

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

JEROME O. HERLIHY  
JUDGE

NEW CASTLE COUNTY  
COURT HOUSE  
WILMINGTON, DE 19801-3733

Submitted: February 19, 2013

Decided: March 1, 2013

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RE: *Estate of Herbert Mitchell v.*  
*Allen Family Foods, Inc.*  
*C.A. No. 10C-06-005-JOH*

Dear Counsel:

This wrongful death action arises from a fatal injury that allegedly occurred at a silo in Delmar, Delaware on June 4, 2008. On December 14, 2012, this Court granted defendants' motion for summary judgment as to Allen Hatchery, Inc., and Allen's Milling Co. Summary judgment was granted as to Allen's Milling Co., as it was no longer a corporation. Summary judgment was granted as to Allen Hatchery, Inc., and the decedent's claim was thus barred under the exclusivity provisions of 19 *Del.C.* § 2304. Summary judgment as to Allen Family Foods, Inc., was denied, as there are genuine issues of material fact regarding whether decedent was defendant's employee.

Prior to the pre-trial conference, the parties moved, *in limine*, on the following: (1) plaintiff's motion to preclude any evidence of contributory negligence of any co-worker or employer; (2) defendant's motion to exclude the introduction and use of photographs; and (3) defendant's motion to exclude plaintiffs' punitive damages claims.<sup>1</sup> Additionally, defendant moved to bifurcate the trial into separate factual issues of whether decedent was employed by Allen Family Foods, Inc., from the issues of negligence and damages.

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<sup>1</sup> This issue would better have been raised on a motion for partial summary judgment.

At the pre-trial conference on February 4, 2013, the Court instructed plaintiffs to select six pictures for potential admission. Plaintiffs were then instructed to disclose the chosen pictures to defense counsel; any defense objections will be addressed on March 11, 2013. Additionally, this Court denied defendant's motion to bifurcate the trial, and denied the motion to exclude plaintiffs' punitive damages claims. Defendant, at the conference however, raised the additional issue regarding whether it was appropriate to allege punitive damages, even though Allen Family Foods, Inc., filed for Chapter 11 bankruptcy on June 9, 2011, and Allen Harim Foods, LLC, purchased Allen Family Foods, Inc. Additionally, plaintiffs seek to admit evidence of Occupational Safety and Health Administration ("OSHA") safety violations against Allen Family Foods, Inc. Counsel were instructed to file simultaneous submissions to the Court on the comparative negligence issue, the punitive damages question, and the admissibility of the OSHA violations by February 19, 2013.

### *Parties' Contentions*

As to the comparative negligence issue, plaintiffs argue that defendant is not permitted to allege negligence against the decedent's employer, Allen's Hatchery, Inc., or co-workers according to 19 *Del. C.* § 2304, as this Court previously ruled decedent was an employee of Allen Hatchery, Inc., and probably Allen's Milling Co.<sup>2</sup> Plaintiffs further contend that defendant has not alleged expressed or implied indemnification and thus, cannot allege negligence on behalf of decedent's employers. Additionally, plaintiffs contend that evidence of comparative negligence is inadmissible because there is nothing in the record to suggest a superseding or intervening cause.

In opposition, defendant claims that, contrary to plaintiffs' submission, the issue of by whom decedent was employed is a factual question to be determined by the trier of fact. It is defendant's position that decedent was an employee of both Allen Hatchery, Inc., and Allen Family Foods, Inc. and thus, the claims are barred by 19 *Del. C.* § 2304. Defendant additionally argues that barring the discussion of possible comparative negligence would prejudice its ability to effectively present the case. Lastly, defendant submits that plaintiffs' arguments regarding contribution and/or indemnification are irrelevant, as those claims were not asserted in this case.

Plaintiffs' next contention is that punitive damages are available even though Allen Family Foods is owned by a successor corporate entity, as the purpose of punitive damages

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<sup>2</sup> One of the pictures plaintiffs showed at the pre-trial conference was of the decedent wearing a work shirt with an Allen's Milling Co. logo on it. Additionally, another picture was of the decedent wearing a work shirt with an Allen Hatchery, Inc. logo on it.

is to both punish and deter. Plaintiffs rely on *Sheppard v. A.C. and S. Co., Inc.*,<sup>3</sup> in support of their argument. Defendant, on the other hand, argues that plaintiffs have failed to show a degree of identity between Allen Family Foods, Inc., and Allen Harim Foods, LLC, to justify the imposition of punitive damages. In support of its argument, defendant cites to a case in the Northern District of California, a decision in the District Court for the Northern District of Illinois, and a decision the Superior Court of Pennsylvania, all of which were cited in *Sheppard*.

Lastly, Plaintiffs' indicate it seeks to introduce six OSHA violations related to the June 4, 2008 incident and states which specific violations are alleged. Defendant has not filed a submission regarding the admissibility of the OSHA violations and indicated it does not oppose the admissibility of the violations.

### *Discussion*

#### *Comparative Negligence*

Under 19 *Del. C.* § 2304:

Every employer and employee, adult and minor, except as expressly excluded in this chapter shall be bound by this chapter and respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

According to the above provision, “[i]njured [parties] cannot generally bring third party claims against co-employees because co-employees are generally considered to be in the same employ under § 2363(a), and, thus, fall within the definition of employer under § 2304.”<sup>4</sup> This Court previously dismissed Allen Hatchery, Inc., and Allen’s Milling Co. as defendants in this case. The Court held that decedent was an employee of Allen Hatchery, Inc. and that Allen’s Milling Co. was an inactive corporation, but also, may have been decedent’s employer. Therefore, based on the exclusivity provision of the Workers’ Compensation Act, there will be no mention of contributory negligence on behalf of any employee of those two above entities. Notwithstanding this holding, defendant is permitted to introduce any evidence of decedent’s contributory (comparative) negligence.<sup>5</sup>

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<sup>3</sup> 484 A.2d 521 (Del. Super. 1984).

<sup>4</sup> *Grabowski v. Mangler*, 938 A.2d 637, 641 (Del. 2007) (citing *Groves v. Marvel*, 213 A.2d 853, 855 (Del. 1965)) (internal citations omitted).

<sup>5</sup> 10 *Del. C.* § 8132.

As to Allen Family Foods, Inc., this Court denied summary judgment and held that it could not be dismissed, as there was an issue of fact as to whether decedent was an employee of that company. Thus, according to the statute, should the jury find that Allen Family Foods was decedent's employer at the time of his death, the question of the employer's negligence is irrelevant. If however, the jury finds that Allen Family Foods was not decedent's employer, plaintiffs are not precluded from recovering on a negligence claim. Further, this keeps open the question of whether the decedent was contributorily negligent.

The interplay of the various issues will be addressed in a special verdict form. While the order of the questions is yet to be worked out, the questions that the jury must address have to cover all issues. Among other questions, the jury will be asked if: (1) Allen Family Foods, Inc., was negligent; (2) the decedent was contributorily negligent; and (3) he was or was not an employee of Allen Family Foods Inc., at the time of the incident, etc. The parties and the Court can sort out the consequences of the answers post-trial.

### *Punitive Damages*

The standard for the imposition of punitive damages in Delaware is well settled. "In tort actions[,] punitive damages are appropriately imposed in situations where the defendant's conduct, though unintentional, has been particularly reprehensible, *i.e.*, reckless, or motivated by malice or fraud."<sup>6</sup> "If the defendant's conduct reflects a conscious indifference to a foreseeable result[,] punitive damages may be imposed to punish such indifference and to deter others from similar conduct."<sup>7</sup> Punitive damages, however, are not appropriate for the purpose of making the plaintiff "whole."<sup>8</sup> "Thus, even though the amount of compensatory damages claimed may be deemed slight in relation to the value of the entire transaction in which the defendant's conduct was manifested, an award of punitive damages is nonetheless appropriate if the defendant's state of mind meets the applicable standard."<sup>9</sup> The *Jardel* court held the following:

Mere inadvertence, mistake or errors of judgment which constitute mere negligence will not suffice. It is not enough that a decision be wrong. It

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<sup>6</sup> *Littleton v. Young*, 608 A.2d 728, 1992 WL 21125, at \*2 (Del. 1992) (citing *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 529 (Del. 1987)) (internal quotations omitted).

<sup>7</sup> *Id.*

<sup>8</sup> *Jardel*, 523 A.2d at 528.

<sup>9</sup> *Littleton*, 1992 WL 21125, at \*2.

must result from conscious indifference to the decision's foreseeable effect.<sup>10</sup>

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Two significant elements must be present for recklessness to exist. The first is the act itself . . . The second, crucial element involves the actor's state of mind and the issue of foreseeability, or the perception the actor had or should have had of the risk of harm which his conduct would create.<sup>11</sup>

With regard to the narrow issue of whether the imposition of punitive damages is permitted even though Allen Family Foods, Inc., filed for bankruptcy, this Court in *Sheppard*,<sup>12</sup> explicitly addressed the issue. In *Sheppard*, this Court held that the successor corporation could be held liable for punitive damages based on the policy goal of supporting deterrence. In that case, Celotex purchased Penacon, and was in the same business of manufacturing and selling asbestos related building products. In addition, Celotex retained some of the same employees that worked Penacon, the predecessor company.

The facts of *Sheppard* are analogous to this case. Here, like in *Sheppard*, Allen Harim, LLC, the company that purchased Allen Family Foods, Inc., is involved in the same type of business as Allen Family Foods, Inc. Allen Harim Foods, LLC is responsible for poultry processing and by defendant's concession, some of the employees employed by Allen Family Foods, Inc., are now working for Allen Harim Foods, LLC. Additionally, the record is insufficient to indicate that the successor corporation should not be held liable for potential punitive damages. Thus, based on the reasoning in *Sheppard*, permitting plaintiffs' to claim punitive damages in this case is appropriate based on the policy goal of deterrence.

#### *Admissibility of Alleged OSHA Violations*

Under Delaware law, a party's violation of an OSHA safety regulation may be used as evidence of that party's negligence,<sup>13</sup> but the violation does not constitute negligence *per*

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<sup>10</sup> *Jardel*, 523 A.2d at 529.

<sup>11</sup> *Id.* at 530.

<sup>12</sup> 484 A.2d 521 (Del. Super. 1984).

<sup>13</sup> *Duphily v. Delaware Electric. Co-op., Inc.*, 662 A.2d 821, 836 (Del. 1995).

*se.*<sup>14</sup> An expert witness is necessary if opposing counsel contests the OSHA violations.<sup>15</sup> Here, defendant has not contested the alleged violations and therefore, an expert witness is not necessary. Based on the holdings of the Supreme Court of Delaware regarding this issue, plaintiff is permitted to introduce evidence of the six violations as evidence of defendant's negligence. The violations may not, however, be used as evidence of negligence *per se*.

### ***Conclusion***

Based on the foregoing: (1) plaintiffs' motion to exclude any evidence of negligence of co-employees is GRANTED as to Allen Hatchery, Inc., and Allen's Milling Co., and DENIED as to Allen Family Foods, Inc.; (2) defendant's motion to exclude the punitive damages claim is DENIED; and (3) plaintiffs' submission to admit alleged OSHA violations without an expert is GRANTED.

**IT IS SO ORDERED.**

Sincerely,

/s/ Jerome O. Herlihy

JOH/cmk  
cc Prothonotary

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<sup>14</sup> *Toll Bros., Inc. v. Considine*, 706 A.2d 493, 498 (Del. 1998).

<sup>15</sup> *Bianco v. Frank Robino Assoc., Inc.*, 2001 WL 112102, at \*5 (Del. Super. Jan. 31, 2001).