

No. 08-0894

IN THE SUPREME COURT OF OHIO

JONATHON KLAUS,

Plaintiff-Appellee,

v.

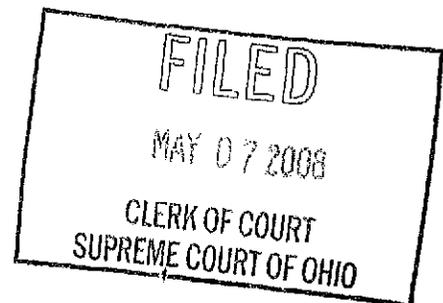
UNITED EQUITY, INC., *et al.*,

Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
THIRD JUDICIAL DISTRICT
NO.1-07-63, 2008-OHIO-1344
COMMON PLEAS COURT, ALLEN COUNTY, OHIO
CASE NO. 06-CV-0696

**APPELLANT UNITED EQUITY, INC.'S
MEMORANDUM IN SUPPORT OF JURISDICTION
ON DISCRETIONARY APPEAL**

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APPENDIX

March 24, 2008, Journal Entry and Opinion, Allen County Court of Appeals, Third Appellate District, No. 1-07-63,2008-Ohio-1344

July 23, 2007, Judgment Entry, Allen County Court of Common Pleas, Case No. CV 2006 0696

**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT
GENERAL INTEREST**

The Third District's decision in *Klaus v. United Equity, Inc.*, 3d Dist. No. 01-07-63, 2008-Ohio-1344, from which United Equity appeals to this Court, is the first decision from an Ohio appellate court that involves the *application* of new employer-intentional-tort statute, R.C. 2745.01. Because this is the first appellate decision under R.C. 2745.01, it presents not only issues of first impression, it presents questions of public and great general interest: specifically, (1) whether the General Assembly's use of the term "deliberate intent" to describe "belief that an injury was substantially certain to occur" in the new employer-intentional-tort statute, R.C. 2745.01, actually has something to do with an employer's "intent" or (2) whether it fits somewhere into the "negligence" standard employees advocate and Ohio courts continually apply to workplace injury cases under *Fyffe v. Jenos Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, and the guise of an "intentional" tort.

The Third District apparently understood that R.C. 2745.01 simply reiterated the common-law standard in *Fyffe*. This appeal is not about correcting error. It is about guiding Ohio courts, lawyers, and litigants in understanding and applying the new statute. This case gives this Court the opportunity to define the boundary of "substantially certain" intentional torts and give Ohio citizens a definitive meaning to that phrase as used by the General Assembly in R.C. 2745.01 -- or by this Court in *Fyffe*.

Another employer has asked this Court to decide R.C. 2745.01's constitutionality on an appeal from a Seventh District decision,¹ but the proposed

¹ *Kaminski v. Metal & Wire Prods Co.*, Sup. Ct. No. 08-0-857, on appeal from 7th Dist. No. 07-CO-15.

propositions of law do not address how Ohio courts should apply the “deliberate intent” test to new employer-intentional-tort cases. This Court’s decision on that issue – regardless of what it is – will have additional significance if the Ohio courts, lawyers and litigants understand what “substantial certainty of injury” really means.

THE STATEMENT OF THE CASE AND FACTS

I. Employer Intentional Tort v. Human Error

Plaintiff-appellee Jonathan Klaus lost his hand on February 13, 2006 as he repaired the upright auger on the third floor of the grain building at United Equity Inc., when one co-worker started the auger after misunderstanding what another co-worker had said.

Klaus readily admits that he did not pull the lever disconnecting the power to the fuse box. Pulling the lever -- rather than locking out and tagging out -- was not only the standard safety practice the employees followed, it signified to other employees that the auger was under repair. Instead of disconnecting the power, Klaus asked one co-worker to “watch” the fuse box – something that co-worker denies. So when a second co-worker thought the repair was complete, he pushed the “on” button setting the auger in motion. Klaus himself described the events of that day as an “accident” and admits that he did not disconnect the power to upright auger because he was in a “hurry.”

On appeal from the grant of summary judgment in United Equity’s favor, Klaus argued, in part, that the trial court erred in failing to follow the “*reduced* standard of ‘substantial certainty’” contained in R.C. 2745.01. 2008-Ohio-1344, ¶27. The Third District apparently accepted Klaus’s interpretation of R.C. 2745.01, when it rejected United Equity’s position that Klaus’s unfortunate injury resulted from combined negligent acts of United Equity employees. Instead, the Third District focused on the

United Equity's purported failure to provide Klaus with formal lock-out/tag-out training ("LO/TO"), concluding that a genuine issue of material fact existed about (1) whether United Equity had a consistent safety practice in the first instance and (2) whether United Equity "consciously disregarded its LO/TO policy, creating a substantial certainty that an employee injury would result." *Id.* at ¶21 & 23.

In essence, the Third District equated "substantial certainty of injury" to either (1) a lack of safety policy or (2) a deliberate decision not to follow a safety policy. But to arrive at that decision, the court had to assume that United Equity had a duty to its employees to have such a safety policy. The existence of a "duty," and the scope of that "duty," is an issue only when considering recklessness and negligence.

The Third District's decision, on its face, demonstrates the difficulty Ohio courts have understanding "substantial certainty" intentional torts, relegating many of them to a "negligence" standard – like the one Klaus advocated on appeal and (what appears to be) the *reduced* intentional-tort standard the Third District adopted under R.C. 2745.01. For this reason, this Court should accept this intentional-tort matter for its review and consideration.

II. Undisputed Facts

A. Grinding Feed

United Equity is a small-town employer, with no more than five employees working at its Spencerville grain facility. No employee had suffered an industrial injury in the 23 years United Equity operated the facility.

Klaus spent much of his time at the Spencerville grain facility "mainly grinding feed." (Deposition of Jonathon Klaus, 4/10/2007, p.36 ("Klaus Dep."); Deposition of Michael O'Neill, 3/27/2007, p 19 ("O'Neill Dep.")). He learned the process

by watching Michael O'Neill and another co-worker, Allen McMichael. (Klaus Dep., pp. 38-39, 53; Deposition of Allen McMichael, 3/27/2007, p. 12-13 ("McMichael Dep.")).

After weighing the feed, an auger "took the corn from the scale up to the grinder," from the grinder the corn traveled to a mixer and, once mixed with supplements, Klaus would either "bag it out" for sale or run it up an "upright auger" that "runs it up to the two storage bins." (Klaus Dep., pp. 37, 39-40, 42; O'Neill Dep., p. 12.) The "run-up" or "upright auger" ran from the first-floor grinding room to the third floor. (O'Neill Dep., pp. 19-20.) Accessing the third floor took a man-lift, a weighted lift that used "a stationary rope with a floor brake." (McMichael Dep., p. 20.)

B. Powering the "Run-Up" or "Upright" Auger.

Klaus or his co-workers operated each of three augers from separate electrical panels (which McMichael spoke of as a "fuse box") located just inside the door of the building. (Klaus Dep., pp. 40-42.) Each of the three separate fuse boxes had a lever that, when up, activated or, when down, eliminated the power supply. The operator turned the auger on or off using paired buttons located immediately below the auger's fuse box. (Klaus Dep., pp. 42-44; McMichael Dep., p. 25; see O'Neill Dep., p. 27.)

A person would disconnect the power to the augers only "to work on it" or at day's end when they would lock out the fuse boxes. (Klaus Dep., pp. 57-58, 61-62; Deposition of Cory Haehn, 4/25/2007, pp. 21, 40.)²

C. Making Repairs

Klaus, McMichael, and O'Neill also repaired assorted equipment as part of their job. (Klaus Dep., pp. 35-36, 51; McMichael Dep., p. 17.) Every three or four

² A master electrical panel, located on the side of the building opposite from the location of the auger panels, controlled the power to the entire building. (Klaus Dep., p. 45; McMichael Dep., p. 25.)

months, two bolts located on the upright auger at the third floor would shear. (McMichael Dep., p. 29; O'Neill Dep., p. 19-20.) Repairing the upright auger was a one-man job, which Klaus learned how to do when either O'Neill or McMichael "told [him] how to do it." (Klaus Dep., pp. 55-57; see O'Neill Dep., p. 20.)

D. LO/TO or "Throwing the Switch"

Before Klaus started his job at United Equity, the company provided LO/TO training in September and December 2004. (Deposition of Jackie Knippen, 3/27/2007, pp. 23-24.) Cory Haehn, the general manager, indicated that he did not have a formal training program for the employees: "it was hands-on training. . . . I worked with all of these guys as far as working on equipment and stuff." (Haehn Dep., p. 26.)

While United Equity provided locks and tags for use in repairs, no one used them. (Haehn Dep., pp. 19-23.) Instead of using LO/TO, Haehn would "kill the power" (pull the lever down) to the upright auger and remove the fuses. (Haehn Dep., pp. 24-25.) Unless the lever was down, the fuse box would not open. (Haehn Dep., p. 24.) "[T]he fact the door was open and the fuses were out, that would be warning saying this machinery is down." (Haehn, p. 25.) Although O'Neill, McMichael, and Klaus did not remove the fuses from the fuse box, they would disconnect the power to the on/off switch by throwing the lever to the down or "off" position. (O'Neill Dep., pp. 25-26, 29; McMichael Dep., pp. 30-31, 64; Klaus Dep., pp. 59-62.)

McMichael admitted he "knew what the [lock] was for" -- he just never locked out the switch after disconnecting the power: "[I]t really wouldn't take very long to change the bolts so we'd just throw the switch and go up [the man-lift] and change the bolt." (McMichael Dep., p. 30, 49-50, & 64-65.) O'Neill did not lock out either. Although he would shut the power off at either the main switch or the auger "disconnect

switch,” he did not “lock out.” (O’Neill Dep., pp. 29-30.) When asked why he did not use the locks, he simply said, “Just didn’t do it.” (O’Neill Dep., p. 29.)

McMicheal explained why he considered it enough to throw the switch at the fuse box before repairing the upright auger: “It was a rule of thumb out there if a switch is throwed you find out why it’s throwed.” (McMichael Dep., p. 32.) No one had ever been injured while repairing the upright auger, and no one had been injured on any of the other augers. (O’Neill Dep., p. 36; McMichael Dep., p. 61.)

E. The Day of the Accident

On the morning of the accident, O’Neill and Klaus were remixing feed as McMichael unloaded the feed from the bulk truck into the mixer. (O’Neill Dep., p. 37; McMichael Dep., pp. 10, 34-36)³ O’Neill remembered that they needed to replace a sheared bolt on the upright auger. (O’Neill Dep., pp. 37-38; McMichael Dep., p. 33.) According to McMicheal, “I just told them you guys go ahead and get the bolt fixed, auger fixed.” (McMichael Dep., p. 33.) He then went back outside and set to work regulating the grain flow from the truck and into the mixer. (McMichael Dep., p. 36.)

Klaus “[j]ust took it upon” himself to repair the upright auger: “McMicheal said it was broke and so me and O’Neill found a bolt and I went upstairs.” (Klaus Dep., p. 63; see O’Neill Dep., p. 45.) Klaus had repaired the upright auger three or four times by himself before the accident. (Klaus Dep., p. 62.) As Klaus took the man-lift to the third floor, O’Neill went back to the tool room to get a wrench to fix a belt on the first-floor roller mill. (O’Neill Dep., pp. 39-41, 52-53.)

Klaus, however, did not cut the power supply to the auger using the power switch. Instead, he says he asked O’Neill to “keep an eye on the power supply” --

³ Haehn was on the road “picking up a load of feed.” (Haehn Dep., p. 16.)

something O'Neill denies. (Klaus Dep., p. 64; O'Neill Dep., p. 46.) Klaus had never before asked one of his co-workers to "keep an eye on" the fuse box. (Klaus Dep., p. 64.)

F. A Miscommunication

When McMicheal returned to the grinding room from the truck, he asked O'Neil "are you guys done yet and he shook his head yes, and that's when I went over and threw on the power switch." (McMichael Dep., p. 36.) O'Neill, however, thought McMicheal had asked whether he and Klaus had found the bolt they needed -- not whether they had finished the repair:

Allen came in . . . and we was talking and he asked me if we got it, and I thought he meant found a bolt because he knew we was hunting bolts and I said yes we got one, and then I come back over to the roller mill and I heard it [the upright auger] kick on. [O'Neill Dep., pp. 41-42.]

Because the arm to the fuse or the "disconnect" switch was not in the down position signifying that the power was disconnected, McMicheal pushed the start button on the auger. (O'Neill Dep., p. 46.)

[T]he switch wasn't thrown, you know, so that indicated to me that they was done and that's when I asked O'Neill "You guys done yet?" and he shook his head yes, and I went over and proceeded to turn the augers on. [McMichael Dep., p. 47.]

McMicheal believed he had the answer to his question whether the repair was done, so he pushed the "on" button, which set the upright auger in motion. (McMichael Dep., p. 48.) As a result of this miscommunication, Klaus lost his hand. Klaus does not blame either O'Neill or McMichael: "**No. It was an accident.**" (Klaus Dep., p. 67.)

III. The Third District's decision

After considering these facts, the Third District apparently applied R.C. 2745.01 and *Fyffe*, and equated an employer's alleged failure to follow or institute a safety plan with the substantial certainty of injury. First, the court held that United

Equity's purported "conscious" choice to no longer use safety consultants and its disregard of both its operations safety plan and "safety protocols" created a genuine issue of fact about whether an injury was "substantially certainty" to occur. 2008-Ohio-1344, ¶19-21. As the court indicated, the record contained evidence "from which a rational trier of fact could find that United consciously disregarded its LO/TO policy, *creating a substantial certainty that an employee injury would result.*" Id. at ¶21 (emphasis added).

Second, the court applied its understanding of the term "substantial certainty" to the "rule of thumb." Klaus admitted that the day of the accident was the first time he had asked someone to just "watch" the fuse box. And Klaus, O'Neill, McMichael, and Haehn consistently testified that they disconnected the power to the fuse box before repairing the auger. But the court found Haehn's testimony that he *also* removed the fuses created a genuine issue of material fact: "the jury might well decide that United failed to have *any* safety policy, written or otherwise, *and that could lead the jury to find that the injury was substantially certain to occur.*" Id. at ¶23 (emphasis added).

Finally, the Third District noted that the trial court had "inappropriately weighed the fact" that no person had sustained an injury while making a repair 92 times over a 23-year period. "[T]he reason that no employee has been injured was because this repair was so infrequent, not because United's safety policies were working." Id. at ¶25.

As the court's decision demonstrates, its understanding of "substantial certainty" under R.C. 2745.01 has nothing to do with either an employer's knowledge of the substantial certainty of injury or the substantial certainty of injury.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

I. PROPOSITION OF LAW NO. 1:

To satisfy the “deliberate intent” requirement of R.C. 2745.01(B), the employee must establish that the employer had a conscious awareness of the consequences of an egregious risk of injury that falls outside the risks to which the employee is ordinarily exposed.

II. PROPOSITION OF LAW NO. 2:

A mere showing that harm is substantially certain to result from an employer’s conduct is not sufficient to prove intent under R.C. 2745.01(B); it must also be shown that the actor is aware that harm is substantially certain to occur. (Restatement of the Law, Third, Torts: Liability for Physical Harm (Proposed Final Draft No. 1, Apr. 6, 2005), §1 at comment c, adopted.)

A. The Not-So-New “Deliberate Intent” in R.C. 2745.01

As R.C. 2745.01’s sponsor explained to the House Commerce & Labor Committee, Ohio court decisions had “opened the door for employees to continue to sue employers for workplace injuries in addition to availing themselves of the ‘no fault’ workers’ compensation system” by reducing the employer-intentional-tort standard “to a negligence-based standard that is far below any reasonable definition of an intentional tort.”⁴ For that reason, the General Assembly repealed former R.C. 2745.01, and enacted a new version of R.C. 2745.01, effective April 7, 2005.

⁴ Ohio Capitol Connection, Minutes of House Commerce & Labor Committee (Aug. 25, 2004), p. 1.

But rather than elevate the burden of proof (which *Johnson v. BP Chemicals, Inc.*⁵ found unconstitutional), R.C. 2745.01 allows a cause of action for a workplace injury where “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.**”⁶ This is simply the Restatement of Torts’ definition of the second prong of “intent,” which this Court adopted in the 1984 employer-intentional-tort case of *Jones v. VIP Development Company*.⁷

Recognizing that Ohio courts repeatedly confused and diluted the “substantial certainty” standard (despite this Court’s best efforts explain where it fell on a “recklessness” and “negligence” scale), the General Assembly tried to guide the courts in applying R.C. 2745.01. To that end, it provided what it hoped would be a more restrictive definition of “substantially certain”: “**Substantially certain’ means that an employer acts with *deliberate intent* to cause an employee an injury, a disease, a condition, or death.**”⁸ In this same vein, R.C. 2745.01(C) provides that an employer’s “deliberate removal . . . of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption” that the employer acted “with intent to injure another” if an injury results.

The repeated use of the word “deliberate” in paragraphs (B) and (C) to describe the employer’s conduct means just one thing: the employee must establish that the employer had a *conscious awareness of the consequences* of exposure to a risk that

⁵ 85 Ohio S.3d 298, 1999-Ohio-267, 707 N.E.2d 1107.

⁶ R.C. 2745.01(A) (emphasis added).

⁷ (1984), 15 Ohio St. 3d. 90, 472 N.E.2d 1046, paragraph one of the syllabus (adopting Restatement of Law, Second, Torts (1964), §8A); see Restatement of the Law, Third, Torts: Liability for Physical Harm (Proposed Final Draft No. 1, Apr. 6, 2005), §1 (Intent).

⁸ R.C. 2745.01(B) (emphasis added).

falls outside the employment relationship – whatever that particular risk might be.⁹ R.C. 2745.01 returns the focus of an employer’s liability for a work-place intentional tort to two, absolute prerequisites: (1) the *employer’s knowledge* of the substantial certainty of injury and (2) the *substantial certainty of injury*.

B. Distinguishing Recklessness from Intentional Conduct

Equating either (1) non-existent or inadequate training or (2) non-existent or inadequate safety procedures with “substantial certainty of injury” under R.C. 2745.01 (or, for that matter, *Fyffe*) imposes liability for workplace injuries under a negligence standard. Either a negligence standard, like the Third District appears to have applied here, or a recklessness standard requires the courts to essentially assume two things: (1) that employers have an absolute duty to make the workplace safe and (2) that an injury is substantially certain to occur when an employer fails to fully satisfy that duty through formal training and enforcing safety procedures. The violation of a duty, however, implies negligence or recklessness – not intent.

“Substantial certainty” is fact dependent. But defining the term “recklessness” in the employer-intentional-tort context may help this Court eliminate the confusion courts repeatedly have when deciding what, exactly, constitutes a “substantial certainty” intentional tort. Twenty years ago this Court acknowledged that the confusion in applying the “substantial certainty” standard “manifests itself in a failure to distinguish

⁹ Webster’s Ninth New Collegiate Dictionary (1989), 336 (defining “deliberate” as “1: characterized by or resulting from careful and thorough consideration < a ~ decision > 2: characterized by awareness of the consequences < ~ falsehood > 3: slow, unhurried, and steady as though allowing time for decision on each individual action involved < a ~ pace >”).

intentionality from recklessness and negligence, and find intentional tort in facts which show only recklessness.”¹⁰

Not much has changed. This Court recently echoed this observation in *Talik v. Federal Marine Terminals, Inc.*,¹¹ noting that “[t]he standard of ‘substantial certainty’ in the intentional tort arena caused confusion” for trial and appellate courts, attorneys, and employers and employees. R.C. 2745.01, this Court noted, “rejects the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct” as defined in *Universal Concrete Pipe Co. v. Bassett*.¹² “Wanton misconduct,” as defined in *Universal Concrete*, is conduct that “manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditions, that his conduct will in all common probability result in injury.”¹³

This Court refers to “wanton misconduct” interchangeably with “recklessness,”¹⁴ but the Restatement of Torts describes “reckless disregard of the safety of others” a bit differently from this Court’s definition of “wanton misconduct”:

[A person acts in reckless disregard of the safety of others when the person] does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates

¹⁰ *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 138-139, 522 N.E.2d 477.

¹¹ ___ Ohio St.3d ___, 2008-Ohio-937, ___ N.E.2d ___, ¶16.

¹² (1936), 130 Ohio St. 567, 200 N.E. 843, paragraph two of the syllabus.

¹³ *Id.*

¹⁴ *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104 fn. 1, 559 N.E.2d 705 (“The term reckless is often used interchangeably with ‘willful’ and wanton.”); accord *Johnson v. Baldrick*, 12th Dist. NoCA 2007-01-013, 2008-Ohio-1794, ¶¶28-31; Restatement of the Law, Second, Torts (1965), Sec. 500 at special note.

an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.¹⁵

Indeed, the distinction between an intentional act and one that is reckless lies in both (1) what the actor knows and (2) the probability of injury. To be “reckless,”

[the act] must be intended by the actor [but] the actor does not intend to cause the harm which results from it. It is enough *that he realizes or, from the facts which he knows, should realize* that there is a *strong probability* that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.¹⁶

Thus, a “reckless” actor *should* know that an injury is *probable*.

An “intentional” actor, however, *must* know that an injury either *will* occur or is *substantially certain* to occur (i.e., only sheer luck would save another from injury). “[A] mere showing that harm is substantially certain to result from the actor’s conduct is not sufficient to prove intent; it must also be shown that the actor is aware of this.”¹⁷

While this Court has adopted and applied the Restatement’s definition of “recklessness” in other contexts, it has not done so in employer-intentional-tort cases.¹⁸ Defining exactly what kind of employer conduct constitutes “recklessness” will help draw the line between intentional conduct, reckless conduct, and negligent conduct. It

¹⁵ *Thompson*, 53 Ohio St.3d at 104-105, adopting Restatement *supra* at Sec. 500; *Marchetti v. Kalsih* (1990), 53 Ohio St.3d 95, 96 fn. 2, 559 N.E.2d 699.

¹⁶ Restatement, *supra* at Sec. 500, comment *f*.

¹⁷ Restatement of the Law, Third, Torts: Liability for Physical Harm (Proposed Final Draft No. 1, Apr. 6, 2005), §1 at comment *c*.

¹⁸ See *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus (requiring “proof beyond that to prove recklessness” to establish an employer’s intentional tort).

will also enable the courts, attorneys, and employers and employees understand what the General Assembly meant when it enacted R.C. 2745.01.

C. Neither negligence nor recklessness is the standard

This case provides this Court a perfect opportunity to draw the line by defining the middle ground between intent and negligence. The Third District saddled United Equity with potential liability for failing to satisfy a “duty” to either ensure training or adopt particular safety protocols that comply with OSHA regulations. But OSHA regulations cannot, as a matter of law, affect the duties, rights, or liabilities between employers and employees under state statutory or common law.¹⁹

While a risk of injury may have existed under the circumstances described in the record, the risk was not *substantially certain* to occur for the simple reason that United Equity employees either “threw the switch” or “disconnected the fuse,” both of which required the employee to pull down the lever to the auger to eliminate the power supply. The *risk* of injury materialized only if the person making the repair failed to ensure that the lever had been pulled, thus disconnecting the power at the fuse box and signifying to everyone involved that a repair was in progress. Because Klaus failed to shut off the power at the fuse box before making the repair, the *risk* of injury matured into an *event* when Klaus’s co-workers failed to effectively communicate that Klaus had not finished replacing the bolts on the upright auger. The mere fact that a risk matured into an event does not establish intent.²⁰

¹⁹ 29 U.S.C. 653(b)(4); *Hernandez v. Martin Chevrolet, Inc.*, 72 Ohio St.3d 302, 303, 1995-Ohio-200, 659 N.E.2d 1215.

²⁰ See Propositions of Law I and II, *supra*, page 9.

CONCLUSION

As the foregoing demonstrates, the Third District, like many Ohio courts, confused “intent” with a lesser standard than the “substantial certainty” standard contained in R.C. 2745.01 or, for that matter, *Fyffe* to establish an employer’s liability for an intentional tort. Imposing an absolute duty to adopt and provide safety protocols, and equating a violation of that duty with “substantial certainty of injury,” necessarily relegates the “deliberate intent” standard the General Assembly adopted in R.C. 2745.01 to mere negligence. An employer’s negligence, however, comes within the ambit of the Worker’s Compensation System.

But describing the scope of the “deliberate intent” standard contained in R.C. 2745.01 will further support the General Assembly’s intent, just as explaining “recklessness” for purposes of an employer-intentional-tort claim will help draw the line between “substantial certainty” and everything else. Indeed, this Court can turn attention back to *substantial certainty* of injury and the *employer’s knowledge of it* and prevent courts from straying into the concept of an employer’s “duty” under OSHA or other industry standards to establish the basis for intentional-tort liability. For these reasons, United Equity respectfully asks this Court to extend its jurisdiction over this appeal and address and decide these propositions of law.



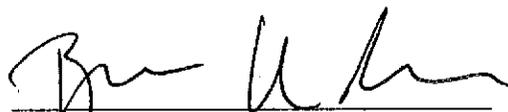
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CERTIFICATE OF SERVICE

A copy of the foregoing Appellants' Memorandum in Support of
Jurisdiction was served by regular mail on May 6, 2008 on the following:

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IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

COURT OF APPEALS
FILED
2008 MAR 24 PM 1:08

ALLEN COUNTY

MA. C. STALEY-DURL
CLERK OF COURTS
ALLEN COUNTY, OHIO

JONATHON KLAUS,

CASE NUMBER 1-07-63

PLAINTIFF-APPELLANT,

JOURNAL

v.

ENTRY

UNITED EQUITY, INC.,

DEFENDANT-APPELLEE.

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is reversed at the costs of the appellee for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

~~It is further ordered that the Clerk of this Court certify a copy of this~~
judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

Vernon L. Boston
John R. Shaw
John B. Williamson

JUDGES

DATED: March 24, 2008

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

COURT OF APPEALS
FILED

2008 MAR 24 PM 1:08

GRA C. STALEY-GURLEY
CLERK OF COURTS
ALLEN COUNTY, OHIO

JONATHON KLAUS,

CASE NUMBER 1-07-63

PLAINTIFF-APPELLANT,

v.

OPINION

UNITED EQUITY, INC.,

DEFENDANT-APPELLEE.

CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: March 24, 2008

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PRESTON, J.

I. Facts/ Procedural Posture

{¶1} Plaintiff-appellant, Jonathon Klaus (hereinafter “Klaus”), appeals the Allen County Court of Common Pleas grant of summary judgment in favor of defendant-appellee, United Equity, Inc. (hereinafter “United”). For reasons that follow, we reverse.

{¶2} Around 1983, the Delphos Equity Elevator Company and the Spencerville Farmers’ Union merged into one corporation called United Equity. (Knippen Depo. at 11-12). United’s Spencerville facility grinds, mixes, loads, and packages grain products and feed. (Haehn Depo. at 7). In order to accomplish these tasks, United uses various pieces of mechanical equipment, including various augers, which move and grind grain. United has five employees at its Spencerville facility: Cory Haehn, general manager/supervisor; Jacqueline

Knippen, general manager/bookkeeper; Allen McMichael, laborer/truck driver; Phillip O'Neill and Jonathon Klaus, laborers. (Haehn Depo. at 33).

{¶3} In April 2005, United hired Klaus as a general laborer at the Spencerville grain facility. (Klaus Depo. at 52). Klaus was trained by his fellow employees, McMichael and O'Neill, to grind, mix, load, and package grain. (Id. at 38-40). Occasionally, equipment at the Spencerville facility would need repairs. Klaus helped his fellow employees with the repairs and on occasion would make some small repairs himself. (Id.; Id at 53-56)

{¶4} As a part of United's operational safety plan, it implemented a written lock-out/tag-out (LO/TO) procedure for repairing power equipment. However, Klaus never received LO/TO training nor is it clear he ever received a written LO/TO policy when he began his employment. (Klaus Depo. at 66); (O'Neill Depo. at 47). ~~United's employees and management did not follow or~~ enforce the written LO/TO policy; rather, each employee developed their own safety "rules of thumb." (Haehn Depo. at 21); (O'Neill Depo. at 17, 22, 31); (McMichael Depo. at 30-32). Haehn removed fuses from the electrical boxes before repairing equipment, while others, like Klaus and O'Neill, simply turned off the power switch or made sure someone else had turned off the power. (Klaus Depo. at 59); (Haehn Depo. at 21).

{¶5} On February 13, 2006, Klaus was informed that two shear bolts on a grinding auger needed to be replaced. Klaus had replaced these shear bolts three

or four times prior and proceeded to make the repairs this time as well. (Klaus Depo. at 62). The shear bolts that needed to be replaced were located in the section of the auger located on the facility's third floor. (McMichael Depo. at 27-28). The power source for the auger is located on the facility's first floor. (O'Neill Depo. at 26). The person on the third floor cannot see the first floor power source while repairing the auger and there is no communication device for employees to use while making the repair. (Klaus Depo. at 59); (O'Neill Depo. at 45); (Rauck Aff. at ¶14).

{¶6} Klaus found a shear bolt to make the repair. Klaus told O'Neill to turn off the power to the auger and keep an eye on the power switch. (Klaus Depo. at 64). Klaus went to the man-pull lift and ascended to the third floor. Klaus began making the repairs. McMichael came into the facility and asked O'Neill if they "got it." (O'Neill Depo. at 42). O'Neill thought McMichael was asking if Klaus found a shear bolt and said "yes, we got one." (Id.). McMichael thought O'Neill meant that Klaus was finished repairing the auger, and McMichael activated the power. (Id.); (McMichael Depo. at 36). Klaus was not finished repairing the auger and, when the power was activated, his hand was amputated. (McMichael Depo. at 45-46).

{¶7} On July 12, 2006, Klaus filed a complaint against United alleging an intentional tort as a result of the injuries he sustained. On September 8, 2006, United filed its answer. On June 1, 2007, United filed a motion for summary

judgment. On July 23, 2007, the trial court granted United's motion. On September 10, 2007, the trial court entered its judgment entry dismissing the complaint.

{¶8} On September 14, 2007, Klaus appealed to this Court asserting four assignments of error.

II. Standard of Review

{¶9} We review a decision to grant summary judgment de novo. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243, citing *Grafton v. Ohio Edison* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is proper where: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can reach but one conclusion when viewing the evidence in favor of the non-moving party, and the conclusion is adverse to the non-moving party. Civ.R. 56(C); *Grafton*, 77 Ohio St.3d at 105, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 219, 631 N.E.2d 150.

{¶10} Material facts are those facts "that might affect the outcome of the suit under the governing law." *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, 617 N.E.2d 1123, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202. "Whether a genuine issue exists is answered by the following inquiry: Does the evidence present 'a sufficient disagreement to

require submission to a jury' or is it 'so one-sided that one party must prevail as a matter of law[?]'” Id., citing *Liberty Lobby, Inc.*, 477 U.S. at 251-52.

{¶11} Summary judgment should be granted with caution, resolving all doubts in favor of the nonmoving party. *Perez v. Scripts-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, 217, 520 N.E.2d 198. “The purpose of summary judgment is not to try issues of fact, but is rather to determine whether triable issues of fact exist.” *Lakota Loc. Schools Dist. Bd. of Edn. v. Brickner* (1996), 108 Ohio App.3d 637, 643, 671 N.E.2d 578.

III. Analysis

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED WHEN IT MISAPPLIED CIV.R. 56(C) BECAUSE IT FAILED TO CONSTRUE ALL THE EVIDENCE IN FAVOR OF THE NONMOVING PARTY.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT’S MOTION FOR SUMMARY JUDGMENT PURSUANT TO CIV.R. 56 BY FINDING THAT PLAINTIFF DID NOT DEMONSTRATE AN ISSUE OF FACT THAT HIS INJURY WAS SUBSTANTIALLY CERTAIN TO OCCUR.

{¶12} Since assignments of error one and two raise similar issues surrounding the trial court’s application of Civ.R. 56(C), we will combine them for analysis.

{¶13} In support of his first assignment of error, Klaus alleges the trial court failed to consider that he never received any LO/TO training and failed to

consider Albert C. Rauck's expert opinions. Furthermore, Klaus argues that the trial court inappropriately made findings of fact to render its opinion.

{¶14} United argues that the trial court did consider the fact that Klaus was not trained but found this fails as a matter of law to establish that his injury was substantially certain to occur. Furthermore, United asserts that the trial court did not ignore Rauck's expert opinion and, even if it did, the trial court was entitled to exclude it as merely conclusory.

{¶15} In support of his second assignment of error, Klaus argues that material issues of fact remain as to whether Klaus's injury was substantially certain to occur. Specifically, Klaus argues that United's failure to provide tag-out tags for down equipment, United's failure to train Klaus on LO/TO procedure, and United's decision not to enforce its LO/TO policy because of management's disagreement with the policy creates issues of fact from which a jury could find that his injury was substantially certain to occur. We agree.

{¶16} Effective April 7, 2005, R.C. 2745.01 provides, in pertinent part:

(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.

(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} To establish an employer-employee intentional tort, plaintiff must show: (1) the employer has knowledge of a dangerous process, procedure, instrumentality or condition within its business operation; (2) the employer knows 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 the dangerous task. *Wehri v. Countrymark* (1992), 82 Ohio App.3d 535, 537, 612 N.E.2d 791, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus; *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus. These elements are collectively referred to as the *Fyffe* elements.

{¶18} In its judgment entry, the trial court found that Klaus demonstrated material facts sufficient to satisfy *Fyffe* element one, but he failed to demonstrate material facts sufficient to satisfy *Fyffe* element two's substantial certainty requirement. We disagree.

{¶19} Several questions of fact remain that could convince a juror on the element of substantial certainty. First, Klaus raised an issue of fact concerning whether or not United's management made a conscious decision not to follow its own written LO/TO policy. Jacqueline Knippen, one of United's general

managers, testified that the previous manager, Floyd Sisinger, stopped using safety consultants because “basically, [he] didn’t feel they were worth the money spent for them.” (Knippen Depo. at 16-17). Furthermore, she testified that Sisinger felt that the operations safety plan was “useless,” and he failed to enforce the safety plan beginning in the early 1990’s. (Id. at 17-18).

{¶20} This case is similar to the facts of *Dailey v. Eaton Corp.* (2000), 138 Ohio App.3d 575, 741 N.E.2d 946 wherein we found that an employer’s intentional disregard for safety policies was relevant in showing that the employer had knowledge that an injury was substantially certain to occur. Like *Dailey*, there is evidence in the record here from which a rational trier of fact could find that United consciously disregarded its LO/TO policy, creating a substantial certainty that an employee injury would result.

~~{¶21} The trial court below incorrectly relied upon the fact that no evidence existed in the record to suggest that United told Klaus *not* to follow the turn-off policy. Although this may be true, there was evidence to show that United had a history of failing to follow safety protocols and failed to provide Klaus with LO/TO training. (Haehn Depo. at 26; Knippen Depo. at 24). These material facts, if believed, could convince a jury that Klaus’ injury was substantially certain to occur.~~

{¶22} Second, Klaus raised an issue of fact regarding whether United had implemented a “rule-of-thumb” safety policy. Although United argued that it had

implemented a “rule-of-thumb” safety policy of disconnecting the machinery’s power source, the evidence was conflicting on this issue. O’Neill and McMichael simply turned off the power switch; Klaus turned off the power switch or made sure someone else had turned it off; Haehn, United’s general manager/supervisor, on the other hand, removed the fuses and placed them in his pocket. (O’Neill Depo. at 27-30); (McMichael Depo. at 29-30); (Klaus Depo. at 64-66); (Haehn Depo. at 19, 22). Given the different safety methods used by various United employees, it is reasonable to question whether any “rule-of-thumb” policy even existed.

{¶23} This issue of fact is material to finding whether the injury was substantially certain to occur. If a “rule-of-thumb” policy was in place and Klaus failed to follow it, then a jury might conclude that his injury was not substantially certain to occur. ~~On the other hand, the jury might well decide that United failed~~ to have any safety policy, written or otherwise, and that could lead the jury to find that the injury was substantially certain to occur.

{¶24} Third, the trial court inappropriately weighed the fact that no other person was injured during the company’s last twenty-three years. Although an absence of prior accidents suggests that an injury was not substantially certain to occur, a lack of prior accidents is not necessarily fatal to a plaintiff’s case. *Taulbee v. Adience, Inc., BMI Div.* (1997), 120 Ohio App.3d 11, 20, 696, 625,

citing *Cook v. Cleveland Elec. Illum. Co.* (1995), 102 Ohio App.3d 417, 429-30, 657 N.E.2d 356.

{¶25} In this case, the evidence demonstrated that no United employee was injured over the past twenty-three years. That fact viewed in isolation supports the trial court's finding that Klaus' injury was not substantially certain to occur; however, when viewed in its context, this fact is less persuasive. The particular repair job that Klaus conducted when he was injured was only done once every three to four months. (McMichael Depo. at 29). Thus, at most, this particular repair job was done only ninety-two (92) times over the past twenty-three years. When viewed in the appropriate context, the reason that no employee has been injured while repairing the auger at United appears to be because this repair was so infrequent, not because United's safety policies were working. We, therefore, are not persuaded that the lack of prior accidents renders summary judgment appropriate here.

{¶26} Weighing the evidence in Klaus' favor as the non-moving party, we find that material questions of fact preclude summary judgment in this case.

{¶27} Klaus' first and second assignments of error are, therefore, sustained.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ERRED IN FAILING TO ADDRESS THE ISSUE OF WHETHER R.C. 2745.01 IS AN AFFIRMATIVE DEFENSE WHICH MUST BE RAISED BY UNITED OR ITS DEFENSE IS WAIVED.

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRED IN FAILING TO APPLY THE REDUCED STANDARD OF "SUBSTANTIAL CERTAINTY" ENACTED IN R.C. 2745.01 [SIC] MOST RECENT AMENDMENT.

{¶28} Since we have determined that summary judgment was inappropriate for the reasons stated in Klaus' first and second assignments of error, we need not address assignments of error three and four as they have now become moot.

IV. Conclusion

{¶29} Having found error prejudicial to the appellant herein in the ~~particulars assigned and argued, we reverse the judgment of the trial court and~~ remand for further proceedings consistent with this opinion.

***Judgment Reversed;
Cause Remanded.***

SHAW, P.J., and WILLAMOWSKI, J., concur.

r

COMMON PLEAS COURT
FILED

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GINA D. HURLEY
CLERK OF COURTS
ALLEN COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

JONATHON W. KLAUS,

Plaintiff[s]

-v-

UNITED EQUITY, INC.,

Defendant[s]

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CASE NO.: CV2006 0696

JUDGMENT ENTRY
Civ. R. 56

This matter comes on for consideration of the defendants' motion for summary judgment filed on June 1, 2007, plaintiff's memorandum contra filed on June 28, 2007 and defendant's reply in support filed on July 10, 2007. The Court allowed oral argument on the motion on July 10, 2007, where both parties were present through respective counsel. The Court has considered all the pleadings and evidentiary material submitted in support of and contra defendants' motion.

This case was initiated with the plaintiff's complaint in which he alleged that defendants committed an intentional tort that resulted in his injury on February 13, 2006. The relevant facts include the following:

On February 12, 2006 plaintiff went to repair a sheared bolt in the upright "run-up" auger at his employer defendant's facility. The power to the

31 JB

auger was *not* cut off. The arm of the fuse or disconnect switch was *not* in the down position, signifying that the power was disconnected. Plaintiff said he asked a co-worker, Phillip O'Neill, to keep an eye on the power supply while he did the work. Plaintiff did not turn the power off to the auger and said he was in a hurry. He said he "just didn't really think about it..." (Klaus Dep. p. 65) There was apparently a miscommunication between O'Neill and another co-worker Allen McMichael.¹ Thinking that the bolt had been replaced and that plaintiff and O'Neill were finished, McMichael, pushed the start button to the auger, the auger started and plaintiff's left hand was amputated.

Defendant has a written "lock-out/tag-out" policy but neither O'Neill, McMichael nor plaintiff ever saw the policy before plaintiff's injury and the policy was not followed. No employee had suffered a machinery-related accident at defendant's facility in the previous twenty-three years of operation.

Pursuant to Civ.R. 56(C), "the appositeness of rendering a summary judgment hinges upon the tripartite demonstration: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence

¹ McMichael said he asked O'Neill if they (O'Neill and Plaintiff) were done [with repairing the auger] and O'Neill shook his head "yes." O'Neill said he thought McMichael was asking whether they had found a replacement bolt.

construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

In *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus, the Ohio Supreme Court established the following three elements necessary to prove the existence of an employer's intentional tort: "(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 the dangerous task." [Emphasis added]

The *Fyffe* test is a conjunctive test. That is, all three elements must be established in order to maintain a prima facie case of an intentional tort by an employer. It follows, therefore, that if there remains no genuine issue of material fact as to one of the elements discussion of the other elements becomes moot. See *Pintur v. Republic Technologies, Internatl., LLC*, 9th Dist. No. 05CA008656, 2005-Ohio-6220, at ¶ 11 (finding the issue of substantial certainty dispositive and not addressing the other *Fyffe* elements)

Effective April 7, 2005, R.C. 2745.01 provides, in part:

"(A) In an action brought against an employer by an 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.**

"(B) As used in this section, "**substantially certain**" means that an employer acts with deliberate intent to cause an employee to suffer an injury..." [Emphasis added]

It has been suggested that this latest version of R.C. 2745.01, applicable in this case since the injury occurred on February 13, 2006, is another attempt to supersede the effect of the Ohio Supreme Court decisions in various cases regarding common law employer intentional tort claims, including *Fyffe. Estate of Merrell v. M. Weingold & Co.*, Cuyahoga App. No. 88508, 2007-Ohio- 3070. In any event, because the applicable standard is exceedingly difficult to satisfy, "[t]he intentional tort cause of action is limited to egregious cases." *Sanek v. Duracote Corp.* (1989), 43 Ohio St.3d 169, 172, 539 N.E.2d 1114; *Smith v. Hancor, Inc.*, Hancock App.No. 5-04-44, 2005 -Ohio- 2243

"In paragraph two of the syllabus in *Fyffe*, we further outlined the proof necessary to establish intent on the part of the employer when we stated that '[t]o establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. 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.' "

Gibson v. Drainage Products, Inc. (2002), 95 Ohio St.3d 171, 174-75, 2002-Ohio-2008 at ¶ 16-17. 766 N.E.2d 982, 986-87.

Under the common law *and* the latest version of R.C. 2745.01 it is the

element of **substantial certainty** which differentiates negligence from an intentional tort . *Marks v. Goodwill Industries of Akron, Ohio, Inc.* (Mar. 27, 2002), 9th Dist. No. 20706, at *2, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 116. According to the court in *Marks*, "[t]he line must be drawn where the known danger ceases to be a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the [employer] a substantial certainty." (Quotations omitted). *Marks* at *2.

Accordingly, the focus in this case is on the proof required to establish **substantial certainty** for the purpose of showing that defendant committed an intentional tort against plaintiff. While an employee need not demonstrate that the employer actually intended the exact harm to occur, "substantial certainty" is more than an employer's mere knowledge that such a condition presented a high risk of harm or danger. *Cope v. Salem Tire, Inc.*, 7th Dist. No.2001 CO 10, 2002-Ohio-1542; *Van Fossen v. Babcock & Wilcox Co.* (1998), 36 Ohio St.3d 100, 117, 522 N.E.2d 489. What actually constitutes a "substantial certainty" varies from case to case, but an employee must always show that the employer's actions were more than merely negligent, or even reckless. *Van Fossen*, at 117, 522 N.E.2d 489. Substantial certainty is "greater than an employer's knowledge of a high risk of harm or danger." *Long v. International Wire Group, Inc.* 3rd Dist. No. 3-2000-11, 2000-Ohio-1751 citing *Cathey v. Cassens Transport Co.* 3rd Dist. No. 14-99-35, 2000-Ohio-1629.

The court, in *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App. 3d 281, 308, stated:

* * * [P]laintiff had to produce evidence that [the employer] knew of the substantial certainty of injury to plaintiff as a result of the dangerous condition. "[E]ven if an injury is foreseeable, and even if it is probable that the injury would occur if one were exposed to the danger enough times, 'there is a difference between probability and substantial certainty.' " * * * "[T]he mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent." * * * Unless the employer actually intends to produce the harmful result or knows that injury to its employee is certain or substantially certain to result from the dangerous instrumentality or condition, the employer cannot be held liable. * * * Accordingly, an intentional-tort action against an employer is not shown simply because a known risk later blossoms into reality. * * * Rather, "the level of risk-exposure [must be] so egregious as to constitute an intentional wrong." * * *

An employee must prove that the employer knew that, because of the exact danger posed, the employee would be harmed or was substantially certain to be harmed in some manner similar to the injury the employee sustained. *Yarnell v. Klema Bldg., Inc.* (Dec. 24, 1998), Franklin App. No. 98AP-178.

In this case, construing the evidence in favor of plaintiff, including the evidence that defendant had instituted a policy that the power to the auger should have been turned off before an employee stuck his or her hand into it, there is at least a genuine issue as to whether defendant was aware of and appreciated the risk of an employee working on the auger without the power being turned off. Thus, the first prong of the *Fyffe* test is resolved in plaintiff's favor.

It is even safe to say that the evidence construed in favor of plaintiff, also presents a question as to whether the defendant was aware that an injury was *probable* if employees placed hands in the auger enough times when the power source was not turned off. However, even if it were probable that injury would occur if an employee was exposed to a danger

enough times, it has been held that "there is a difference between probability and substantial certainty." *Heard v. United Parcel Service* (July 20, 1999), Franklin App. No. 98AP-1267, quoting *Ruby v. Ohio Dept. of Natural Resources* (Dec. 3, 1992), Franklin App. No. 92AP-947. Substantial certainty is "greater than an employer's knowledge of a high risk of harm or danger." *Long v. International Wire Group, Inc.* 3rd Dist. No. 3-2000-11, 2000-Ohio-1751 citing *Cathey v. Cassens Transport Co.* 3rd Dist. No. 14-99-35, 2000-Ohio-1629.

Construing the evidence most strongly in favor of plaintiff, there was evidence of a lack of application of the defendant's policy about turning the power supply off before an employee put his or hands in the auger, and evidence that management knew that the employees were not following the policy. Defendant's knowledge that employees, like plaintiff, did not always follow its written policy to turn off power to the auger before repairing it does not rise to level of substantial certainty. See *Foust v. Magnum Restaurants, Inc.* (1994), 97 Ohio App.3d 451, discretionary appeal not allowed *Foust v. Magnum Restaurants, Inc.* (1995) 71 Ohio St.3d 1466. Defendant's actions fall short of the higher standard of substantial certainty. The mere knowledge and appreciation of a risk does not constitute intent. *Fyffe, supra*, paragraph two of the syllabus.

Further, there is no evidence in the record that defendant told plaintiff not to follow the turn-off policy or that defendant interfered with plaintiff's ability to shut the power off.

The fact that no person had ever been injured when repairing

