

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY**

KAREN REIER	:	
	:	Appellate Case No. 09-CA-13
Plaintiff-Appellant	:	
	:	Trial Court Case No. 07-779
v.	:	
	:	(Civil Appeal from
JACKSON TUBE SERVICE, INC., et al.	:	Common Pleas Court)
	:	
Defendant-Appellees	:	
	:	

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OPINION

Rendered on the 13th day of November, 2009.

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FAIN, J.

{¶ 1} Karen Reier appeals from a summary judgment rendered against her on her intentional tort claim against her employer, Jackson Tube Service, Inc. Reier contends that summary judgment was inappropriate, because she presented evidence for each of the elements of a claim of employer intentional tort.

Specifically, she claims that a reasonable juror could find from the evidence presented that Jackson Tube had knowledge of the existence of a dangerous condition that was substantially certain to cause her injury and that the company required her to expose herself to that danger in performing her work.

{¶ 2} We agree. Consequently, the judgment of the trial court is Reversed and this cause is Remanded for further proceedings.

I

{¶ 3} In May, 2004, Reier was working as a “work cell operator” of an automated tube straightener, when she sustained an amputation injury to her finger. At the time of the accident, Reier had been employed, performing the same job task, for four years. The machine was purchased new by Jackson Tube in 1999. It was installed as manufactured without the removal of any safety features.

{¶ 4} The metal tubing that is run through the straightener is first heat-treated in a furnace. The tubing is then transported in bundles, of about sixty tubes, over to the straightener, where it is laid on belts. The tubing bundles are bound by metal bands, which are removed. The work cell operator then raises the belts, and the tubes are lowered onto a table. The work cell operator would “flip” the tube into position for the machine’s “flippers” to grab the tubes.¹ The flippers would then lower and pick up one piece of tubing and flip it into the loading trough. From there, the machine automatically fed the tubing into the straightener.

¹ Apparently the tubes are not smooth enough to roll at this point, so that the operator is required to flip, rather than to roll, the tubes into position.

{¶ 5} On the date of Reier's injury, the flippers picked up a piece of tubing and, rather than flipping it into the trough, flipped the tube toward Reier. Reier's hand was pinned between the end of the tube and the straightener, and her finger was severed.

{¶ 6} Reier filed an employer intentional tort action against Jackson Tube. Following discovery, Jackson Tube filed a motion for summary judgment, in which it argued that Reier had failed to present evidence of all of the elements of an employer intentional tort. Specifically, Jackson Tube argued that Reier failed to demonstrate that the company had knowledge of a dangerous condition involving the straightener machine. The company cites the deposition testimony of six company employees, all of whom deny any knowledge of any dangerous condition resulting in a tube flipping out at an employee. The company further claims that Reier admitted that no one else had been injured as she described, when she testified that "nothing happened like it did me."

{¶ 7} Jackson Tube also argued that Reier failed to establish that the company had knowledge that the dangerous condition was substantially certain to result in injury. In support, the company argues that the machine "averages 4,200 tubes per day, operates approximately 250 days per year, and has been operating since 1999 * * * and Reier's injury is the only one involving that machine flipping a tube out towards a worker." Jackson Tube also notes that no safety devices were ever removed from the machine, which had emergency stop features with a procedure in place whereby an operator could lock out and tag out an unsafe machine.

{¶ 8} Finally, Jackson Tube claimed that Reier failed to show that she was required to continue working on the machine. The company again cites to its lock-out, tag-out procedures that were in place to shut down a machine that an operator felt was a danger. Furthermore, the company claims that employees could approach any supervisor regarding the need to shut down a machine. As noted by Jackson Tube, Reier even testified that she regularly shut the machine down when she felt there was a problem.

{¶ 9} Conversely, Reier filed a memorandum in opposition to the motion for summary judgment, in which she claimed, as will be discussed below, that she had established a genuine issue of material fact with regard to all the elements of an employer intentional tort. The trial court rendered summary judgment against Reier, from which she now appeals.

II

{¶ 10} Reier fails to assert an assignment of error. We will construe the four issues raised in her appellate brief as an assertion of the following assignment of error:

{¶ 11} “THE TRIAL COURT ERRED BY RENDERING SUMMARY JUDGMENT IN FAVOR OF JACKSON TUBE.”

{¶ 12} Reier contends that the trial court should not have rendered summary judgment against her, because the record demonstrates a genuine issue of material fact with regard to the establishment of an employer intentional tort.

{¶ 13} We review a summary judgment on a de novo basis, and note that a trial court should render summary judgment only when the evidence “show[s] that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Civ.R. 56(C); *Cohen v. G/C Contracting Corp.*, Greene App. No.2006 CA 102, 2007-Ohio-4888, at ¶ 20.

{¶ 14} With this standard in mind, we turn to the law regarding the establishment of an employer intentional tort. In order to prove an employer intentional tort, an employee must meet the three-part test set forth by the Ohio Supreme Court in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115. The *Fyffe* test requires a person alleging an employer intentional tort to demonstrate the following: (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. *Id.*

{¶ 15} With respect to the first prong of the *Fyffe* test, i.e., whether Jackson Tube had been aware of a dangerous condition within its operation, we conclude that Reier presented sufficient evidence to survive summary judgment. In her deposition testimony, Reier claims that there were repeated instances when the load of tubes placed upon the belts at the straightening machine were unevenly stacked; specifically, some of the tubes would be jutting length-wise out of the main portion of the bundle. Furthermore, she testified that this uneven loading resulted in the tubes being flipped out of the trough and back toward the operator. Reier testified that she notified her supervisor on three separate occasions that the tubes were being placed

unevenly on the belts leading to the flippers and trough and that “somebody is going to get hurt because * * * [i]t would flip it [the tube] over [every] which way sometimes and the incident with me it caught the end of the tube and brought it back straight back at me.” She was told to keep the machine running, and to be careful.

{¶ 16} Reier also contends that the company had notice of the dangerous condition because of a prior, similar accident that resulted in an injury to Deanne Meed, another Jackson Tube employee. According to Meed’s deposition, she had also operated the straightening machine. Meed testified that prior to Reier’s accident, she had experienced problems with tubes flipping out of the machine toward her. She further testified that on the date of her injury, a tube that was sticking out farther than the rest of the bundle of tubes was flipped up by the flippers and smashed her hand between the tube and the machine. Meed suffered only bruising to her hand. Meed testified that the only thing that caused her injury was the fact that the tube was extended past the rest of the bundle. She testified that she reported the injury.

{¶ 17} From our reading of the depositions of Reier and Meed, it appears that the description of the dangerous condition and resulting flipping of the tubes by the flippers was similar, if not identical. In other words, from the deposition testimony, both employees testified that their accidents were the result of tubes extending out past the main bundle of tubes causing a tube to be flipped in an unpredictable direction.

{¶ 18} A person with more expertise or insight into the machine that caused the injury in this case might interpret the descriptions given in these depositions

differently, but we must view the deposition testimony in a light most favorable to Reier, with all reasonable inferences in her favor resulting therefrom, for purposes of determining whether summary judgment was appropriate. Applying that standard, we conclude that Reier has presented sufficient evidence to overcome the motion for summary judgment with regard to the first prong of the *Fyffe* test.

{¶ 19} The next prong of the *Fyffe* test involves the question of whether Jackson Tube had knowledge that this dangerous condition – the uneven stacking of the tubes and resulting unpredictable flipping – was substantially certain to cause harm to Reier. Substantial certainty of harm requires much greater proof than negligence or recklessness. *Van Fossen v. Babcock & Wilcox Co.*, 36 (1988), Ohio St.3d 100. The Supreme Court of Ohio has stated:

{¶ 20} “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.” *Fyffe*, 59 Ohio St.3d at paragraph two of the syllabus, citing *Van Fossen*, 36 Ohio St.3d at paragraph six of the syllabus. This court has stated that simply knowing that an employee is at risk is insufficient; the employer must be virtually certain that an employee will be injured. *Spates v. Richard E. Jones & Assoc.* (July

12, 1995), Montgomery App. No. 15057, citing *Van Fossen*, 36 Ohio St.3d at 116. Of course, substantial certainty does not mean that it must be substantially certain that an injury will occur today or tomorrow; it is enough that injury is substantially certain to occur at some time during the expected life of the machine.

{¶ 21} Jackson Tubing contends that the prior accident involving Meed was unrelated to, and completely different from, Reier's accident, and that the company had no knowledge that Reier's injury was substantially certain to occur. In support, the company claims that when asked whether anyone else was "injured on the machine as she described she was injured, *** she responded 'nothing happened like it did me'." However, our reading of this statement indicates that it could be construed as relating to the amputation injury rather than to the actual mechanics of how the accident occurred. In other words, when Reier responded to this question, it appears that she was merely noting that no one else had suffered an amputation injury. This interpretation of the testimony is plausible given that Reier presented her testimony and Meed's indicating that the same process caused similar injuries.

{¶ 22} The company also notes that the machine had a good track record of running tubes without incident. However, we again note that the company had notice that Meed had a similar injury apparently caused by the same problem with uneven stacking of the pipes. Furthermore, Reier testified that she notified the company of the problem but the company did nothing to ameliorate it. There is testimony in this record from which a reasonable person could conclude that the company had knowledge of the uneven stacking of the tubes as well as the fact that the uneven stacking was substantially certain to cause a tube to flip out toward an

employee and cause injury.

{¶ 23} Finally, we conclude that the record demonstrates an issue of fact whether Reier was required to continue to perform her work despite the dangerous condition. Reier testified at her deposition that she complained to her supervisor on several different occasions about the uneven stacking of the tubing, but was only told to be careful and to keep running the machine. Thus, we find a genuine issue of fact exists with regard to the third *Fyffe* prong.

{¶ 24} Reier's sole, inferred assignment of error is sustained.

III

{¶ 25} Reier's sole assignment of error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

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