[Cite as *Beany v. Ohio State Univ.*, 2009-Ohio-3712.]

Court of Claims of Ohio
The Ohio Judicial Center
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MARK EDWARD BEANY, et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY

Defendant
Case No. 2007-06624

Judge J. Craig Wright

DECISION

{¶ 1} Plaintiff, Mark Beany, brought this action against defendant, The Ohio State University (OSU), alleging a claim for bodily injury and intentional workplace tort. Plaintiff's family members also filed a claim for loss of consortium. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability. Plaintiff testified that he was a student at OSU in the late 1970s and that he also worked part-time as a student housekeeper from 1980 through the spring of 1982. When he was taking a full load of classes, he worked afternoon shift on the weekends and performed general tasks such as mopping, sweeping, and cleaning tables and chairs. Plaintiff recalled that during the summer of 1981, OSU began a project to replace ceilings on the second floor of the Ohio Union. He testified that his class schedule had been light, that he had worked Monday through Friday on the afternoon shift, and that his supervisor was John Ellinger.

{¶ 2} Plaintiff explained that the work site in the hallway was cordoned off from floor to ceiling with sheets of plastic and that the ceiling plaster debris was all over the

floor inside the cordoned-off areas. According to plaintiff, he was directed by Ellinger to break up the larger pieces of ceiling tile and to place the debris in trash bags that were then sealed with yellow hazard tape. He estimated that he cleaned up the discarded ceiling plaster debris for approximately two to four hours per shift for as long as eight to ten weeks that summer. Plaintiff states that the work was dusty and that he was often covered with a powdery substance while performing this task. Plaintiff admits that he was informed that the ceiling material contained asbestos and that he was provided a respirator to wear during the clean up. Plaintiff insisted that he had received assurances from Ellinger that if he wore the respirator he would be safe from harm. Plaintiff described the respirator as a black rubber mask with two canisters. Plaintiff maintained that he was not provided with any special clothing to wear and he did not recall whether the respirators were cleaned after each use. Plaintiff stated that the respirators were merely tossed into a box each night and retrieved for use again the next day.

{¶ 3} In March 2007, plaintiff was diagnosed with mesothelioma, a cancer of the pleural cavity lining, between the lungs and the ribs. According to testimony adduced at trial, exposure to asbestos is a known cause of mesothelioma, and persons who contract this disease have an average life expectancy of two years. Plaintiff alleges that OSU committed an intentional workplace tort by directing him to clean up asbestos-contaminated debris without either instructing him on the appropriate protocol or providing him with the equipment necessary to protect himself from exposure to the cancer-causing substance.

{¶ 4} Defendant argues that plaintiff was not asked to, nor did he, clean up ceiling tile debris; rather, the student workers transported the filled and sealed trash bags from the hallways to a trash collection area located outside the building. In addition, defendant disputes plaintiff's characterization of the project as total demolition of the ceilings and asserts that OSU authorized an electrical contractor to remove only such ceiling plaster as was necessary to accommodate replacement light fixtures. Finally, defendant contends that even assuming that plaintiff cleaned up asbestos-contaminated materials, plaintiff cannot prove that defendant intended to cause injury to plaintiff or that defendant could have known with any certainty that plaintiff would suffer injury by such acts.

{¶ 5} John Ellinger testified that he has been employed by OSU since 1979 and that he was the Associate Director of the Ohio Union from 1979 to 1988. He denied that he ever directly supervised the student housekeepers. He recalled that in 1981, the university opted to replace approximately 33 light fixtures in the stairwells and hallways of the student union building. To accommodate the larger fixtures, an area of ceiling plaster was removed for each light. Ellinger acknowledged that the ceiling plaster was known to contain asbestos. He stated that the work would have been done by an electrical contractor, most likely by Jess Howard Electric Company, and that the contractor would have been responsible to clean up all of the asbestos-contaminated materials, on a daily basis. Ellinger identified Plaintiffs' Exhibit 25 as a memo dated July 9, 1981, that Ellinger authored to Roger Seckel, an employee of Jess Howard Electric Company, outlining the procedure for handling asbestos ceiling material. The memo provided that the ceiling would be sprayed with water before being cut; that the electrical contractors would wear protective clothing, goggles, and respirators; that the rubble would be swept and the dust sprayed with water, and that all debris was to be double bagged and identified with a hazardous waste sticker. According to the memo, the Ohio Union employees were responsible for transporting the filled and sealed bags to a loading dock. (Plaintiffs' Exhibit 25.)

{¶ 6} In contrast to this testimony, the owner of the electric company, Jess Howard, testified by deposition that he would not have bid on a project of this nature and that he would not have agreed to work in an area contaminated with asbestos.[1] Ellinger maintained that it would not have been his custom or practice to send students into the enclosed areas to clean when asbestos-contaminated materials were present. Ellinger testified that it was his understanding that the student housekeepers merely loaded the sealed trash bags onto a cart and transported them to another area in the building.

{¶ 7} Defendant's maintenance worker, Don Wright, and maintenance supervisor, Doug Karnap, both testified that they were assigned to work at the Ohio Union in 1981. Wright testified that he recalled the project to replace light fixtures in the hallways; that Jess Howard employees performed the work; that the contractor was

responsible for all aspects of the job from tear down to clean up; and that the work sites were clean before his shift ended in the afternoon. Karnap testified that he remembers being at work in the Ohio Union when the light fixtures were replaced and seeing the barriers in place but that he does not recall how the areas were cleaned or who performed such task. Nevertheless, he maintained that it was not common practice to have student workers clean up after contractors.

{¶ 8} R.C. 2745.01 addresses an employer's liability for intentional tort, and states as follows:

{¶ 9} "(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.

{¶ 10} "(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.

{¶ 11} "(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

{¶ 12} "(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation."

{¶ 13} It is undisputed that the exposure described by plaintiff occurred over 20 years ago and the court finds that the testimony of defendant's employees concerning the scope of the project differed significantly from plaintiff's recollection of events. Moreover, plaintiff did not provide a corroborating statement from any former student

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[1]Neither Jess Howard nor OSU was able to locate any invoices or work orders relating to the light

workers or other persons who may have been exposed. Defendant's employees maintained that students would not have been required to perform tasks assigned to a contractor. In addition, Ellinger's memo regarding the asbestos procedures bolstered defendant's position that the electrical contractor was responsible for all clean-up and that plaintiff would merely be required to transport sealed trash bags while wearing a respirator. "In determining the issue of witness credibility, the court considers the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear, and know the things about which he testified; his accuracy of memory; frankness or lack of it; intelligence, interest, and bias, if any; together with all facts and circumstances surrounding the testimony." *Adair v. Ohio Dept. of Rehab. & Corr.* (1998), 96 Ohio Misc.2d 8, 11; see also 1 Ohio Jury Instructions (1994), Section 5.30.

{¶ 14} Applying these criteria to the testimony presented herein, the court finds that Ellinger's memo to Roger Seckel corroborates defendant's version of events and further calls into question both the accuracy of plaintiff's memory and the testimony of Jess Howard and his employees.

{¶ 15} Based upon the testimony of plaintiff and defendant's employees, the court finds that plaintiff failed to prove that defendant directed plaintiff to perform a task with the intent to cause injury to plaintiff as contemplated by R.C. 2745.01.[2]

{¶ 16} The court notes that "[o]n its face, R.C. 2745.01 requires, as an essential element of an employer intentional tort action, that the employer commit an act in which the employer deliberately and intentionally injures the employee. Statutes are presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision. *Fabrey v. McDonald Police Dept*. (1994), 70 Ohio St. 3d 351, 352, 639 N.E.2d 31, 33. If R.C. 2745.01 were unconstitutional on its face, then the employer intentional tort would retain its common law definition prior to the enactment of the definition set forth in R.C. 2745.01." *Brant v. Lewark Metal Spinning* (Mar. 13, 1998), Montgomery App. No. 16653.

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fixture replacement project at the Ohio Union in 1981.

[2]The parties notified the court prior to trial that the constitutionality of this statute is currently under review by the Supreme Court of Ohio. See *Kaminski v. Metal & Wire Prods. Co.*, 119 Ohio St.3d 1407, 2008-Ohio-0857.

{¶ 17} In the event that the statutory provision is declared unconstitutional, the court makes the following determination. Courts in Ohio have ruled that "in order to establish 'intent' under the common law for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to 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." *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, paragraph one of the syllabus. See also *Arrigo-Klacik v. Germania Singing and Sports Soc.* (Aug. 30, 2001), Franklin App. No. 00AP-1397.

{¶ 18} The Tenth District Court of Appeals recently opined that the burden on the employee is an extremely difficult standard to meet inasmuch as a plaintiff must present evidence that proves that the employer was not merely negligent, but rather must present such proof which surpasses even that required to prove recklessness. "The employee bears the burden of demonstrating that the employer had knowledge amounting to substantial certainty that an injury would occur. *Pariseau v. Wedge Products, Inc*. (1988), 36 Ohio St.3d 124, 127, 522 N.E.2d 511. Even where an employer possesses knowledge and appreciation of a risk, nothing short of substantial certainty demonstrates intent. *Fyffe* at paragraph two of the syllabus." *Singleton v. Ohio Concrete Resurfacing, Inc.*, Franklin App. No. 06AP-991, 2007-Ohio-2012, ¶ 29.

{¶ 19} "Even if an injury is foreseeable, * * * there is a difference between probability and substantial certainty. The 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."

Arrigo-Klacik supra, quoting *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 308-309.

{¶ 20} Plaintiffs' expert pathologist, Dr. David Groth, testified that asbestos is the only known cause of mesothelioma and that the disease manifests some 30 to 40 years after exposure to asbestos occurs. In addition, he explained that, although there is no safe level of exposure, the greater the exposure to asbestos the greater the risk of developing mesothelioma. He opined that plaintiff's exposure at OSU was a significant cause of the mesothelioma; however, he admitted that such opinion was based upon plaintiff's account of the project as plaintiff recollected the earlier events from memory. On cross-examination, Groth conceded that even though a person is exposed to asbestos, one is not certain to develop mesothelioma. He agreed that the vast majority of exposed persons do not develop mesothelioma. Finally, he acknowledged that some persons are thought to be more susceptible to develop mesothelioma, although the reasons are unknown.

{¶ 21} Dr. Lemen, plaintiff's expert epidemiologist, testified that the latency period for mesothelioma averages 30 years. Epidemiology is the field of medicine and public health that compares groups of people to determine their risk of developing disease or injury. He stated that if plaintiff swept up four to five bags of asbestos-contaminated materials for several hours over a five-week period, such exposure would have placed him at a heightened risk of developing mesothelioma. On cross-examination, Lemen conceded that exposure to asbestos does not make it a certainty that a person will develop mesothelioma. In addition, Lemen explained that if plaintiff had been exposed to asbestos on other occasions, such as the times he worked in a steel plant, one cannot determine which exposure to asbestos led to the development of mesothelioma.

{¶ 22} William Ewing, plaintiff's industrial hygienist, explained that his field involved the identification, evaluation, and control of health hazards for workers. He stated that he had attempted to estimate the amount of exposure plaintiff experienced and that he relied, in part, on plaintiff's recollection that he broke up dry ceiling tiles and swept up dust in the enclosed area over several separate instances. Based upon his calculations, Ewing opined that plaintiff suffered significantly elevated exposure to asbestos, that OSU should not have assigned student workers to clean the areas of

ceiling debris, and that the asbestos-contaminated materials should have been wetted before they were moved to reduce the amount of dust propelled into the air. Nevertheless, upon cross-examination, Ewing agreed that had plaintiff merely transported the sealed bags of debris from one location to another, his exposure would have been considerably less than previously estimated. In addition, Ewing conceded that the vast majority of persons exposed to asbestos do not get mesothelioma and that it was not a certainty that plaintiff would have developed mesothelioma.

{¶ 23} Defendant's expert epidemiologist, Dr. Charles Buncher, testified that mesothelioma is a rare disease that afflicts less than one percent of workers with exposure to asbestos, even long-term exposure spanning two or three decades. Dr. Buncher opined that, based upon the amount of exposure to asbestos-contaminated materials that plaintiff reported, he would place plaintiff's risk of developing mesothelioma well under one percent. If plaintiff merely transported sealed bags of contaminated ceiling debris, then according to Buncher his risk of developing mesothelioma would be practically eliminated. Dr. Buncher also opined that even assuming that plaintiff had been exposed to large amounts of asbestos-laden dust, one cannot say that plaintiff was certain to develop mesothelioma. The court found that the opinions expressed by Dr. Buncher were more persuasive and convincing than those offered by the other experts who testified.

{¶ 24} Based upon a review of the testimony and evidence presented in this case, including a review of the transcript of the proceedings, the court finds that plaintiff has failed to prove, by a preponderance of the evidence, that defendant acted in an egregious manner toward plaintiff, or that his supervisors knew with substantial certainty, or even with any certainty, that plaintiff would contract mesothelioma as a result of tasks he performed during his employment as a student housekeeper at the Ohio Union.

{¶ 25} "Even where a plaintiff establishes that his employer had knowledge of a dangerous condition, it does not necessarily follow that the employer knew that injury to its employee was certain, or substantially certain, to result. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192-193, 532 N.E.2d 753. Without more, an employer's knowledge and appreciation of the risk 'is insufficient to impute knowledge with

substantial certainty that [the] harm would befall its employees.' *Richard v. Mr. Hero, Inc*. (Mar. 8, 1989), Summit App. No. 13701, 1989 Ohio App. LEXIS 788." *Singleton*, supra, ¶ 34.

{¶ 26} For the foregoing reasons, the court finds that plaintiff has failed to provide sufficient evidence to demonstrate the second and third factors listed in *Fyffe*, supra, which are necessary to establish intent for the purpose of proving the existence of an intentional tort claim. The court further finds that the loss of consortium claim is derivative of the central cause of action. Thus, the derivative claim fails as well. See *Breno v. City of Mentor,* Cuyahoga App. No. 81861, 2003-Ohio-4051. Accordingly, judgment shall be rendered in favor of defendant.

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JUDGMENT ENTRY

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

____
J. CRAIG WRIGHT
Judge

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