

IN THE SUPREME COURT OF OHIO

08-1971

THOMAS NORMAN
and
TAMMY NORMAN

Appellants

vs.

SERTA MATTRESS CO., DIVISION
OF NATIONAL BEDDING CO., LLC

Appellee

: On Appeal from the Hamilton
: County Court of Appeals,
: First Appellate District

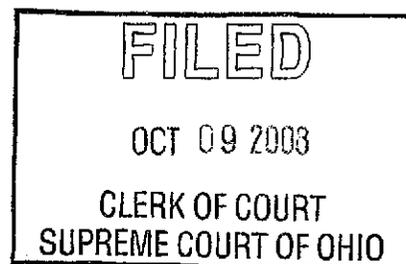
: Court of Appeals
: Case No. C-070503

**NOTICE OF APPEAL OF APPELLANT,
THOMAS NORMAN AND TAMMY NORMAN**

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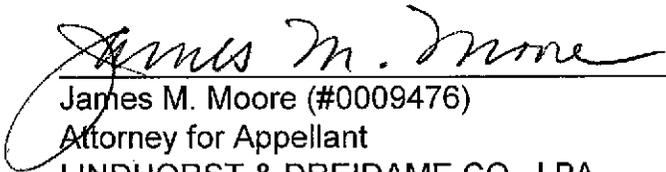


Notice of Appeal of Appellants, Thomas Norman and Tammy Norman

Appellant, THOMAS NORMAN and TAMMY NORMAN hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District entered in Court of Appeals Case No. C-070503 on August 27, 2008.

This case is one of public or great general interest.

Respectfully Submitted,



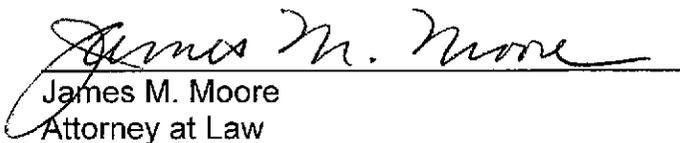
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by regular U.S. mail upon the following this 8th day of October, 2008:

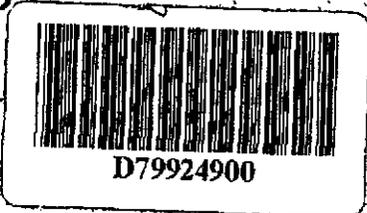
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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
AUG 27 2008



THOMAS NORMAN

and

TAMMY NORMAN,

Plaintiffs-Appellants,

vs.

SERTA MATTRESS CO., DIVISION OF
NATIONAL BEDDING CO., LLC.,

Defendant-Appellee.

APPEAL NO. C-070503
TRIAL NO. A-0602990

JUDGMENT ENTRY.

SD
KA

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiffs-appellants Thomas Norman, and his wife, Tammy, appeal from the trial court's entry of summary judgment for defendant-appellee Serta Mattress Co., Division of National Bedding Co., LLC., ("Serta") on the Normans' intentional-tort and loss-of-consortium claims. For the following reasons, we affirm.

Thomas Norman was employed by Serta as a delivery truck driver at their mattress-manufacturing plant in Forest Park, Ohio. On January 7, 2005, Norman was scheduled to deliver mattresses to several Sam's Club locations. Mattresses being

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

OHIO FIRST DISTRICT COURT OF APPEALS

delivered to Sam's Clubs had to be stacked vertically onto wooden pallets (three to six mattresses per pallet) and then shrink-wrapped. Each pallet was then loaded onto a trailer.

Prior to arriving at the plant, Norman testified during his deposition, the driver that had pulled Norman's loaded tractor-trailer onto the truck lot told Norman to be careful because an unsecured twin pillow-top mattress had been placed on top of the shrink-wrapped pallets because the workers loading the trailer forgot to load the loose mattress behind the wooden pallets.

When Norman arrived at the plant, he opened the doors to the trailer, grabbed his paperwork and headed off on his route. He did not inspect his cargo. At his first stop, he backed his truck up until the back end of the trailer was approximately five feet away from the loading dock. He walked to the back of the trailer, opened one of the swinging doors, and latched it to the side of the truck. He then opened the second door and turned his back to the load to latch that door. At that time, a twin pillow-top mattress weighing 35 pounds fell out and hit him on the head. He fell to his knees and became dizzy. He then got up and completed his route.

When he later returned to the Serta plant, Norman discussed the accident with Jim Lindsey, the transportation supervisor, and Mike Nearn, the plant manager. Norman testified that when Nearn had asked Lindsey why there had not been a load lock placed in the trailer, Lindsey had responded that there were not any available. Then Nearn responded that he wanted load locks "here today."

A load lock is a pressure device used to secure cargo. A load lock is to be secured horizontally across the trailer, midway between the ceiling and the floor of the trailer, just beyond the end point of the cargo that has been loaded inside. The fuller the load, the closer the load lock would be to the doors of the trailer.

OHIO FIRST DISTRICT COURT OF APPEALS

During his deposition, Norman testified that he and others had asked Lindsey to order load locks to secure the cargo. He further testified that Lindsey had told him that if he refused to deliver cargo he would be fired.

Since the date of Norman's injury, he did not return to work. He testified that he was in pain and could not even function in a sedentary work capacity. Kevin Kruezkamp, a former employee of Serta and a co-worker of Norman, testified that he had witnessed Norman help remodel a mutual friend's home since the accident, including installing drywall.

Following his injury, Norman filed suit against Serta, alleging an intentional tort and loss of consortium, as well as other claims not at issue here. The trial court granted summary judgment to Serta.

This court reviews a grant of summary judgment de novo, without any deference to the trial court's decision.² Summary judgment is appropriately granted when there exists no genuine issue of material fact, the movant is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to the nonmoving party.³

To recover on a claim for an intentional tort, a plaintiff must prove 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

² *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

³ *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.

circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task."⁴

An employee must present proof beyond that necessary to establish negligence or recklessness.⁵ Mere knowledge and appreciation of a risk do not establish that an employer knew with substantial certainty that an injury was likely to occur.⁶

This is a very difficult standard to meet, as an intentional-tort claim is intended to be a narrow exception to the worker's compensation system's prohibition against an employee's ability to sue his or her employer for a workplace injury.⁷

In establishing whether an employer knew that an injury was substantially certain to occur, prior accidents are probative.⁸ Moreover, "the absence of prior accidents 'strongly suggests' that injury from the [condition] was not substantially certain to result from the manner in which the job was performed."⁹ But a lack of prior accidents is not necessarily fatal to a plaintiff's case. Thus, "in the final analysis, absent some other evidence indicating that injury is substantially certain to occur, such as a number of prior accidents resulting from the dangerous condition, a determination of substantial certainty turns in large part on the nature of the dangerous condition."¹⁰

We focus our analysis on the second prong of this test, as it is determinative of the outcome of the appeal.

⁴ *Fyffe v. Jenco's Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus.

⁵ *Id.* at paragraph two of the syllabus.

⁶ *Id.*

⁷ *Blanton v. Internatl. Minerals and Chemical Corp.* (1997), 125 Ohio App.3d, 22, 25, 707 N.E.2d 960.

⁸ *Taulbee v. Audience, Inc., BMI Div.* (1997), 120 Ohio App.3d 11, 20, 696 N.E.2d 625.

⁹ *Id.*

¹⁰ *Id.* at 21.

OHIO FIRST DISTRICT COURT OF APPEALS

Norman argues that Serta had knowledge that if an employee was subject to the dangerous condition of delivering a cargo load without a load lock, harm was substantially certain to occur because (1) there had been at least one instance where mattresses had fallen from the back of a trailer and were damaged; and (2) according to Norman's testimony, when Nearn learned of Norman's accident, he asked Lindsey why there was not a load lock on the trailer and that he wanted some ordered immediately.

But these factors did not demonstrate that Serta knew with substantial certainty that Norman would be injured by delivering mattresses that were not secured by a load lock. Simply because on one occasion a mattress had fallen from the back of trailer and was damaged spoke more to the fact that the door of the trailer had not been securely shut, not that the absence of a load lock was substantially certain to cause injury to the truck driver delivering the mattress. Furthermore, Nearn's question why a load lock was not present on the trailer demonstrated that Serta may have appreciated the risk of driving a trailer without a load lock. But as we have stated, appreciating a risk does not amount to intent to harm an employee.

Because it is undisputed that there had been no injuries to employees from the absence of a load lock in the trailers, we must look at the nature of the dangerous condition: delivering mattresses without a load lock in place. We note that there was no testimony from industry experts or any witness that delivering mattresses without a load lock was particularly dangerous. Instead, a former employee of Serta and co-worker of Norman's testified that he rarely used load locks when transporting mattresses. And Norman even testified that when a trailer was full, a load lock was not used because it would rub against the door of the trailer. At most, the evidence

OHIO FIRST DISTRICT COURT OF APPEALS

presented by Norman demonstrated that Serta may have been negligent in not supplying each trailer with a load lock, or perhaps even reckless, but it did not demonstrate that Serta knew that the absence of load locks was substantially certain to cause injury to one of its delivery truck drivers.

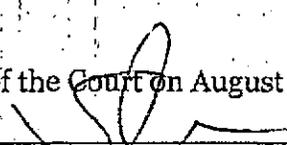
Accordingly, we conclude that there existed no genuine issues of material fact, and that Serta was entitled to judgment as a matter of law, because Norman failed to demonstrate that Serta had committed an intentional tort. Furthermore, because of its derivative relation to the intentional-tort claim, we hold that Serta was also entitled to judgment as a matter of law on Tammy Norman's loss-of-consortium claim. Thus, the trial court properly granted summary judgment to Serta, and that judgment is affirmed.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HILDEBRANDT and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 27, 2008
per order of the Court _____


Presiding Judge