From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Can a failure to service a parking brake constitute a "removal of an equipment safety guard" so as to cause the employer to lose workers' compensation immunity under R.C. 4123.74?

Normally, employers are immune from suit for damages by employees arising from a work-related injury or death. R.C. 4123.74. A very limited exception to this immunity is provided under Ohio's "intentional tort" statute, R.C. 2745.01, which creates a cause of action against employers for acts demonstrating an intent to injure their employees. For example, under this statute the deliberate removal of the "equipment safety guard" can be used to infer that the employer intended to injure the employee. Although revisions to the "intentional tort" statute have virtually eliminated most intentional tort actions, the Ninth Appellate District recently considered a case involving a failed safety brake on an asphalt roller, and the question of whether alterations made to the safety brake made by the employer created a genuine issue of material fact as to the "intent to injure."

Seaton v Willoughby, 2018-Ohio-77, involved an employee who was working on a paving project in the course of his employment. While patching pot holes, the employee attempted to move an asphalt roller in order to permit a resident to exit his driveway. Unexpectedly, the roller began to roll down an incline at a high rate of speed. When the employee could not stop the roller, he jumped off the machine, striking his head, and later died from his injuries. A workers' compensation claim for death benefits was filed, followed by a survivorship and wrongful death action against the employer alleging "intentional tort." The employer moved for summary judgment, claiming it was immune from suit under R.C. 4123.74. The employer acknowledged the emergency brake was a "safety guard," but maintained that the "intentional tort" exception to immunity was not applicable to the facts of this case, as it did not remove or intentionally disable the brake. The claimant's survivors opposed the motion, citing the fact that the employer had performed alterations to the brake that rendered it inoperable. The trial court denied the employer's motion for summary judgment, prompting an interlocutory appeal to the Ninth Appellate District.

The Ninth District affirmed, finding issues of fact existed with regard to whether modifications to the parking brake made by the employer amounted to intentionally disabling it. The Court cited deposition testimony of a supervisor, who was present at an inspection where it was found that the brake was engaged but "not tight enough" and therefore not operational. The brake had been repaired several years prior to the accident, record keeping was "horrible," and other alterations had been made to the brake over the years, such as adding an extender to the brake lever, lowering a mounting bracket, and cutting away sheet metal that surrounded the calipers. The supervisor ultimately conceded under oath that "the brakes and calipers were substantially modified … from the time that they were received from the manufacturer." Both parties retained experts who rendered conflicting opinions on the condition of the parking brake, with the claimant's experts stating that alteration of the caliper level effectively disabled the brake. The Court concluded that construing evidence in favor of the non-moving party, there were genuine

issues of material fact as to whether the modifications over the years constituted the "deliberate removal" of the brake. The Court also rejected the argument that there must be a "careful and thorough decision" to rid a piece of machinery of a safety guard, finding that the claimant presented evidence that the employer's modifications to the brake were intentional, creating a genuine issue of fact for trial.

If the reasoning employed in *Seaton* is broadly adopted, it will constitute a significant expansion of the "intentional tort" standard formerly applicable only to employers who deliberately remove safety devices or guards. A failure to service a safety device (or to document same) could result in a finding of "intent to injure," opening employers to substantial tort liability. Employers will have to closely monitor this line of cases going forward.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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