[Cite as *Hoffman v. Stearns & Lehman, Inc.*, 2008-Ohio-5978.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
DEBORAH L. HOFFMAN, ET AL	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiffs-Appellants	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-29
STEARNS & LEHMAN, INC., ET AL	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING: Civil appeal from the Richland County Court of Common Pleas, Case No. 05CV356H

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: November 19, 2008

APPEARANCES:

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Gwin, P.J.

{¶1} Plaintiffs-appellants Robert and Deborah Hoffman appeal a summary judgment of the Court of Common Pleas of Richland County, Ohio, entered in favor of defendant-appellee Stearns & Lehman, Inc. Appellants assign four errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN HOLDING THAT THERE WAS NO ISSUE OF FACT AS TO WHETHER THE EMPLOYER HAD KNOWLEDGE THAT AN INJURY TO ONE OF ITS EMPLOYEES WAS SUBSTANTIALLY CERTAIN TO OCCUR.

{¶3} "II. THE TRIAL COURT ERRED IN HOLDING THAT THERE WAS NO ISSUE OF FACT AS TO WHETHER APPELLANT WAS REQUIRED TO ENCOUNTER THE DANGEROUS PROCESS.

{¶4} "III. THE TRIAL COURT ERRED IN HOLDING THAT THE APPELLANTS WERE NOT ENTITLED TO MAKE A CLAIM FOR PUNITIVE DAMAGES.

{¶5} "IV. THE TRIAL COURT ERRED IN HOLDING THAT THE APPELLANT ROBERT HOFFMAN WAS NOT ENTITLED TO MAKE A CLAIM FOR LOSS OF CONSORTIUM."

{¶6} The trial court set out certain facts in its decision and judgment of August 28, 2007. The trial court found in December 2002, Stearns & Lehman hired Automated Machine & Equipment Company to locate and purchase a machine it could use to rinse, fill, and cap bottles for its production facility. Stearns & Lehman purchased a Linker Equipment Corporation Mono-Block Rinser/Filler/Capper machine in the early part of 2003, but did not order the optional guards for the machine.

{¶7} Deborah Hoffman began her employment with Stearns & Lehman in September 2003, as a temporary employee, but was later hired as a full time production employee. The court found she was specifically given training on the operation and cleaning of the Linker machine. The Linker machine must be cleaned after each production run to prevent contamination. The employee uses a hot water hose to spray the interior of the Linker machine to remove syrup and caps that may have accumulated during the previous production run. If all the caps could not be removed using the water hose, the proper procedure was to turn the machine off before manually removing the caps. No employee should put their hand in the machine while it was operating, but Hoffman and the other employees would use their hands to remove caps from the edge of the machine while it was operating, without reaching into the machine. Ms. Hoffman operated the Linker machine between December 2003 and November 2004 without injury or incident, as did other employees. The court found Hoffman did not view the machine as presenting any safety hazard and neither she nor any other employee ever complained about the safety of the machine.

{¶8} Several months before Ms. Hoffman's accident, Stearns & Lehman decided to have a barrier guard designed and fabricated. The barrier guard was delivered to Stearns & Lehman in October 2004, but could not be installed because workers were unable to drill into the stainless steel of the Linker machine.

{¶9} On November 22, 2004, after Hoffman ran the final line of product, she began to clean the Linker machine with the water hose. Some caps remained stuck in the machine so she reached in with her hand to brush them out. In doing so, her right

hand became caught in the machine. When she attempted to free her right arm, her left arm also became entangled, and she suffered serious injuries.

{¶10} Appellant Deborah Hoffman and her husband Robert Hoffman asserted an intentional tort claim against her employer. The trial court found appellant had failed to present evidence on the second and third prongs of the test set forth in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St. 3d 115. To prevail in an action for intentional tort against an employer, the employee must prove all three prongs of the test set forth in *Fyffe*: "(1) knowledge by the employer of the existence of the 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, that 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., paragraph 1.

{¶11} R.C. 2745.01 now governs an employer's liability for intentional torts. The statute went into effect April 7, 2005, to replace a former statute struck down as unconstitutional by the Ohio Supreme Court in *Johnson v. BP Chems, Inc.* (1999), 85 Ohio St. 3d 298, 308, 707 N.E. 2d 1107. Because appellant Deborah Hoffman was injured in November of 2004, and brought suit on April 5, 2005, this case falls into the gap between statutes and is governed by the *Fyffe* standard, see, e.g., *Gibson v. Precision Strip, Inc.,* Butler App. No. CA2007-08-201, 2008-Ohio-4958, at paragraph 11 and footnote 2.

{¶12} Civ. R. 56 states in pertinent part:

{¶13} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶14} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶15} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The*

Wedding Party, Inc. (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶16} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶17} In *Gibson v. Drainage Products, Inc.,* 95 Ohio St. 3d 171, 2002-Ohio-2008, the Ohio Supreme Court instructed us that cases involving workplace intentional torts must be judged on the totality of the circumstances surrounding each accident. *Gibson* at paragraph 27. The focus is the employer's knowledge of the risk of injury. A plaintiff must prove the employer had actual knowledge of the exact dangers which caused the injury, *Sanek v. Durakote Corporation* (1989), 43 Ohio St. 3d 169 at 172. This requires proof beyond that is required to establish negligence or recklessness, and mere knowledge or appreciation of a risk does not prove intent. An intentional tort action is limited to egregious cases where the employer had knowledge that an injury to an employee is substantially certain to occur. Id.

{¶18} The trial court held appellants had satisfied the first prong of the *Fyffe* test, finding there was no dispute that Stearns & Lehman recognized a general danger

presented by the existence of unguarded rotating parts. The court found appellants had not met the second or third prong, and thus summary judgment in favor of Stearns & Lehman was appropriate as a matter of law.

I.

{¶19} In their first assignment of error, appellants argue the court erred in finding there was no issue of fact as to whether the employer had knowledge an injury to one of its employees was substantially certain to occur. The court framed the central issue as whether the employer knew that requiring an employee to clean the unguarded Linker machine was substantially certain to cause injury, and if so, whether Stearns & Lehman nevertheless required employees to reach into the machine.

{¶20} The question of whether an employer has knowledge that an injury to one of its employees is substantially certain to occur has been addressed by many courts, whose decisions are based on the particular facts before them. An employer can fail to take corrective action, institute safety measures, or properly warn its employees of the risks involved, and still not be liable for an intentional tort, even if the employer's conduct may be characterized as grossly negligent or wanton. *Van Fossen v. Babcock & Wilcox* (1988), 36 Ohio St. 3d 100, 522 N.E. 2d 489.

{¶21} In *Vermett v. Fred Christen & Son Co.*(2000), 138 Ohio App. 3d 586, 741 N.E. 2d 954, the Sixth District Court of Appeals listed some of the factors that could raise a genuine issue of material fact on the second prong of the *Fyffe* test: (1) how long the employee had worker for employer; (2) the employee's familiarity with the machine; (3) the adequacy of the training the employee received before being assigned to the machine; (4) whether the employee was warned which specific areas of the

machine were dangerous; (5) whether the employee was told what to do if the machine malfunctioned; (6) whether the employee understood he or she was required to reach into the dangerous area; (7) whether there was safeguarding on the machine; (8) whether the job could be performed if the safeguarding were in place; (9) whether the employer had a safety policy; and (10) any OSHA investigations of the incident or prior violations. *Vermett* at 601-602.

{¶22} In *Duco v. Wheeling-Pittsburg Steel Corporation,* Jefferson App. No. 07JE41, 2008-Ohio-3092, the Seventh District Court of Appeals discussed at some length prior case law regarding what facts might raise a genuine issue of material fact regarding the second prong of *Fyffe.* In the case of *Duckworth v. Creative Interglobal, Inc.,* 74 Ohio St. 3d 12, 1995-Ohio-93, 655 N.E. 2d 1299, the court of appeals affirmed a summary judgment in favor of the employer where an employee used a table saw without guards. The employee did not know the guards were nearby. The Supreme Court reversed *Duckworth* without opinion on authority of *Fyffe.*

{¶23} Likewise, in *Gibbs v. Simcote, Inc.,* 71 Ohio St. 3d 651, 1995-Ohio-73, 646 N.E. 2d 1108, the Ohio Supreme Court reversed a grant of summary judgment in favor of the employer where an employee suffered damage to his nervous system from chemical cleaner fumes. The trial court and the court of appeals found a lack of prior injuries and the employer's provision of the type of safety gear recommended by the manufacturer was sufficient to grant summary judgment in favor of the employer. Again, the Supreme Court reversed on the authority of *Fyffe* without opinion.

{¶24} The trial court found it was undisputed Stearns & Lehman had implemented a safety procedure intended to prevent contact with the rotating parts

during the machine's cleaning process, and there had been no other similar accidents or injuries, no prior OSHA citations, and no prior complaints.

{¶25} The record contains the transcript of a deposition of Darrell Smith, the plant safety coordinator during the time in question. Smith testified in April of 2004, he submitted a memo to the plant manager stating, among other things, the machine in question here had eighteen spinning, rotating parts which represented eighteen separate potential OSHA citations. The memo also stated Smith had asked a safety committee to tour the Mansfield plant. In May of 2004, the committee toured the plant, and in June of 2004 submitted a seventeen page report. The committee reported a critical need was machine guarding. Smith testified a "critical need" is a deficiency that indicates a major safety failure. The report stated that as a result of the condition, there is a likelihood of major injury or death.

{¶26} Smith stated the Linker machine should be shut off before anyone reached into it, but other employees, including a shift supervisor and the employee who trained appellant Deborah Hoffman, deposed they routinely used their hands to brush away stuck caps inside the machine when it was running. The second-shift supervisor on the day of appellant Deborah Hoffman's accident, Mandy Hornung, deposed the machine had to be running when it was being cleaned in order to pump the wash, rinse, and sanitizer through the system. While this was going on, the machine operator would spray the machine off on the outside. Hornung testified she did not recall that any of the machines in production were guarded. Hornung testified she was never warned of any dangers, and so did not pass any warnings along to her employees.

{¶27} Appellant Deborah Hoffman deposed as safety precautions, the employees wore hair nets, safety glasses, and uniforms with short sleeves and shirt tails tucked in. She testified not all the bottle caps would rinse off with the hose, because they became stuck in the spilled syrup on the machine. The operator could not pick the caps up, but had to sweep them off the machine. The employees had no sweeping tool and had to use their hands. She testified on the day she was injured, the floor was wet and slippery, and another employee nearly fell while coming to her aid.

{¶28} We find the above evidence is sufficient to raise a genuine issue of material fact regarding whether Stearns & Lehman knew an injury to one of its employees was substantially certain to occur.

{¶29} The first assignment of error is sustained.

II

{¶30} In their second assignment of error, appellants argue the court erred in finding there was no issue of fact regarding the third prong of the *Fyffe* test, that is, whether appellee Stearns & Lehman required their employees to reach into the unguarded machine.

{¶31} The court found the appellant was not required to place her hands into the Linker machine when it was operating, but was instructed to use a water hose to clean out the caps and never place her hands in the rotating parts of the Linker machine when it was in her operation. Based upon the testimony outlined in I, supra, we find the trial court erred in finding no genuine dispute of material fact. Appellants presented evidence the employees were never instructed to keep their hands away, and in fact believed

they should use their hands to remove stuck caps. If believed by a jury, this evidence would meet the third prong of the *Fyffe* test.

{¶32} The second assignment of error is sustained.

III & IV

{¶33} The trial court found because appellants did not satisfy all three prongs of the *Fyffe* test, they were not entitled to make a claim for punitive damages, and appellant Robert Hoffman was not entitled to damages for loss of consortium. In light of our rulings in I & II, supra, the third and fourth assignments of error are also each sustained.

{¶34} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is reversed, and the cause is remanded to the trial court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE

WSG:clw 1030

[Cite as *Hoffman v. Stearns & Lehman, Inc.*, 2008-Ohio-5978.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DEBORAH L. HOFFMAN, ET AL	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
STEARNS & LEHMAN, INC., ET AL	:	
Defendants-Appellees	:	CASE NO. 2008-CA-29

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is reversed, and the cause is remanded to the trial court for further proceedings in accord with law and consistent with this opinion. Costs to appellees.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE