[Cite as *Murray v. Express Packaging of Ohio, Inc.*, 2009-Ohio-4312.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KIMBERLY MURRAY, ET AL. Plaintiffs-Appellants -vs- EXPRESS PACKAGING OF OHIO, INC., ET AL. Defendants-Appellees	JUDGES: Hon. Sheila G. Farmer, P.J. Hon. Julie A. Edwards, J. Hon. Patricia A. Delaney, J. Case No. 2009AP020011 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2007CT050360
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 20, 2009

APPEARANCES:

For Plaintiffs-Appellants	For Defendants-Appellees
PETER D. TRASKA WILLIAM J. PRICE 6105 Parkland Blvd. Mayfield Heights, OH 44124	MARK F. FISCHER DONALD L. ROBBINS, JR. 4505 Stephen Circle, NW Suite 100 Canton, OH 44718

For Attorney General

KEVIN DAVIS
12 East Exchange Street
8th Floor
Akron, OH 44308

Farmer, P.J.

{¶1} On July 17, 2003, appellant, Kimberly Murray, was working for appellee, Express Packaging of Ohio, Inc., when she injured her hand while using a "blister press" machine.

{¶2} On May 18, 2007, appellant, together with her husband, Leslie Murray, re-filed a complaint against appellee and John Does, alleging an employer intentional tort and consortium claims. On March 17, 2008, appellee filed a motion for summary judgment. By judgment entry filed November 6, 2008, the trial court granted the motion, finding no basis for reasonable minds to conclude that appellee knew of a patently dangerous condition with the machine and that appellee knew an injury to an employee was substantially certain to occur.[1]

{¶3} Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT ON THE PLAINTIFF'S EMPLOYER INTENTIONAL TORT CLAIM BECAUSE OF EXPLICIT WARNING IN THE OWNER'S MANUAL OF THE TYPE OF INJURY THAT OCCURRED, AND APPELLEE'S CHOICE TO REQUIRE HIGH PRODUCTION WITH SHORT STAFF."

[1]The Ohio Bureau of Workers' Compensation was added as a party plaintiff on February 26, 2008. On January 8, 2009, the trial court granted summary judgment to appellee as to all remaining claims, therefore rendering the November 6, 2008 judgment entry a final appealable order.

I

{¶5} Appellants claim the trial court erred in granting summary judgment to appellee. Specifically, appellants claim reasonable minds could differ as to whether appellee knew a dangerous process or procedure existed and whether appellee knew an injury to an employee was a substantial certainty. We disagree.

{¶6} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶7} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶8} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35.

{¶9} In their brief at 7, appellants argue genuine issues of material fact exist on the following issues:

{¶10} "(1) whether Express knew that its employee had to engage in a dangerous process or procedure, (2) whether the Defendant knew that Ms. Murray was substantially certain to be injured by so doing, and (3) whether Express nevertheless expected Ms. Murray to operate the press alone."

{¶11} The applicable standard in reviewing intentional torts is governed by the three-pronged test set forth in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, paragraph one of the syllabus:

{¶12} "1. Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed.1984), in order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (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. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)"

{¶13} The trial court limited its decision on appellants' failure to provide evidence of prongs one and two of the *Fyffe* test. However, the majority of the trial court's decision centered on prong two, knowledge by appellee that appellant was subjected to

a dangerous process, procedure, instrumentality or condition, and harm to appellant would be a substantial certainty.

{¶14} Appellants argue appellee's acceptance in permitting appellant to work alone on the machine that should have been staffed by two employees was sufficient to establish prong two. Appellants also argue a dangerous instrumentality existed because the safety guard was out of place.

{¶15} In support of its motion for summary judgment, appellee submitted the affidavits of Dawn Brandon, a floor supervisor for appellee, Fred Hartzler, appellee's President, and Daniel Crone, a maintenance employee for appellee. These affidavits set forth the following facts:

{¶16} 1) Only one person was ever required to perform the task appellant was performing when she was injured.

{¶17} 2) No problems with single employee operation or falling behind in work because of lack of help were ever reported.

{¶18} 3) There had never been any reported problems relative to the operation of the subject machine.

{¶19} 4) No problems were reported regarding the safety guards, and the safety guards were properly in place.

{¶20} In response, appellant presented the affidavit of Richard Harkness, Ph.D, P.E., a registered professional engineer. At ¶10 of his affidavit, Mr. Harkness stated "normally two people were assigned" to the machine but on the day of the incident, "the crew was short-handed." These statements were based upon appellant's statements in

her deposition that short staffing caused her to operate the machine alone. K. Murray depo. at 45-47.

{¶21} Based upon a summary judgment standard, we presume the sole operation of the machine by appellant was not the norm.

{¶22} As for the safety guards, appellant stated she was working alone on the machine and "the next thing I knew, my hand was caught in the machine." K. Murray depo. at 39. She stated she was unaware that her hand was "that far under the machine." Id. at 50. In his affidavit, Mr. Harkness opined at ¶12 that appellant's hand was too far under the machine because "the safety gate was improperly adjusted, allowing a hand to enter into the seal head area without stopping the machine."

{¶23} Under a summary judgment standard, all disputed factual issues of evidentiary quality are presumed in the non-moving party's favor. Despite this standard, there is no evidence that appellee knew about any problems with the machine or that a one person operation created a dangerous process and harm would be a substantial certainty.

{¶24} What is factually undisputable is that the machine was set up and working properly at the commencement of the shift. Brandon aff. at ¶6. No previous injuries had ever occurred despite the one person operation. Brandon aff. at ¶7; Hartzler aff. at ¶3; Crone aff. at ¶4.

{¶25} Appellant argues that short staffing is sufficient to impugn knowledge to appellee because appellee created the short staffing. However, appellant's own testimony does not support the fact that one person operation was the cause of her injury. She basically stated she did not know how her hand got too far under the

machine. K. Murray depo. at 50. Mr. Harkness opined appellant's hand was too far under the machine because the safety gate was improperly adjusted. However, there was no knowledge by appellee and/or appellee's supervisory employees that the safety guards were not properly positioned.

{¶26} We concur with the trial court's analysis that appellants have failed to satisfy prongs one and two of the *Fyffe* test.

{¶27} Upon review, we find the trial court did not err in granting summary judgment to appellee.

{¶28} The sole assignment of error is denied.

{¶29} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

__s/ Patricia A. Delaney_____

JUDGES

SGF/jbp 0721

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

KIMBERLY MURRAY, ET AL.	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
EXPRESS PACKAGING OF OHIO, INC., ET AL.	:	
Defendants-Appellees	:	CASE NO. 2009AP020011

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio is affirmed. Costs to appellants.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES