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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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CUYAHOGA COUNTY

BROC ROOT
Plaintiff

STAHL SCOTT FETZER COMPANY, ET AL.
Defendant

Case No: CV-14-822889

Judge: MICHAEL E JACKSON

JOURNAL ENTRY

DEFENDANT THE SCOTT FETZER COMPANY'S MOTION FOR SUMMARY JUDGMENT, FILED 11/12/2014, IS GRANTED AND DENIED IN PART. O.S.J.

Judge Signature

3/24/15
Date

BROC ROOT,	)	Case No. CV 14-822889
	)	
	)	
PLAINTIFF,	)	JUDGE MICHAEL E. JACKSON
	)	
v.	)	
	)	**JOURNAL ENTRY AND OPINION:**
	)	**MOTION FOR SUMMARY JUDGMENT BY**
STAHL/SCOTT COMPANY, et al.	)	**SCOTT FETZER COMPANY**
	)	
DEFENDANTS.	)	

On January 15, 2015 this Court held a hearing on three separate motions for summary judgment filed by each of the three defendants, Stahl/Scott Fetzer Company (Stahl), Scott Fetzer Company (Scott Fetzer), and Marsh USA Inc. and its Cleveland branch, Marsh USA Risk Services (collectively, Marsh). Arguments were presented by counsel for each Defendant and responded to by counsel for Plaintiff, Broc Root (Root).

Root, a temporary employee, suffered a severe injury to his hand on March 19, 2012 while working for Stahl as an operator of a large machine called a "press brake". Scott Fetzer and Stahl are separate legal entities owned by Berkshire Hathaway Company (Berkshire), with Scott Fetzer acting as the de-facto parent company for Stahl and other Berkshire companies. Scott Fetzer acted as the center for safety-related activities and coordinated the distribution of all safety-related information to Stahl and the related entities. Also, Scott Fetzer hired Marsh as an outside consultant with expertise in safety matters to perform safety assessments at all of the Berkshire plants, including Stahl's.

For the reasons stated in this Journal Entry and Opinion, Scott Fetzer's motion for summary judgment is denied regarding Root's claim of negligence, and is granted regarding Root's claim of employer intentional tort. The Court granted Marsh's motion for summary

judgment filed on November 11, 2014 as stated in a separate Journal Entry and Opinion on March 18, 2015. Further, the Court granted and denied in part Stahl's motion for summary judgment regarding Root's claim for intentional employer tort as stated in a separate Journal Entry and Opinion on February 9, 2015.

Law regarding: Motion for Summary Judgment

"A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the non-movant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

Key Facts: Scott Fetzer and Marsh - their involvement with Stahl

Stahl manufactures utility goods and accessories for work trucks at the Wooster plant. To form various sizes of metal parts that are used in these work trucks, various types of press brake machines are used at this facility. These machines press sheet-metal into different shapes and bends by using various patterns, called dies. Root was injured when he was operating one of the press brakes for the first time. When injured, he was working on bending small metal parts, an operation that requires his hand to be very close to the powerful rod or ram that is used to form a small metal piece. Hand tools are made part of the press brake operations, and they are to be used

to protect a press brake operator from incurring the injury sustained by Root. For the reasons explained in the Stahl Journal entry, Root did not use the hand tools while operating this machine, and was severely injured.

Scott Fetzer provides services, including consulting and risk management, to Berkshire companies under a shared services arrangement and charged each company for this service. The risk management function involves interacting with insurance brokers to obtain insurance coverage, as well as acting as a center for safety-related information and coordinated the distribution of all safety-related information to Stahl and the related entities for use by the Berkshire companies.

Scott Fetzer and Marsh worked under a master contract, with Scott Fetzer establishing the parameters of Marsh's safety related services and the number of consulting hours to be provided each year. The price for this service and all of the other terms were stated in a yearly agreement called, "Statements of Work" (SOW).

At Scott Fetzer's request, Marsh conducted OSHA Readiness Assessments (Assessments) at Stahl's Wooster, Ohio facility on a three year cycle. These Assessments were customized based on Scott Fetzer's requests. Marsh conducted these Assessments in June 2006, October 2009, and one was planned for 2012, but the date of that Assessment had not been scheduled when Root suffered his serious injury. In response to the Root's injury, Scott Fetzer asked Marsh to visit the Wooster facility in April 2012, and perform a different type of assessment, one recommended by Scott Fetzer's insurance company, Zurich, as early as 2005.

The Assessments consisted of a one or two day plant walk-throughs during which a Marsh safety engineer, along with Scott Fetzer's manager of tax and risk management, Scott Bellack (Bellack), or other Scott Fetzer employees, would; (1) meet with Stahl plant personnel, (2) examine the machines and the facility to identify safety concerns, and (3) correct unsafe practices when observed. Marsh worked with Stahl at the time of Assessment to correct observed risks that could be immediately rectified. Assessments also included a review of Stahl's written

safety policies, procedures, and history, as well as conversations with Stahl managers who have assigned safety duties.

Thereafter, Marsh prepared a written report describing any OSHA violations observed during the inspections, and provided recommendations to Scott Fetzer to remedy the violations. If Scott Fetzer accepted these recommendations then Stahl would implement those approved recommendations because Stahl maintained day-to-day control of the operations of its Wooster facility, including the: (1) hiring, assignment, training, and supervision of personnel, (2) maintenance of equipment, and (3) enforcement of workplace safety policies and procedures. Thereafter, Scott Fetzer verified if Stahl implemented these improved recommendations.

The 2006 inspection by Marsh identified machinery/equipment missing guards on at least one type of machine, and emphasized in its summary report that:

> the point of operation of machines, whose operations expose employees to injury, shall be guarded. One or more methods of machine guarding shall be provided to protect the operator and the other employees in the machine area from hazards such as those created by point of operations, ingoing nip points, rotating parts, flying chips and sparks.

The warning about machine guarding is consistent with the Stahl Machine Guarding Handbook revised in January 2000 which contained specific procedures and policies Stahl employees were to follow when operating the press brakes. The handbook specifically instructs operators to keep hands free from the commonly called "pinch point" - a point in between moving and stationary parts of a machine where an individual's body part may become caught, leading to injury - and to use hand tools for "feeding, supporting, and removing small parts." Marsh reviewed this handbook and discussed its policies with Stahl employees during its inspections. In addition, between 2003 and 2005 Stahl purchased new hand tools for use on press brake machines, and Stahl trained the employees on how to use them.

July 10, 2006, Stahl supervisor Keith Yeater sent an e-mail requesting information concerning press brake guarding to Marsh consultant Donald Esker. On July 17, 2006, Esker responded by including three attachments that provided press brake safety information. He

recommended that the best solution for small parts might be "part holders, grippers, or other devices that can be used to hold the sheet metal so the hands are at a safe distance." A copy of Esker's e-mail was sent to Bellack at Scott Fetzer, and several Marsh employees.

In the fall of 2009, Zürich, insurance company for Scott Fetzer, questioned Scott Fetzer again about its 2005 recommendations that had not been addressed by Scott Fetzer. Zürich recommended that a complete press brake survey be conducted to determine whether all of these machines complied with safety regulations. Bellack responded to Zürich, as follows:

> Adam Novak ([of the Scott Fetzer] Risk Department) and [a] member of Marsh Risk Consulting will be at the Wooster facility the week of October 19, 2009 and will be conducting an OSHA Readiness Assessment. Machine guarding is one of the many areas that will be reviewed. We will issue corrective action where necessary and if this area is one of the areas where corrective action is taken we will report the closing for the open rec [recommendation] directly to Zürich to clear this item.

Bellack testified in his deposition that he expected Marsh's 2006 Assessment would have addressed the recommendation of a press guard survey at the Wooster plant first expressed by Zürich in 2005. In any event, in 2009 Bellack appears to have addressed this issue of conducting a formal machine guarding survey in his response to Zürich, as stated above.

However, Bellack also provided an affidavit after his deposition which made it crystal clear that he had no intention of conducting the Zürich recommended press brake survey. Bellack stated in ¶¶ 16 and 18 of his affidavit[1]:

> ... We never planned to conduct an in-depth guarding survey of press brakes at Wooster in response to Zürich that we would conduct such a survey [the 2005 recommendation].

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[1]The case cited by Scott Fetzer, *Peck v. Bridgeport Machines, Inc.*, 237 F.3d 614, 619 (6th Cir. 2001), does not apply in this case because the statements made by Bellack may be considered an admission, which arguably contradicts his deposition testimony. In the case cited by Scott Fetzer, the person providing the affidavit after the deposition attempted to enhance or bolster the testimony and it is understandable that the affidavit would be inadmissible. However, that is not the situation here where admitting the affidavit enhances issues of material fact.

> Before Broc Root's injury, while I knew what an in-depth guarding audit would entail and that Marsh could perform it, we never felt the need for such an audit to be performed at Wooster or any other BHSD, Inc. facility. Thus, we never expected or asked Marsh to conduct in-depth guarding audit until Mr. Root's injury brought to light the Wooster facility's failure to observe its established reasonable safety and training policies. At that point in time, in April 2012, we asked Marsh to perform an in-depth guarding audit to conduct intensive training of the Wooster employees. ... An in-depth guarding audit was not contemplated by any SOW before 2012. Because an in-depth guarding was deemed necessary in 2012, we negotiated an additional payment for this service with Marsh, as reflected in the amended SOW for 2012 assessment.

Bellack also explained that he gained his knowledge of these safety issues by studying and by participating with Marsh in various safety-related inspections and assessments. Bellack stated in ¶¶ 5, 6, 7, 8 and 9 of his Affidavit.

> When I first took over the position of Dir. of Risk Management at Scott Fetzer in 2004, I made sure to obtain training in various areas of risk management that may pertain to [all the companies]. ... I attended courses offered by various insurers and brokers in the Risk and Insurance Management Society's meetings. I also participated in numerous site inspections with consultants, including Marsh, where I observed and learn their processes and the extensive explanations concerning the applicable standards and regulations.
>
> My review of the safety and claims records at various [Berkshire companies] in 2004-2005 lead me to focus on developing a risk management program that would reduce incidents and the associated costs across [the Berkshire family]. Regulatory citations were also considered.
>
> As part of the redesigned risk management program that I helped Scott Fetzer develop, I retained the services of outside consultants, such as Marsh, periodically to evaluate operation of the [Berkshire companies] to identify open and obvious safety compliance risk and to serve as a resource with respect to safety-related questions from the companies. ... I worked with Marsh to replace the scoring aspect of the system with a "find and fix it" OSHA Readiness Assessment. Essentially, I told Marsh what Scott Fetzer wanted out of a Readiness Assessment, and Marsh delivered precisely what we asked for.

> Specifically, I communicated to the facilities that the focus of the Readiness Assessment was to "find and fix it" with respect to the open and obvious safety compliance issues identified at that particular point in time.
>
> When we rolled the Readiness Assessments out to the [Berkshire companies], I personally went with Marsh to conduct the Assessments, and by 2009 had accompanied Marsh on several visits.

In addition, when Bellack was developing the new risk management programs at Scott Fetzer, he described this role in his deposition, pages 66-67, as "partnering with responsible people at the other brother/sister corporations responsibility, and "assisted the sister corporations to develop their own risk management programs."

Finally, Bellack described the nature of the workforce at the Wooster and other facilities, and described the role played by Stahl and the other companies regarding safety by stating in ¶¶ 11 and 12 of his affidavit:

> The Stahl/Scott Fetzer facilities in the 2004 – 2012 time frame was a very lean operation, with many jobs going unfilled for extended periods of time. The safety function was often treated as an add-on responsibility of the highest level supervisory employees at the particular facility. However, at all times, the [Berkshire] philosophy has been that each operating company was responsible for the safety of its own employees and that each operation was responsible for developing and enforcing safety policies and procedures, and conducting any necessary safety training for its employees. If Marsh provided any recommendations or safety-related information in connection with its inspections … each [Berkshire] company would be responsible for deciding how to react to the recommendations and whether and how to apply the information Marsh provided.
>
> Because Stahl/Scott Fetzer facilities, including the Wooster facility, did not have a significant history of injuries, they were scheduled for Readiness Assessments on a three-year cycle.

Keith Yeater, Director of Operations at Stahl from 2004 -2006, explained the relationship among Stahl, Scott Fetzer, and Marsh. He testified that directives regarding safety issues

typically came through Bellack of Scott Fetzer, and that if Marsh had recommendations, those typically went through Bellack and then to Stahl. Yeater also noted that he was expected to notify Bellack when corrections were made regarding these directives, and that he did not report these corrections to Marsh. With regard to the written policy concerning the press brake, Yeater stated that, to the best of his knowledge, the policy was developed by Stahl, submitted to Scott Fetzer for approval, and if approved, implemented by Stahl.

Scott Fetzer's partnering with Stahl and other Berkshire companies was focused on more than existing safety-related conditions concerning employees and machinery at Stahl and the other Brookshire companies. This partnering relationship also included Bellack's involvement in the approval process of Stahl's purchase of new machinery for its plant equipment. When Stahl wanted to purchase machinery for its plant, it needed the approval of Scott Fetzer. Bellack would evaluate safety-related concerns applicable to the risks of ownership and operation of the machinery before granting approval to that proposed purchase.

On March 19, 2012, about two and one half years after the 2009 Marsh Assessment and before the planned, but unscheduled 2012 Assessment, Root was injured while operating a press brake machine for the first time. He was hired to be a laser machine operator at Stahl through a temporary placement agency in February 2012. He was hired, assigned, trained, and supervised by Stahl employees for the laser position. Marsh did not provide the training or supervision of Root or any other Stahl employees.

On the day Root was injured, a Stahl supervisor offered Root work on a press brake machine because his laser machine was inoperable. Stahl's policy regarding press brake operators was to: (1) only hire experienced press brake operators, and (2) train and supervise the new hire for one to two months on the nuances of Stahl's processes before leaving him on his own. In addition, Stahl's machine guarding handbook required employees to use hand tools when using a press brake to make small parts, which Root was making at the time of injury. This policy forbids operator's hands from coming within four inches of the point of impact, the "pinch point", where the operating ram compresses the metal into the die.

However, as this Court explained in its opinion and journal entry on Stahl's motion for summary judgment issued February 9, 2015, Root was not trained on press brake guarding, was not given a machine guarding handbook, and was not instructed by his Stahl supervisor to use the hand tools to guard his hands when making the small parts. In fact, Root did not know that hand tools even existed, and this supervisor specifically trained and directed Root to form the small pieces by placing his hands within three inches of the point of impact without using hand tools.

Marsh was not at the Wooster plant the day Root was injured. However, Scott Fetzer requested that Marsh investigate this incident. In the course of Marsh's investigation, its representative testified first that hand tools were available, but not at the workstation, and then that tools were not available at all. However, when Marsh inspected the facility in April 2012, the machine was locked out/tagged out – i.e., inoperable. A floor supervisor at Stahl who does not use the machine testified that tongs were available and stored in the other floor supervisor's, Larry Spade's, desk. When asked in his deposition where the hand tools were located when Root was injured, Spade testified that the tools were at the machine at the time of the incident.

Root's Argument that Scott Fetzer is liable for negligence

Root argues that Scott Fetzer was negligent in 13 circumstances as set out in paragraph 48 of his complaint. For the purposes of this motion the Court selected the two that Root highlighted in his brief and oral argument, sub-parts l and m of paragraph 48. Root alleges that Scott Fetzer was negligent in: (l.) "Failing to timely and adequately act on Zürich's recommendations regarding a press brake safety audit [sic: survey],"and (m.) "Communicating the need for a full press brake safety audit [sic: survey] to Marsh ... and confirming that Marsh ... Had performed a full press brake safety audit [sic: survey]." In his brief, Root further explained subpart (m) as: (1) failing to dispel Scott Fetzer's expectations regarding the scope of the OSHA Readiness Assessments, and (2) failing to communicate to Scott Fetzer the limited scope and limitations of the safety consultation services. Root asserts that his negligence claims arise from the common law duty of care, from section 324A of the Restatement (Second) of

Torts, and from the "direct participation" doctrine "holding corporations responsible for meddling in the affairs of their siblings". Root's Reply Brief, pp. 12-17.

Scott's Fetzer's Arguments that it is Not Liable for Negligence

Scott Fetzer disputes each of these allegations and contends that it owes no duty to Root. Scott Fetzer argues that it is not liable for Root's injuries and that its motion for summary judgment should be granted because "Stahl is an independent company that manages its own day-to-day production operations, including all safety related matters." As the de facto parent company, Scott Fetzer, also argues that it is not liable for the acts of its subsidiaries/affiliates absent veil piercing circumstances that are neither alleged or present here." Further, it argues that a parent for an affiliate company is not vicariously liable for negligent wrongdoing by the subsidiary or sister company. Finally, Scott Fetzer notes that under Ohio law, "the corporate form may be disregarded and an individual shareholders held liable for corporate misdeeds when [a] control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, [b] control of the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and [c] injury or unjust loss resulting to the plaintiff from such control and wrongdoing." Scott Fetzer's Brief, pp. 6-8;

Law Applicable to This Case

A. Negligence

The law concerning this fact pattern is not clearly established in Ohio. Accordingly, various cases and statutes have application , as discussed below. The basic law of negligence is: "To make a claim for negligence, a plaintiff must show the existence of a duty, a breach of that duty, and an injury resulting proximately therefrom." *Menifee v. Ohio Welding Prod., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984).

B. Scott Fetzer and Marsh - Their Involvement with Stahl

1. *Durham v. Warner Elevator Mfg. Co.*, 166 Ohio St. 31, syllabus paragraph 2, 139 N.E.2d 10, 13 (1956).[2]

The Supreme Court of Ohio has held, "Where one, under a written contract, undertakes to service and examine the mechanical equipment of another and make a report on the condition thereof, and the equipment is of such a nature as to make it reasonably certain that life and limb will be endangered if such work is negligently performed, he is chargeable with the duty of performing the work in a reasonably proper and efficient manner, and if such a duty is negligently or carelessly performed whereby injury occurs to a blameless person, not a party to the contract and lawfully using such equipment, such injured person has a right of action directly against the offending contractor. Liability in such instances is not based upon any contractual relation between the person injured, and the offending contractor, but upon the failure of such contractor to exercise due care in the performance of this assumed obligations." *Durham v. Warner Elevator Mfg. Co.*, 166 Ohio St. 31, syllabus paragraph 2, 139 N.E.2d 10, 13 (1956).

2. Restatement (Second) of Torts, Section 324A[3]

This section states: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or

[2] Not cited by any party in their respective briefs. See also: *Hendrix v. Eighth & Walnut Corp.*, Ohio St.3d 205, 209, 438 N.E.2d 1149 (1982) (no duty breach where independent contractor was hired to perform limited and temporary repairs, and the record did not show any evidence that the specified work requested was performed in a negligent manner.); *Heneghan v. Sears, Roebuck & Co.*, 67 Ohio App.3d 490, 587 N.E.2d 854, Eighth District Court of Appeals of Ohio (1990) (no duty breach when plaintiff offered no evidence that contractor breached any of its contractual duties under a maintenance agreement with Sears); *Carpenter v. Shape Form, Inc.*, 1990 Ohio App. LEXIS 219, Court of Appeals of Ohio, Twelfth Appellate District (no evidence presented that defendant breached a duty of ordinary care when contracted to make periodic adjustments, and other routine maintenance work on press brake); but see, *Moore v. Covenant Care Ohio*, Inc. 2014-Ohio-4113 (6th Dist.), at ¶ 49 and ¶ 55 (Pharmaceutical company was found to have contracted to fulfill all the pharmaceutical needs prescribed under Ohio law to nursing center, and undertook a duty of reasonable care in providing the agreed services under that contract to the nursing home patients.)

[3] *Merrill v. Arch Coal, Inc.*, 118 F.App'x 37, 44 (6th Cir.2004); *Gaines v. Excel Indus., Inc.*, 667 F.Supp. 569, 571 (M.D.Tenn.1987).

his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform][1] his undertaking, if:

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

3. Stahl's Obligation as an Employer

Under Ohio law, employers, such as Stahl, have a non-delegable duty to provide a safe work environment for their employees. R.C. 4101.11 (mandating that employers "shall furnish a place of employment which shall be safe for the employees therein ... shall furnish and use safety devices, and safe guards ... and shall do everything reasonably necessary to protect the life, health, safety, and welfare of such employees.")[4]

4. Scott Fetzer and Stahl – Defacto Parent and Subsidiary

The parent corporation is not liable for the negligent acts of its subsidiaries under the doctrine of respondeat superior. [Cite Ohio case] However, a parent company, as the shareholder of a subsidiary, may be liable for the wrongdoing of that subsidiary when: (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own (2) control over the corporation by those to be held liable was exercised in a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulting plaintiff from such control were wrong. *Taylor, Inc., Steel, Inc. v. Keeton,* 417 F.3d 598, 605 (6th Cir. 2005) (citing *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St. 3d 274 (1993).

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[4] See also: *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 260, 553 N.E.2d 1038, 1047 (1990) (among the duties considered non-delegable as a matter of law is the "duty to provide employees with a safe place to work."); *Shump v. Firestone Tire & Rubber Co.*, 44 Ohio St. 3d 148, 152, 541 N.E.2d 1040 (1989) ("An employer has a duty to provide a safe workplace for his employees. If an employer provides an employee with a defective machine or tool to use in his work, he has breached his duty . . . as an employer to provide a safe working environment.").

Analysis of Scott Fetzer's Argument that Summary Judgment Should be Granted

To determine what duty, if any, Scott Fetzer owed to Root on March 19, 2012 when he his hand was severely injured while working as a press brake operator for Stahl, this Court must examine the above-mentioned statutes and case law which have different approaches and factors for consideration to resolve the relationship among the parties to this case. As Root's employer, Stahl has a non-delegable duty to provide a safe workplace which follows the applicable governmental safety regulations as well as its own safety policies. In so doing, Stahl has relationships with two separate corporations that provide safety related functions.

One relationship is with Scott Fetzer, and affiliated corporation that acts as the de facto parent to Stahl and other affiliated corporations, all of which are ultimately owned by Berkshire companies. There is a memorandum of understanding and a working agreement that explains the terms and conditions of that relationship. Concerning the matters at issue in this case – safety related matters – Scott Fetzer acted as the center for safety-related activities and coordinated the distribution of all safety-related information to Stahl and the Berkshire entities. Also, Scott Fetzer hired safety experts, such as Marsh, a consultant with expertise in safety matters to perform safety assessments at all of the Berkshire plants, including Stahl's. These safety related services provided by Scott Fetzer were not free to Stahl or the other Berkshire companies. Scott Fetzer charged Stahl for these services, as it did other Berkshire entities, and Stahl paid its share of these expenses based on the amount of safety-related work provided to Stahl.

The other relationship was with Marsh and its experts who performed safety assessments and provided other related safety information to Stahl with the approval of Scott Fetzer. Charges attributable to Marsh's work at Stahl was paid by Stahl to Scott Fetzer, with Scott Fetzer paying Marsh for rendering its services to Berkshire companies.

The first issue for consideration is whether the Supreme Court of Ohio's ruling in *Dunham* applies to the Stahl - Scott Fetzer - Marsh relationship., This Court has already determined that Marsh has a duty to Root under the Supreme Court of Ohio's holding in the

Durham case, although no breach of that duty occurred as stated in that journal entry and opinion granting Marsh's motion for summary judgment.

As to Scott Fetzer, this Court determines that Scott Fetzer has a similar duty to Stahl based on the *Durham* case because all the factors are also present that allow Root to assert a negligence claim against Scott Fetzer. There was a written agreement between Stahl and Scott Fetzer that included the safety measures concerning equipment, and Root was authorized to operate the equipment when he was injured. Further, the equipment was of such a nature as to make it reasonably certain that life and limb will be endangered if such work was negligently performed, then Scott Fetzer is chargeable with the duty of performing the work in a reasonably proper and efficient manner. This duty arises not out of their agreement, but rather an alleged breach of Scott Fetzer's duty. By entering into such agreement with Scott Fetzer, Stahl has not delegated any aspect of its non-delegable duty to provide safety to its employees. Instead, Stahl is seeking assistance with regard to safety matters when it has no ability to deliver those services and quite properly seeks assistance from others to make sure that safety is provided to its employees. If Stahl attempted to provide the duties of Marsh and/or Scott Fetzer that in and in and of itself may be a breach of its duties because Stahl acknowledged that it had no ability to perform these tasks.

The question then becomes whether reasonable minds can come to more than one conclusion regarding a breach of Scott Fetzer's duty. This Court has concluded that reasonable minds could differ in this regard and therefore Scott Fetzer's motion for summary judgment based on the *Durham* case must be denied. There is sufficient evidence to indicate, as stated above, that reasonable minds could reach more than one conclusion as to whether Scott Fetzer breached its duty.

Scott Fetzer in its briefs and during oral argument characterized its role as follows; "to coordinate the logistics of Marsh's [safety-related] services," to provide "certain discrete professional services," but "never purported to provide substantive, safety advice to Stahl on any relevant issue." Scott Fetzer Brief, pp. 2-5. However, Bellack, said that the relationship between Scott Fetzer and Stahl was a "partnering arrangement" and he made a decision as to what type of

safety assessments would be performed by Marsh or any other expert hired by Scott Fetzer for the benefit of Stahl or other Berkshire companies. In fact, Bellack stated in his affidavit that he had no intentions of following the advice of Zürich and its repeated recommendations from 2005-2009 to perform a press brake survey, which Bellack acknowledged was more thorough than the safety inspections he directed Marsh to perform during this time.

It is also significant to note that from 2004 - 2012 Berkshire operating entities such as Stahl had to reduce its workforce and safety matters were reassigned to existing supervisory personnel rather than hire individuals dedicated to that task on full-time basis. At the same time, Bellack was reorganizing the risk management operations to centralize all safety-related matters in the Berkshire companies to be under Scott Fetzer's control. One result of this centralization is a greater reliance by Stahl and other Berkshire companies on Scott Fetzer.

Reasonable minds can come to more than one conclusion concerning whether Scott Fetzer and, in particular, whether Bellack was negligent in repeatedly ignoring recommendations of its insurer, Zürich, to perform a more thorough safety inspection of the press brake operations at Stahl. There is a basis for reasonable minds to reach more than one conclusion that Scott Fetzer breached its duty to Root by repeatedly failing to conduct this more thorough safety inspection as recommended by Zürich.

Analyzing the situation under section 324A of the Restatement (Second) of Torts, Scott Fetzer did undertake to render services to Stahl which it did recognize as necessary for the protection of Root and other employees. In addition, Scott Fetzer is subject to liability to Root for this physical harm that he suffered if that undertaking arises out of any one of three circumstances. First, if Scott Fetzer's failure to exercise reasonable care increases the risk of harm to Root, then Scott Fetzer is liable to him. Second, if Scott Fetzer has undertaken to perform a duty of Stahl to Root and then breached that duty, then similar results occurs. Third, if Stahl or Root relies upon the undertaking by Scott Fetzer, then Scott Fetzer will be liable for the harm suffered. This Court has determined, based on the facts and analysis discussed so far, that at least two of the three circumstances – the first and third situations – exist in this case and, as such, reasonable minds could conclude that Scott Fetzer is legally responsible to Root. There is

at least one basis for reasonable minds to reach more than one conclusion that Scott Fetzer breached its duty to Root by repeatedly failing to conduct this more thorough safety inspection as repeatedly recommended by Zürich. Accordingly, Scott Fetzer's motion based upon section 324A of the Restatement (Second) of Torts is denied. See *Bugg v. Am. Std., Inc.*, 2005-Ohio-2613 (8th Dist.); *Barrow v. Lally*, 1987 Ohio App. LEXIS 5515, 1987 WL 5459 (Ohio Ct. App., Cuyahoga County Jan. 15, 1987) (The Eight District Court of Appeals has entertained arguments asserting negligence claims by applying Section 324A of the Restatement (Second) of Torts; however, it does not appear that any plaintiffs have succeeded on the merits of those claims.)

Further, Root is not seeking to hold Scott Fetzer responsible for his conduct based on the doctrine of respondeat superior. Nor does Root seek to hold Scott Fetzer liable as a shareholder of Stahl based on the case cited by Scott Fetzer's brief, *Taylor, Inc., Steel, Inc. v. Keeton,* 417 F.3d 598, 605 (6th Cir. 2005) (citing Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc., 67 Ohio St. 3d 274 (1993). Each of these theories were advanced by Scott Fetzer as a basis to claim that no liability could be attached to Scott Fetzer because of these doctrines. Since Root is not seeking to hold Scott Fetzer liable on these theories, there is no reason to analyze the applicability of these doctrines. These theories in and of themselves did not preclude Root from asserting the claims analyzed by this Court.

Finally, based on the facts and analysis stated above, there is sufficient evidence that reasonable minds can come to more than one conclusion regarding the proximate causes of Root's injury, including any breach of duty owed by Scott Fetzer to Stahl and to Root. Accordingly, Scott Fetzer's motion based upon the Supreme Court of Ohio's ruling in *Dunham* is denied.

Scott Fetzer's Motion for Summary Judgment:
Employer Intentional Tort

Root, in his Brief in Opposition, filed December 12, 2014 at page 11 unequivocally asserts that "Root was not Scott Fetzer's employee." Scott Fetzer has denied that Root was ever its employee. Because there is no dispute that Root was not employed by Scott Fetzer, Root's claim for employer intentional tort against Scott Fetzer must be dismissed as a matter of law

because he cannot demonstrate a genuine issue of material fact as to essential elements of the claim.

Conclusion

For all the forgoing reasons, Scott Fetzer's motion for summary judgment filed November 12, 2014, is denied in part and granted in part. The Court, having considered all the evidence and having construed the evidence most strongly in favor of the non-moving party, determines that reasonable minds can come to more than one conclusion, and that there are genuine issues of material fact as to the issue of negligence, and that Root is entitled to judgment as a matter of law on this issue. Accordingly, Scott Fetzer's motion for summary judgment on the issue of negligence is denied.

The Court, having considered all the evidence and having construed the evidence most strongly in favor of the non-moving party, determines that reasonable minds can come but to one conclusion, that there are no genuine issues of material fact as to the issue of employer intentional tort, and that Scott Fetzer is entitled to judgment as a matter of law on this issue. Accordingly, Scott Fetzer's motion for summary judgment on the issue of employer intentional tort is granted; Root's claim for employer intentional tort against Scott Fetzer is dismissed with prejudice.

IT IS SO ORDERED.

DATED: 3/24/15

JUDGE MICHAEL E. JACKSON

THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.