[Cite as *Stallman v. Midwest Bldgs. & Supply Co.*, 2019-Ohio-3582.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

BRADLEY STALLMAN,	:	
	:	Case No. 18CA16
Plaintiff-Appellant,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
MIDWEST BUILDINGS AND	:	
SUPPLY CO., et al.,	:	
	:	
Defendants-Appellees.	:	**Released: 08/27/19**

APPEARANCES:

Bradley Stallman, Leesburg, Ohio, Pro se Appellant.

Jason A. Snyder, Markesbery & Richardson, Co., LPA, Cincinnati, Ohio, for Appellees Midwest Buildings and Supply Co.

Timothy B. Spille, Reminger Co., L.P.A., Cincinnati, Ohio, for Appellees Donald and Virginia Warner.

McFarland, J.

{¶1} This is an appeal from a Highland County Court of Common Pleas summary judgment in favor of Appellees. Appellees Donald and Virginia Warner hired Appellee Midwest Buildings and Supply Co. to construct a building. Appellant Bradley Stallman, an employee of Midwest Buildings and Supply Co., was injured during the construction of the Warners' building. Appellant sued Midwest Buildings and Supply Co., its

employees, and the Warners for his injuries. The trial court granted summary judgment to both Midwest Buildings and Supply Co. and the Warners. After review of the record, we overrule Appellant's assignments of error on appeal and affirm the judgment of the trial court.

FACTS

{¶2} Appellant filed a complaint against Appellee Midwest Buildings and Supply Co.; Midwest Buildings and Supply Co.'s owner, Larry Brubaker; Midwest Buildings and Supply Co. employees, including Larry Maynard, and others (collectively hereinafter referred to as "MBS"); and Donald and Virginia Warner, the owners of the premises at 1939 Elmville Road, Leesburg, Ohio, in Highland County (the construction site).

{¶3} Appellant alleged he was an employee of MBS and was injured while constructing a building for the Warners at the construction site. The complaint alleged that Appellant, Larry Maynard, and other MBS employees were erecting a wall, when one of the MBS employees released his grip, which caused the wall to fall on Appellant and caused him to suffer a severe leg injury.

{¶4} Count one of the complaint alleged MBS, its named employees, and the Warners were negligent in failing to protect Appellant from injury by not properly securing the wall during the installation, etc. The complaint

alleged that as a proximate result of this negligence Appellant suffered a serious injury.

{¶5} Count two of the complaint alleged MBS employees were liable to Appellant through the doctrine of respondent superior because they were employees of MBS.

{¶6} Count three of the complaint alleged an employer intentional tort against MBS was the proximate cause of Appellant's injury. The complaint alleged MBS knew or should have known that MBS employees were under the influence of drugs or alcohol that affected their work, that there was an insufficient workforce to safely perform the construction, that there was no safety equipment that secured the walls, and that there was insufficient equipment on the site to prevent the wall from falling. And, as a proximate result of these intentional acts, Appellant was seriously injured.

{¶7} Finally, count four of the complaint alleged the Warners were liable to Appellant because they managed, controlled, and/or supervised the construction site. The complaint alleged that the Warners' failure to inspect the construction site created dangerous conditions and that they failed to warn of these conditions, thereby proximately causing Appellant's injuries.

{¶8} MBS answered, asserting, among other defenses, that the doctrines of intentional tort and Bureau of Workers' Compensation claims barred Appellant's complaint.

{¶9} The Warners answered, asserting, among other defenses, that Appellant's injuries were "the sole, proximate or substantial result of an intervening and superseding act of negligence over which [the Warners] had no control or responsibility" resulting in a "complete bar to plaintiff's recovery herein."

{¶10} Both MBS and the Warners filed motions for summary judgment. Appellant filed a memorandum contra to both motions for summary judgment.

{¶11} The trial court issued a decision and entry granting summary judgment to both MBS and the Warners. It is from this judgment that Appellant, now acting pro se, filed his appeal, which asserts seven assignments of error.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED IN GRANTING ON BOTH SUMMARY JUDGMENTS.

II. THE TRIAL COURT NEGLECTED TO CONSIDER MEDICAL IMPEDIMENTS, AND THE FACT THAT PARTIES WERE IN MEDIATION UNTIL NOV. 26, 3 DAYS BEFORE BREIF [*SIC*] COULD BE SUBMITTED, WITH MORE LATENT EVIDENCE OF BIAS, DECEIT TO ACCUMULATE DISCOVERY.

III. THE COURT FAILED TO RECOGNING [*SIC*] MR. HAYSLIPS [*SIC*] MEMO IN A WAY THAT WAS IMPARTIAL, BASED ON THE MATERIAL FACTS HE OVERLOOKED, GENERALE [*SIC*] DUTY CLAUSE, SEPTIC PERMIT, IDENTIFY HAZARDS.

IV. TRIAL COURT FAILED TO IDENTIFY BASIC "GENERAL DUTY CLAUSE" REGULATIONS THAT KEEP ALL EMPLOYS [*SIC*] IN A HAZARD FREE WORK ENVIRONMENT.

V. THE TRIAL COURT WAS INCORRECT IN PARAGRAPH (6) OF THE ORIGINAL FACTS WE PLAINTIFF AND DEFENDANT AGREED UPON.

VI. PARTICAL [*SIC*] (A) P.S. WELLMAN VS. EAST OHIO GAS CO. #2 BOTTOM PARAGRAPH DANGER VS. HAZARDOUS COURT FAILED TO IDENTIFY HAZARDS FROM DANGER. [*SIC*]

VII. PICKERINGTON VS. REINFORCING AND STRUCTURAL ERECTIONS. COURT AGAIN FAILED TO NOTICE AGAIN THE DIFFERENCE IN POTENTIAL DANGER AND HAZARDOUS PRE-DETERMINED CONDITIONS WIND, GROUND, INCOPETANCE [*SIC*], BROWN, MANOR."

{¶12} Appellant's assignments of error do not correspond with the arguments made in the body of his brief. For example, in assignment of error six Appellant appears to cite the Ohio Supreme Court case, *Wellman v. East Ohio Gas*. However, there is no corresponding citation to *Wellman* in the body of his brief, let alone any argument regarding how *Wellman* applies.

{¶13} Appellant's brief is a mix of authorities such as Ohio Jurisprudence 3d, OSHA (Occupational Safety and Health Act), etc., and various purported facts from the case in an apparent attempt to argue that the trial court erred in granting summary judgments in favor of MBS and the Warners. Consequently, we collectively construe Appellant's assignments of error as asserting the trial court erred in granting summary judgment to MBS and the Warners.

STANDARD OF REVIEW

{¶14} "When reviewing a trial court's summary judgment decision, appellate courts conduct a de novo review under the standard set forth in Civ.R. 56." *Bob Bay & Son, Co. v. Circle Inv. Corp.*, 4th Dist. Pickaway No. 17CA11, 2018-Ohio-2632, 114 N.E.3d 268, ¶ 9, citing *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. In a de novo review, a court of appeals affords "no deference to the trial court's decision and independently review[s] the record and the inferences that can be drawn from it to determine whether summary judgment is appropriate." *Lang v. Piersol Outdoor Advert. Co.*, 4th Dist. Washington No. 19CA17, 2018-Ohio-2156, 116 N.E.3d 667, ¶ 14.

{¶15} "[T]he burden to show that no genuine issue of material fact exists falls upon the party who requests summary judgment." *Bob Bay &*

Son, Co., 4th Dist. Pickaway No. 17CA11, 2018-Ohio-2632, 114 N.E.3d 268, ¶ 10. " '[T]he moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) * * *.' " *McClure v. Davis*, 186 Ohio App.3d 25, 2010-Ohio-409, 30, 926 N.E.2d 333 (4th Dist.), ¶ 6, quoting *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107, 662 N.E.2d 264. "These materials include ' "the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any." ' " *Id*., quoting *Dresher*, 75 Ohio St.3d at 293, quoting Civ.R. 56(C).

{¶16} "After the movant supports the motion with appropriate evidentiary materials, the nonmoving party 'may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.' " *Bob Bay & Son, Co.*, 4th Pickaway No. 17CA11, 2018-Ohio-2632, 114 N.E.3d 268, quoting Civ.R. 56(E). "If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." *Id*., quoting Civ.R. 56(E).

{¶17} Summary judgment is then appropriate, only if: (1) the moving party demonstrates there is no genuine issue of material fact, (2) reasonable minds can come to only one conclusion, after the evidence is construed most strongly in the nonmoving party's favor, and that conclusion is adverse to the opposing party, and (3) the moving party is entitled to judgment as a matter of law. *McClure v. Davis*, 186 Ohio App.3d 25, 2010-Ohio-409, 926 N.E.2d 333 (4th Dist.) ¶ 5, citing Civ.R. 56.

ANALYSIS

1. Liability of MBS and Its Employees

{¶18} We begin our review with the trial court's summary judgment in favor of MBS that concluded that there was no genuine issue of material fact that either MBS or its employees were not liable in negligence, nor committed any act(s) with a deliberate intent to injure Appellant.

{¶19} "[A]bsent 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., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 25. Ohio's worker's compensation system is the "result of a unique compromise between employees and employers, in which employees give up their common-law remedy and accept possibly

lower monetary recovery, but with greater assurance that they will receive reasonable compensation for their injury." *Stolz v. J & B Steel Erectors, Inc.*, 2018-Ohio-5088, 122 N.E.3d 1288, ¶ 20, quoting *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 54.

{¶20} "But when an employee seeks damages resulting from an act or omission committed by the employer with the intent to injure, the claim arises outside of the employment relationship, and the workers' compensation system does not preempt the employee's cause of action." *Hoyle v. DTJ Ents., Inc.*, 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.3d 122, ¶ 7, *see also Schaad v. Valley Proteins, Inc.*, 4th Dist. Washington No. 05CA41, 2006-Ohio-5273, ¶ 9. However, the threshold for an employee to sue their employer is steep. R.C. 2745.01 effectively codifies an employer intentional tort: "the employer shall not be liable 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). " '[S]ubstantially certain' means that an employer acts with *deliberate intent to cause* an employee to suffer *an injury*, a disease, a condition, or death." (Emphasis added.) R.C. 2745.01(B).

{¶21} "The substantial certainty standard in an employer intentional tort cause of action is a significantly higher standard than even gross negligence or wantonness." *Jefferson v. Benjamin Steel Co*., 5th Dist. Richland Nos. 09 CA 62 & 09 CA 75, 2010-Ohio-50, ¶ 77, citing *Zink v. Owens–Corning Fiberglas Corp.*, 65 Ohio App.3d 637, 584 N.E.2d 1303 (1989). The mere knowledge and appreciation of a risk or hazard, something short of substantial certainty, is not intent. *Id*.

{¶22} Initially, we note that count one of Appellant's complaint alleged that MBS was negligent in causing Appellant's injuries.[1] However, as explained above, Worker's Compensation benefits are the exclusive remedy of an employee injured by their employer's actions that amount to anything less than a deliberate intent to injure, absent non-compliance by the employer with the Worker's Compensation, which may expose the employer to liability under a negligence standard, but that is not at issue in this case. *See Bradley v. Admin, Bureau of Workers' Compensation*, 12th Dist. Warren No. CA2000-01-012, 2000 WL 1370998, at *5, citing R.C. 4123.77. Therefore, the trial court did not err in granting summary judgment to MBS and its employees regarding Appellant's negligence claims.

[1] Count one also alleged the Warners were negligent; however, the analysis required to determine their liability differs from the analysis required to determine the liability of MBS and its employees. Consequently, we address the Warners' liability later in the decision.

{¶23} The next question is whether the trial court properly granted summary judgment to MBS regarding Appellant's employer intentional tort claim.

{¶24} Movant, MBS, asserted that Appellant made several claims including that one of the MBS workers, Brown, who was helping erect the wall, was intoxicated; that Brown let go of the wall; and that various safety procedures were ignored. But MBS alleged that contrary to Appellant's assertions, there was no evidence that MBS employees were drunk that day, that Brown purposely let go of the wall, or that any failure of any safety discussion or lack or safety protocols resulted in a deliberate intent to injure Appellant.

{¶25} In response, Appellant claimed that MBS failed to provide a safety manual to its employees, that MBS failed to verify Appellant's experience when he was hired, that MBS admitted that wind could make it difficult to erect a wall, and that MBS admitted that it "did not take adequate precautions * * * against foreseeable gusts of wind." Appellant also alleged that his expert opined the manpower on the jobsite was inadequate and erection of the wall was not adequately managed or supervised, that MBS had machinery that was capable of setting the wall that would have been

safer, and that MBS did not use any safety device when erecting wood framed walls.

{¶26} Appellant asserts his expert concluded that the evidence indicated "an unreasonably dangerous job condition in a manner that was deliberate, willful, reckless, wanton and egregious and evidenced a deliberate intent to cause injury to its employees."

{¶27} Here, we note that Brown testified that it was Appellant's hammering the wall with a sledge hammer in attempting to properly position it that knocked the wall out of Brown's hands, causing it to fall, while Manor testified that "the wind picked up and hit the wall," causing it to fall over. Even though the testimony of Brown and Manor differ as to the actual cause of the wall falling, neither cause/act evidences a deliberate intent by Manor or Brown to injure Appellant.

{¶28} Moreover, even construing *all* the evidence most strongly in favor of Appellant under a de novo review, MBS may have had knowledge and appreciation of a risk or hazard to its employees when erecting the wall, and may have failed to take appropriate steps to mitigate that risk or hazard, but the failure to respond to a known risk does not equate to deliberate intent to injure in the context of an employer intentional tort. *Jefferson*, 5th Dist. Richland Nos. 09 CA 62 & 09 CA 75, 2010-Ohio-50, ¶ 77. As such, no

genuine issue of material fact exists on this issue. Accordingly, the trial court did not err in granting summary judgment in favor of MBS.

2. Liability of the Warners

{¶29} Finally, we consider whether the trial court properly granted summary judgment in favor of the Warners, who owned the construction site and contracted with MBS to construct a building.

{¶30} Appellant alleged the Warners were liable because as owners of the property, they managed, controlled, and/or supervised the construction project and their negligence in doing so proximately caused Appellant's injury.

{¶31} Generally, "[i]n order to recover on a negligence claim, a plaintiff must prove the existence of a duty of care, a breach of that duty, and that damages proximately resulted from the breach." *Morgan v. Gracely*, 4th Dist. Washington No. 05CA36, 2006-Ohio-2344, ¶ 6, citing *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614 (1989). "If the defendant owes no duty, the plaintiff cannot recover for negligence." *Id.* The question of whether a duty exists is a question of law for the court to determine. *Id.*, citing *Stevens v. Highland County Board of Commissioners*, 4th Dist. Highland No. 04CA8, 2005 WL 1120275, ¶ 3.

{¶32} As a general rule, "Where an independent contractor undertakes to do work for another in the very doing of which there are elements of real or potential danger and one of such contractor's employees is injured as an incident to the performance of the work, no liability for such injury ordinarily attaches to the one who engaged the services of the independent contractor." *Pinkerton v. J & H Reinforcing*, 4th Dist. Scioto Nos. 10CA3386 & 10CA3388, 2012-Ohio-1606, ¶ 18, quoting *Wellman v. E. Ohio Gas Co.*, 160 Ohio St. 103, 113 N.E.2d 629 (1953), at paragraph one of the syllabus. "[A] construction site is an inherently dangerous setting." *Bond v. Howard Corp.*, 72 Ohio St.3d 332, 336, 1995-Ohio-81, 650 N.E.2d 416, citing *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 600, 613 N.E.2d 1032 (1993) (Pfeifer, J., dissenting). In other words, the general rule is that a person, who hires a contractor to undertake construction, has no duty to protect employees of the contractor from injury during that construction, and consequently is not liable for any injuries suffered by the contractor's employees.

{¶33} "The rule of nonliability will not apply, however, when the owner or occupier of the premises 'actively participates' in the independent contractor's work." *Frost v. Dayton Power & Light Co.*, 138 Ohio App.3d 182, 192, 740 N.E.2d 734 (4th Dist.), citing *Hirschbach v. Cincinnati Gas &*

Elec. Co., 6 Ohio St.3d 206, 452 N.E.2d 326 at the syllabus. " '[A]ctively participated' means that the [one engaging the independent contractor] *directed the activity which resulted in the injury* and/or gave or denied permission for the critical acts that led to the employee's injury, rather than merely exercising a general supervisory role over the project. * * *.' " *Id.*, quoting *Bond v. Howard Corp.,* 72 Ohio St.3d 332, 650 N.E.2d 416, syllabus.

{¶34} In their motion for summary judgment, the Warners asserted they met with Vidourek from MBS and informed him of the type of building they wanted, as well as certain desired specifications. However, they alleged the wall was erected by, and under the supervision of, MBS employees. Their motion asserted that Vidourek testified that the Warners did not participate in the actual construction of the building, i.e. they drove no nails, made no measurements, etc. They also asserted that Vidourek also testified that the Warners did not manage the job site or limit the ability of MBS's crew to access the construction site. And finally, their motion asserted that Mr. Warner testified that he did not discuss with MBS how they should construct and or install any of the walls.

{¶35} In his memorandum contra, Appellant argued that the Warners' requirement that the walls be constructed from 2x6 lumber covered with

sheeting was sufficient to show control. However, requiring construction of a building to certain specifications does not equate to active participation within the exception to nonliability first set out in *Hirschbach*, 6 Ohio St.3d 206, 452 N.E.2d 326 (1983). There is no evidence that the Warners instructed MBS employees on how to erect the wall that collapsed on Appellant, or otherwise more generally controlled or managed construction of the building that would have required MBS to use the installation method that it used.

{¶36} Appellant also contends that Nick Brown, one of the MBS employees, testified that Mrs. Warner "was actively participating in directing the work they were performing." However, Appellant provides no cite to the record, nor is there any specific assertion on how or what Mrs. Warner was doing to actively participate. And, after reviewing Brown's deposition, we could not find any testimony asserting that Mrs. Warner participated in supervising construction of the building, let alone instructed MBS on how to erect the wall in question. An "unsupported assertion is insufficient as a matter of law to raise a genuine issue of material fact." *Mitchell v. City of Ypsilanti*, E.D. Mich. No. 06-11547, 2007 WL 2259117 (Aug. 3, 2007), at *7.

{¶37} Construing the evidence most strongly in favor of Appellant, under a de novo review, reasonable minds can only conclude that the Warners have demonstrated there is no genuine issue of material fact in that they did not actively participate in the construction of their building, or more specifically manage the erection of the wall that collapsed on Appellant. Therefore, the trial court did not err in granting summary judgment to the Warners.

CONCLUSION

{¶38} Having concluded that the trial court did not err in granting summary judgment in favor of MBS and the Warners, we overrule Appellant's assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland 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.

Smith, P.J. & Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.