[Cite as *Trusick v. Lindsay Concrete Prods. Co., Inc.*, 2010-Ohio-4235.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
RICHARD TRUSICK	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-00029
LINDSAY CONCRETE PRODUCTS CO., INC., ET AL	:	
	:	
	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 2009CV00791
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 7, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
DARREN W. DEHAVEN MCNAMARA, DEMCZYK & DEHAVEN CO. 12370 Cleveland Ave. N.W. Uniontown, OH 44685	JAMES A. DESMITH FISCHER, EVANS, ROBBINS & GEISER 4505 Stephen Circle N.W., Ste. 100 Canton, OH 44718

Gwin, J.,

{¶1} Plaintiff Richard Trusick appeals a summary judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of defendant-appellee Lindsay Concrete Products Co., Inc. on his claim of employer intentional tort. Appellant assigns a single error to the trial court:

{¶2} "THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

{¶3} The trial court made findings as to the undisputed facts. The Reserves Network, Inc., a temporary employment agency, placed appellant to work for appellee as a general laborer. Appellee's business involves the manufacturing of pre-cast concrete structures. On or about February 26, 2008, appellant's job involved smoothing out the top of a mold with a trowel after concrete was poured into it. The mold was approximately 73 inches in height and approximately 74 inches in diameter. It was used to make septic tanks. The mold contained a foot rail approximately one foot in width and located approximately 48 inches off the ground. The court found employees were to use the foot rail in order to reach the top of the mold to smooth it from the side. If a mold did not contain a walkway or a platform, the employees used ladders to reach the tops of the molds.

{¶4} On the day he was injured, appellant butted a ladder up against the mold in order to reach the top, just as he had done on other molds on prior days. Appellant climbed up the ladder to the second-to-last rung and then stepped off the ladder to climb directly on top of the concrete mold. When he attempted to climb back onto the ladder, appellant slipped and fell, sustaining injuries.

{¶5} The court found appellant alleges: (1) appellee was negligent in failing to provide a safe work environment; (2) appellee subjected him to a dangerous work environment in which harm was substantially certain to occur; and (3) the ladder and mold appellant was working on contained defects when manufactured and/or sold by appellee, and the defects caused appellant's injuries.

{¶6} Civ. R. 56 (C) states in pertinent part:

{¶7} "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."

{¶8} 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.

{¶9} 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.

{¶10} 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.

{¶11} In addition to the facts stated supra, the trial court discussed the question of the lubricant used in the manufacturing process. The court found there was no evidence the lubricant was the proximate cause of appellant's fall. Appellant stated he did not know exactly how the fall occurred. He was getting off the concrete mold and as soon as his first foot hit the ladder, he fell. His other foot was still on the mold. Appellant testified he did not know if the ladder tilted, causing his foot to slip, or if his

foot slipped, causing the ladder to tilt. Either way, he stated, as soon as his weight shifted off of the ladder, he fell.

{¶12} Appellant testified he had not been told he was not able to stand on the top of the mold. Appellee's safety director testified he had instructed the employees not to stand on top of the mold, and he did not know employees were doing so until after appellant's accident. Appellee's supervisor testified employees were not to get on top of the molds if there was no walkway. Instead, the employees were to work from the side, even if they needed a ladder. He testified the employee would put a ladder up beside the mold to use a concrete vibrator to remove the air bubbles and to finish it with a trowel.

{¶13} The trial court found appellee provides its employees with the proper orientation and safety training, and there had been no prior fall related accidents like the one appellant suffered.

{¶14} R.C. 2745.01 states in pertinent part:

{¶15} "(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, 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.

{¶16} "(B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

{¶17} ***"

{¶18} During the pendency of this appeal, the Ohio Supreme Court decided *Kaminski v. Metal & Wire Products Company,* 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, holding R.C.2745.01 is constitutional. The Supreme Court directed courts to apply the statute instead of case law and consider the record in light of the statutory standards for an employer intentional tort. *Kaminski,* paragraph 103. See also S*tetter v. R. J. Korman Derailment Services, LLC,* 2010-Ohio-1027, decided the same day as *Kaminski*.

{¶19} At the time this matter was before the trial court, the leading case law with regard to employer intentional torts was *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St. 3d 115, 570 N.E. 2d 1108. The trial court analyzed this case both under *Fyffe* and under R.C. 2745.01.

{¶20} *Fyffe* held: "Within the purview of Section 8 (A) of The Restatement of Law II, Torts, and Section of *Prosser & Keeton* on Torts (5) Ed. (1984), in order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) Knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) Knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to 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. (*Van Fossen v.*

Babcock & Wilcox Company [1998], 36 Ohio St. 3d 100, 522 N.E. 2d 489, paragraph five of the syllabus, modified as set forth of and explained.)"

{¶21} The trial court found appellant could not satisfy the first prong of the *Fyffe* test. The court found there was no dangerous condition within the business operations. The court also found because appellant's claim fails the *Fyffe* test, appellant is unable to satisfy the more stringent standards set forth in R.C. 2745.01, in that there is no evidence of a deliberate intent by the defendant to injure the plaintiff.

{¶22} We agree with the trial court the record does not contain evidence appellee had a deliberate intent to injure appellant, nor was the accident substantially certain to occur.

{¶23} The assignment of error is overruled.

{¶24} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. JOHN W. WISE

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[Cite as *Trusick v. Lindsay Concrete Prods. Co., Inc.*, 2010-Ohio-4235.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

RICHARD TRUSICK	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
LINDSAY CONCRETE PRODUCTS CO., INC., ET AL	:	
Defendants-Appellees	:	CASE NO. 2010-CA-00029

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed. Costs to appellants.

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HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS

_____
HON. JOHN W. WISE