[Cite as *Root v. Stahl Scott Fetzer Co.*, 2017-Ohio-8398.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104172

BROC ROOT

PLAINTIFF-APPELLEE/
CROSS-APPELLANT

vs.

STAHL SCOTT FETZER CO., ET AL.

DEFENDANTS-APPELLANTS/
CROSS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-822889

BEFORE: Keough, A.J., E.T. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: November 2, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Defendant-appellant/cross-appellee, The Scott Fetzer Company, ("Scott Fetzer"), appeals from a judgment, rendered after a jury verdict, awarding plaintiff-appellee/cross-appellant, Broc Root ("Root"), damages in the amount of $1,708,109.67. For the reasons that follow, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. The Injury

{¶2} Stahl/Scott Fetzer ("Stahl") manufactures truck bodies at its facility in Wooster, Ohio. It is a sister company of Scott Fetzer, which is located in Westlake, Ohio. Both Stahl and Scott Fetzer are wholly owned subsidiaries of BHSF, Inc.

{¶3} In early 2012, Root was working for RS Resources, a temp agency, which placed him at the Stahl Wooster facility where he was trained to operate a laser table that cut metal into shapes. During the training, Root worked first shift, and his supervisor was Larry Spade ("Spade"). After Root was approved to operate the laser table, he began working second shift.

{¶4} On March 19, 2012, Root arrived for work, but was advised that the laser table was inoperable. Because he was paid only for time worked, he asked Spade if he could perform another job. Spade suggested that Root could operate a 90-ton brake press manufactured by Chicago Dreis & Krump and make a metal part called a divider. The dividers were 16 inches long and 3 inches wide, which were classified as "small parts."

{¶5} The press brake operates by forcing down the upper piece, called a "ram," and exerting pressure to form a metal part. Metal dies, which are used to cut or shape metal, are inserted into the press brake to form the part. The operator slides a piece of sheet metal into the gap below the ram, inserting it until it hits the back stop or back gauge, which will determine where the bend is formed. The operator then steps on a foot pedal that lowers the ram, bends the metal, and then raises the ram. The divider being made by Root required two separate steps in which he bent the metal one way using the first die, and then moved the divider over to the second die, to make the second bend.

{¶6} Spade, a seasoned operator of this press brake, demonstrated and explained to Root how to operate the brake press and make the dividers. Spade expressly told Root to keep his hands out of the die area, instructing him to hold the metal piece when inserting it into the press brake with his thumb on top at the edge of the part and his fingers underneath. Spade testified that holding the part this way would keep the operator's fingers out of the die area because as the operator inserts the metal part into the gap, resting it on the bottom die, the operator's fingers necessarily will be blocked by the bottom die and cannot proceed into the pinch point.

{¶7} Spade did not tell Root to use any hand tools or tongs, or show Root where hand tools could be obtained. Spade had used hand tools to make small dividers — those less than two and one-half inches wide — but felt hand tongs were not necessary for making dividers of this size.

{¶8} After Root observed Spade making approximately six dividers and Spade observed Root making approximately eight dividers, Root operated the press brake without supervision. Testimony was given that Root assured Spade that he was comfortable operating the press. However, approximately 90 minutes later, Root's fingers, which were on top of, not underneath the metal part, became wedged in the 90-ton press. As a result of the injury, one of Root's fingers was partially severed and two fingers required surgical amputation.

II. The Lawsuit

{¶9} In March 2014, Root filed a cause of action against Stahl, Scott Fetzer, Marsh USA, Inc. ("Marsh"), Marsh USA Risk Services ("Marsh Risk"), and Stephen Buehrer, Administrator of the Ohio Bureau of Workers' Compensation ("OWC"), raising causes of action for employer intentional tort and negligence, and requesting declaratory judgment. Root also alleged that the defendants' conduct gave rise to punitive damages. Summary judgment was granted in favor of Stahl and Marsh on Root's negligence claim, and in favor of Scott Fetzer on Root's intentional tort claim. The causes of action tried before the jury were Root's claim against Stahl for employer intentional tort and against Scott Fetzer for negligence. Specific to Scott Fetzer, Root alleged it was negligent in the manner in which it oversaw safety reviews, assessments, and evaluations at various Stahl facilities, including the Wooster facility. This appeal centers around the relationship between Scott Fetzer and Stahl and whether Scott Fetzer owed a duty of care to Root such that it could be found negligent and liable for Root's injuries.

III. Scott Fetzer's Role

{¶10} Scott Fetzer provides services, including consulting and risk management, to BHSF, Inc. companies under a shared services arrangement and charges each company for this service. The risk management function involves interacting with insurance brokers to obtain insurance coverage, as well as acting as a center for safety-related information and coordinating the distribution of all safety-related information to Stahl and the related entities for use by the BHSF, Inc. companies. At the time of Root's injury, Scott Bellack ("Bellack") was the head of risk management at Scott Fetzer, and was the direct contact for Marsh and Stahl employees.

{¶11} Scott Fetzer and Marsh worked under a master contract, with Scott Fetzer establishing the parameters of Marsh's safety-related services and the number of consulting hours to be provided each year. The price for this service and all of the other terms were set forth in a yearly agreement called "Statements of Work."

{¶12} At Scott Fetzer's request, Marsh conducted OSHA Readiness Assessments at Stahl's Wooster facility. These assessments were customized based on Scott Fetzer's requests. Marsh conducted these assessments in 2004, June 2006, October 2009, and one was planned for 2012.

{¶13} The assessments consisted of a one- or two-day plant walkthrough during which a Marsh safety engineer or other Scott Fetzer employees would (1) meet with Stahl plant personnel, (2) examine the machines and the facility to identify safety concerns, and (3) correct unsafe practices when observed. Marsh worked with Stahl at the time of

assessment to correct observed risks that could be immediately remedied. Assessments also included a review of Stahl's written safety policies, procedures, and history, as well as conversations with Stahl managers who have assigned safety duties.

{¶14} Thereafter, Marsh prepared a written report describing any OSHA violations observed during the inspections, and provided recommendations to Scott Fetzer to remedy the violations. If Scott Fetzer accepted these recommendations, Stahl would implement the approved recommendations because Stahl maintained day-to-day control of the operations of its Wooster facility, including: (1) hiring, assignment, training, and supervision of personnel, (2) maintenance of equipment, and (3) enforcement of workplace safety policies and procedures. Scott Fetzer would verify that Stahl implemented these improved recommendations.

{¶15} Keith Yeater, Director of Operations at Stahl from 2004-2006, explained the relationship among Stahl, Scott Fetzer, and Marsh. He testified that directives regarding safety issues typically came through Bellack, and if Marsh had recommendations, those also went through Bellack and then to Stahl. Yeater also testified that he was expected to notify Bellack when corrections were made regarding these directives, but he did not report these corrections to Marsh. Regarding the written policy concerning the press brake, Yeater stated that, to the best of his knowledge, the policy was developed by Stahl, submitted to Scott Fetzer for approval, and if approved, implemented by Stahl.

{¶16} In September and October 2004 at the request of Scott Fetzer, Marsh conducted a safety compliance audit of two of Stahl's facilities — Wooster and Durant.[1] The memo provided to Bellack from Don Esker, Scott Fetzer's primary loss control consultant at Marsh, specifically noted:

> Power press. When small parts are formed in a press brake, the operators' fingers are unacceptably close to the point of operation. A small error or a brief lapse of attention could result in severe injuries. Holders or tongs have been purchased for use with small parts, but they were not being used because they do not offer adequate control or "feel" of the piece as it is formed. Enforce the use of holders or tongs for small parts that bring the operators' fingers within 12" of the point of operation.

{¶17} Eric Heffelflinger, second shift supervisor at Stahl's Wooster facility, testified that he did not use hand tools or tongs when he operated the press brake because he felt it was easier and safer to not use tools — the press could pull the operator's hand up toward the press if the piece was not timely released. He testified that he did not know of any internal policy to use tongs or of any OSHA regulations requiring their use. However, Heffelflinger admitted that if he had known about the policy, he would have used tongs and would have instructed individuals to use tongs during training. Additionally, Heffelflinger testified that he was not aware of any Stahl guarding manual that stated the use of tongs on small parts was required.

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[1] Interestingly, while one of the memos references "RE: STAHL — WOOSTER — SAFETY AUDIT," the first paragraph of the memo indicates that an audit was conducted at the Stahl Durant facility. Moreover, the last paragraph of the memo thanks the management team at another facility — "Campbell Hausfeld-Harrison."

{¶18} Subsequently, on October 14, 2005, Zurich, one of Scott Fetzer's insurance companies, sent a memo to Scott Fetzer inquiring about the status of the 2005 HSE Risk Engineering Recommendations. Specific to the Stahl Wooster facility, it had been recommended that Scott Fetzer

> 05-05-3 – Perform a formal machine guarding survey on the press brakes utilized throughout the facility. Some press brakes were adequately guarded while others were without guarding. The evaluation should be in accordance with established OSHA and ANSI standards. The guarding survey should be performed at the Cardington and Wooster locations at a minimum.

The memo noted that to date, "NO RESPONSE" had been received regarding the recommendation. Despite this memo and recommendation, no action was taken by Scott Fetzer to conduct a "formal machine guarding survey on press brakes utilized throughout" the Stahl Wooster facility. However, Bellack testified that he expected that the next OSHA readiness assessment by Marsh in 2006 would address press brake guarding, and meet OSHA and other applicable standards.

{¶19} The next risk assessment was conducted at the Stahl Wooster plant on June 13-14, 2006. Prior to the audit, Marsh employees exchanged emails discussing the Stahl Wooster facility and its past problems with "machine guarding." The emails further stated that "[Bellack] will send us the OSHA 300 and claim data." Present at the assessment were members of Marsh's team as well as Stahl employees and management.

{¶20} The 2006 OSHA readiness report prepared on June 26, 2006, by Marsh indicated a "significant" hazard that open areas of a specific press brake should be

guarded when the press brake was in operation. As to the Chicago press brake, Marsh indicated a "significant" hazard that

> A Chicago press brake is equipped with "holdbacks" that keep hands away from the point of operation when the holdbacks are adjusted properly. Holdbacks are acceptable, but must be policed regularly because most operators do not like holdbacks or pullbacks. Holdbacks are not as effective as light curtains or other passive safety systems. We understand that the Chicago press brake is used exclusively for the larger doors, where the press brake operator's hands will be well away from the point of operation. Consider installing a presence sensing device (light curtain, RF sensor) to protect the point of operation. If a light curtain is not practical, hold-backs may be used, provided that the operator is trained, the supervisor verifies the adjustment, and it is always used OR use this machine only for large parts that can be held well away from the POO, it may be appropriate to operate the machine without additional guarding.

{¶21} According to the July 28, 2006 final report, which was generated after Stahl implements the Scott Fetzer's approved recommendations, Stahl's "[e]mployees have bee[n] instructed on the use of holdbacks. They are required to use these each time they run the press." Additionally, guards were placed on both ends of the identified press brake.

{¶22} After the 2006 risk assessment was conducted at Stahl Wooster, an injury occurred at the Stahl Durant facility when both hands of an employee were crushed in a power press. According to the June 23, 2006 email from Robert Gaus, senior vice president at Marsh, to Margaret Ludwig and other Marsh employees, he "spoke with [Bellack] late last night. They had another press-related incident. * * * [Bellack] wants to develop an [sic] risk assessment score sheet and guideline ASAP to get a better handle on exposure and risk." The email also suggested that the Bellack had the authority to assess $200,000 against each division that did not respond to the risk assessment score

sheet and take corrective actions. Despite this injury, Scott Fetzer did not order the Zurich recommended "formal machine guarding survey on press brakes" at the Stahl Wooster facility.

{¶23} The Machine Tool Risk Assessment and Inventory Guideline was prepared in June 23, 2006, by Marsh at the request of Scott Fetzer and specifically stated that the purposes of the guidelines were to (1) prevent traumatic injuries by properly evaluating the risk potential, determining the level of tolerable risk, and applying suitable safeguarding when needed; (2) provide guidance, uniformity and accountability of machine-tool-related risk across each Division; (3) increase management and employee understanding of machine-tool risk; and (4) comply with applicable federal, state, and local laws. The focus of the guidelines was about machine guarding. In the months that followed, various emails were exchanged between Scott Fetzer, Marsh, and Stahl regarding brake press guarding.

{¶24} In September 2009, Bellack notified the Stahl Wooster facility that Marsh would be conducting an OSHA readiness assessment. In an October 2009 email between Bellack and Zurich, Zurich inquired about recommendations they made to Stahl facilities where the response was "No Plans to Comply." Assurances were made by Bellack to Zurich that these responses were not meant to be interpreted as "chose not to act," but rather, the locations just did not respond. Additionally, Bellack maintained, "I assure you that we take employee safety very seriously which is why we have [Zurich] assist us with the IH side of things and why [Scott Fetzer] has spent over $1 million over the past

five years focusing on human capital * * *." Bellack's memo to Zurich, specifically addressed Zurich's recommendation:

> 05-05-3 (Stahl — Wooster) Adam Novak (Scott Fetzer Risk Department) and a member of Marsh Risk Consulting will be at the Wooster facility the week of October 19, 2009 and will be conducting an OSHA Readiness Assessment. Machine guarding is one of the many areas that will be reviewed. We will issue corrective action where necessary and if this area is one of the areas where a corrective action is taken we will report the closing of the open recommendations directly to Zurich to clear this item.

The jury heard that Bellack gave conflicting statements regarding whether he believed Marsh's OSHA readiness assessment would cover Zurich's recommendations.

{¶25} Gil Mayo, Stahl's operations manager, testified that he met with Colton Young, Marsh's consultant, at the Stahl Wooster facility. Mayo said he understood that Marsh was "going to do a complete audit of every piece of equipment and every operation in our process within our four walls."

{¶26} Young, at the direction of Bellack, conducted the 2009 OSHA readiness assessment. He testified that he was allotted eight hours to review the entire Stahl Wooster facility. Although he was copied on an email regarding an open recommendation by Zurich and that "machine guarding" would be reviewed at the 2009 OSHA assessment, he did not conduct a full press brake audit because he was not instructed by Bellack to conduct the audit.

{¶27} Young testified about the difference between an OSHA readiness assessment and a full brake press audit. He explained that an OSHA readiness assessment is a "drive-by" review of the machines, whereas the full brake press audit is

an observation of the operation of the machine during all stages, from tear down to start up to operation — he would observe parts being made. During an OSHA assessment, however, he would generally observe the machines as he walked through the facility, but he would review them for further safety parameters only if the machines were in operation. According to Young, if he had seen a press brake in operation that was not in compliance with OSHA standards, he would have noted that in his report.

{¶28} The 2009 OSHA report prepared by Young indicated that "chuck guards were missing" on a particular press and that

> The point of operation of machine whose operation exposes and [sic] employee to injury, shall be guarded. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks.

After Bellack reviewed the report and asked Colton to change some wording, Scott Fetzer shared the report with Mayo and requested that the report be updated when the corrective measures were completed at the Stahl facility.

{¶29} Gaus testified that his primary risk management contact was Bellack. His testimony corroborated Young's testimony that not every press brake in the facility is tested or inspected with an OSHA readiness assessment, but a full brake assessment is a more detailed evaluation. The only way a full brake assessment would be conducted is if the client (Scott Fetzer) requested it.

{¶30} Following Root's March 2012 accident, Scott Fetzer created and implemented "Stahl's Press Brake Safety Program," which included operator training. Additionally, Scott Fetzer ordered a full press brake audit.

IV. The Verdict

{¶31} On September 23, 2015, the jury returned a verdict in favor of Root and the OWC and against Scott Fetzer on Root's negligence claim, and in favor of Stahl and against Root and the OWC on the employer intentional tort claim. The jury awarded Root $1,708,109.67 in economic and noneconomic damages, but apportioned 40 percent of fault to Stahl's negligence, 7.5 percent to Root's negligence, and 52.5 percent to Scott Fetzer's negligence. The trial court entered judgment on the verdict of $1,708,109.67 but reduced the noneconomic damages by 47.5 percent; thus entering a final judgment in favor of Root and against Scott Fetzer in the amount of $843,937.50 in noneconomic damages, plus court costs and interest from the date of the judgment. Additionally, the court entered judgment in favor of the OWC and against Scott Fetzer in the amount of $52,820.10 in economic damages, plus court costs and interest from the date of the judgment.

{¶32} Scott Fetzer appealed and Root cross-appealed.

V. The Appeal

A. Judgment Notwithstanding the Verdict ("JNOV")

{¶33} In evaluating the grant or denial of a Civ.R. 50(B) motion for JNOV made after all the evidence is presented at trial, a reviewing court applies the same test as that

applied in reviewing a motion for a directed verdict. *Kanjuka v. Metrohealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, 783 N.E.2d 920, ¶ 14 (8th Dist.), citing *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 90, 509 N.E.2d 399 (1987); *Chem. Bank of New York v. Neman*, 52 Ohio St.3d 204, 206-207, 556 N.E.2d 490 (1990). Under Civ.R. 50(A)(4), a court may properly grant a motion for directed verdict when, after construing the evidence most strongly in favor of the party against whom the motion is directed, it finds that reasonable minds could come to but one conclusion on a determinative issue, and the conclusion is adverse to the nonmoving party. Review of the grant or denial of a motion for directed verdict is de novo. *Kanjuka* at ¶ 14, citing *Grau* at *id*. With these standards in mind, we now turn to defendants' arguments.

{¶34} In its first assignment of error, Scott Fetzer contends that the trial court erred as a matter of law in denying its motion for JNOV and finding that it owed a duty to Root. The issues submitted to the jury, as evidenced by the jury interrogatories, were whether Scott Fetzer was negligent in (1) "undertaking workplace safety evaluations" at Stahl, and (2) "controlling of access to" Stahl's workplace safety evaluations. These two issues focused on whether Scott Fetzer owed a duty to Root under (1) the Good Samaritan doctrine or (2) direct participant liability for affiliate companies. Scott Fetzer maintains that it did not assume a duty under either of these theories.

{¶35} 2 Restatement of the Law 2d, Torts, Section 324A (1965), which is also referred to as the "Good Samaritan" doctrine or negligent undertaking, provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third

> person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The threshold issue in an action under Section 324A is generally whether there is evidence from which the jury could conclude that the actor (Scott Fetzer) undertook to provide services under an agreement or with the intention of benefitting a third-party (Stahl's employees). *See Good v. Ohio Edison Co.*, 149 F.3d 413, 420 (6th Cir.1998); *McAtee v. Fluor Constructors Internatl., Inc*., 6th Cir. No. 98-5927, 1999 U.S. App. LEXIS 21040, *16 (Aug. 27, 1999) (actor's specific undertaking of the services allegedly performed without reasonable care is a threshold requirement to Section 324A liability). The existence and scope of such an undertaking establishes a relationship giving rise to a duty, as well as defines and limits an actor's duty under Section 324A. *In re TMJ Implants Prod. Liab. Litigation*, 113 F.3d 1484, 1493 (8th Cir.1997). If evidence is produced from which the jury could find such an undertaking, it is for the jury to determine whether the evidence establishes the elements of that relationship. *Rick v. RLC Corp*., 535 F.Supp. 39, 44 (E.D.Mich.1981).

{¶36} Specific to whether a parent or sibling corporation affirmatively undertook the duty of safety owed by its subsidiary under Section 324A, "courts have looked at the scope of the parent's involvement, the extent of the parent's authority, and the underlying

intent of the parent to determine whether the parent corporation affirmatively undertook that duty." *Bujol v. Entergy Servs.*, 922 So.2d 1113, 1131 (La.2004), citing Annette T. Crawley, *Environmental Auditing and the "Good Samaritan" Doctrine: Implications for Parent Corporations*, 28 Ga.L.Rev. 223, 243 (1993); *Muniz v. Natl. Can Corp*. 737 F.2d 145 (1st Cir.1984) (parent corporation may be liable for unsafe conditions at a subsidiary only if it assumes a duty to act by affirmatively undertaking to provide a safe working environment; communication, concern, minimal contact, and superior knowledge and expertise over safety matters is insufficient).

{¶37} Once the duty has been satisfied, liability can only be imposed under Section 324A if (a) the defendant's failure to exercise reasonable care increased the risk of such harm; or (b) the defendant has undertaken to perform a duty owed by the employer to the injured employee; or (c) harm is suffered because of reliance of the employer or the injured employee under the undertaking. Restatement 2d, Torts, Section 324A.

{¶38} Specific to this appeal, under Section 324A(b), a parent corporation or other entity will only be liable for a voluntary assumption of duty where that corporations' undertaking was intended to supplant, not merely supplement, the subsidiary's duty. *Bujol* at 1136, citing *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F.Supp. 1348 (D.Md.1982) (liability under Section 324A(b) arises in the workplace setting only if the actor's undertaking was intended to be in lieu of, rather than as a supplement to, the employer's own duty of care to the employee); *Asher v. Unarco Material Handling, Inc*., E.D.Kentucky No. 6:06-548-DCR, 2008 U.S. Dist. LEXIS 49370, *11 (June 26, 2008),

citing *Bujol* at 1136, fn. 30 (Section 324A might be met if a parent only takes over one aspect of the subsidiary's duty to provide a safe workplace, such as for the * * * safety of a particular piece of equipment rather than safety of the entire plant, but it is still necessary that the parent supplant the subsidiary's duty with respect to that aspect completely).

{¶39} Additionally, under Section 324A(c), the subsidiary must have relied on the parent company's undertaking to provide for safety at the subsidiary's plant. *Bujol* at 1136, citing *Johnson v. Abbe Eng.*, 749 F.2d 1131, 1133 (5th Cir.1984) (subsidiary's plant manager testified that he relied on parent for accident prevention and safety training).

{¶40} Accordingly, whether the Good Samaritan doctrine will apply to a parent or sibling corporation depends on specific facts, based on the surrounding circumstances, and is determined on a case-by-case basis.

{¶41} In this case, Scott Fetzer argued in its motion for JNOV that it did not have sufficient control over workplace safety at Stahl to create a duty to Root. Specifically, Scott Fetzer maintained that while Bellack scheduled OSHA readiness assessments for the Stahl facilities, Scott Fetzer had no substantive involvement in performing the inspections or rendering advice on safety. Rather, Scott Fetzer maintained that Stahl had its own safety administrator, written safety plans, which were updated by Stahl employees, and safety training.

{¶42} In support of its arguments, Scott Fetzer cites to this court's decision in *Connell v. Goodyear Tire & Rubber*, 8th Dist. Cuyahoga Nos. 92833 and 92923, 2010-Ohio-4344. In that case, the plaintiff was exposed to asbestos while working at Goodyear Aerospace Corporation ("GAC"), a wholly owned subsidiary of Goodyear Tire and Rubber Company ("Goodyear"). In affirming summary judgment for Goodyear, this court held that Goodyear had not undertaken GAC's duty to provide a safe workplace, even though Goodyear personnel provided safety advice and performed air sampling tests for GAC. *Id*. at ¶ 47. This court reasoned that because GAC maintained its own safety department and decided whether to follow Goodyear's advice or take action based on the testing performed by Goodyear, "GAC retained complete responsibility for the safety of its workers." *Id*.

{¶43} However, we find *Connell* distinguishable. The facts in this case reveal that Scott Fetzer provided to Stahl more than just mere safety advice. Instead, Scott Fetzer provided Stahl the necessary means through the exclusive contractual relationship with Marsh to maintain its facility OSHA compliant and safe for its employees. Without Scott Fetzer, Stahl did not have any means to obtain safety audits, OSHA readiness assessments, or any other risk assessment reviews and inspections. The testimony revealed that for the Stahl employees to obtain any assistance by Marsh, they had to seek permission from Scott Fetzer. Further, Scott Fetzer utilized its authority to direct and dictate Marsh's services, including the frequency of visits at each facility, the time spent, and the services provided. Because the jury heard testimony from Bellack that safety

was top priority, the jury could have reasonably found that Scott Fetzer undertook a duty of care to Stahl's employees, including Root.

{¶44} A review of the evidence reveals that brake press and machine guarding was an ongoing problem at all Stahl facilities. In each of the OSHA reports from 2004, 2006, and 2009, the Marsh inspector noted that machine guarding at the Stahl Wooster facility was a significant concern that needed remedied. Each of these reports was provided to Scott Fetzer. The jury could reasonably conclude that Scott Fetzer knew that the Stahl facilities were either removing or not using the appropriate guarding on the machines because even though each report indicated that the guarding was remedied, each subsequent report noted the lack of guarding on press brake machines. Nevertheless, Scott Fetzer affirmatively decided against Zurich's recommendation for a full press brake safety audit at Stahl's Wooster facility, without disclosing the recommendation or its decision to Stahl. This decision was made despite Scott Fetzer's knowledge that a brake press injury occurred in 2006 at another Stahl facility where both hands of an employee were crushed. In fact, immediately after the Durant facility injury, Scott Fetzer discussed the importance of guarding and implemented a "machine tool risk assessment and inventory guideline." Additionally, it was suggested that Scott Fetzer would allocate a penalty against each division that did not respond to this risk assessment score sheet and take corrective actions. Despite this implementation, Yeater testified that he was not aware of any guidelines or procedures regarding press brake operation at Stahl.

{¶45} The jury could reasonably conclude that Scott Fetzer undertook the duty to provide a safe workplace for Stahl and its employees by contracting with Marsh to provide risk assessments, directing Marsh regarding the parameters of those assessments and audits, and creating, establishing, and implementing brake press manuals, policies, and penalties for failing to follow the established protocols. This record reveals that these tasks demonstrate an undertaking where the management and employees of Stahl relied on Scott Fetzer for evaluations and assessments of its press brakes to ensure a safe workplace. Furthermore, because Stahl had no means to conduct its own press brake audits, Scott Fetzer supplanted Stahl's duty of care in evaluating and assessing those machines.

{¶46} After construing the evidence most strongly in favor of Root, reasonable minds could reach different conclusions on whether Scott Fetzer owed a duty to Root in this matter.[2] Accordingly, the trial court did not err in denying Scott Fetzer's motion for JNOV.

{¶47} The first assignment of error is overruled.

B. Immunity

{¶48} Scott Fetzer contends in its second assignment of error that the trial court erred in failing to provide Scott Fetzer immunity from negligence claims under the Ohio

[2] We need not decide whether Ohio recognizes direct participant liability because the jury found Scott Fetzer owed a duty to Root under both the Good Samaritan doctrine and direct participation theory. *See* Jury Interrogatory Nos. 5-9. Having found that JNOV was properly denied based on the Good Samaritan doctrine, any error in submitting the direct participation theory to the jury is harmless.

Workers' Compensation Act after it found that Scott Fetzer owed a duty to an employee of its sister corporation.

{¶49} The exclusive remedy provision of the Ohio Workers' Compensation Act, R.C. 4123.74, confers immunity on complying employers when the injured party is an employee of the employer. In this case, the parties stipulated that although RS Resources was Root's actual employer, Root was Stahl's borrowed employee; thus, Stahl's employee. Accordingly, Stahl was entitled to immunity under R.C. 4123.74 if any liability was apportioned to Stahl.

{¶50} Whether an affiliated or parent company, like Scott Fetzer, is entitled to workers' compensation immunity for injuries sustained by a subsidiary's employee has not been addressed applying Ohio law. However, this court has addressed the issue applying Pennsylvania law in *Ropele v. Dravo Corp.*, 8th Dist. Cuyahoga No. 40669, 1980 Ohio App. LEXIS 11420 (Apr. 17, 1980). In *Ropele*, this court explained:

> [T]he issue of whether a parent corporation of a wholly owned [sic] subsidiary is the employer of the subsidiary's employees, for purposes of the common-law tort immunity provision of the Pennsylvania Workmen's Compensation Act, is a question of fact to be determined in light of all the circumstances surrounding the relationship between the parent corporation, the subsidiary, and the employee.

Id. at paragraph two of the syllabus. This court noted that whether a parent company will be deemed an "employer" of a subsidiary's employee is answered only after consideration of all relevant factors.

> And while the classic test is the right of control, the existence of that right is established by the answers to such questions as what entity paid the employee, directed his work, carried him on its payroll, paid his worker[s']

> compensation, withheld his taxes, could hire and fire him, and if the two corporate entities had separate functions, in which functions did the employee principally participate.

Id. at *6-7.

Moreover, immunity from suit based on workers' compensation law is not available to a parent company that does not contribute under the workers' compensation statute. *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir.1979).

{¶51} We find *Ropele* instructive and consistent with cases from other jurisdictions addressing this issue. *See, e.g., Briden v. Road Sys., Inc.*, 705 F.Supp. 367 (E.D.Mich.1989); *Wheeler v. New York, N.H. & H.P. Co.*, 112 Conn. 510, 153 A. 159 (1931)(mere fact that a plaintiff's employer is a subsidiary of a defendant corporation does not compel the court to treat the defendant as the plaintiff's employer for the purpose of workers' compensation); *Latham v. Technar, Inc.*, 390 F.Supp. 1031, 1037 (E.D.Tenn.1974) (presence of a common insurer between the holding company and the wholly owned subsidiary does not automatically establish a single employer unit, nor does identity of management create identity for workers' compensation purposes); *Vernon v. Supermarket Servs. Corp.*, 250 N.J.Super. 8, 10, 593 A.2d 345 (App.Div.1991) (corporation may not share the workers' compensation immunity provided to a sister subsidiary corporation).

{¶52} In this case, no evidence was presented that Scott Fetzer had any direct control over Root and his day-to-day responsibilities at Stahl. It did not have any discussions with anyone over Root's hiring, or the machine that Root would operate.

There was no testimony that Scott Fetzer paid Root, carried him on its payroll, paid his workers' compensation, or withheld his taxes. It was undisputed that Root was an employee of Stahl, operating Stahl's machines that made parts for Stahl's benefit. Accordingly, under these circumstances, Scott Fetzer was not Root's employer for purposes of workers' compensation immunity. Although Scott Fetzer owed a duty to an employee of its sister corporation, it was not an employer for immunity purposes under the Ohio Workers' Compensation Act; they are separate legal entities in this context.

{¶53} However, a parent or sibling company is still liable for its own independent acts of negligence. *Merrill v. Arch Coal, Inc*., 118 Fed.Appx. 37, 43-44 (6th Cir.2004), citing *Boggs*, 590 F.2d 655 (6th Cir.). After applying Kentucky workers' compensation law, the *Boggs* court held that a parent company is not immune from tort liability to its subsidiary employee for its own independent acts of negligence. A parent company will be liable under customary principles of common law for harm resulting from its own negligent or reckless conduct. *Id.* at 663. We also find *Boggs* instructive on whether to apply workers' compensation immunity to Scott Fetzer.

{¶54} In this case, Scott Fetzer's liability is based on its own specific, affirmative acts that proximately resulted in Root's injuries. The jury found that Scott Fetzer was negligent in its manner of providing access to the appropriate workplace safety evaluations for Stahl and its employees, and that it was negligent in undertaking the duty to perform the appropriate workplace safety evaluations for Stahl and its employees. These affirmative acts are not attributable to Stahl, but solely to Scott Fetzer.

{¶55} Accordingly, because the evidence demonstrated and the jury found that Scott Fetzer committed its own independent act of negligence, and there was no evidence that Scott Fetzer contributed under the workers' compensation statutes, the trial court did not err in failing to provide Scott Fetzer immunity from negligence claims under the Ohio Workers' Compensation Act.

{¶56} Scott Fetzer's second assignment of error is overruled.

C. Evidentiary Ruling — Subsequent Remedial Measures

{¶57} In its third assignment of error, Scott Fetzer contends that the trial court erred in permitting Root to introduce evidence of subsequent remedial measures in violation of Evid.R. 407.

{¶58} Evid.R. 407 provides,

> When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The decision to admit into evidence remedial measures taken by a party is entrusted to the sound discretion of the trial judge. *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991).

{¶59} In this case, Scott Fetzer filed a motion in limine to exclude the presentation of testimony or evidence of subsequent remedial measures following Root's injury. The trial court granted the motion, in part, to preclude Root from introducing evidence

concerning any measures taken by Stahl or Scott Fetzer that would make the injury or harm less likely to occur in the future, or of any remedial measures if the purpose of the evidence was to prove the culpability of the defendants. However, the court denied the motion, in part, and allowed Root to introduce evidence of subsequent measures taken by the defendants if offered for proof of ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

{¶60} The trial court additionally noted that any ruling on specific testimony was premature, but that it would consider objections made during trial. Finally, the court noted that it would issue an instruction to the jury regarding what is and is not permissible concerning the use of the evidence in accordance with Evid.R. 407 and Evid.R. 105.

{¶61} During trial, Scott Fetzer renewed its motion and entered a continuing objection to any testimony regarding subsequent assessments, audits, training, or investigations of the press brake following Root's injury. The trial court noted the objection, but indicated that it already ruled on the issue of permissible and impermissible use.

{¶62} During Bellack's examination, testimony was elicited regarding subsequent actions taken by Scott Fetzer, Marsh, and Stahl following Root's injury. The trial court then gave the jury an in-depth and comprehensive instruction on permissible use of the evidence. Specifically, the trial court instructed the jury that (1) an OSHA citation does not mean that Stahl or Scott Fetzer was responsible for Root's injuries, and (2) the subsequent assessment by Marsh that was ordered by Scott Fetzer after Root's injury

could be considered as proof that Scott Fetzer or Stahl was responsible for the injury itself, but only could be considered as to whether Scott Fetzer had control over safety services being provided to Stahl, or whether the remedial measures could have been feasible beforehand. (Tr. 810-817.)

{¶63} On appeal, Scott Fetzer appears to contend that the trial court abused its discretion in allowing *any* testimony about *any* actions taken following Root's injury because control over the decision to conduct the press brake audit or its feasibility were not contested issues.

{¶64} We agree with Scott Fetzer that its control over the decision to conduct the press brake and the feasibility to do so was not contested — Scott Fetzer had complete control over whether Marsh would conduct a full brake press audit and the ability to do so. In fact, Bellack testified that if he "had told [Marsh] to do a full brake press survey [in 2009], they would have done that as well."

{¶65} However, Scott Fetzer's control over Stahl's access to Marsh, safety assessments, and safety information for its overall workplace safety was contested. The subsequent measures that Scott Fetzer directed and implemented regarding press brake safety cannot easily be isolated. Therefore, the trial court, knowing this difficulty, exercised its discretion and provided a comprehensive instruction to the jury. The jury was specifically instructed that the use of subsequent remedial measures could not be considered to prove liability or responsibility. The jury can be presumed to have

followed the instructions, including curative instructions, given by a trial judge. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 93.

{¶66} Finally, even if the court abused its discretion in allowing impermissible testimony about subsequent remedial measures in violation of Evid.R. 407, it was harmless at best. Root presented substantial evidence apart from the remedial measures from which a jury could reasonably find Scott Fetzer negligent. Scott Fetzer admitted that it unilaterally decided against the recommended press brake audit. This decision was made despite (1) Zurich's recommendation, (2) a press brake injury at a different Stahl facility, and (3) the implementation of score sheet and penalty system for failing to take corrective actions. Mayo testified that he was unaware of Scott Fetzer's decision to not conduct the audit. In fact, Mayo testified that he believed the Marsh assessment satisfied all safety matters at the Stahl facility. Thus, Scott Fetzer cannot say that the jury would have reached a different conclusion but for the trial court's alleged abuse of discretion in admitting the evidence of subsequent remedial measures.

{¶67} Accordingly, we find no abuse of discretion in allowing the testimony regarding subsequent measures for the purposes of proving Scott Fetzer's control over Stahl's access to Marsh, including the investigation and implementation of subsequent measures following Root's injury. Scott Fetzer's third assignment of error is overruled.

VI. The Cross-Appeal

A. Directed Verdict — Punitive Damages

{¶68} In his first and second cross-assignments of error, Root contends that the trial court erred in granting Scott Fetzer a directed verdict on his punitive damages claim during the compensatory damages phase of a trial bifurcated under R.C. 2315.21 before he had an opportunity to present all of his evidence in support of his claim. He contends in his second assignment of error that the evidence adduced at trial would permit a jury to reasonably conclude that Scott Fetzer acted with a conscious disregard for the rights and safety of Stahl's employees, and that such conduct had a great probability of causing substantial harm.

{¶69} R.C. 2315.21(B)(1) requires a trial court to bifurcate the compensatory and punitive phases of a tort action upon the motion of any party. *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270.

> In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:
>
> (a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.
>
> (b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage

> of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

R.C. 2315.21(B)(1).

{¶70} A motion for a directed verdict under Civ.R. 50 tests the sufficiency of the evidence, not the weight of the evidence or the credibility of witnesses. *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119, 671 N.E.2d 252 (1996). The trial court's decision is reviewed de novo. *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 257, 741 N.E.2d 155 (2d Dist.2000).

{¶71} Despite the bifurcation of trial, Scott Fetzer "discretely" moved for "summary judgment" or directed verdict on the punitive damages after the close of Root's presentation of evidence on compensatory damages, but prior to submitting the case to the jury for deliberations. (Tr. 1025.) Scott Fetzer contended that directed verdict was requested "on the issue of whether they acted with actual malice sufficient to — to invoke the punitive damages. There's no evidence of that at all. * * * No reasonable juror could find that there was actual malice in anything that Scott Fetzer did." (Tr. 1025-1026.)

{¶72} While the record reveals that Root did not object to Scott Fetzer's "discrete" motion for a directed verdict on punitive damages, it is fundamental that in a bifurcated trial, the plaintiff is expressly precluded from presenting any evidence supporting a request for punitive damages, including evidence of actual malice. *See* R.C. 2315.21;

Havel. Presentation of evidence purporting to show malice on the part of a defendant must be bifurcated from the presentation of evidence regarding the recovery of compensatory damages. *See* R.C. 2315.21(C).

{¶73} Accordingly, the trial court erred in granting Scott Fetzer's Civ.R. 50 motion for directed verdict at the close of Root's case. Because Root was successful on his negligence claim against Scott Fetzer, the matter is remanded to the trial court to conduct a punitive damages hearing on this claim.

{¶74} Root's first cross-assignment of error is sustained. Having sustained his first assignment of error, Root's second cross-assignment of error challenging the sufficiency of the evidence to support a punitive damages award is moot.

B. Apportionment

{¶75} Over Root's objection, the trial court allowed Scott Fetzer to submit jury interrogatories inquiring if Stahl, who was entitled to workers' compensation immunity, was negligent and a proximate cause of Root's injuries, and if so, the percentage of fault attributable to Stahl. The jury found that Stahl was negligent, attributing 40 percent fault for Root's injuries. The trial court used this percentage and the 7.5 percent attributed to Root, to reduce Root's nonecomonic damages by 47.5 percent pursuant to R.C. 2307.22 and 2307.23.

{¶76} Root contends in his third cross-assignment of error that the trial court erred in treating Scott Fetzer and its sibling corporation, Stahl, as separate "persons" for the purposes of apportionment under R.C. 2307.22 and 2307.23. Specifically, he contends

that the two entities shared a unity of interest, were represented by the same counsel, and worked together to minimize their joint exposure by attributing his injuries to Stahl's negligence where Stahl was entitled to workers' compensation immunity.

{¶77} R.C. 2307.23, commonly called the "empty chair" defense, sets forth the statutory scheme for apportionment of liability among responsible defendants, nonparties, and the plaintiff:

> (A) In determining the percentage of tortious conduct attributable to a party in a tort action under section 2307.22 * * * the jury in a jury action shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following:
>
> (1) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to the plaintiff and to each party to the tort action from whom the plaintiff seeks recovery in this action;
>
> (2) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to each person from whom the plaintiff does not seek recovery in this action.
>
> (B) The sum of the percentages of tortious conduct as determined pursuant to division (A) of this section shall equal one hundred per cent.
>
> (C) For purposes of division (A)(2) of this section, it is an affirmative defense for each party to the tort action from whom the plaintiff seeks recovery in this action that a specific percentage of the tortious conduct that proximately caused the injury or loss to person or property or the wrongful death is attributable to one or more persons from whom the plaintiff does not seek recovery in this action. Any party to the tort action from whom the plaintiff seeks recovery in this action may raise an affirmative defense under this division at any time before the trial of the action.

{¶78} This court has held that "R.C. 2307.23 requires a jury to consider the percentage of tortious conduct attributable to each person who proximately caused the

injury or loss, regardless of whether the plaintiff is seeking recovery or is able to seek recovery from that person." *Fisher v. Beazer E., Inc.*, 8th Dist. Cuyahoga No. 99662, 2013-Ohio-5251, ¶ 38, *appeal not allowed*, 138 Ohio St.3d 1469, 2014-Ohio-1674, 6 N.E.3d 1205. Moreover, this court specifically observed that "R.C. 2307.23 does not exclude employer negligence from apportionment. Nor does it exclude any party who may be entitled to immunity or who otherwise could not be made a party." *Id.* at ¶ 37. The goal of apportionment is to ensure that no defendant pays more than its fair share of the plaintiff's damages. *Romig v. Baker Hi-Way Express, Inc.*, 5th Dist. Tuscarawas No. 2011AP-02-0008, 2012-Ohio-321, ¶ 30, *appeal not allowed*, 132 Ohio St.3d 1409, 2012-Ohio-2454, 968 N.E.2d 491. Although Stahl would be subject to immunity under workers' compensation, the inclusion of Stahl was appropriate under the statute and our controlling precedent.

{¶79} Root conceded before the trial court that *Fisher* controlled; however, he maintained that the court should consider adopting the Fifth District's decision in *Romig*. In *Romig*, the court concluded that there was no way to reconcile R.C. 2307.23's inclusion of employer negligence for apportionment with the immunity provided to employers under the workers' compensation statutes. *Id.* at ¶ 37. Accordingly, it held that "to include the employer's negligence in the allocation of fault is completely inconsistent with the Worker[s'] Compensation system as structured by the constitution and the legislature and as construed by the courts." *Id.* at ¶ 46. Therefore, according to the Fifth District, "there is no such thing as employer negligence, and a tortfeasor cannot

raise the affirmative defense of the empty chair as to an employer for negligent acts." *Id*. at ¶ 45.

{¶80} We recognize this split of authority between our court and the Fifth District. However, R.C. 2307.23 is clear that when determining percentage of tortious conduct attributable to a party, the trier of fact shall also specify a percentage of tortious conduct that is "attributable to each person from whom the plaintiff does not seek recovery in this action," as defined in R.C. 2307.11(G). This includes, but is not limited to (1) persons that have settled, (2) persons dismissed from the action with or without prejudice, and (3) persons that are not a party, but could have been a party if disclosed prior to trial. The statute is unambiguous that all persons, whether recoverable or not, are included in the allocation under R.C. 2307.23. Accordingly, we do not agree with the Fifth District's inability to reconcile R.C. 2307.23 and 4123.74.

{¶81} Root further contends that Stahl and Scott Fetzer should be treated as one party for purposes of apportionment because they were a unified defense at trial. Root cites to various cases in support of his argument; however, none involve apportionment of tort liability. *See Martha's 319 LLC Partnership v. Reed*, Franklin C.P. No. 11 CVH-08-10881, 2012 Ohio Misc. LEXIS 4941 (Sept. 21, 2012) (piercing the corporate veil, formation of LLCs, creation of partnerships); *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (liability under the Sherman Antitrust Act); *Raniola v. Bratton*, S.D.N.Y. No. 96 Civ. 4482, 2003 U.S. Dist. LEXIS 7199 (Apr. 21, 2003) (costs under Fed.R.Civ.P. 54(d) and Title VII); *Smith v.*

Circle P Ranch Co., 87 Cal. App.3d 267, 150 Cal.Rptr. 828 (1978) (costs under California's Code of Civil Procedure Section 1032(b)).

{¶82} In this case, the causes of action presented to the jury against Stahl and Scott Fetzer were different — intentional tort and negligence, respectively. Root contends that Stahl had nothing at stake because (1) any apportioned liability would be subject to immunity, and (2) Root's claim of intentional tort was nearly impossible to prove. Despite Root's lack of confidence in his intentional tort cause of action, both Stahl and Scott Fetzer had to defend, individually, against their respective cause of action. Therefore, without any authority to the contrary that they should be treated as the same person, we find no error by the trial court in deciding to treat Stahl and Scott Fetzer as separate persons for apportionment of liability purposes.

{¶83} Root's third cross-assignment of error is overruled.

C. Summary Judgment

{¶84} In his fourth cross-assignment of error, Root contends that the trial court erred in granting Marsh summary judgment and denying his motion for reconsideration where Bellack's affidavit conflicted with his prior deposition as to why the press brake audit recommended by Zurich was not performed, allowing Scott Fetzer to assert an empty chair defense. Root brings this assignment error "in the event the Court sustains Scott Fetzer's Third Assignment of Error." Despite our decision overruling Scott Fetzer's third assignment of error, we summarily overrule Root's fourth cross-assignment

of error for failing to comply with App.R. 12 and 16 by failing to support his claims with citations to the record, case law, or statutes. *See* App.R. 12(A)(2) and 16(A)(7).

VII. Conclusion

{¶85} Judgment affirmed in part, reversed in part, and remanded for a punitive damages hearing on Root's claim against Scott Fetzer.

It is ordered that appellee/cross-appellant recover from appellant/cross-appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

EILEEN T. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR