "proof beyond that required to prove negligence and beyond that to prove recklessness must be established." Id. quoting *Fyffe,* supra, at paragraph two of the syllabus. "However, the mere knowledge and appreciation of a risk-something short of substantial certainty-is not intent." Id.

{¶ 12} Upon review of the evidence, arguments, post-trial filings of the parties, and after visiting the NCI premises to personally view the stairs and the lighting in question, this court finds for the following reasons that plaintiffs failed to prove that defendant committed an intentional workplace tort.

{¶ 13} Plaintiffs have not proved the elements necessary to establish intent for the purposes of their claims. While defendant did have knowledge of the defective condition of some of the stairs at Unit C, the court is not persuaded that the condition was "dangerous"; that defendant knew that if its employees traversed that stairway that harm to them would be a substantial certainty; or that defendant, under such circumstances and with such knowledge, required its employees to continue to use the stairs.

{¶ 14} The evidence is clear that the stairway at Unit C was used by more than 600 people, (inmates and COs) about three times per day, seven days per week. The only reported accidents that occurred during the time that the stairs were cracked and crumbling were those of plaintiffs in this case. Further, the court is persuaded by the evidence that even with one bulb burned out the lighting on the stairway was adequate to illuminate the stairs and allow safe travel. There was no evidence that the lighting in the Unit C stairway failed to comply with applicable standards set by governmental and regulatory bodies for correctional institutions in the state of Ohio. Additional lighting was provided by the overhead lights in the adjacent yard that shone through the chain-

link fencing structure on the outside edge of the stairway. The lighting was bright enough that it was virtually like daylight in the yard even after dark. The steps were also wide enough that plaintiffs could have walked around the crumbling area.

{¶ 15} The evidence also shows that defendant did make efforts to prevent injury on the steps and was in the process of obtaining approval and hiring a contractor to repair the steps at the time that Pettit's injury occurred. For example, yellow caution tape had been used to mark off the crumbling area; however, inmates would frequently take it down. Duffey himself had put up caution tape when he returned to NCI after his accident. The next night, the tape was missing and he put up more. However, Duffey never filed a grievance regarding the condition of the stairs. Milligan, who regularly monitored the stairs on all the units, did not detect any condition that warranted repair until noting some cracks in early September 2001. At that point, caution tape was placed at the top and bottom of the stairs on the side where the step needed to be repaired.

{¶ 16} In any event, the condition was not hidden and neither Duffey nor Petit were ever ordered or instructed to use the side of the stairs where the cracked and chipping stairs were located. The court finds that the fact that defendant may have permitted an unsafe condition to exist is insufficient to impute intent or to prove that defendant knew that plaintiffs' injuries were substantially certain to occur.

{¶ 17} In *Fyffe*, supra, at paragraph two of the syllabus, the Supreme Court of Ohio expanded on its definition of the "substantially certain" requirement in the following manner:

{¶ 18} "*** 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. ***"

{¶ 19} It has been held that, in general, "the employer intentional tort is a narrow exception to the public policy in favor of Ohio's workers' compensation system." *Fields v. Ohio Dep't of Rehab. & Corr.*, Franklin App. No. 02AP-599, 2003-Ohio-152 at ¶18, quoting *Estate of New v. Dairy Mart Convenience Stores*, Inc. (July 16, 2001), Warren App. No. CA2000-11-097. "[B]y setting this rigorous requirement of intent on the part of the employer, the Supreme Court declared that the standard was meant to limit the circumstances in which intent could be circumstantially inferred." Id. In the court's view, this case simply does not present a circumstance in which intent can be inferred.

{¶ 20} For all the foregoing reasons, this court concludes that plaintiffs failed to prove their case by a preponderance of the evidence. Inasmuch as the spouses' claims for loss of consortium are derivative of plaintiffs' claims, they must be denied. Accordingly, judgment shall be rendered in favor of defendant.

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		JUDGMENT ENTRY
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	:	
Defendant		

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This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
FRED J. SHOEMAKER
Judge

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