[Cite as *Conley v. Faurecia Exhaust Sys., Inc.*, 2010-Ohio-2394.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

WILLARD S. CONLEY, JR., et al. :

Plaintiffs-Appellants : C.A. CASE NO. 2009 CA 26

v.

: T.C. NO. 06 CV 536

FAURECIA EXHAUST SYSTEMS, INC. et al. : (Civil appeal from Common Pleas Court)

Defendants-Appellees :

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O P I N I O N

Rendered on the 28th day of May, 2010.

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DONOVAN, P.J.

{¶ 1} Plaintiff-appellants Willard S. Conley, Jr., and his wife, Susan L. Conley, appeal from a decision of the Miami County Court of Common Pleas, General Division, in

which the trial court sustained defendant-appellee R & D Machine, Inc.'s motion to strike the affidavit of the Conley's expert, Ernest Chiodo, M.D., J.D. The Conleys also appeal a decision of the trial court which sustained R & D's motion for summary judgment. On May 13, 2009, the trial court issued two separate entries: one granting R & D's motion to strike Dr. Chiodo's affidavit, and one granting R & D's motion for summary judgment. On June 22, 2009, the trial court filed a final judgment entry which journalized its decision to grant R & D's motion for summary judgment. The Conleys filed a timely notice of appeal with this Court on July 16, 2009.

I

{¶ 2} In May of 2004, Faurecia Exhaust Systems, Inc. hired R & D in order to devise and implement a procedure to salvage defective catalytic converters. The catalytic converters consisted of an internal "brick" covered with insulation called Unifrax which was glued to the brick. The insulated brick was housed in a metal casing. The bricks contained platinum, a precious metal. Accordingly, Faurecia wanted R & D to create a process to not only remove the bricks from the metal casing, but also remove the insulation coating the bricks, in order to salvage the platinum contained in the bricks.

{¶ 3} Once the bricks were removed from the metal casing using a modified log splitter, R & D employees utilized two separate procedures to remove the insulation from the outside of the bricks. One process employed by R & D to remove the insulation involved the use of a nylon brush mounted on a buffer which was used to grind the insulation off of the brick. The grinding process created a great deal of dust. Eventually, the grinding process was abandoned, and R & D instructed its workers to remove the insulation by scraping it off with a putty knife, which produced little or no dust.

{¶ 4} Willard Conley, who had been hired by R & D in late June of 2004, was assigned to the task of removing the insulation from the bricks using the grinding method. Although the grinding was performed at a work station that was located outdoors, the operation still produced a great deal of dust. It is undisputed that Willard did not use any respiratory protection while grinding the insulation off of the bricks. Additionally, Willard claimed that he was told by Dan Daffner, owner of R & D, that officials at Faurecia stated that the insulation removal should be performed by employees wearing protective equipment in an enclosed environment with exhaust fans to remove the dust.

{¶ 5} At some point, R & D employees became concerned that the dust created by the grinding process could be hazardous. In response, Daffner contacted Faurecia and asked for the material safety data sheet (MSDS) for the insulation material on the bricks. The MSDS for the insulation material, known an Unifrax, described the insulation as a "refractory ceramic fiber product" which posed a possible cancer hazard if inhaled. The MSDS also stated that there was "no increased incidence of respiratory disease in studies examining occupationally exposed workers." Nevertheless, the MSDS advised an employer whose employees would be exposed to Unifrax to take specific precautions in order to insure employee safety. In particular, the MSDS advised employers to implement procedures designed to minimize airborne fiber emissions such as using "local exhaust ventilation, point of generation dust collection, down draft work stations, [and] emission controlling tool designs." The MSDS also recommended the use of a respirator or other respiratory protection to prevent inhalation of Unifrax, as well as wearing appropriate skin and eye protection in order to minimize exposure to the ceramic fibers.

{¶ 6} With the exception of performing the insulation grinding at an outdoor work

station, Willard alleges that R & D failed to implement any of the safety procedures outlined in the MSDS even after Daffner was warned of the hazardous nature of the airborne ceramic fiber. We note that Willard claims that he specifically asked Daffner for a respirator while he performed the grinding, but Daffner refused his request, stating that a respirator was too expensive. Daffner, on the other hand, claims that R & D owned a respirator that was available at the time the grinding was performed. After approximately two weeks of grinding the insulation from the bricks, R & D discontinued the process. Thereafter, R & D instructed its employees to simply scrape the insulation from the bricks with putty knives.

{¶ 7} Willard testified during his deposition that he worked on the insulation removal job for approximately four weeks, five days a week, and for ten hours a day. On several occasions during the brick grinding process, Willard testified that he complained of feeling sick and had to be driven home. Willard also informed Daffner that he had gone to the hospital to be treated. Willard stated that when he showed hospital personnel the MSDS for the Unifrax, they told him he should be wearing safety equipment when he handled the insulation.

{¶ 8} On August 17, 2006, the Conleys filed a complaint against R & D and Faurecia.[1] In the complaint, Willard claimed that as result of the grinding process utilized by R & D, he was exposed to platinum dust and ceramic fiber dust which caused permanent injury to his lungs. In support of their claims, the Conleys presented the deposition testimony of Dr. Ernest Chiodo who opined as follows: 1) Willard was suffering from a lung disease and occupational asthma related to his exposure to chemicals released during the grinding process;

[1]Faurecia was dismissed with prejudice as a party to the litigation on June 12, 2009 and is not involved in the instant appeal.

2) Willard has an increased risk of serious disease in the future; and 3) R & D exhibited a total disregard for Willard's safety and welfare by allowing him to be exposed to the chemicals released by the insulation grinding process. Dr. Chiodo also stated during his deposition that R & D acted recklessly by allowing Willard to grind the insulation off of the bricks without instituting the proper safety procedures; e.g. providing respirators and adequate ventilation as recommended by the MSDS for Unifrax.

{¶ 9} On March 11, 2009, R & D filed its motion for summary judgment. The Conleys filed their memorandum contra on March 25, 2009. On April 3, 2009, the Conleys filed the affidavit of Dr. Chiodo in which they sought to supplement his deposition testimony. R & D filed a motion to strike Dr. Chiodo's affidavit on April 9, 2009. On May 13, 2009, the trial court filed two separate entries in which it granted R & D's motion to strike Dr. Chiodo's affidavit, as well as R & D's motion for summary judgment.

{¶ 10} It is from this judgment that the Conleys now appeal.

II

STANDARD OF REVIEW

{¶ 11} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts in the case in a light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶ 12} Pursuant to Civil Rule 56(C), summary judgment is proper if:

{¶ 13} "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence

that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that 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. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The non-moving party must then present evidence that some issue of material fact remains for the trial court to resolve. *Id*.

III

{¶ 14} The Conleys' first assignment of error is as follows:

{¶ 15} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFFS-APPELLANTS IN GRANTING THE DEFENDANT-APPELLEE R & D MACHINE, INC.'S MOTION TO STRIKE THE AFFIDAVIT OF THE PLAINTIFFS-APPELLANTS' EXPERT, ERNEST CHIODO, M.D."

{¶ 16} In their first assignment, the Conleys contend that the trial court erred when it granted R & D's motion to strike the affidavit of Dr. Chiodo based on R & D's assertion that it conflicted with his earlier deposition testimony. Specifically, the Conleys argue that pursuant to our recent holding in *Pettiford v. Aggarwal*,[2] Montgomery App. No. 22736, 2009-Ohio-3642, the trial court could not strike the affidavit of Dr.Chiodo because he was a non-party expert witness.

{¶ 17} The Conleys rely on the following excerpt from *Pettiford* in support of their

[2]On December 2, 2009 the Ohio Supreme Court accepted *Pettiford* for review, and the case was set for oral arguments on May 11, 2010.

assertion that the court erred in striking Dr. Chiodo's affidavit:

{¶ 18} "In the present case, contradictions do exist between the deposition of Dr. Sickles and his subsequent affidavit. However, we conclude that *Byrd* does not control, because *Byrd* deals with contradictory affidavits of parties, not non-party witnesses. See *Walker v. Bunch*, Mahoning App. No. 05-MA-144, 2006-Ohio-4680, at ¶ 33 (distinguishing *Byrd* because it deals only with affidavits of a '*party*') (emphasis in original). Accord, *Gessner v. Schroeder*, Montgomery App. No. 21498, 2007-Ohio-570, at ¶ 53-57." Montgomery App. No. 22736, 2009-Ohio-3642, at ¶ 38.

{¶ 19} Because on close questions of law the doctrine of stare decisis requires that we follow the latest holding of our court upon an issue of law, we are required to follow our recent decision in *Pettiford*. *Wogoman v. Wogoman* (1989), 44 Ohio App.3d 34. Thus, since Dr. Chiodo is a non-party witness, and not a party to the litigation, the trial court erred by striking his contradictory affidavit.

{¶ 20} The Conleys' first assignment of error is sustained.

IV

{¶ 21} The Conleys' second and final assignment of error is as follows:

{¶ 22} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFFS-APPELLANTS IN GRANTING DEFENDANT-APPELLEE R & D MACHINE, INC.'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THERE WAS GENUINE ISSUE OF FACT WHETHER THE DEFENDANT-APPELLEE COMMITTED AN EMPLOYER INTENTIONAL TORT."

{¶ 23} In their second assignment, the Conleys argue that the trial court erred when it sustained R & D's motion for summary judgment because the record demonstrates a genuine

issue of material fact in regards to the establishment of an employer intentional tort.

{¶ 24} In order to prove an employer intentional tort, an employee must meet the three-part test set forth by the Ohio Supreme Court in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115. The *Fyffe* test requires a person alleging an employer intentional tort to demonstrate the following: (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 the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform. *Id*.

{¶ 25} With respect to the first prong of the *Fyffe* test, i.e., whether R & D had been aware of a dangerous condition within its operation, we conclude that the Conleys presented sufficient evidence to survive summary judgment. In his deposition testimony, Willard claims that he was ordered to grind the insulation off of the bricks with a nylon brush attached to a buffer. Willard testified that this process created a great deal of dust which essentially covered his clothes, hair, and exposed skin. Willard further testified that he was required to grind the insulation from the bricks in this manner for approximately two weeks before Dan Daffner abandoned the grinding in favor of scraping the insulation off of the bricks with putty knives.

{¶ 26} Before the grinding process was abandoned, however, Daffner became aware that some of his employees were concerned that the dust being produced was harmful. In response to their concerns, Daffner requested the MSDS for the Unifrax

insulation from Faurecia. The MSDS outlined the properties of Unifrax and described the relevant government regulations and safety precautions to be followed when handling the substance. The MSDS specifically noted that Unifrax was known to cause cancer if inhaled. While the MSDS stated that there was "no increased incidence of respiratory disease in studies examining occupationally exposed workers," the MSDS advised those handling Unifrax to take special precautions in order to insure their safety. The MSDS advised employers to implement procedures designed to minimize airborne fiber emissions such as using "local exhaust ventilation, point of generation dust collection, down draft work stations, [and] emission controlling tool designs."

{¶ 27} The MSDS also recommended the use of a respirator or other respiratory protection to prevent inhalation of Unifrax, as well as wearing appropriate skin and eye protection in order to minimize exposure to the ceramic fibers. With the exception of placing the work station outside, it is undisputed that R & D failed to implement any of the safety precautions recommended in the MSDS while Willard was required to grind the insulation off of the bricks. In light of the information contained in the MSDS regarding the hazardous nature of Unifrax, as well as the recommended safety precautions when handling the substance, we find that a genuine issue of material fact exists in regards to whether R & D had knowledge of a dangerous condition.

{¶ 28} The second prong of the *Fyffe* test involves the question of whether R & D had knowledge that this dangerous condition – the hazardous nature of the Unifrax dust if inhaled – was substantially certain to cause harm to Willard. Substantial

certainty of harm requires much greater proof than negligence or recklessness. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100. The Supreme Court of Ohio has stated:

{¶ 29} "Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent." *Fyffe,* 59 Ohio St.3d at paragraph two of the syllabus, citing *Van Fossen,* 36 Ohio St.3d at paragraph six of the syllabus. This court has stated that simply knowing that an employee is at risk is insufficient; the employer must be virtually certain that an employee will be injured. *Spates v. Richard E. Jones & Assoc.*, Montgomery App. No. 15057, citing *Van Fossen,* 36 Ohio St.3d at 116.

{¶ 30} As stated previously, the Conleys retained the services of Dr. Chiodo, a doctor, a lawyer, a certified industrial hygienist, and a biomedical engineer, in order to provide expert testimony regarding the nature and cause of Willard's injuries. In his affidavit filed on April 3, 2009, Dr Chiodo opined as follows:

{¶ 31} "20. It is further my opinion that the MSD sheet required that the employer, R & D Machine, comply with the hazard safety requirements of the MSD sheet, and the handling requirements designated in the MSD sheet, including the use

of gloves, eye protection, and respiratory protection.

{¶ 32} "21. It is further my opinion, based upon a reasonable and scientific certainty, *that once Dan Daffner received the MSD sheet from Faurecia, he would have been aware that injury and exposure were substantially certain to occur in workers exposed under the circumstances that existed at R & D Machine in the handling of this material, including Willard Conley*.

{¶ 33} "23. Further, it is my medical opinion and professional opinion, based upon a reasonable medical certainty and scientific certainty, that as a result of the failure to adhere to the clearly stated requirements of the Material Safety Data Sheet for refractory ceramic fiber, Mr. Conley has been exposed to vitreous aluminosilicate fiber, and that this fiber contains vermiculite and asbestiform, and further, that the medical testimony in this case indicates that Mr. Conley has developed interstitial changes in his lungs consistent with this exposure, and further that he has obstructive airway disease consistent with this exposure, and as a result, he will require medical monitoring by a qualified specialist for the rest of his life for ongoing evaluation of his lung function and potential for development of other debilitating diseases.

{¶ 34} "25. It is my further opinion, as I have expressed in a previously written report and in my deposition testimony, *the actions of R & D Machine, Inc., through Mr. Daffner, were so inconsistent with the duties and obligations upon an employer under OSHA that they rose to the level of an intentional act and subjected his employee to conditions under which there was a substantial certainty of harm,* which has since come to fruition for Mr. Conley."

{¶ 35} The Eleventh District Court of Appeals has stated that the existence of

an MSDS sheet containing "harm may occur" language is not determinative, standing alone, of knowledge by the employer of the substantially certain nature of the injury. *Ailiff v. Mar-Bal, Inc.* (1990), 62 Ohio App.3d 232, 240. We, however, have held that a genuine issue exists for the purposes of summary judgment when the evidence included an affidavit from an expert who opined that the employer should have known that an injury was substantially certain to occur if the safety measures recommended by the MSDS were not followed. *Linebaugh v. Electrical Control Systems, Inc., et al.* (Sept. 23, 1994), Montgomery App. No. 14412. In the instant case, we find that there is evidence in this record from which a reasonable person could conclude that R & D had knowledge that injury to Willard was substantially certain to occur when he was exposed to the dust created during the grinding of insulation material off of the bricks.

{¶ 36} Finally, we conclude that the record demonstrates an issue of fact as to whether Willard was required to continue to perform his work despite the dangerous condition. In his deposition, Willard testified that he complained numerous times to Daffner regarding exposure to the dust created by the grinding operation. He made these complaints both before and after Daffner received the MSDS for the Unifrax insulation. The MSDS clearly noted the inhalation warnings and safe handling recommendations. Willard further testified that he requested the use of safety equipment and other protective gear, but was refused by R & D management. Specifically, Willard testified that he asked Daffner for a respirator but was told that the device was too expensive. We acknowledge that R & D disputes this allegation. Thus, we find that a genuine issue of fact exists regarding whether R & D required

Willard to perform a job without any protective equipment, knowing that injury was substantially certain to result.

{¶ 37} The Conleys' second and final assignment of error is sustained.

V

{¶ 38} All of the Conleys' assignments of error having been sustained, the judgment of the trial court is reversed, and this matter is remanded for proceedings consistent with this opinion.

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GRADY, J. and RINGLAND, J., concur.

(Hon. Robert P. Ringland, Twelfth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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