

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

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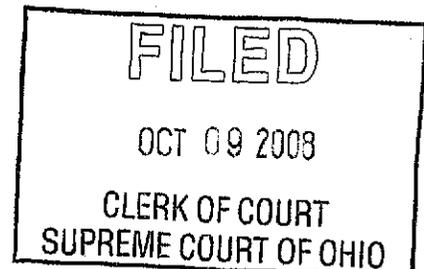
**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANTS, THOMAS NORMAN AND TAMMY NORMAN**

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## I. WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This is an employer intentional tort case. In its decision in Gibson v. Drainage Products, Inc., 95 Ohio St.3d 171, 2002-Ohio-2008, this Court held that the third element of the test in Fyffe v. Jenos, Inc. (1991), 59 Ohio St.3d 115 570 N.E.2d 1108, can be satisfied by presenting evidence that raises an inference that the employer, through its actions and policies, required the employee to engage in a dangerous task. 95 Ohio St.3d at 177-78, 2002-Ohio-2008, ¶ 24, 25.

This Court has never addressed the second prong of Fyffe - - knowledge by the employer that if the employee is subjected by his employer to a dangerous process, or procedure, instrumentality or condition, then harm to the employee would be a substantial certainty, 59 Ohio St.3d 115, 570 N.E.2d 1108, ¶ 1 of the syllabus - - in the context of a case where there is a lack of evidence of prior accidents. That is the issue which this case presents. Here, the employee is a truck driver for a mattress manufacturer who presented evidence that his employer failed to follow its own safety guidelines, as well as those of the United States Department of Transportation, and ignored the complaints of several employees that the loads they were delivering were not properly secured, and that on at least one prior occasion, an unsecured mattress had fallen from the truck when the rear doors were opened, though no personal injury occurred. This issue presents itself in many intentional tort cases, but has yet to be addressed by this Court.

The Courts below determined that the Plaintiffs presented insufficient evidence to survive a motion for summary judgment on the second prong of Fyffe with the Court of Appeals emphasizing the lack of prior accidents. This Court should accept jurisdiction

of this case to define the role that a lack of prior accidents plays in the resolution of an employer intentional tort claim.

## II. STATEMENT OF THE CASE AND FACTS

### A. Procedural Posture

Appellants, Thomas Norman and Tammy Norman, husband and wife, ("Norman") filed their Complaint in Hamilton County Common Pleas Court on March 31, 2006. In four counts, they alleged causes of action against appellee Serta Mattress Company, Division of National Bedding Co., LLC ("National") based upon: (1) Ohio Revised Code Chapters 4123 and 4112; and (2) employer intentional tort.

After discovery had been completed, National filed, on February 22, 2007, a Motion for Summary Judgment directed to all counts of the Complaint. National's Motion was granted on July 3, 2007.

On July 12, 2007, Norman timely filed a Notice of Appeal from the trial court's granting of National's Motion for Summary Judgment. On appeal to the Court of Appeals for the First Appellate District, Hamilton County, Norman sought reversal and remand of only his employer intentional tort causes of action including Thomas Norman's claim and Tammy Norman's derivative claim. Norman did not seek in the appellate court below review of claims based on Ohio Revised Code Chapter 4123 and 4112.

On August 27, 2008, the appellate court issued its Judgment Entry affirming the trial court's grant of summary judgment on Norman's employer intentional tort causes of action. A copy of the appellate court's Judgment Entry is attached hereto.

**B. Statement of Facts**

1. ALLEGATIONS OF THE COMPLAINT

In Count Three of the Complaint, Norman alleged a cause of action sounding in employer intentional tort.

The trailer which Norman was preparing for unloading on January 7, 2005 was not equipped with load-locks, straps or other devices which would have prevented the mattress from falling out of the trailer and striking him. National was aware of the existence of the dangerous condition posed by the absence of safety devices on the trailers and knew that if Norman was subjected by his employment to such a dangerous condition, then he was substantially certain to be harmed. National, under such circumstances and with such knowledge, acted to require Norman to continue to perform the dangerous task of hauling National's products in trailers which were not equipped with load-locks, straps or other similar devices.

As a direct and proximate result of National's actions, Norman sustained crushing injuries to the vertebrae in his neck and back as well as neurological and other permanent injuries.

2. FACTS PERTINENT TO NORMAN'S INTENTIONAL TORT CLAIM

Norman was hired by National on January 1, 2004. Before that he worked as a truck driver for J.B. Hunt, which provided driving and trucking services for Sleep Master. Sleep Master was the company that operated the facility that eventually became a National facility.

National's Transportation Safety Manual, which was furnished to Norman when he was hired by National, states that: "Serta Mattress/National Bedding Company is

committed to maintaining a safe working environment for all its employees. Serta Mattress/National Bedding Company will comply with all applicable safety and security laws and regulations, such as those established by DOT, EPA, OSHA and all other federal, state and local safety and health agencies..." National's Transportation Safety Manual contained a list of "Acute and Critical Regulations violations," among them No. 392.9(a)(1); "Requiring or permitting a driver to drive without the vehicle's cargo being properly distributed and adequately secured. (Critical)" (Emphasis supplied).

Norman's supervisor was Jim Lindsey. When J.B. Hunt 's contract to haul National's products terminated, J.B. Hunt took all its load bars and straps with it. As of the date Norman was hired by National, there was not a single load bar or cargo strap or cargo bar at National's facility except for two non-working ones that were kept on the dock by the doors. By contrast, when J.B. Hunt was providing hauling services, there were twenty-five (25) to twenty-eight (28) load locks or load bars which were kept on the dock and in the trailers.

Besides the absence of safety devices, another difference between J.B. Hunt and National's operation of the Forest Park facility was that J.B. Hunt inspected its loads before the driver could take them off the premises. If there was a problem, J.B. Hunt took care of it immediately. With National, however, Norman was required to take the load even when it was not loaded properly. Norman recalled an occasion when he was employed by J.B. Hunt when a trailer was loaded with the mattresses facing the wrong way and no load locks or bars were in place. He brought this to his J.B. Hunt manager's attention and the trailer was emptied and reloaded. However, under National's policies, Norman was required to take a load even without safety straps or

devices and was told, on two or three separate occasions by Jim Lindsey, his supervisor, that if he did not take the load, he would not have a job. Drivers were told they could not refuse to take a load without load locks or else they would be fired.

Load locks and cargo bars are placed inside the trailer to protect not only the product but are also for the safety of the driver and the unloader in order that when the doors are opened at a stop, the product does not fall out. On at least three occasions, at safety meetings held in February, June and August 2004 at National's facility, Norman and other employees asked about the load locks and straps. Jim Lindsey, Norman's supervisor, repeatedly said they would be forthcoming. This was confirmed by the testimony of other drivers: the complaint, by "a handful" of drivers that load bars were needed in order to secure the products; "a lot of drivers" complained in safety meetings and outside of the safety meetings that load locks were needed because "when you open the doors it's hard to tell if you're going to get one to fall on you or not").

The first time Norman raised the issue of safety locks with his supervisor was at the first safety meeting in February 2004, right after National hired Norman. The next occasion was in June 2004 when Norman related to Lindsey that he was backing into a dock when four mattresses fell out and he ran over the top of them and destroyed them. Norman told Lindsey that if there were straps for load locks the incident would not have happened. Again, in August, 2004, Norman asked Lindsey to obtain load locks as there had been three or four instances when unsecured mattresses had fallen out of National's trailers. Lindsey told him that if he didn't take a load he would not have a job.

On January 7, 2005, Norman arrived at National's facility at about 1:00 a.m. His trailer had been pulled away from the dock and the doors were shut. He opened one

door and got the bill of lading that was inside the trailer door. (Id.) Because the trailer contained a complete Sam's Club load, it was not necessary to inspect it. He had been told by the driver who pulled the trailer out into the truck yard that there was a loose twin mattress that had been placed on top of the load of mattresses. Norman could not see the loose mattress. There should have been a load lock across the top to prevent the mattress from falling out but National did not have any working load locks. Norman took his truck out of the Defendant's facility at about 1:15 a.m. He drove from Forest Park, Ohio to Canton, Ohio to a Sam's Club store, arriving at 4:30 a.m.

When Norman arrived at Sam's Club in Canton, he backed his vehicle to within five feet of the loading dock. He was responsible for opening the doors of the trailer. (Id.). He opened one door and turned his back to the load, shoving the door open because the wind was blowing excessively. He latched the first door and then unlatched the second door. That is when the "lights went out" when a pillow-top mattress hit him on the top of the head.

When the mattress fell on his head, Norman fell to his knees. Although he "saw stars" and "everything went black," he did not lose consciousness. He contacted Jim Lindsey about two hours later at 6:30 a.m., to report the injury. He then finished two more deliveries and returned to National's facility where, at about 2:30 p.m. the same day, he spoke to Jim Lindsey and Mike Nearn (Nearn was National's plant manager), about his injury. In that conversation, Nearn said to Lindsey: "Why in the hell weren't there any load locks in the trailer?" Lindsey responded: "We don't have any," to which Nearn said: "I want them here today."

On January 10, 2005, three days after Norman's injury, National received an invoice from Ryder Trucking for National's purchase of fifteen (15) cargo bars, designated "load locks" on the invoice. A short time later, on January 31, 2006, National bought seven ratchets with straps, and ten (10) more cargo bars and straps. Lindsey acknowledged in his deposition that there is supposed to be one load lock on each trailer. He issued a memo to National's truck drivers stating: "We have ordered enough load locks to make sure every trailer has at least one. Please make sure that all returns or non-delivered pieces are against the wall load locked and not lying on the floor..." The memo is not dated and Lindsey could not remember when he issued it. He also "can't say for certain" whether he ordered any load locks prior to Norman's injury on January 7, 2005. National has produced no documents in this litigation establishing the purchase by National prior to January 10, 2005, of any load locks, cargo bars, straps or other devices with which to secure cargo in its trailers.

As the result of his injury, Norman has not worked since January 7, 2005. He cannot function even in a sedentary work capacity and has constant pain in his neck, numbness in his legs from a pinched nerve, and three bone spurs in his neck that "move around". His doctor has told him that the only work he could do is to answer a telephone (Id.) He has driven a truck all his life and that is all he knows how to do.

### **III. PROPOSITION OF LAW AND ARGUMENT**

Proposition of Law:

In an intentional tort case, lack of evidence of prior accidents is not necessarily fatal to a plaintiff's claim that the employer had knowledge of the substantial certainty of

harm to the employee when the employer required the employee to perform a dangerous task.

**A. The Appellate Court Was in Error in Affirming Summary Judgment for National.**

Norman presented sufficient evidence of the existence of a dangerous condition which was known to National such that harm to Norman was substantially certain to occur and, despite such knowledge, National required Norman to perform the task.

The Court of Appeals agreed with National that the absence of prior accidents involving personal injury (not merely property damage) made it less than substantially certain that harm to the employees of National would occur as a result of a failure to secure cargo. In agreeing with National, the appellate court ignored the evidence that numerous complaints had been made by National's drivers about the absence of load locks for the vehicles. These complaints were made, not because of a concern that mattresses might be damaged if they were not properly secured; rather, the drivers were concerned about their own safety. National's awareness of the substantial certainty that harm to its employees would occur can also be inferred from its own regulations and those of the United States Department of Transportation, as well as from Nearn's statement immediately upon learning of Norman's injury. In addition, Appellants presented evidence of complaints from other drivers, and from Thomas Norman as well, about the dangers posed by unsecured cargo.

**B. Summary Judgment Standard**

An appellate court reviews a trial court's grant of summary judgment de novo, without deference to the trial court. See Doe v. Shaffer 90 Ohio St.3d 388, 2000 – Ohio

– 186, 738 N.E.2d 1243; Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241.

Rule 56(C), Ohio Rules of Civil Procedure, specifically provides that before summary judgment may be granted, it must be determined that: (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 and in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Temple vs. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

The party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. Celotex Corp. v. Catrett (1987) 477 U.S. 317, 330; Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798 Doubts must be resolved in favor of the nonmoving party. Murphy v. Reynoldsburg (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

**C. Standard Applicable to Norman's Employer Intentional Tort Claims.**

Norman's injury giving rise to his lawsuit occurred on January 7, 2005. Fyffe vs. Jenos, Inc. (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108 and its progeny control the outcome of this case.

**D. Argument**

In this litigation, Norman alleged that his employer is liable for injuries he suffered while delivering a load of mattresses on January 7, 2005. Although Ohio Workers' Compensation Provisions provide employees with the primary means of compensation

for injury suffered in the scope of employment, the Supreme Court of Ohio has recognized a common law cause of action by an employee against the employer when the employer's conduct is sufficiently egregious to constitute an intentional tort. Hannah v. Dayton Power & Light Co. (1998), 82 Ohio ST.3d 482, 484, 696 N.E.2d 1044. Such conduct is considered as occurring outside the scope of the employment and, necessarily, beyond the bounds of the workers' compensation act. Blankenship v. Cincinnati Millicron Chemicals, Inc. (1982), 69 Ohio St.2d 608, 433 N.E.2d 572.

An employee can prevail in an intentional tort claim against his employer if he demonstrates (1) that the employer had actual or constructive knowledge that a dangerous process, instrumentality or condition existed at the workplace; (2) that the employer knew that if the employee were subjected by his employment to such a danger he was substantially certain to sustain harm; and (3) that despite such knowledge, the employer required the employee to perform the dangerous task or work under that dangerous condition. Dailey v. Eaton (2000), 138 Ohio App.3d 575, 581, 741 N.E.2d 946; citing, Fyffe v. Jenos Inc., (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, ¶5 of the syllabus. Considering the evidence in the case now before the court in the light most favorable to Norman, the evidence is sufficient to raise genuine issues of material fact on all three prongs of Fyffe v. Jenos, Inc. Thus, summary judgment was not appropriate on Norman's intentional tort claim.

(1) Knowledge of Dangerous Condition.

National argued in the court below that it did not know that the absence of load locks created a dangerous condition. The record does not support this assertion. Norman testified that on at least three separate occasions, in February, June and

August 2004, he specifically requested that load locks or similar devices be provided. On one such occasion, he was prompted to make this request when mattresses had fallen out of the rear of a trailer. Norman was not the only individual who complained about the lack of these safety devices. Robbins and Kruetzkamp also testified that they and several other drivers as well, had repeatedly requested that Defendant provide the necessary devices and that their concern was their safety. One of National's drivers, Kevin Kruetzkamp, telephoned Norman to advise him on the day he was injured of the "potentially dangerous situation" regarding the loose mattress in the trailer which Norman was about to haul.

On the very day of Norman's injury, Nearn, National's Plant Manager demanded to know of Norman's supervisor, Lindsey: "Why in the hell weren't there any load locks in the trailer?" and when Lindsey responded "we don't have any," Nearn said "I want them here today." Thus, it is clear that National's Plant Manager knew the danger the absence of such devices posed to National's drivers.

National provided each of its drivers with its own Transportation Safety Manual which contained a requirement, described in the manual as "critical", that loads be properly secured before being hauled.

National's handouts to its drivers expressly acknowledged the "critical" requirement of securing the load. National conceded in the court below that it had knowledge that its drivers were requesting safety devices. That begs the question: Why were these safety devices being requested? The obvious answer is: to prevent the product from falling out of the trailer, not only to prevent damage to the product, but

also, as William Robbins testified, to avoid having the product hit the driver on the head.

There is sufficient evidence in the record to demonstrate National's knowledge of a dangerous condition. Therefore, the first prong of Fyffe has been satisfied.

(2) Injury is Substantially Certain.

The second element when claiming an employer intentional tort is that the employee must prove that the employer knew the employee's exposure to the dangerous condition was substantially certain to cause harm. Fyffe at ¶1 of the syllabus. 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., 7<sup>th</sup> Dist. No. 2001 CO 10, 2002-Ohio-1542. However, the employee need not demonstrate that the employer actually intended that the harm occur. Van Fossen v. Babcock & Wilcox Co., (1988), 36 Ohio St.3d 100, 117, 522 N.E.2d 489. As the probability or likelihood of harm increases, and the employer knows that injury to an employee is certain or substantially certain to result from a particular activity, the law treats the employer as if he intended to cause the harm if the employer proceeds with the activity despite such knowledge. Brookover v. Flexmag Industries, Inc., 2002 – Ohio – 2404.

In this case, National's sole argument on the second prong of Fyffe was that no employee, aside from Norman, had been injured due to the absence of a load lock.

This argument ignores the fact that there is evidence in the record that product had fallen out of the back of National's trailers on several occasions and that this was the result of the absence of load locks, cargo bars or similar devices. While there is no evidence in the record that a physical injury had yet occurred on any of these several

occasions, the unsecured mattresses and box springs had fallen out and National knew that without the presence of load locks or bars, its mattresses and box springs had fallen out of its trailers when the cargo doors were opened. It is National's employees who are opening the cargo doors and who are, thus, within the zone of danger. National cannot simply turn a blind eye to these previous incidents by declaring, as it does in its present motion for summary judgment, that it did not know that injury was substantially certain.

Even if the Court regards damage to product as different from knowledge of substantial certainty of harm to person, an employer's conduct can be found to be intentional even though there were no prior accidents resulting from the conduct. Cook v. Cleveland Electric Illuminating Co., (1995), 102 Ohio App.3d 417, 657 N.E.2d 356. In that case, the employer argued that because there had been no previous accidents during the three-year period that the transfer system at issue was used, it could not have known that the system was substantially certain to cause harm. The court rejected the employer's argument and reversed summary judgment which the trial court had granted in favor of the employer. The appellate court stated: "The appreciation of danger can be obtained in a myriad of ways other than personal knowledge or previous injuries. Simply because people are not injured, maimed or killed every time they encounter a device or procedure is not solely determinative of the question of whether that procedure or device is dangerous and unsafe. If we were to accept the appellee's reasoning, it would be tantamount to giving every employer one free injury for every decision, procedure or device it decided to use, regardless of the knowledge or substantial certainty of the danger that the employer's decision entailed. This is not the

purpose of Fyffe. It is not incumbent that a person be burned before one knows not to play with fire.” 102 Ohio App.3d at 429-30, 657 N.E.2d at 364; see also Taulbee v. Adience (1997), 120 Ohio App.3d 11, 20, 696 N.E.2d 625.

When Norman returned to National's facility in the afternoon on January 7, 2005 and spoke with both Mike Nearn and Jim Lindsey, Nearn demanded of Lindsey “why the hell” there were no load locks on Norman's trailer. This is strong evidence that National possessed the requisite knowledge that harm to an employee was a substantial certainty because of the company's failure to provide the necessary devices to secure the cargo within its trailers.

There is, therefore, sufficient evidence in the record that Norman has established the second prong of Fyffe.

(3) Requirement that the Employee Perform the Dangerous Work.

The third and final element essential for sustaining a claim of an employer intentional tort requires proof that the employee was given no choice but to perform the dangerous task. An employer does not have to expressly order the employer to engage in the dangerous task of his injury. Gibson v. Drainage Products, Inc., 95 Ohio St.3d 171, 2002-Ohio-2008, 766 N.E.2d 982, at ¶23. Rather, an employee may satisfy the third prong of the Fyffe inquiry by “presenting evidence that raises an inference that the employer, through its actions and policies, required the employee to engage in the dangerous task.”. Browne v. Walgreens, 11<sup>th</sup> Dist. No. 2002-L-062, 2003-Ohio-6691, 2003 WL 22931357 citing Hannah v. Dayton Power & Light Co., (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044.

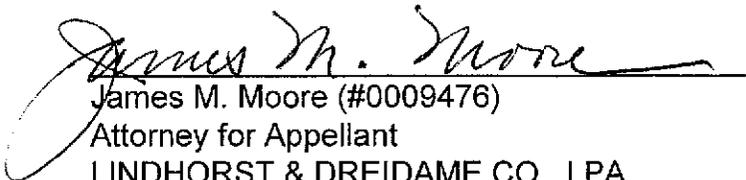
Here, although it was literally true that Norman could refuse to take the load without proper security, his choice was between doing so or being fired. He was expressly told on several occasions by Jim Lindsey that if he did not take a load, he would be fired. Robbins also testified in the same vein. See Caldwell v. Petersburg Stone Co., 2003-Ohio-3275 at pg.9. (“While no one directly told Appellant his refusal would result in termination, [the dispatcher’s] message was clear when he said, ‘this is what you have been scheduled to do, Doug.’ (Appellant’s Depo., pg. 85.) Certainly, such testimony created enough of a factual dispute to preclude summary judgment with respect to the claim against [the employer].”)

For these reasons, National’s motion for summary judgment on Norman’s intentional tort claim should have been denied and the lower court erred in granting and affirming it.

**IV. CONCLUSION**

For the reasons set forth herein, Norman respectfully requests this Court to accept jurisdiction of the lower courts rulings on summary judgment as to Norman’s claim of employer intentional tort.

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 8<sup>th</sup> day of October, 2008:

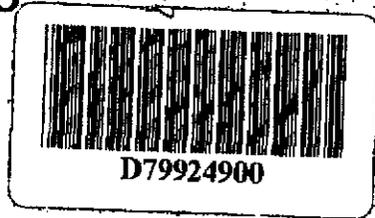
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IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

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.<sup>1</sup>

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

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

**OHIO FIRST DISTRICT COURT OF APPEALS**

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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 Kruetzkamp, 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.<sup>2</sup> 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.<sup>3</sup>

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

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

<sup>3</sup> *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."<sup>4</sup>

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

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.<sup>7</sup>

In establishing whether an employer knew that an injury was substantially certain to occur, prior accidents are probative.<sup>8</sup> 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."<sup>9</sup> 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."<sup>10</sup>

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

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<sup>4</sup> *Fyffe v. Jenos Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus.

<sup>5</sup> *Id.* at paragraph two of the syllabus.

<sup>6</sup> *Id.*

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

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

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 21.

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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

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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