An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-1117

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

MARY ANNE LINKENHOGER, Individually and Administratrix of the ESTATE OF THOMAS CHARLES MUNFORD, deceased, JOHN TERRY MUNFORD, ALICIA MUNFORD WHITEHURST, JENNIFER LINKENHOGER HOWELL, MICHELLE LYNN LINKENHOGER, and BRIAN KEITH LINKENHOGER,
Plaintiffs,

v.

Dare County
No. 04 CVS 45

RENAISSANCE CONSTRUCTION COMPANY, INC., and MICHAEL PAYNE,and RCI CUSTOM CONSTRUCTION, INC.,
Defendants.

Appeal by plaintiffs from order entered 24 March 2005 by Judge J. Richard Parker, in the Superior Court in Dare County. Heard in the Court of Appeals 10 April 2006.

Wallace and Graham, P.A., by Michael B. Pross, for plaintiff-appellants.

Yates, McLamb & Weyher, L.L.P., by John T. Honeycutt, for defendant-appellees Michael Payne and RCI Custom Construction, Inc.

HUDSON, Judge.

Plaintiffs Mary Ann Linkenhoger, individually and Administratrix of the Estate of Thomas Charles Munford, deceased, John Terry Munford, Alicia Munford Whitehurst, Jennifer Linkenhoger Howell, Michelle Lynn Linkenhoger, and Brian Keith Linkenhoger

("plaintiffs") brought suit against defendants Michael Payne ("Payne") and RCI Custom Construction, Inc., ("RCI") for the death of Thomas Charles Munford ("Munford"). On 5 August 2004, defendants moved for summary judgment. Following a hearing on 7 February 2005, the court granted summary judgment to defendants and dismissed plaintiffs' claims. Plaintiffs appeal. For the reasons discussed below, we affirm.

On 29 January 2002, Munford, an employee of RCI, died after falling from the roof of a five-story building. Neither Munford nor other RCI employees was using fall protection at the worksite. Payne is the president and sole shareholder of RCI.

Plaintiffs argue that the trial court erred in granting summary judgment to defendants. We disagree.

We begin by noting that

> [s]ummary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). All such evidence must be considered in the light most favorable to the non-moving party.

Kornegay v. Robinson, __ N.C. App. __, __, 625 S.E.2d 805, 807 (2005) (some internal citations and quotation marks omitted). We review a grant of summary judgment *de novo*. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713, *disc. review denied*, 358 N.C. 545, 599 S.E.2d 409 (2004).

Generally, the Workers' Compensation Act provides the exclusive remedy for workers injured on the job. N.C. Gen. Stat.

§§ 97-9, 97-10.1 (2005). However, our Courts have noted exceptions when an employer or co-employee commits an intentional tort. *See Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991); *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). "[I]njury to another resulting from willful, wanton and reckless negligence [by a co-employee] should also be treated as an intentional injury for purposes of our Workers' Compensation Act." *Pleasant*, 312 N.C. at 715, 325 S.E.2d at 248.

Plaintiffs argue that Payne was liable for Munford's death under *Pleasant*. *Id.* However, because Payne was the sole shareholder and president of RCI at the time of the accident, his liability is determined under the *Woodson* standard described below. This assignment of error is without merit.

"[W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer." *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228. This distinction

> is also in keeping with the statutory workers' compensation trade-offs to require that civil actions against employers be grounded on more aggravated conduct than actions against co-employees. Co-employees do not finance or otherwise directly participate in workers' compensation programs; employers, on the other hand, do. N.C.G.S. § 97-93 (1985). This distinction alone justifies the higher 'substantial certainty' threshold for civil recovery against employers.

Id., 329 N.C. at 342, 407 S.E.2d at 229.

Here, Payne failed to provide OSHA-required safety fall protection gear to Munford when he was working at heights. Plaintiffs forecast no evidence that Payne intentionally engaged in misconduct knowing it was substantially certain to cause Munford's serious injury or death. *See Maraman v. Cooper Steel Fabricators*, 146 N.C. App. 613, 555 S.E.2d 309 (2001), *affirmed in part and rev'd in part per curiam for the reasons stated in the dissent*, 355 N.C. 482, 562 S.E.2d 420 (2002) (no *Woodson* liability where employer ordered safety lines removed shortly before employee fell thirty feet to his death); *Canady v. McLeod*, 116 N.C. App. 82, 87, 446 S.E.2d 879, 882, *disc. review denied,* 338 N.C. 308, 451 S.E.2d 632 (1994) (holding that while failing to provide safety appliances and "furnishing alcohol to the deceased while he was re-roofing a house were inappropriate," it did not meet the *Woodson* standard). In *Maraman*, "[t]he fact which clearly distinguishes this case from *Woodson*, and those cases finding a Woodson claim, is that defendant . . . did not instruct plaintiffs' decedent to work without being attached to a safety line." 146 N.C. App. 613, 635-36, 555 S.E.2d at 322 (citing "*Woodson*, 329 N.C. 330, 407 S.E.2d 222 (employee killed when a trench collapsed, employer had four previous OSHA violations, knew the trench would fail, and knowingly refused to allow worker to use a trench box); *Arroyo v. Scottie's Prof. Window Cleaning*, 120 N.C. App. 154, 461 S.E.2d 13 (1995), *disc. review denied,* 343 N.C. 118, 468 S.E.2d 58 (employee injured while washing windows, employer had been previously cited for OSHA violations,

provided no safety training, ordered employee to lean outward from a small ledge without fall protection equipment, and refused to allow a fellow employee to anchor); (*Pastva v. Naegele Outdoor Advertising*, 121 N.C. App. 656, 657, 468 S.E.2d 491, 494, *disc. review denied*, 343 N.C. 308, 471 S.E.2d 74 (1996)] (employee injured when a billboard collapsed, employer had been cited and fined for numerous safety violations, did not provide safety training, and employer knowingly ordered employee to work on the billboard). . . .") Here, plaintiffs did not allege that Payne ordered Munford to work without safety lines or otherwise required him to do anything that could meet the *Woodson* standard. The forecast of evidence indicated that Payne did not even know Munford was on the roof. We overrule this assignment of error.

Affirmed.

Chief Judge Martin and Judge BRYANT concur.

Report per Rule 30(e).