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Hoskins v. DaimlerChrysler Corp.
S.D.Ohio,2005.
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United States District Court,S.D. Ohio,Western Division.
Roger HOSKINS, et al., Plaintiffs,
v.
DAIMLERCHRYSLER CORP., Defendant.
No. 3:03cv338.

March 30, 2005.

David Glen Roach, Hochman & Roach, Kevin A. Lantz, Hockman & Roach Co LPA, Dayton, OH, for Plaintiffs.
Katharine T. Talbott, Robert J. Gilmer, Jr., Eastman & Smith, Toledo, OH, for Defendant.

DECISION AND ENTRY SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOC. # 17); JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFFS; TERMINATION ENTRY

WALTER HERBERT RICE, United States District Judge.

***1** The Plaintiffs bring this action to obtain compensation for the harm they suffered when, on January 13, 1999, Plaintiff Roger Hoskins was injured while working at the Defendant's Dayton Thermal Products plant ("Dayton Thermal"), located in Dayton, Ohio.[FN1] In the Complaint,[FN2] Roger Hoskins sets forth, *inter alia*, an intentional tort claim against his employer, the Defendant, based upon *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 572,*cert. denied*,459 U.S. 857 (1982), while his wife, Lynn Hoskins, brings a claim for loss of consortium.

FN1. Many of the acts which give rise to this litigation occurred when Roger Hoskins was employed by Defendant's predecessor, Chrysler Corporation. For sake of convenience, the Court uses "Defendant" throughout this Decision to describe both DaimlerChrysler and Chrysler Corporation.

FN2. The Plaintiffs filed this litigation in the Common Pleas Court of Montgomery County, Ohio. They had initially joined Minster Machine Company as a defendant. After the Plaintiffs had dismissed their claims against Minster Machine with prejudice, the Defendant removed it to this Court on the basis of diversity of citizenship. A copy of Plaintiffs' Complaint is attached to Defendant's Notice of Removal (Doc. # 1).

The basic circumstances giving rise to the incident underlying this lawsuit are not greatly disputed.[FN3] Roger Hoskins was hired by Defendant in 1994, and became a job setter in January, 1998, a position he continued to occupy when the incident giving rise to this action occurred.[FN4] His duties in that position included putting dies in large presses, ensuring that the presses were operating and checking to make certain that the presses were producing quality parts. He would also maintain the presses. For instance, it was his responsibility to clear a press when it became jammed with stock material.

FN3. Since this litigation comes before this Court on Defendant's Motion for Summary Judgment (Doc. # 17), the Court sets forth those circumstances in the manner most favorable to the Plaintiffs, against whom summary judgment is sought.

FN4. Previously, he had worked for Defendant as a welder, coordinator and assembler.

The incident giving rise to this litigation occurred

on Press 17, a large press used to manufacture parts from stock material, which is fed into the press and then shaped into parts when its dies struck or stamped the stock material. That machine is operated in a production mode, under which raw material is fed into it on one side with an automatic feeder, and the press continually stamps out parts that are ejected through a slot on another side. In addition to its production mode, Press 17 has an inch mode, which is used by job setters when they set or adjust dies. To run the press in inch mode, the mode selector switch on the operator's panel must be set to inch mode, and a separate start button on that panel must be depressed. Each time the start button is depressed, the press would open or close, depending upon where it was in its cycle.

Press 17 has a number of safety devices. For instance, that machine has a disconnect lever on its main power panel, which is located in a fenced in area adjacent to the press. The parties disagree over whether the disconnect lever for Press 17 had a hasp on it, which would pop out when the lever was in the "off" position and permitted the lever to be locked with a padlock in that position. When a padlock had been so inserted, a press could not be operated, in either the production or inch mode, until the padlock had been removed and the lever had been returned to the "on" position. When the lever on a press was in the "off" position, without being locked in that position with a padlock, it could not be operated in either mode until the lever had been manually returned to the "on" position. Since the Court construes the evidence in the manner most favorable to the Plaintiffs, it concludes that the disconnect lever on Press 17 was not equipped with such a hasp. The press was also equipped with electronically interlocked safety gates on its front and rear.[FN5] In order to remove the front or rear safety gates, it was necessary to remove safety plugs that were attached to each gate. When either gate was unplugged and removed, the machine could not be operated in the production mode; however, it was possible to run it in the inch mode under those circumstances. In order for a job setter to work on the inside of that press (i.e., to change or to adjust its dies), it was necessary to remove one or both of the safety gates. In addition, Press 17 was equipped with a die block, which, when installed, would prevent the press from closing.[FN6]

FN5. The press is operated from its front side.

FN6. A die block is a metal block that is inserted between the dies.

***2** On January 13, 1999, while Roger Hoskins was working as a job setter at Dayton Thermal, Sharon Holloway ("Holloway"), the co-worker who was operating Press 17, asked him about the quality of a part being produced by that press. He told her to discard the part, because it had scrap in it. After ascertaining that Holloway had forgotten to turn on an air compressor which would have blown scrap away from the press, Roger Hoskins began to clear scrap from the press and its dies, working from the operator's side. His initial efforts, however, did not resolve the problem. At about that time, Robert Green ("Green"), a coordinator, arrived at Press 17, and Roger Hoskins briefed him on the situation. After continuing to clear scrap from the front of the press, Roger Hoskins went around to the back of the machine and opened the rear safety gates, after having removed the plugs therein. He cleared some more scrap from the front of the machine and ran a few more parts through it, only to observe that more scrap had to be removed. As a consequence, he returned to the rear of Press 17, while Green remained on the operator's or front side. After Roger Hoskins had cleared more scrap from the rear of the press and while he was preparing it for operation, Green cycled the press, causing Roger Hoskins to lose the tips of two of his fingers on his right, non-dominant hand and to miss work for three months.[FN7] While he worked on Press 17, Roger Hoskins never placed the disconnect lever in the "off" position, which would have prevented that press from operating, nor did he utilize a die block, which would have prevented the press from closing on his finger tips.

FN7. Roger Hoskins received workers' compensation benefits as a result of the injuries he received on January 13, 1999.

In their Complaint, Plaintiffs set forth four claims against Defendant, to wit: an intentional tort claim on behalf of Roger Hoskins, a claim of negligence on his behalf, a claim of loss of consortium on behalf of Lynn Hoskins and a claim for punitive damages.[FN8] This case is now before the Court on the Defendant's Motion for Summary Judgment (Doc. # 17). As a means of analysis, the Court will initially set forth the standards which apply to all such motions, following which it will turn to the parties' arguments in support of and in opposition to the instant such motion.

FN8. That pleading contains additional claims, which were asserted against Minster Machine Company, the manufacturer of Press 17. Those claims were dismissed before this matter was removed.

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."*Celotex Corp. v. Catrett,* 477 U .S. 317, 322 (1986). Of course, the moving party:

always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323.*See also Boretti v. Wiscomb,* 930 F.2d 1150, 1156 (6th Cir.1991) (The moving party has the "burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial.") (quoting *Gutierrez v. Lynch,* 826 F.2d 1534, 1536 (6th Cir.1987)). The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial."*Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986) (quoting Fed.R.Civ.P. 56(e)). Thus, "[o]nce the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial."*Talley v. Bravo Pitino Restaurant, Ltd.,* 61 F.3d 1241, 1245 (6th Cir.1995). Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment by demonstrating that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed.R.Civ.P. 50).*Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1478 (6th Cir.1989).

***3** Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts."*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).*See also Michigan Protection and Advocacy Service, Inc. v. Babin,* 18 F.3d 337, 341 (6th Cir.1994) ("The plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a jury could reasonably find for the plaintiff."). Rather, Rule 56(e)"requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.,* 477 U.S. at 324. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c). Summary judgment shall be denied "[i]f there are ... 'genuine factual issues that properly can be resolved only by a finder of fact because they may

reasonably be resolved in favor of either party.' " *Hancock v. Dodson,* 958 F.2d 1367, 1374 (6th Cir.1992) (citation omitted). Of course, in determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all *reasonable* inferences in the favor of that party. *Anderson,* 477 U.S. at 255 (emphasis added). If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Wright, Miller & Kane, *Federal Practice and Procedure,* § 2726. In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not ... obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller,* 889 F.2d 108, 111 (6th Cir.1989), *cert. denied,*494 U.S. 1091 (1990).*See also L.S. Heath & Son, Inc. v. AT & T Information Systems, Inc.,* 9 F.3d 561 (7th Cir.1993); *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 915 n. 7 (5th Cir.), *cert. denied,*506 U.S. 832 (1992) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment...."). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

***4** With its motion, Defendant seeks summary judgment on all four claims the Plaintiffs have asserted, i.e., intentional tort, negligence, loss of consortium and their remedial claim for punitive damages. As an initial matter, Defendant argues that it is entitled to summary judgment on all of Roger Hoskins' claims, because he did not bring them in timely fashion.[FN9] When he applied for a job with Defendant in 1994, he signed an employment application, in which he agreed to initiate any lawsuit relating to his employment within six months of the acts giving rise to that litigation.[FN10] It could not be questioned that this lawsuit was filed more than six months after January 13, 1999, when Roger Hoskins suffered the injuries which underlie it.[FN11]

FN9. Plaintiffs have not responded to this branch of Defendant's Motion for Summary Judgment (Doc. # 17).

FN10. A copy of that application is attached to and authenticated by the affidavit of Fred McCarty, which, in turn, is attached to Defendant's Motion for Summary Judgment (Doc. # 17).

FN11. This lawsuit was commenced on December 3, 2002; however, it is a refiling of a previous lawsuit which the Plaintiffs had voluntarily dismissed without prejudice. That earlier lawsuit had been filed on January 12, 2001, far more than six months after the occurrence of the incident giving rise to this litigation. Therefore, assuming for sake of argument that Ohio's savings clause (Ohio Rev.Code § 2305.19) is applicable to the contractual limitation agreed to by Roger Hoskins, this action was initiated nearly 18 months after the six-month period had expired.

Normally, workplace intentional tort claims are governed by the two-year statute of limitations contained in § 2305.10 of the Ohio Revised Code.*Funk v. Rent-All Mart, Inc.,* 91 Ohio St.3d 78, 742 N.E.2d 127 (1991); *Hunter v. Shenango Furnace Co.,* 38 Ohio St.3d 235, 527 N.E.2d 871 (1988). However, the Ohio Supreme Court has held that a contractual provision that shortens the time in which a party has to bring a lawsuit is enforceable, as long as it is not unreasonable. *Colvin v. Globe American Casualties Co.,* 69 Ohio St.2d 293, 432 N.E.2d 167 (1982), *overruled in part on other grounds, Miller v. Progressive Casualty Ins. Co.,*

69 Ohio St.3d 619, 635 N.E.2d 317, 321 (1994); *Universal Windows & Doors, Inc. v. Eagle Window & Door, Inc.*, 116 Ohio App.3d 692, 689 N.E.2d 56, 58-59 (1996).[FN12] In *Thurman v. Daimler-Chrysler, Inc.*, 397 F.3d 352 (6th Cir.2004), the Sixth Circuit held that the an identical six-month limitation contained in another employment application was reasonable and, therefore, enforceable under Michigan law. Under the law of that state, like that of Ohio, only a reasonable contractual limitation that shortens the applicable statute is enforceable. Based upon *Thurman* and in the absence of any argument to the contrary by Plaintiffs, the Court concludes that the six-month limitation contained in the employment application signed by Roger Hoskins is reasonable. Accordingly, the Court sustains Defendant's Motion for Summary Judgment (Doc. # 17), to the extent that motion is predicated upon the argument that Roger Hoskins' claims are barred by the six-month limitation period contained in the employment application he had signed in 1994.

> FN12. In both *Colvin* and *Miller*, the Ohio Supreme Court reiterated that such a contractual provision is enforceable, if reasonable. Those decisions differ regarding the question of what constitutes a reasonable limitation in the context of uninsured motorist coverage.

Nevertheless, this conclusion does not affect Lynn Hoskins' derivative claim of loss of consortium, since she did not sign her husband's application. Indeed, the Ohio Supreme Court has repeatedly held that one spouse's derivative claim for loss of consortium is governed by the four-year statute of limitations contained in § 2305.09 of the Ohio Revised Code, rather than that which is applicable to the substantive claim of the other spouse.*Holzwart v. Wehman*, 1 Ohio St.3d 26, 437 N.E.2d 589 (1982); *Amer v. Akron City Hospital*, 47 Ohio St.2d 85, 351 N.E.2d 479 (1976); *Dean v. Angelas*, 24 Ohio St.2d 99, 264 N.E.2d 911 (1970); *Kraut v. Cleveland Ry. Co.*, 132 Ohio St. 125, 5 N.E.2d 324 (1936).*See also*, *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 585 N.E.2d 384 (1992) (holding that a claim for loss of consortium "is a separate and distinct cause of action that cannot be defeated by a contractual release of liability which has not been signed by the spouse who is entitled to maintain the action"). Accordingly, the Court turns to the substantive claims Plaintiffs have set forth on behalf of Roger Hoskins (i.e., intentional tort and negligence), discussing his negligence claim before turning to his workplace intentional tort claim.[FN13]

> FN13. Of course, a conclusion by the Court, that the evidence fails to raise a genuine issue of material fact with respect to those claims, will constitute an alternative basis for having sustained the Defendant's motion, as it relates to Roger Hoskins' claims, because a derivative loss of consortium claim cannot survive if none of her husband's substantive claims survive.

***5** Plaintiffs claim that Roger Hoskins was injured as a result of the Defendant's negligence. It is axiomatic, however, that an employer which is in compliance Ohio's Workers' Compensation statutes is immune from a negligence action by one of its employees. *See*Ohio Constitution, Art. 2, § 35; Ohio Rev.Code § 4123.74. Herein, Plaintiffs have failed even to allege, much less present evidence, that Defendant is not in compliance with those statutes.[FN14] Therefore, the Court sustains Defendant's Motion for Summary Judgment (Doc. # 17), as it relates to Roger Hoskins' claim of negligence and the derivative, loss of consortium claim of Lynn Hoskins predicated upon Defendant's alleged negligence.

> FN14. Indeed, Plaintiffs did not even respond to Defendant's request for summary judgment on the negligence claim.

Plaintiffs also contend that Defendant is liable to them under a workplace intentional tort theory. In the absence of direct evidence of intent, a plaintiff may prove such a claim by inferred intent. *Fyffe v.*

Jeno's Inc., 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991).[FN15] Therein, the Ohio Supreme Court defined, in paragraph 1 of the syllabus, the "intent" necessary to support such a claim:

> FN15. Plaintiffs have not argued, nor have they submitted evidence in support of the proposition that there is direct evidence of Defendant's intent to injure Roger Hoskins. Accordingly, the Court concludes that the intentional tort claim must be established inferentially, in accordance with the *Fyffe* test.

1. Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed.1984), in order to establish "intent" 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. (*Van Fossen v.. Babcock & Wilcox Co.*[1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)

Defendant has argued that the evidence fails to raise a genuine issue of material fact concerning all three prongs of the three-part test set forth in *Fyffe.*For reasons which follow, the Court concludes that the evidence fails to raise a genuine issue of material fact concerning the second prong of that analytical framework; therefore, it sustains the Defendant's Motion for Summary Judgment (Doc. # 17), without addressing the first or third prongs of the *Fyffe* test.

In paragraph 2 of the syllabus of *Fyffe*, the Ohio Supreme Court elaborated upon that element (i.e., that harm to the employee will be a substantial certainty):

2. 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 [sufficient inferred] intent. (*Van Fossen v. Babcock & Wilcox Co.*[1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph six of the syllabus, modified as set forth above and explained.)

***6** 59 Ohio St.3d at 115, 570 N.E.2d at 1110.

Based upon the affidavit of their expert witness, Gary Robinson ("Robinson"), Plaintiffs contend that the evidence raises a genuine issue of material fact concerning the second-prong of the *Fyffe* test (i.e., that harm to an employee would be a substantial certainty), because Defendant required him to insert his hands into the pinch points of Press 17, without providing adequate guarding that would have prevented the accident from occurring,[FN16] and, further, given that it failed to provide Roger Hoskins with adequate training. In particular, Plaintiffs point to the fact that the machine could be operated in the inch mode, even though the safety gates had been removed.[FN17] In addition, the Plaintiffs point out that Press 17 did not have an interlocking die block (i.e., a block which would have automatically prevented the press from closing when it was being serviced). For reasons which follow, the Court concludes that the evidence fails to

raise a genuine issue of material fact concerning the second-prong of the *Fyffe* analysis.

> FN16. The pinch points of a press is the area between where its dies would meet if it were to close.
>
> FN17. Plaintiffs also place great emphasis on the fact that the evidence raises a genuine issue of material fact as to whether the disconnect lever had a hasp on it which would have permitted a lock to be used to prevent that lever from being moved to the "on" position from the "off" position. It bears emphasis that Plaintiffs have neither presented evidence nor suggested that the accident occurred as a result of someone moving the disconnect lever into the "on" position. On the contrary, Roger Hoskins did not even move the disconnect lever to the "off" position. Therefore, the absence of a hasp to lock the lever in that position is totally unrelated to the accident.

With respect to requiring employees such as Roger Hoskins to place their hands in Press 17, there is no evidence that the dies on that press could be changed, serviced or cleaned, without an employee placing his hands into the pinch points of that press. Therefore, an employee was required to put his hands in the pinch points of that press in order to do his job. That said, however, the Plaintiffs have not presented any evidence that the Defendant required employees to place their hands in the pinch points in the manner remotely similar to that in which Roger Hoskins acted on January 13, 1999. On that date, he placed his hands inside the pinch points on a number of occasions, without having either moved the disconnect lever to the "off" position or using an available die block. If Roger Hoskins had chosen to utilize either of those precautions, the accident would not have been possible. The Defendant did not permit employees to place their hands between the dies of a press, unless one of those precautions had been taken. On the contrary, it disciplined those employees who so acted. For instance, Roger Hoskins admitted during his deposition that, about two months before the accident, he had been disciplined by a plant safety operator for working in the pinch points of Press 17, without having disconnected the power from it, by placing the lever in the "off" position. In addition, he testified that no one instructed him to place his hands in that location of a press to remove scrap while the machine was operating. Therefore, the Court cannot agree with the Plaintiffs that the evidence raises a genuine issue of material fact as to whether Roger Hoskins was taught to place his hands inside the press in the manner that he did on January 13, 1999.

Plaintiffs also argue that Roger Hoskins was not provided adequate training concerning the lock-out/tag-out procedures.[FN18] Simply stated, the evidence fails to raise a genuine issue of material fact concerning that question. On the contrary, when he first became a job setter, Roger Hoskins attended a two-hour training session about the lock-out/tag-out procedure, which consisted of a video-tape presentation, followed by a question and answer period. As a result of that training, Roger Hoskins understood that all presses had a main power disconnect panel, that the lock-out/tag-out policy required that the power to a press be turned off and locked out before an employee worked between its pinch points, that it was the job setters' responsibility to follow the lock-out/tag-out procedure and that this procedure was to protect job setters' safety. Indeed, Roger Hoskins had followed the lock-out/tag-out procedure when he had previously changed dies on Press 17; however, he decided not to use it when cleaning scrap, because it would have wasted a lot of time.[FN19]

> FN18. An employee would lock-out/tag-out a press by moving its disconnect lever to the "off" position and padlocking the lever in that position.
>
> FN19. Roger Hoskins also knew that Press 17 had a die block prior to the accident and how to use it.

***7** Plaintiffs also contend that the evidence raises a genuine issue of material fact on the second-prong of the *Fyffe* test, because of inadequate guarding of Press 17. They point to the fact that one could continue to operate it in the inch mode, even though its safety gates were open, given that it did not have an interlocking die block. It cannot be questioned that Plaintiffs' criticisms of Press 17 in that regard are accurate and that, if the machine either was unable to be operated with a safety gate open or had been equipped with such a die block, the accident involving Roger Hoskins would not have occurred. Nevertheless, the fact that a piece of equipment or process in an employer's facility could be improved is not, in and of itself, sufficient to raise a genuine issue of material fact on the second-prong of the *Fyffe* test. The second-prong of that analytical framework requires a showing that the employer knew to a substantial certainty that harm was likely to occur. Merely showing that such an instrumentality or process could be made more safe does not show that the employer had the requisite knowledge. More importantly, other than Robinson's affidavit, which for reasons discussed below does not raise a genuine issue of material fact, the Plaintiffs have failed to present any evidence establishing that Defendant knew to a substantial certainty that harm to an employee would occur, since Press 17 could be operated with a safety gate open and had not been equipped with an interlocking die block. For instance, Plaintiffs have failed to point to any evidence that any of Defendant's employees had been injured in a similar accident. On the contrary, Green testified during his deposition that, in his more than 30 years working for Defendant, he had not seen anyone else attempt to clean scrap from the rear of a press, like Roger Hoskins did on January 13, 1999.[FN20] In addition, Peter Barroso, the Defendant's safety expert, states in his affidavit that no safety regulation required that Press 17 be prevented from operating with a safety gate open or required it to be equipped with an interlocking die block, thus removing a potential source of information which could have provided the requisite knowledge to Defendant.

FN20. The accident would not have occurred if Roger Hoskins had been cleaning scrap from the front of Press 17, since Green would have realized his hands were in the machine and would not have activated its inch mode.

Plaintiffs also rely upon Robinson's affidavit. In that document, he merely makes the conclusory statement that harm to the employee was a substantial certainty, which is followed by a listing of the alleged shortcomings listed above. There is simply no discussion of how those shortcomings led to his conclusion. That conclusory statement does not raise a genuine issue of material fact, since it fails to comply with Rule 56(e), which in relevant part provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

***8** In *Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 598-99 (6th Cir.1999), the Sixth Circuit applied that part of Rule 56(e) in an action in which the plaintiff, a registered nurse, alleged that the defendant had violated the ADA by failing to accommodate her disability by permitting her to work eight rather than twelve-hour shifts. The District Court granted summary judgment to the defendant, and the plaintiff appealed. The issue facing the Sixth Circuit was whether the evidence raised a genuine issue of material fact on the question of whether the plaintiff was disabled under the ADA. In particular, the plaintiff argued that such a genuine issue of material fact was raised by the statements in the affidavit of her vocational expert, who had opined that the plaintiff's impairments prevented her from engaging in most jobs in the national and regional economies as a registered nurse. The Sixth Circuit rejected the argument, writing that the statements in the vocational expert's affidavit were

"merely conclusory, restating the requirements of the law, and therefore cannot create a genuine issue of material fact sufficient to defeat a motion for summary judgment."*Id.* at 599.Similarly, the conclusory statement in Robinson's affidavit does not raise a genuine issue of material fact on the second prong of the *Fyffe* test. Therein, Robinson merely restates the second prong of that test as a conclusion, following which he lists the shortcomings of Press 17 and Roger Hoskins' training that he has identified. Missing from Robinson's affidavit are the building blocks upon which his conclusion is based. In other words, Robinson has failed to establish a nexus between the conclusion that the Defendant had knowledge that an injury was substantially certain to occur and the shortcomings he has identified. Rather than setting forth such a nexus by explaining how and why the shortcomings concerning Press 17 and Roger Hoskins' training lead to his conclusion that Defendant had knowledge that an injury was substantially certain to occur, which is the second prong of the applicable test, he merely sets forth that conclusion and then lists those shortcomings.

Accordingly, the Court concludes that the evidence fails to raise a genuine issue of material fact on the second-prong of the *Fyffe* analysis. Therefore, the Court sustains Defendant's Motion for Summary Judgment (Doc. # 17), as it relates to the aspect of Lynn Hoskins' loss of consortium claim predicated upon a workplace intentional tort against Roger Hoskins. Of course, the Court's conclusion in this regard supplies an alternative basis for granting summary judgment to Defendant on Roger Hoskins' workplace intentional tort claim.

Finally, since the Court has concluded that the Defendant is entitled to summary judgment on the Plaintiffs' two substantive claims and one derivative claim (i.e., negligence, workplace intentional tort and loss of consortium), it concludes that the Defendant is also entitled to summary judgment on Plaintiffs' remedial claim, i.e., their request for punitive damages.

***9** Based upon the foregoing, the Court sustains Defendant's Motion for Summary Judgment (Doc. # 17). The Court directs that judgment be entered in favor of Defendant and against Plaintiffs.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

S.D.Ohio,2005.
Hoskins v. DaimlerChrysler Corp.
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