

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WOOD COUNTY

James Forwerck

Court of Appeals No. WD-10-040

Appellant

Trial Court No. 2009CV0335

v.

Principle Business Enterprises, Inc.

**DECISION AND JUDGMENT**

Appellee

Decided: February 4, 2011

\* \* \* \* \*

Stuart F. Cubbon, for appellant.

Michael W. Regnier, Sarah E. Pawlicki and Joseph Dawson, for appellee.

\* \* \* \* \*

HANDWORK, J.

{¶ 1} In this appeal from the Wood County Court of Common Pleas, we are asked to consider the following assignment of error:

{¶ 2} "The trial court erred in granting summary judgment in favor of defendant-appellee where plaintiff-appellant established genuine issues of material fact by which reasonable minds could find liability pursuant to R.C. 2745.01."

{¶ 3} Appellant, James Forwerck, was employed as a line operator by appellee, Principle Business Enterprises ("PBE") at their Dunbridge, Wood County, Ohio, plant. PBE is a manufacturer of, inter alia, disposable adult diapers. James worked on production line 4, the Legacy line, which glues the adult pull-on diapers together. PBE purchased a guard from Curt G. Joa, Inc. ("JOA") for this line. Because PBE requested a guard package which met or exceeded Occupational Safety and Health Administration ("OSHA") regulations, JOA designed and manufactured a six foot, eight inch tall, Plexiglas guard wall that completely surrounds Line 4. The wall has access doors all along the 1,400 foot line which, if opened, shut down the line. There are also two buttons that can be pushed to shut down the line. If the yellow and red emergency button is pressed and the line shuts down, it will take approximately one and one-half to two hours to restart the line. If the red stop button is pushed, the line is down only during that period of time that it takes to fix the problem on that line.

{¶ 4} In addition, PBE placed safety rule signs all over the plant. The sign near Line 4 provides, in material part:

{¶ 5} "Do not operate machinery unless all guards are in place and properly positioned. Guards should only be removed by authorized personnel for repairs or adjustment and then should be replaced before operating machinery. \* \* \*.

{¶ 6} "Never reach into moving machinery.

{¶ 7} "Do not repair or adjust machinery in operation where there is any possibility of injury."

{¶ 8} On April 18, 2007, appellant was working on the line when he noticed a build up of glue on an "insert knife drum." Therefore, he grabbed a six foot tall rolling ladder, climbed up the ladder while holding a rag, sprayed "citrus cleaner" on the rag, leaned over the guard wall, and attempted to clean the excess glue off the drum while it was spinning. As appellant was wiping, "the rag got caught, possibly by glue residue," and his left hand and arm were pulled into the "in-feed belt." When the line stopped, his hand and arm were still trapped. Subsequently, Forwerck was freed by a co-worker, but suffered severe injuries to his left hand and arm.

{¶ 9} On April 3, 2009, appellant filed, pursuant to R.C. 2745.01, an employment intentional tort claim against PBE. Later that same year, this court held that R.C. 2745.01 was unconstitutional. See *Warren v. Libbey Glass, Inc.*, 6th Dist. No. L-09-1040, 2009-Ohio-6686. Appellee filed its first motion for summary judgment on January 19, 2010. Based upon the common law standard applied to employment intentional tort actions, see *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, and its progeny, the trial court determined that questions of fact existed on the issue of whether PBE had knowledge of the fact that a dangerous practice was occurring on line 4. Consequently, the court below denied the motion for summary judgment.

{¶ 10} On March 23, 2010, however, the Supreme Court of Ohio determined that R.C. 2745.01 was constitutional. See *Kaminski v. Metal & Wire Prod. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 2; *Stetter v. R.J. Korman Derailment Servs., L.L.C.*, 2010-Ohio-1027, 125 Ohio St.3d 280, paragraph one of the syllabus. Therefore, under

*Kaminski*, an injured employee cannot recover for an on the job injury unless he or she demonstrates that the employer acted with "a conscious or deliberate intent directed toward the purpose of inflicting an injury." *Id.* at ¶ 100.

{¶ 11} On May 19, 2010, appellee filed its second motion for summary judgment, asserting, that under R.C. 2745.01, appellant failed to show, as required by the statute, that PBE deliberately injured him. In response, appellant relied on R.C. 2745.01(C), alleging that a question of fact exists as to whether PBE deliberately removed an equipment safety guard. Specifically, appellant asserted that PBE "constantly required" its employees to use the six foot rolling ladder "to reach over, to bypass, to subjugate, to remove the safety afforded" by the guard wall.

{¶ 12} After the parties filed replies and supplemental memoranda, the trial court granted PBE's motion for summary judgment. The trial judge found that appellant failed to create a genuine issue of material fact on the issue of whether Alan Clifford, the Vice President of Operations at PBE and manager of the day to day operation of the factory, was even aware of the "dangerous practice" used by the employees on Line 4 in removing excess glue from the insert knife drum.

{¶ 13} Because an appellate court reviews the grant of a summary judgment de novo, the standard applicable to both of appellant's assignment of error is found in Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. The grant of a motion for summary judgment is proper when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party,

reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C) provides, in pertinent part:

{¶ 14} "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. \* \* \* A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, 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, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶ 15} On appeal, appellant relies on R.C. 2745.01(C) to reiterate that a "deliberate process of *requiring* employees to use a ladder to climb over a six foot eight inch guard wall to clean moving machinery may constitute a deliberate removal of a guard pursuant to R.C. 2745.01(C)." (Emphasis added.) While we agree with the law set forth by appellant, we find that Forwerck failed to create a genuine issue of material fact on the issue of whether PBE required appellant and the other employees who either oversaw the production of PBE products, or those who worked directly on Line 4, to abridge safety procedures by using the rolling ladder to reach over the guard wall.

{¶ 16} R.C. 2745.01 provides, in pertinent part:

{¶ 17} "(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.

{¶ 18} "(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.

{¶ 19} "(C) Deliberate removal by an employer of an equipment safety guard \* \* \* creates a irrebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury \* \* \* occurs as a direct result."

{¶ 20} Forwerck relies on his deposition testimony and the deposition testimony of Ernesto Villarreal, Darrel Smith, Chad Grover, and Alan Clifford to argue that because PBE required employees on Line 4 to use the six foot ladder to reach over the guard wall while the line is running, it created a irrebuttable presumption of an intent to injure him under R.C. 2945.01(C). We disagree.

{¶ 21} As applied to the case before us, "deliberate" means: "characterized by or resulting from careful and thorough consideration-a deliberate decision." Merriam-Webster's Collegiate Dictionary (10 Ed. 1996) 305. Thus, the testimony of the aforementioned PBE employees must, at the least, create a question of fact on the issue of whether PBE acted with a conscious, careful consideration of the consequences, that is,

injuries, that could occur by requiring its employees to nullify the safety measure, that is, the guard wall, by using a ladder to clean off excess glue while the insert knife drum was spinning. Based upon the following, we conclude that appellant failed to do so.

{¶ 22} In his deposition, Ernesto Villarreal, appellant's immediate supervisor, stated that the six foot rolling ladder was on the production line for use in "threading the machinery on Line 4 up" when the line was stopped. Villarreal acknowledged that although it was not an approved process to use the rolling ladder to clean glue off the insert knife drum while it was spinning, he utilized it to reach over the top of the guard wall to, using a "rag" and "Right Stuff" solvent, wipe off a build up of hot glue on that drum while it was in operation. Nonetheless, in an affidavit, Villarreal swore that he never told appellant that he was required to clean excess glue off the insert knife drum while it was operating.

{¶ 23} In his deposition, James Forwerck admitted that he was aware of the warning signs posted on Line 4, in particular, the sign warning employees never to reach into moving machinery. He claimed, however, that Villarreal showed him how to clean the excess glue off the insert knife drum while the line was running because it would improve his efficiency numbers, meaning a higher amount of product would be completed on his shift and the amount of scrap would be reduced. Nevertheless, a reading of Villarreal's deposition reveals that despite the fact that he did assert that cleaning off excess glue on said drum while Line 4 was in operation could help maintain

the efficiency on the line, he also stated that you could perform that operation all day and still not maintain your "efficiencies."

{¶ 24} Chad Grover, who was a helper on Line 4 at the time of appellant's accident, stated that he would clean the excess glue off the knife insert drum while the line was in operation by using the rolling ladder and reaching over the guard wall.<sup>1</sup> When asked whether Alan Clifford, the Vice-President of Operations at PBE, was aware of this practice, Grover answered that he did not know whether Clifford was aware of the same. He did, nonetheless, say that "management" knew that it was common practice for workers to reach over the wall to wipe off excess glue. He also testified that after appellant's injury, the line is now stopped and the guard wall is opened for cleaning off excess glue. When asked about efficiencies and their effect on his evaluations and ability to keep his job, Grover replied that they were only a part of his evaluations and that while they play a part in keeping his employment, it would depend on what caused the problem.

{¶ 25} Appellant claims that Darrel Smith, PBE's plant manager, testified in his deposition that the failure of a line operator to make his efficiencies, that is, productions goals, could result in termination or reassignment. Actually, when asked this question, Smith replied that simply failing to "hit their numbers" did not lead to the termination of employees. Rather, Smith indicated that depending on the cause, and if he or she was a good employee, "it could lead to reassignment."

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<sup>1</sup>Appellant also urges that an employee named Kyle was also injured because he was required to bypass the guard wall. According to Grover, Kyle was injured when Grover dropped a "nip roller" and it hit the other man right above the eye.

{¶ 26} Alan Clifford, PBE's Vice President of Operations, was also deposed. He swore that he was not aware of the process used by the employees on Line 4 to clean excess glue off the insert knife drum. He further stated that he would have immediately stopped that practice. In fact, Clifford emphatically declared that removing the excess glue in this manner was against PBE's policy and procedure. He did concede that Villarreal and Smith were considered "entry level management."

{¶ 27} Based on the evidence set forth above, we find that appellant's arguments fail as a matter of law under R.C. 2745.01(C). Specifically, reasonable minds could not only conclude that the fact that (1) PBE promoted higher production levels, to wit, "efficiencies;" and (2) employees and entry level management who were aware of the safety measures to be taken when there were problems on the line bypassed the guard wall to remove excess glue from the insert knife drum do not create a genuine issue of material fact on the question of whether PBE deliberately removed an equipment safety guard. Accordingly, appellant's sole assignment of error is found not well-taken.

{¶ 28} The judgment of the Wood County Court of Common Pleas is affirmed. Appellant, James Forwerck, is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

**JUDGMENT AFFIRMED.**

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.  
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.