

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CLARK JEFFERSON, et al.,	:	JUDGES:
	:	Sheila G. Farmer, P.J.
Plaintiffs-Appellants	:	W. Scott Gwin, J.
	:	Julie A. Edwards, J.
-vs-	:	Case Nos. 09 CA 62 & 09 CA 75
	:	
BENJAMIN STEEL CO., INC., et al.,	:	<u>OPINION</u>
Defendants-Appellees	:	
and		
THE CINCINNATI INSURANCE CO.		
Defendant-Appellee/Cross-Appellant		

CHARACTER OF PROCEEDING: Civil Appeal from Richland County
Court of Common Pleas Case No.
07 CV 1469

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 8, 2010

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Edwards, J.

{¶1} Plaintiffs-appellants, Clark and Brenda Jefferson, appeal from the March 27, 2009, Order of the Richland County Court of Common Pleas granting summary judgment in favor of appellee Benjamin Steel Co., Inc. and denying appellants' Motion for Summary Judgment. Cincinnati Insurance Company has filed a cross-appeal and also appeals from the trial court's May 27, 2009, Order overruling its "Civ.R. 50 Motion for Declaratory Judgment of Cincinnati Insurance Company, or, Alternatively, Motion for New Trial as to Insurance Coverage Issues."

STATEMENT OF THE FACTS AND CASE

{¶2} This case arose as a result of an injury that occurred at appellee Benjamin Steel's plant in Mansfield, Ohio on October 31, 2005.

{¶3} Appellant Clark Jefferson [hereinafter "appellant"] was employed at appellee's Mansfield plant for approximately five years as a maintenance man. His job duties included repairing machinery and equipment or, if he was unable to do so, arranging for someone else to repair the same. Appellant worked the day shift, which was from 7:00 a.m. to 3:00 p.m., and was on call 24 hours a day. John Uhl, the Superintendent of the plant, was appellant's direct supervisor. Tim Sinclair was the plant manager.

{¶4} The Mansfield plant has two buildings that are connected by two man-sized doors and by a large overhead door that is large enough to drive a truck through. The overhead door is located along the east wall of Building 2. Building 2 at the plant has four overhead cranes that are installed along the ceiling and that are used to lift and

move steel around the building. The cranes operate on long rails. The crane that was involved in appellant's accident is operated by a remote control.

{¶5} On Friday, October 28, 2005, after the overhead door between the two buildings stopped working, appellant called a door repair company to repair the door on Monday. After appellant arrived at work at approximately 7:00 a.m. on Monday, he and John Uhl discussed the broken door and "we decided that - - that I would go over there and take another look at it." Deposition of Clark Jefferson at 51. The following is an excerpt from appellant's deposition testimony:

{¶6} "Q. And tell me everything you can remember about your conversation with John.

{¶7} "A. We just discussed - - discussed the door that was broke.

{¶8} "Q. What was the discussion?

{¶9} "A. The overhead door was - - Did he want me to go up and take another look at it before the door company got here because if it was something simple, I could repair it and save the service call and save the company some money on that door repair and not have to be worried about them coming to repair it.

{¶10} "Q. Okay.

{¶11} "A. It would have been simpler if it was something simple, easier for me to fix than to have to pay that service call and pay that labor rate for that company to come and fix the door when we could have fixed it ourselves.

{¶12} "Q. So I'd like to hear as much as you can remember what you said, what he said rather than a summary of what was said.

{¶13} “A. I said to him, ‘John, what are we gonna do about the door?’ He said, I think, to me maybe we ought to take another look at it. I said, ‘You really want me to take another look at it? I really don’t want to look at it ‘cause the door company’s coming.’ I said, ‘You sure?’ He said ‘Yeah, go ahead, take one more look at it.’ I said, ‘Okay, I’ll take one more look at it.’

{¶14} “Because I was already in here Friday and looked at the door and called the door company to come Monday.

{¶15} “Q. Was there anything else said in that conversation regarding the door?

{¶16} “A. Not that I can remember, no, unless - - no, not that I can remember.”

Deposition of Clark Jefferson at 53-54.

{¶17} Appellant then went over to the building where the door was located and sat there while waiting for people to leave because he did not like to have many people around when he was making repairs. Appellant, mistakenly believing that there was no one else in the building, then went over to a scissors-type lift and raised himself into the air to check on the door. Unbeknownst to appellant, an employee had entered the building and started the crane. After the crane struck the scissors-lift, appellant fell to the floor, sustaining injuries.

{¶18} Appellant had attended lockout/tagout training in September of 2004 and was a person who could perform the lockout/tagout procedure. At the training, a participant was taught that no one was to raise a scissor type lift unless he or she had shut off and locked down the cranes. In addition, appellant had his own lockout/tagout kit and had performed lockouts/tagouts in the past. The following is an excerpt from appellant’s deposition testimony:

{¶19} “Q. Okay. Well, if you look at Exhibit B, on the third page of - - Well, let me ask you about Exhibit B. This Safety Day that says lockout/tagout September, '04, is this a training that you would have attended?”

{¶20} “A. Run that past me again.”

{¶21} “Q. Well, you’ll agree that Exhibit B Says Lockout/Tagout Safety Day, correct?”

{¶22} “A. Right.”

{¶23} “Q. And it is a number of pages of documentation regarding a lockout/tagout training, correct?”

{¶24} “A. Right.”

{¶25} “Q. And is this something that you attended?”

{¶26} “A. Yes.”

{¶27} “Q. Okay. You’ll look at the third page at the bottom says, ‘Always be aware of the overhead cranes - do not raise the scissors lift until you have effectively shut off and lock (sic) out the cranes.’ Correct?”

{¶28} “A. Yeah, that’s what it says.”

{¶29} “Q. And that was covered in this safety meeting?”

{¶30} “A. Probably so.”

{¶31} “Q. Okay.”

{¶32} “A. It’s on the paper. I don’t know if anybody made any comments about it or anything because I don’t remember.”

{¶33} “Q. And you had lockout/tagout training before 2004, correct?”

{¶34} “A. I would have to say yes, probably so.”

{¶35} “Q. And there is some documentation of lockout/tagout training in - - as early as 2001; do you recall that?

{¶36} “A. I don’t recall it, but I probably did get it.

{¶37} “Q. You’re not denying that you lockout - -

{¶38} “A. No.” Deposition of Clark Jefferson at 43-44. (Emphasis added).

{¶39} Appellant, during his deposition, admitted that he had received lockout/tagout training every year and that he had attended a meeting in October of 2005, before the accident, that concerned the lockout/tagout procedure. On September 28, 2005, appellant had received and signed for a copy of the lockout/tagout program procedures.

{¶40} Appellant testified that on the day of his accident, no one had told him not to shut the cranes down. While he testified that only John Uhl or Tim Sinclair, the plant manager, could tell him to shut the cranes down, appellant testified that neither had ever told him not to do so. Appellant, by his own admission, was never criticized by the company’s management for locking and tagging out a machine although some of the “guys” did criticize him. Deposition of Clark Jefferson at 92.

{¶41} John Uhl, during his deposition, testified there was separate lockout/tagout training provided to those employees such as appellant who were given a lockout/tagout device. Uhl further testified that the lockout/tagout policy required a lockout/tagout on a crane to be performed if an employee was doing maintenance work on the crane and also when an employee was doing something that would bring him or her within the range of movement of the crane.

{¶42} During his deposition, Uhl testified that there also was a common unwritten company procedure on the date in question. Pursuant to such unwritten policy, Uhl or another employee would act as a “spotter” nearby while someone was in the scissors-lift and would make sure that employees did not use the crane while someone was on the lift.

{¶43} On the day of the accident, appellant did not use the lockout/tagout safety device to disable the crane before he used the scissors-lift to raise himself approximately 30 feet above the plant floor. When asked during his deposition why he did not lockout/tagout the crane, appellant testified as follows:

{¶44} “A. I wasn’t there to fix the cranes. I was there to look at the overhead door. Shut cranes down and if somebody is in there or somebody does come in there, they cannot perform their job duties to do nothing, stops production, stops everything.” Deposition of Clark Jefferson at 60.

{¶45} On October 16, 2007, appellant and his wife filed a complaint against appellee Benjamin Steel Company, Inc. alleging that appellee had committed an intentional tort. Appellants, in their complaint, brought both statutory and common-law claims against appellee. Appellants, in their complaint, also alleged that R.C. 2745.01, the intentional tort statute, was unconstitutional and that pre-R.C. 2745.01 law governed their claims.

{¶46} On September 8, 2008, Cincinnati Insurance Company, which provided liability insurance to appellee Benjamin Steel Company, filed a Motion to Intervene as a defendant. As memorialized in an Order filed on September 18, 2008, Cincinnati Insurance Company was permitted to intervene on a limited basis.

{¶47} Thereafter, on September 22, 2008, appellee, Benjamin Steel, filed a Motion for Summary Judgment.

{¶48} On October 6, 2008, Cincinnati Insurance Company filed an answer and filed a cross-claim against appellee Benjamin Steel, seeking a declaration that the policy which it had issued to appellee did not provide coverage with respect to appellants' claims if such claims were governed by R.C. 2745.01. On November 14, 2008, appellee Benjamin Steel filed an answer to the cross-claim and also a counterclaim against Cincinnati Insurance Company.

{¶49} On January 1, 2009, appellants filed a Motion for Summary Judgment on Count 6 of their complaint, seeking a declaration that R.C. 2745.01 was unconstitutional. On the same date, appellants filed a brief in opposition to appellee Benjamin Steel's Motion for Summary Judgment. Appellee, on January 26, 2009, filed a response in opposition to appellants' Motion for Summary Judgment on Count 6.

{¶50} Pursuant to an Order filed on March 27, 2009, the trial court granted appellee Benjamin Steel's Motion for Summary Judgment while denying that filed by appellants. The trial court, in its Order, found that R.C. 2745.01 was constitutional and governed appellants' claims. The trial court further held that even if R.C. 2745.01 were ultimately found unconstitutional, summary judgment would be appropriate under the common law standard for employer intentional torts. The trial court further held that a "holding of no liability on the part of Benjamin Steel consequently requires judgment in favor of intervenor defendant Cincinnati Insurance on claims raised against it by virtue of intervention" and found that its holding rendered Cincinnati's cross-claim moot. The

trial court also held that the counterclaim against Cincinnati Insurance Company was moot.

{¶51} On April 10, 2009, Cincinnati Insurance Company filed a “Civ.R. 50 Motion for Declaratory Judgment of Cincinnati Insurance Company, or, Alternatively, Motion for New Trial as to Insurance Coverage Issues.” Cincinnati, in its motion, noted that while the trial court found that R.C. 2745.01 governed appellants’ claims, the trial court, in its March 28, 2009, Order, dismissed Cincinnati’s declaratory judgment cross-claim, “leaving the issue of whether [Cincinnati] must defend [appellants] promised appeal unresolved.” Cincinnati requested that the trial court either enter judgment declaring that its policy did not provide coverage for violation of R.C. 2745.01 or, in the alternative, grant a new trial on its declaratory judgment claims on insurance coverage issues.

{¶52} On April 23, 2009, appellants filed a Notice of Appeal from the trial court’s March 27, 2009, Order. Such appeal was assigned Case No. 09 CA 62. On April 30, 2009, Cincinnati Insurance Company filed a Notice of Cross-Appeal in such case.

{¶53} As memorialized in an Order filed on May 27, 2009, the trial court overruled Cincinnati Insurance Company’s “Civ.R. 50 Motion for Declaratory Judgment of Cincinnati Insurance Company, or, Alternatively, Motion for New Trial as to Insurance Coverage Issues.” The trial court, in its Order, found that it had no jurisdiction to consider such motion because its March 27, 2009 Order had been appealed.

{¶54} On June 12, 2009, Cincinnati Insurance Company filed a Notice of Appeal from the trial court’s May 27, 2009, Order. Such appeal was assigned Case No. 09 CA 75.

{¶55} Pursuant to a Judgment Entry filed by this Court on July 1, 2009, the two cases were consolidated.

{¶56} Appellants now raise the following assignments of error on appeal:

{¶57} “I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES BENJAMIN STEEL CO., INC., AND THE CINCINNATI INSURANCE CO., AND DISMISSING PLAINTIFFS-APPELLANTS’ EMPLOYER INTENTIONAL TORT ACTION.

{¶58} “II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY RULING THAT OHIO REV. CODE §2745.01 IS CONSTITUTIONAL, THEREBY DENYING PLAINTIFFS-APPELLANTS’ MOTION FOR SUMMARY JUDGMENT.”

{¶59} Cincinnati Insurance Company raises the following assignment of error on cross-appeal:

{¶60} “IF THE TRIAL COURT’S ORDER GRANTING SUMMARY JUDGMENT TO BENJAMIN STEEL IS REVERSED, THEN THE TRIAL COURT ALSO COMMITTED REVERSIBLE ERROR WHEN IT DISMISSED CIC’S DECLARATORY JUDGMENT CROSS-CLAIM WHEN THE ISSUE OF INSURANCE COVERAGE IN THIS CASE REMAINED UNRESOLVED.”

{¶61} Cincinnati Insurance Company also raises the following assignments of error on appeal:

{¶62} “I. IF THE TRIAL COURT DECISION AWARDED SUMMARY JUDGMENT TO DEFENDANT/APPELLEE BENJAMIN STEEL CO., INC. IS REVERSED, THEN THE TRIAL COURT COMMITTED ADDITIONAL REVERSIBLE ERROR WHEN IT DISMISSED AS MOOT THE DECLARATORY JUDGMENT CROSS-

CLAIM FIELD BY INTERVENING DEFENDANT/APPELLEE/CROSS-APPELLANT THE CINCINNATI INSURANCE COMPANY AGAINST DEFENDANT/APPELLEE BENJAMIN STEEL CO., INC. WHEN THE ISSUE OF INSURANCE COVERAGE INVOLVED IN THIS CASE REMAINED IN DISPUTE.

{¶63} “II. IF THE TRIAL COURT DECISION AWARDING SUMMARY JUDGMENT TO DEFENDANT/APPELLEE BENJAMIN STEEL CO., INC. IS REVERSED, THEN THE TRIAL COURT COMMITTED ADDITIONAL REVERSIBLE ERROR WHEN IT DISMISSED AS MOOT THE DECLARATORY JUDGMENT CROSS-CLAIM FILED BY INTERVENING DEFENDANT/APPELLEE/CROSS-APPELLANT THE CINCINNATI INSURANCE COMPANY AGAINST DEFENDANT/APPELLEE BENJAMIN STEEL CO., INC. WHEN THE ISSUE OF INSURANCE COVERAGE INVOLVED IN THIS CASE REMAINED IN DISPUTE. INSTEAD, THIS COURT SHOULD ENTER DECLARATORY JUDGMENT FOR THE CINCINNATI INSURANCE COMPANY AS PRAYED FOR IN THE CIV. R. 50 MOTION FOR DECLARATORY JUDGMENT OF CINCINNATI INSURANCE COMPANY, OR, ALTERNATIVELY MOTION FOR NEW TRIAL AS TO INSURANCE COVERAGE ISSUES.”

APPELLANTS' APPEAL

I, II

{¶64} Appellants, in their first assignment of error, argue that the trial court erred in granting summary judgment in favor of appellee Benjamin Steel Company and Cincinnati Insurance Company. In their second assignment of error, appellants argue that the trial court erred as a matter of law in finding R.C. 2745.01 constitutional, thereby denying appellants' Motion for Summary Judgment.

{¶65} An appellate court's review of summary judgment is conducted de novo. See, e.g., *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine if summary judgment was appropriate and need not defer to the trial court's decision. See *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153. Thus, in determining whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

{¶66} Civ. R. 56(C) provides, in relevant part, as follows:

{¶67} “* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.”

{¶68} Therefore, pursuant to that rule, a trial court may not award summary judgment unless the evidence demonstrates 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) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Vahila v. Hall*, 77 Ohio St.3d 421, 429-30, 1997-Ohio-259, 674 N.E.2d 1164.

{¶69} As is stated above, after appellant Clark Jefferson's accident on October 28, 2005, appellants filed a complaint alleging that appellee Benjamin Steel Company had committed an intentional tort. R.C. 2745.01, which became effective April 7, 2005, now governs an employer's liability for intentional torts. Such section states as follows: "(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.

{¶70} "(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."

{¶71} As noted by the court in *Kaminski v. Metal & Wire Products*, 175 Ohio App.3d 227, 2008-Ohio-1521, 886 N.E.2d 262, "R.C. 2745.01 codifies the common-law employer intentional tort and makes its remedy an employee's sole recourse for an employer intentional tort." *Id.* at paragraph 14.

{¶72} The trial court, in the case sub judice, found R.C. 2745.01 constitutional and, in part on such basis, granted summary judgment in favor of appellee. Appellants,

in their second assignment of error, now argue that the trial court erred in finding such section constitutional and point to cases out of the Seventh District Court of Appeals, the Eight District Court of Appeals and the Eleventh District Court of Appeals finding R.C. 2745.01 to be unconstitutional. See, for example, *Kaminski*, supra, which is currently pending before the Ohio Supreme Court; *Barry v. A.E. Steel Erectors, Inc.*, Cuyahoga App. No. 90436, 2008-Ohio-3676, at ¶ 21-27; and *Fleming v. AAS Serv., Inc.*, 177 Ohio App.3d 778, 2008-Ohio-3908, 896 N.E.2d 175, at ¶ 40 (Eleventh District Court of Appeals).

{¶73} However, we find it unnecessary to address the constitutionality of R.C. 2745.01 because it is well settled that constitutional issues should not be decided "unless absolutely necessary." *Mayer v. Bristow*, 91 Ohio St.3d 3, 9, 2000-Ohio-109, 740 N.E.2d 656, 662. We find, for the reasons that follow, that it is not necessary to determine whether or not R.C. 2745.01 is constitutional.

{¶74} Assuming, arguendo, that this Court found R.C. 2745.01 unconstitutional, we would be required to analyze appellants' claims under the common-law test for intentional torts. See *Kaminski*, supra. We note that the trial court, in its March 27, 2009 Order, in addition to analyzing appellants' claims under the standard set forth in R.C. 2745.01, also analyzed such claims under the common-law test.

{¶75} In order to maintain an action for intentional tort committed by an employer against an employee under the common-law test, 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. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108 at paragraph 1 of the syllabus.

{¶76} There is an extremely high burden of proof to establish an intentional tort of an employer. As stated by the court in *Fyffe*: “To 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.” *Id.* at paragraph 2 of the syllabus.

{¶77} Assuming, arguendo, that appellants are correct that the dangerous condition was “potential contact between the overhead crane, while in operation, and any obstacle in its path” and that appellee Benjamin Steel had knowledge of the same, we concur with the trial court that appellants failed to demonstrate that appellee knew that harm to appellant Clark Jefferson was substantially certain to occur. The substantial certainty standard in an employer intentional tort cause of action is a

significantly higher standard than even gross negligence or wantonness. *Zink v. Owens-Corning Fiberglas Corp.* (1989), 65 Ohio App.3d 637, 584 N.E.2d 1303. The mere knowledge and appreciation of a risk or hazard, something short of substantial certainty, is not intent.

{¶78} In the case sub judice, there was evidence in the record that appellee Benjamin Steel had a lockout/tagout procedure in place and that appellant Clark Jefferson had been extensively trained regarding the same since as early as 2001. Appellant testified during his deposition that he received such training in September of 2004, that he was a person who could perform the lockout/tagout procedure, and that he had his own lockout/tagout kit. He further admitted that he knew how to lockout/tagout and had done so in the past.

{¶79} Appellant, in his brief, notes that during his deposition, he testified, in relevant part, as follows when asked if he was aware of when he was supposed to lockout/tagout:

{¶80} “Q. When were you supposed to lockout/tagout?”

{¶81} “A. Lockout/tagout when the equipment is broken and cannot be repaired.

{¶82} “Q. Any other time?”

{¶83} “A. I can’t answer that.

{¶84} “Q. Why can’t you answer that?”

{¶85} “A. Because that could go either way.

{¶86} “Q. What do you mean?”

{¶87} “A. There could be times yes and there’s times no.” Deposition of Clark Jefferson at 42.

{¶88} As noted by appellee, appellant never testified that he was instructed that the lockout/tagout procedure could only be used when an overhead crane needed to be repaired. Moreover, during his deposition, appellant admitted that he had attended lockout/tagout training in September of 2004 during which documentation was provided which stated as follows: “Always be aware of the overhead cranes – do not raise the scissors lift until you have effectively shut off and lock out the cranes.” Appellant, when asked if this was covered in the safety meeting, testified that it “probably” was.

{¶89} Appellant Clark Jefferson, during his deposition, also testified that he received lockout/tagout training every year and that he had attended training on October 13, 2005, which was shortly before his accident. Appellant further testified that no one had told him not to shut down the cranes and neither John Uhl nor Tim Sinclair had ever told him not to do so. We note that Richard Dale Eldridge, who was employed by appellee as a processor at the time of the accident and who was operating the crane when it struck the scissors-lift, testified during his deposition that either the supervisor or the maintenance man had authority to lock out a crane. Appellant was a maintenance man. Eldridge further testified that he had never seen anyone lock out a crane other than when the crane was being worked on.

{¶90} Appellants, in support of their argument that injury was substantially certain to occur, note that John Uhl, during his deposition, admitted that that written lockout/tagout procedure was not always followed or enforced. Appellants also note that there was evidence that when someone was using a lift, appellee Benjamin Steel, on occasion, used an unwritten procedure of having a second person (a “spotter”) watch for moving cranes rather than using the written lockout/tagout procedure.

{¶91} However, the record is clear that appellant Clark Jefferson, through his own choice, failed to avail himself of either the written lockout/tagout procedure or the unwritten procedure of using a “spotter.” While appellants imply in their brief that John Uhl, who appellant testified usually spotted for him, was responsible for appellant’s accident because he failed to do so on the day in question, there is no evidence that appellant ever asked Uhl to act as a spotter for him. Nor is there evidence that Uhl or anyone else knew that appellant would not be locking out and tagging the cranes and, therefore, would need a spotter. The following testimony was adduced when appellant Clark Jefferson, was asked if he had asked Uhl to be a spotter:

{¶92} “A. Well, he [Uhl] was gone and probably who knows where in what building or where. Usually when I’m in inspections or checking out, he’s there.

{¶93} “Q. You didn’t look for him?

{¶94} “A. No, ‘cause I sat there ‘cause I’m quite sure that he knew I was going there.

{¶95} “Q. And why do you say he knew you were going there?

{¶96} “A. Because we talked about me going over there to look at the door.

{¶97} “Q. And you didn’t wait for him?

{¶98} “A. Oh, yeah.

{¶99} “Q. You didn’t wait till he got there?

{¶100} “A. Well, he never came.

{¶101} “Q. Okay. And you went up anyway?

{¶102} “A. Yeah, after the building was empty.” Deposition of Clark Jefferson at

{¶103} In short, the evidence demonstrates that appellant chose to disregard the lockout/tagout procedure even though he knew that there was no one present nearby to act as a “spotter” for him.

{¶104} Appellants, in an attempt to demonstrate that appellee Benjamin Steel was substantially certain that appellant would be injured, also note that a prior incident occurred on December 15, 2004 at another of appellee’s facilities. The incident is described in Exhibit 4¹ to appellants’ brief in opposition to appellee’s Motion for Summary Judgment as follows:

{¶105} “1) Contractor was using lift to reach the lights he was replacing.

{¶106} “2) Took lift up to the crane where he attached his fall protection – because he was exiting the lift truck.

{¶107} “3) Employee exited lift truck and was on top of the crane replacing lights.

{¶108} “4) Employee forgot that he left the manlift extended – moved the crane and pushed over the manlift – no injuries.”

{¶109} On the accident analysis report, which was attached as Exhibit 4 to appellants’ brief in opposition to appellee Benjamin Steel’s Motion for Summary Judgment, Bob Reed of Reed Builders was listed as the employee. The report further indicated that the contractor was told to be more careful with the equipment and was to replace the lift because of damage to the same.

{¶110} We concur with appellee that this evidence is not sufficient to create a triable issue of material fact because it occurred due to the conduct of a third-party vendor and not because appellee’s employee operated a scissors-lift without first locking out and tagging the crane as he had been instructed to do.

¹ Exhibit 4, an accident analysis report, was submitted by appellee in response to Interrogatory 21.

{¶111} Finally, appellants argue that appellee Benjamin Steel was substantially certain that injury would occur because it violated OSHA safety regulations. We note that appellants do not allege, nor is there evidence, that appellee has been cited by OSHA for any violations.²

{¶112} Moreover, as noted by this Court in *Reising v. Broshco Fabricated Prods.*, Richland App. No. No. 2005CA0132, 2006-Ohio-4449 at paragraph 61: “OSHA citations, standing alone, do not demonstrate an intent to injure.’ *Fleck v. Snyder Brick and Block* (Mar. 16, 2001), Montgomery App. No. 18368; see, also, *Vermett v. Fred Christen and Sons Co.* (2000), 138 Ohio App.3d 586, 603, 741 N.E.2d 954 (refusing to consider an OSHA violation issued after an accident in determining substantial certainty and stating that OSHA does not affect an employer's duty to an employee); *Cross v. Hydracrete Pumping Co.* (1999), 133 Ohio App.3d 501, 507 n. 1, 728 N.E.2d 1104 (stating that the employee's ‘attempt to impute actual knowledge through an OSHA violation is misplaced. An OSHA violation might present evidence of negligence’); *Neil v. Shook* (Jan. 16, 1998), Montgomery App. No. 16422 (‘We conclude that the prior OSHA violations do not manifest the substantial certainty of harm required, but are only one of many factors to be considered.’). An employer's failure to follow proper safety procedures might be classified as grossly negligent or wanton, but does not constitute an intentional tort. *Neil, supra* (citing *Young v. Miller Bros. Excavating, Inc.* (July 26, 1989), Montgomery App. Nos. 11306 and 11307.”

² Appellants submitted an affidavit from an OSHA safety expert to the trial court which stated that there were OSHA violations.

{¶113} Based on the foregoing, we find that appellants have failed to demonstrate that appellee Benjamin Steel knew that injury to appellant Clark Jefferson was substantially certain to occur.

{¶114} Moreover, we find that appellants cannot satisfy the third prong in *Fyffe* because there is no evidence that appellee required appellant Clark Jefferson to perform the allegedly dangerous task. There is no evidence in the record that appellant was required to use the scissors-lift without using the written lockout/tagout procedure. As is noted above, appellant testified during his deposition that he was never criticized by management or his supervisors for locking and tagging out a machine as he had done in the past and that neither John Uhl nor Tim Sinclair ever told him not to shut cranes down. While appellant indicated that John Uhl should have acted as his spotter on the day in question, there is no evidence that appellant asked Uhl to spot for him and/or that Uhl agreed to do so. Rather, the evidence clearly shows that appellant used the lift without a spotter because he did not want to wait for Uhl to arrive.

{¶115} Based on the foregoing, we find that even though it is easier for an injured party to prove an intentional tort under *Fyffe*, supra, than it is under R.C. 2745.01, the trial court did not err in granting summary judgment in favor of appellee Benjamin Steel and Cincinnati Insurance Company and in finding that even if R.C. 2745.01 were found unconstitutional, summary judgment would be appropriate under the common law standard for intentional torts.

{¶116} Appellants' first assignment of error is, therefore, overruled. Appellants' second assignment of error is moot.

CINCINNATI INSURANCE COMPANY'S APPEAL AND CROSS-APPEAL

{¶117} Based on our disposition of appellants' assignments of error, Cincinnati Insurance Company's assignments of error on appeal and cross-appeal are moot.

{¶118} Accordingly, the judgment of the Richland County Court of Common Pleas is affirmed.

By: Edwards, J.
Farmer, P.J. and
Gwin, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/W. Scott Gwin

JUDGES

JAE/d1027

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CLARK JEFFERSON, et al.,	:	
	:	
Plaintiffs-Appellants	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BENJAMIN STEEL CO., INC., et al.,	:	
	:	
Defendants-Appellees	:	
	:	
and	:	CASE NOS. 09 CA 62 & 09 CA 75
	:	
THE CINCINNATI INSURANCE CO.	:	
	:	
Defendant-Appellee/Cross-Appellant	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellants.

s/Julie A. Edwards

s/Sheila G. Farmer

s/W. Scott Gwin

JUDGES