[Cite as *Cope v. Salem Tire, Inc.*, 2002-Ohio-1542.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DAVID J. COPE,	)	
	)	**CASE NO. 2001 CO 10**
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	**OPINION**
	)	
SALEM TIRE, INC.,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS:	**Appeal from Columbiana County, Common Pleas Court, Case No. 99 CV 469.**
JUDGMENT:	**Affirmed.**
APPEARANCES:	
For Plaintiff-Appellant:	**Attorney Robert L. Guehl 217 N. Lincoln Avenue Salem, OH 44460**
For Defendant-Appellee:	**Attorney Frederic E. Naragon 248 E. State Street P.O. Box 317 Salem, OH 44460** **Attorney Lawrence Springer 100 Federal Plaza East Suite 926 Youngstown, OH 44503**

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 20, 2002

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Plaintiff-Appellant, David Cope (hereinafter "Cope"), appeals the trial court's decision granting summary judgment in favor of Defendant-Appellee, Salem Tire, Inc. (hereinafter "Salem Tire"). For the following reasons, we conclude no reasonable mind could, when reviewing the evidence in the light most favorable to Cope, find Salem Tire knew with substantial certainty that Cope was going to be injured when he was trying to mount a tire onto a truck while working for Salem Tire. Accordingly, we affirm the trial court's decision.

{¶2} On April 23, 1996, Cope was working for Steele Tire, which has since merged with Salem Tire, and had been at that job for approximately two weeks. That day a customer, Michael Jablonski, brought in four rims on which he wished to have tires mounted onto his truck. Cope had two weeks of on-the-job training at the time and was assigned the task of mounting the tires on the rims. By this time he had mounted at least a dozen tires in that two week training period. During that time, Cope was never given any safety training, instructed to wear safety glasses although they were available, or given a safety manual. There were safety posters on the walls of the shop.

{¶3} Cope successfully mounted two tires on the truck. When he started to mount the third tire he noticed a crack in the decorative aluminum portion of the rim. He brought the crack to

the attention of his manager, Chuck Moore (hereinafter "Moore"), who told Cope to go ahead and mount the tire. He thought the crack was on the decorative part of the rim and would not interfere with the mounting process. As Cope proceeded with mounting this third tire, he was having difficulty getting the tire to seed, *i.e.* get the tire to settle itself into the rim. Therefore, Moore suggested Cope use a device called a Cheetah. This was a high pressure air tank which was used to mount semi-truck tires onto their rims. To use this device, someone attached an air hose to the tire and Cope used the Cheetah under the edge of the tire. Cope had previously operated the Cheetah a couple of times and was unassisted this time. While Cope operated the Cheetah the tire exploded, apparently from over-inflation. A piece of aluminum broke off the rim and struck Cope in his right eye. Cope has suffered a loss of vision in that eye as a result of this incident.

{¶4} On August 18, 1999, Cope filed a complaint against Salem Tire alleging intentional tort. On February 8, 2001, after discovery and arbitration, Salem Tire filed a motion for summary judgment. Cope then filed his own motion for summary judgment the next day. The trial court granted Salem Tire's motion for summary judgment on March 21, 2001 and dismissed Cope's case.

{¶5} Cope presents two assignments of error for review:

{¶6} "The trial court erred in granting summary judgment in favor of Defendant Salem Tire, as reasonable minds could have concluded, based upon the evidence presented, that Salem Tire committed an intentional tort against its employee David Cope."

{¶7} "The trial court erred in granting summary judgment in favor of Defendant Salem Tire, as the standard used by the trial court is unconstitutional and violative of equal protection, due process, and the open

courts provisions of the Ohio Constitution."

{¶8} Because Cope did not first challenge the constitutionality of the intentional tort standard used by the trial court at the trial court level, he may not argue the issue on appeal. Furthermore, when reviewing the evidence in the light most favorable to Cope, no reasonable mind could find Salem Tire knew with substantial certainty that Cope was going to be injured when he was trying to mount the third tire onto the truck.

{¶9} In his first assignment of error, Cope argues the trial court erred in granting summary judgment for Salem Tire because a genuine issue of material fact exists as to whether Salem Tire knew or should have known with substantial certainty that Cope could be injured by not wearing safety glasses when mounting this tire. Salem Tire argues that although it may have acted negligently or recklessly, no reasonable mind could have found it acted intentionally.

{¶10} When reviewing a trial court's granting of summary judgment, an appellate court applies the same standard used by the trial court. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121, 1122. This court's review is, therefore, *de novo*. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243, 1245. Under Civ.R. 56, summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of nonmovant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Id.* "In order to overcome an employer-defendant's motion for summary judgment on an intentional tort claim, the plaintiff must set forth specific facts showing there is a genuine issue as to whether the employer committed an intentional tort."

Burgos v. Areway, Inc. (1996), 114 Ohio App.3d 380, 383, 683 N.E.2d 345, 346-7 citing *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108.

{¶11} In order to prove an employer has committed an intentional tort against its employee, the employee must demonstrate the following:

{¶12} "(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, supra* at paragraph one of the syllabus.

{¶13} This form of intentional tort should not be confused with negligence.

{¶14} "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 two of the syllabus.

{¶15} Under *Fyffe*, the fact that there is a "high risk" of harm or that "the risk is great" does not necessarily mean the act was intentional. In most instances those acts could be correctly viewed as reckless. *Id.* at 117, 570 N.E.2d at 1111-2. The key is whether there is a substantial certainty of harm. *Id.* In order

to prove this, a plaintiff must show the level of risk-exposure was egregious. *Sanek v. Duracote Corp.* (1989), 43 Ohio St.3d 169, 172, 539 N.E.2d 1114, 1117.

{¶16} After the Ohio Supreme Court decided *Fyffe*, the General Assembly enacted R.C. Chapter 2705 in an effort to limit an employer's liability in intentional tort. The Ohio Supreme Court found this unconstitutional in *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107. Therefore, the *Fyffe* analysis is the appropriate analysis under Ohio law. See *Liechty v. Yoder Mfg., Inc.* (2000), 141 Ohio App.3d 360, 751 N.E.2d 490.

{¶17} The evidence, when looked at in the light most favorable to Cope, could show both that Salem Tire knew of the existence of a dangerous process, procedure, instrumentality or condition within its business operation, *i.e.* the mounting of tires onto a truck, and that Salem Tire required Cope to perform that dangerous task. The real issue on appeal is whether a reasonable mind, examining the evidence in the light most favorable to Cope, could find Salem Tire was substantially certain that Cope was going to be harmed by mounting that third tire.

{¶18} Cope argues two facts support his position that a reasonable mind could have found the tire shop knew with substantial certainty that he would be injured: 1) according to the Goodyear Tire & Rubber Company Retail Stores Division Safety and Environmental Manual, 348 eye injuries in Goodyear retail outlets were reported in 1990 and 2) Moore knew the decorative aluminum rim could break if the tire ruptured from overinflation. Cope argues the question before this court is one of foreseeability and preventability, and urges this court to adopt a negligence standard of foreseeability when determining whether Salem Tire was substantially certain of harm to Cope. However,

Cope misstates and misapplies the law. Even if an injury is foreseeable, there is a difference between probability and substantial certainty. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 308, 736 N.E.2d 517, 536. As *Fyffe* points out, "the mere knowledge and appreciation of a risk--something short of substantial certainty--is not intent." *Id.* at paragraph two of the syllabus.

{¶19} In the present case, it simply cannot be said that the level of risk-exposure to Cope when he mounted this tire was so egregious that it constitutes an intentional wrong. Cope's training consisted of watching more experienced employees perform the task and by the time of the accident he felt he knew how to properly mount a tire at that point as he had done so more than a dozen times. Cope was never instructed he had to wear safety goggles when mounting a tire, however safety goggles were available. Salem Tire knew an overinflated tire could explode, and that if this particular tire ruptured, then it could break the cracked decorative aluminum portion of the rim. Finally, Salem Tire knew that although no eye injuries had occurred in its shop, other people had previously suffered eye injuries while working for other tire shops.

{¶20} These facts illustrate that although it may be fair to say Salem Tire knew with substantial certainty that Cope would be injured *if* this tire did rupture, they are silent as to whether Salem Tire was substantially certain this tire *would* rupture. In other words, even though the fact that the rim may have been cracked could be described as a dangerous condition, it does not appear, viewing the evidence in the light most favorable to Cope, Salem Tire knew with substantial certainty that letting Cope mount a tire on that rim would injure Cope. Cope's first assignment of

error is meritless.

{¶21} In his second assignment of error, Cope argues the trial court's judgment was unconstitutional for a variety of reasons: 1) it violates his constitutional right to open courts by denying him a legal remedy; 2) it violates equal protection because it distinguishes between intentional torts committed by employers from those committed by others; and, 3) it violates due process because the trial court denied him a meaningful right to a remedy. However, Cope failed to raise any constitutional issues before the trial court. It is well settled that a party challenging the constitutionality of the law must raise this argument before the trial court. *Abraham v. Natl. City Bank Corp.* (1990), 50 Ohio St.3d 175, 553 N.E.2d 619, fn. 1. If the party did not do this, a reviewing court need not consider the issue on appeal. *VFW Post 1238 Bellevue v. Ohio Liquor Control Comm.* (1998), 131 Ohio App.3d 591, 723 N.E.2d 161. Although Cope argues the trial court's decision is what is unconstitutional, because the trial court merely applied *Fyffe* to the case at hand, what he is really challenging is the constitutionality of *Fyffe*'s definition of intentional tort. Because he did not raise this issue before the trial court, we are precluded from addressing this assignment of error.

{¶22} For the foregoing reasons, Cope's assignments of error are meritless, and the trial court's decision is affirmed.

Vukovich, P.J., concurs.
Donofrio, J., concurs.