COURT OF APPEALS
THIRD APPELLATE DISTRICT
PAULDING COUNTY

SUSAN R. GIBSON, ADMINISTRATOR OF THE ESTATE OF MIKE E. GIBSON, DECEASED, ET AL. **CASE NUMBER 11-99-14**

PLAINTIFFS-APPELLANTS

v. **O P I N I O N**

DRAINAGE PRODUCTS, INC.

DEFENDANT-APPELLEE

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: March 2, 2001.

ATTORNEYS:

W. PATRICK MURRAY
Attorney at Law
Reg. #0008841
William H. Bartle
Attorney at Law
Reg. #0008795
Steven C. Bechtel
Attorney at Law
Reg. #0020582
111 East Shoreline Drive
P.O. Box 19
Sandusky, OH 44871-0019
For Appellants.

GLENN H. TROTH
Attorney at Law
Reg. #0008420
Norman E. Cook
Attorney at Law
Reg. #0008435
112 N. Water Street
Paulding, OH 45879
For Appellee.

WALTERS, P.J. Plaintiff-Appellant, Susan R. Gibson, individually and as administratrix of the Estate of Mike E. Gibson, and also as parent, natural guardian and next friend of Kayla and Samantha Gibson, appeals the judgment of the Paulding County Common Pleas Court directing a verdict in favor of Defendant-Appellee, Drainage Products, Inc.

This case arises from an incident that occurred on February 21, 1996, which led to the death of Mike E. Gibson. The defendant is a company that manufactures plastic corrugated drainage pipe, and employed Mike Gibson on a full-time basis from March 1994 until his death.

As part of defendant's manufacturing process, plastic chips are fed by a conveyor into an "extruder" that heats the plastic until it becomes malleable, at approximately 500 degrees Fahrenheit. The plastic is then pushed through a "screen changer" that removes impurities, and then through two pipes that force the molten plastic into a die that molds it into a tube shape. At certain intervals the

piping is wrapped with heating coils, which are intended to keep the plastic at a consistent temperature as it passes through the machine. The manufacturing line is approximately sixty feet long.

In 1994, the Occupational Health and Safety Administration (OSHA) issued a citation to the defendant, relating to the defendant's failure to implement a safety procedure known as a "lockout-tagout" for the plastic tubing manufacturing line. Specifically, this procedure required that when maintenance or repair work was to be performed on the manufacturing line, the person who was performing the work was to shut down the power to the line and place a lock on the power switch to prevent the line from being restarted. The relevant OSHA rules indicated that there should be a written "lockout-tagout" policy and training about that policy to ensure that "before any employee performs any servicing or maintenance on a machine or equipment * * * the machine shall be isolated from the energy source, and rendered inoperative." 29 C.F.R. 1910.147(a)(3)(c)(1).

In response to the 1994 OSHA citation, the defendant developed a written "lockout-tagout" policy, but apparently trained only certain supervisory personnel as to its specifics. Other personnel who had not been trained in "lockout-tagout" occasionally performed "minor maintenance" upon the manufacturing line.

On February 21, 1996, defendant's employee, Tim Jewell, who was working as an "operator" of a portion of the manufacturing line, noticed that

molten plastic appeared to be seeping from around the screen changer. He concluded that the bolts joining the pipe in the rear of the screen changer to the pipe in front of it were loose, but a few of the bolts snapped as he was attempting to tighten them. At this point, Jewell contacted the floor foreman, John Meggit, who decided that the proper course of action was to remove and replace all the bolts holding the two pipes and the screen changer together.

Meggitt and Jewell spent twenty-five minutes to an hour removing the broken bolts that held the two pipes and the screen changer together, at which point Meggitt left the work area to find replacement bolts. Before Meggitt left, he instructed Jewell to separate the screen changer from the pipe leading into the die and to scrape the plastic residue from the edges of the changer. The extruder was shut down, and the heaters surrounding the piping closest to the extruder were also shut off. However, the heaters leading into the die were apparently left on. Jewell then disconnected the screen changer from the pipe leading to the die, and began to clean the plastic off, at which point plaintiff's decedent approached Jewell and asked him if he wanted help. Jewell indicated that he did not need Gibson's help.

Mike Gibson, was a "mixer" and did not work directly on the line; he worked in a different but nearby area of the plant. However, testimony in the record indicated that it was not uncommon and in fact might have been expected for employees who had completed their assigned tasks to assist other employees.

Moreover, employees were both expected and required to talk to a supervisor if they ran out of work to do. Gibson's supervisor was John Meggitt, the employee who had been working on the pipeline and had left the area to obtain new bolts prior to the time that Gibson approached.

At approximately the same time as Gibson approached Jewell, maintenance supervisor Randy Bullinger also approached the scene. Shortly thereafter, Bullinger heard a hissing sound, and shouted "duck" or other words to that effect. Tim Jewell testified that he heard a "pop" and a hiss, and knew at that point that molten plastic was about to blow out of one of the open tubes. In fact, plastic did blow out of the pipe connected to the die. Plaintiff's decedent was standing approximately three feet away from the open end of the pipe, and was sprayed directly in the face with molten plastic. He was immediately transported by EMS to the Van Wert County Hospital and subsequently to Parkview Memorial Hospital in Fort Wayne, Indiana. While at the Indiana hospital, Gibson suffered an asthma attack that was allegedly treated in a negligent manner, and he died three days after the initial injury.

On January 21, 1997, plaintiff filed this action in the Common Pleas Court of Paulding County, alleging that Haviland Drainage Products, Inc. had committed an intentional tort against Mike Gibson that resulted in his death. Plaintiff also alleged medical malpractice against the Indiana Hospital and the two Indiana

doctors who had treated Mr. Gibson. However, the claims against the Indiana defendants were dismissed prior to trial due to lack of personal jurisdiction, and plaintiff filed an amended complaint proceeding solely against defendant Drainage Products, Inc. While defendant, Drainage Products, Inc. and Haviland Products, Inc. are separate but related companies, Mike Gibson was employed by Drainage Products, Inc., and plaintiff's amended complaint reflected this fact.

Defendant answered the complaint, discovery commenced, and on October 15, 1997, defendant filed a motion for summary judgment, arguing in part that plaintiff had failed to present sufficient evidence of the defendant's intentional conduct pursuant to the test set forth in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, paragraphs one and two of the syllabus. Plaintiff responded by arguing that it was standard procedure at the plant to work on portions of the line without "powering down" the entire line and that this procedure created an unreasonable danger of spraying hot plastic. Plaintiff also noted that the procedure appeared to be in violation of both the company's own written policy and the OSHA regulations on the "lockout-tagout", and that if the policy regulations had been complied with, Mike Gibson's injuries and his eventual death would not have occurred. On April 27, 1998, the trial court issued a judgment entry overruling the defendant's motion without setting forth any specific reasons for the decision.

The case proceeded to trial on October 25, 1999. At the close of Plaintiff's case, the defendant moved for a directed verdict pursuant to Civ.R. 50, again arguing that the plaintiff failed to present sufficient evidence of an intentional tort by the employer under the standard set forth in *Fyffe.* Although it had previously denied summary judgment on this same ground, the trial court determined that a directed verdict should be granted. This timely appeal followed wherein the plaintiff asserts three assignments of error for our review.

Assignment of Error I

The trial court erred in directing a verdict for defendant at the close of plaintiff's case as plaintiffs did prove a *prima facie* case of an employer intentional tort.

Plaintiff's first assignment of error asserts that the trial court improperly granted a directed verdict because her *prima facie* case contained evidence sufficient to establish that defendant acted intentionally under the test defined by the Ohio Supreme Court in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115:

> **[I]n 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.**

Fyffe, 59 Ohio St.3d 115, at paragraph one of the syllabus. The trial court granted a directed verdict based upon its conclusion that the plaintiff "failed to establish that prior to plaintiff's decedent's injury, the defendant knew of the existence of a dangerous process, procedure, equipment, or condition within its facility that was substantially certain to cause harm to plaintiff's decedent or any other employee."

Civ.R. 50(A)(4) provides the standard for a decision on a motion for directed verdict as follows:

> **When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.**

When addressing a motion for directed verdict, the trial court must neither consider the weight of the evidence nor the credibility of the witnesses. "A motion for directed verdict * * * does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *O'Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus. "The 'reasonable minds' test of Civ.R.50(A)(4) calls upon the court only to determine whether there exists any evidence of substantial probative value in support of [the non-moving party]." *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68-69. Moreover, since a directed verdict presents a question of

law, appellate courts are to review a trial court's judgment on a *de novo* basis. See, *e.g.*, *Nichols v. Hanzel* (1996), 110 Ohio App.3d 591, 599.

Because we find it to be dispositive, we have chosen to focus our attention on the third prong of the *Fyffe* test. As previously noted, pursuant to the final element of the *Fyffe* test, the employee must demonstrate "that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." *Fyffe*, 59 Ohio St.3d 115, at paragraph three of the syllabus. We recognize that an express order from the employer is not the only method by which an opposing party can satisfy the third prong of the *Fyffe* test. *Hannah v. Dayton Power & Light* (1998), 82 Ohio St.3d 482, 487. Rather, this element can be satisfied "by presenting evidence that raises an inference that the employer, through its actions and policies, required the decedent to engage in that dangerous task." *Id.*

It is undisputed that Mike Gibson was never expressly directed to assist in the repair of the extruder pipe. And, based upon the evidence presented in this case, we find that Appellant has failed to raise even the inference of such a requirement.

First, there is no evidence from which the jury could have inferred that the defendant required plaintiff's decedent to be in the area to offer assistance with the problem. Even though various witnesses testified that employees were expected to

assist each other in performing various tasks, the evidence shows that upon Gibson's approach, Jewell stated that he had the situation under control and did not need any help. Notwithstanding, the record indicates that Gibson remained standing in the area, apparently merely observing the repairs, for approximately two to five minutes before the accident occurred.

Similarly, although the evidence also suggests that Gibson would have been required to ask his immediate supervisor for another assignment in the event that he ran out of work at his own station, it is undisputed that John Meggitt, Gibson's supervisor, was not working on the line nor was he in the immediate area at the time of plaintiff's decedent's approach. There is no evidence that Gibson even asked for Meggitt or that he was waiting for Meggitt to return during those few moments that he remained in the area after Tim Jewell informed him that the situation was under control. Consequently, there is no evidence from which the jury could have inferred that Gibson was in the area in an attempt to find his supervisor to ask for more work.

Additionally, we note that this Court has previously found that in order to satisfy the third prong of the *Fyffe* test, the injured employee must have been compelled, as a condition of employment, to participate in the dangerous task. See, *e.g. Myers v. Oberlin Processing, Inc.* (Sept. 27, 1996), Seneca App. No. 13-96-20, unreported, appeal not allowed by 77 Ohio St.3d 1547; *Paxton v. Hench*

(July 22, 1992), Allen App. No. 1-92-36, unreported, jurisdictional motion overruled by 66 Ohio St.3d 1410. In this case, Plaintiff has merely shown that the decedent's employer expected him to inquire about and perform any number of unspecified and varied duties at times when his own tasks had been completed. This general expectation is not tantamount to a *requirement* that Mike Gibson specifically assist in the repair of a manufacturing line without the power to the entire line having been first shut down. While we certainly are not unaware of the tragic results of this accident, we find that reasonable minds could only conclude that Plaintiff's decedent placed himself at the point of danger by choice and not as a requirement of employment.

Based upon the foregoing, we find the trial court's decision to grant the defendant's motion for directed verdict, albeit for different reasons than those addressed herein, was appropriate. Consequently, Plaintiff's first assignment of error is not well-taken and is overruled.

Assignment of Error II

The trial court erred in ruling it was admitting evidence of the surviving spouse cohabitating with another after decedent's death.

Assignment of Error III

The trial court erred in permitting defense counsel to adduce and argue that since OSHA cited the violations as serious, not willful, no employer intentional tort claim existed.

Given our disposition of the first assignment of error, specifically on the third prong of the *Fyffe* test, we find these remaining evidentiary arguments to have been rendered moot.

Having found no error prejudicial to the Appellant herein, in the particulars assigned and argued, the judgment of the trial court is affirmed.

Judgment affirmed.

HADLEY, J., concurs.

SHAW, J., dissenting.

Shaw, J., dissents. Plaintiff's first assignment of error asserts that the trial court improperly granted a directed verdict because her *prima facie* case contained evidence sufficient to establish that defendant acted intentionally under the test defined by the Supreme Court in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115:

> **[I]n 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.**

Fyffe, 59 Ohio St.3d 115 at paragraph one of the syllabus. The trial court granted a directed verdict based upon its conclusion that the plaintiff had "failed to

establish that prior to plaintiff's decedent's injury, the defendant knew of the existence of a dangerous process, procedure, equipment, or condition within its facility that was substantially certain to cause harm to plaintiff's decedent or any other employee" and had thus presented insufficient evidence on the second prong of the *Fyffe* test. Judgment Entry at **1-2. But see *Fyffe*, 59 Ohio St.3d 115, paragraph two of the syllabus. Similarly, the majority now sustains that directed verdict based upon its conclusion that plaintiff's decedent "has failed to raise even the inference" that he was required to engage in a dangerous task, and has thereby failed to present sufficient evidence on the third prong of the *Fyffe* test. Majority Opinion, *ante* at *9. Upon review of the evidence in this case, I am convinced that neither claim is entirely accurate, and accordingly, I respectfully dissent.

With regard to the first two prongs of the *Fyffe* test, there is significant evidence in the record that defendant knew that the extruder line was dangerous and that harm to employees as a result of that danger was a substantial certainty. Plaintiff's safety expert James McCarthy visited the defendant's plant, examined the manufacturing line, reviewed defendant's OSHA file and also the depositions of defendant's employees. At trial, Mr. McCarthy stated his expert opinion that Mike Gibson's injury and subsequent death "was a result of lack of de-energization and lockout of an extruder system there at the plant." Transcript at *270.

Mr. McCarthy also indicated that the defendant's failure to de-energize and failure to comply with lockout—tagout procedures was not in compliance with OSHA regulations, did not meet the standard of practice in the machinery industry and was not in compliance with defendant's own written policy. See *id.* at **280-300. He further testified that in his opinion that it was a "100 percent" certainty that molten plastic would spray from an open end of the line as soon as the cold plastic plugging the line became hot enough, *e.g.*, *id.* at *276-77, and that this known risk was substantially certain to result in serious injury to an employee. See *id.* at 304. He also offered his expert opinion that if defendant had complied with lockout—tagout and de-energization procedure that Mike Gibson would not have been injured. See *id.* at *308. Finally, he testified that the risk posed a substantial certainty of harm to not just one of defendant's employees, but all of them. See *id.* at 306-07.

Mr. McCarthy described as a "hazard" the "hot plastic material that exploded out of the system and sprayed and * * * ultimately killed Mr. Gibson." *Id.* at * 273. He indicated that in safety analysis terms a "risk" is the probability of exposure to a hazard, and noted that "the methodology to analyze the risk is essentially how do you minimize the hazard coming into play, the method for that, to accomplish that. In other words, to keep the plastic from exploding out because it's going to burst through a plug that happens to be in there in a cooled section

with hot plastic behind it. * * * * That is done by de-energizing the system, all power systems to it and locking out and tagging out the system." *Id.* at *274. Mr. McCarthy noted that defendant was aware of the hazard posed by the plastic and was aware of the proper procedures necessary to neutralize that hazard. Mr. McCarthy also observed that it was just a matter of time before an employee was injured by the employer's failure to utilize those procedures:

> **Q: * * * * Let's assume that I – let's assume that I want to fix a machine and I take, I open this pipe up and there's a plug at the end of 4 to 5 feet.**
>
> **A: Okay.**
>
> *** * * ***
>
> **Q: [A]ssuming that there is a plug, 4 to 5 feet of solidified plastic which behind it has molten plastic which is about 500 degrees or so, when you calculate this risk, in light of, in light of the fact that this part was de-energized and this part was not de-energized, could you give us your assessment of that risk?**
>
> **A: As soon as the heat melts the plastic plug, it's going to blow out. There's no question of that. It's just, it's 100 percent it's going to blow out. It's not something if it's going to do it, it's just a function of when it's going to do it. It's going to blow out that plug.**

Id. at **275-76. Mr. McCarthy analogized the mechanism to "putting a snowball in a pipe and running hot water behind it. Eventually, you're going to move that snowball, you're going to dissipate that snowball, and you're going to have in that analogy hot water shooting out." *Id.* at *277. He repeatedly characterized the

likelihood of danger in defendant's plant from the failure to de-energize and lockout the extruder line as "100 percent." *E.g., id.* at *278. "It's a substantial certainty that that's going to go and the danger is going to be, is going to be such that it's going to explode if somebody is in the vicinity." *Id.*

Mike Gibson's foreman John Meggitt admitted that he knew at the time of the accident that if there was a solidified plastic plug that formed "that the molten plastic that's up against the inner edge of the plug is going to melt the plug," and also admitted that anyone who had worked around the plastic manufacturing machine for "awhile" would have known that turning off only some of the heaters would form a hot spot that would eventually spray plastic. See Transcript at *133-34. He also stated that he felt that prior to the accident he had not been properly trained, and that proper training would have included instruction on de-energizing the entire manufacturing line when conducting repairs. See Transcript at **123-25. Finally, he acknowledged that the company had changed its procedures since plaintiff's decedent was injured, and it was now the practice to shut down the entire line and shut off all heaters when conducting repairs. See Transcript at *130.

Similarly, Robert Hughes, who was in charge of safety at the defendant's plant, admitted that it was a "virtual certainty" that given a long enough period of time molten plastic would break through the plug and a person standing in the

front of the plugged pipe would be injured. See *id.* at **44-45. Mr. Hughes also specifically testified that he was aware that a "lockout—tagout" plan and procedures were necessary for the safety of plant employees:

> **Q: And so Products Drainage, Inc. [sic] knew that they were being asked to prepare this written plan and to implement this written plan to protect and keep safe the life and well-being of the employees; is that correct?**
>
> **A: Yes.**
>
> **Q: This plan was very important, wasn't it?**
>
> **A: Yes**
>
> **Q: They were telling you that, look, you violate this plan, you're going to injure or kill people that work for you, isn't that true?**
>
> **A: Yes.**
>
> **Q: You knew that, didn't you?**
>
> **A: Yes.**

Id. at **28-9.

Considering John Meggitt's testimony that anyone who had worked around the machinery would have known that a plastic plug could melt under such circumstances and his testimony that he had not been properly trained, as well as the evidence from plaintiff's expert as to the existence of the hazard of spraying plastic at defendant's plant and the expert's testimony that both the OSHA regulations and defendant's own policy implementing them required the entire line

to be shut down, I must conclude that there is substantial credible evidence upon which a rational trier of fact could conclude that the defendant knew that the manufacturing line was dangerous and that harm was substantially certain to occur if defendant failed to comply with the "lockout—tagout" procedure when conducting repairs of the manufacturing line.

In granting the directed verdict, the trial court appears to have misapplied the second prong of the *Fyffe* test. Whether or not an event is "substantially certain" to occur can often only be shown by circumstantial evidence. Cf. *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, citing *Adams v. Aluchem, Inc.* (1992), 78 Ohio App.3d 261, 264; *Fyffe*, 59 Ohio St.3d 115 at paragraph two of the syllabus. While the trial court correctly observed that "there has to be some notice to [the second prong of the *Fyffe* test]," that notice need not take the form of a previous workplace incident. The substantial certainty test does not establish a "one free bite" rule, and accordingly it was not necessary for the Plaintiff to show that plastic had blown out of the extruder in the same location on a previous occasion. Rather, I believe plaintiff established a question for the jury on these facts by showing that the defendants knew of the risk of the extruder spraying molten plastic, knew why plastic might spray out of the extruder, knew that there were safety procedures associated with the operation of the extruder to prevent the spraying of plastic, and knew that the failure to utilize the safety

procedures carried a serious risk of danger that could result in injury or death to their employees but still disregarded those safety procedures. For these reasons, the trial court's decision to grant a directed verdict based upon the second prong of the *Fyffe* test was improper.

Apparently recognizing that the trial court's analysis was erroneous, the majority has nevertheless sustained the trial court's judgment, based instead on the third prong of the *Fyffe* test. The majority correctly observes that the plaintiff produced no testimony that Mike Gibson was expressly directed to assist Tim Jewell in the repair of the extruder pipe. However, the leading case interpreting the third prong of *Fyffe* does not require such an express direction. In *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, a member of a power plant's volunteer emergency rescue squad suffered an attack of hypothermia and died while attempting a vertical rescue of two men stranded at the four-hundred-fifty foot level of a nine-hundred foot smokestack. The trial court granted summary judgment in favor of the defendant employer on an intentional tort claim, but the Supreme Court reversed:

> **Additionally, sufficient evidence was presented to create an issue of fact whether DP & L required the decedent to perform the rescue. DP & L contends that this requirement is not satisfied because DP & L never ordered the decedent to climb up the ladder to rescue the stranded men. However, under the third element of *Fyffe*, DP & L did not have to expressly order the decedent to make the rescue. Instead, to overcome a motion for summary judgment, *an opposing party***

> ***can satisfy this requirement by presenting evidence that raises an inference that the employer, through its actions and policies, required the decedent to engage in that dangerous task.*** **Here, former plant manager Fred Southworth testified that *DP & L expected the rescue squad to respond to an emergency, and to do so in a safe manner.* Thus, when DP & L sounded the alarm and summoned its own rescue squad into action, reasonable minds could differ as to whether DP & L required the squad to make the rescue.**

Id. at 487 (emphasis added). The Supreme Court's decision in *Hannah* establishes that if the plaintiff presents evidence showing that an employer *expects* an employee to perform a job in a way that is substantially certain to cause harm, the plaintiff has satisfied her burden on the third prong of the *Fyffe* test. Moreover, the Supreme Court has previously "reject[ed] the proposition that a *specific* intent to injure is necessary to a finding of intentional misconduct." *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, 95 (emphasis added).

The majority opinion cites previous cases from this Court in support of proposition that "in order to satisfy the third prong of the *Fyffe* test, the injured employee must have been compelled, as a condition of employment, to participate in the dangerous task." Majority Opinion, *ante* at *10, citing *Myers v. Oberlin Processing, Inc.* (Sept. 27, 1996), Seneca App. No. 13-96-20, unreported, 1996 WL 547920, and *Paxton v. Hench* (July 22, 1992), Allen App. No. 1-92-36, unreported, 1992 WL 180095. However, this position was rejected by the Supreme Court in the *Hannah* case. The employee in that case was a *volunteer*

member of an emergency rescue squad, and died as a result of attempting a dangerous rescue. He was not required to be a member of the squad, nor was he instructed to perform the specific rescue that led to his death. See *Hannah*, 82 Ohio St.3d at 485-86; *id.* at 488-89 (Moyer, C.J., dissenting). Notwithstanding these facts, the Supreme Court determined that the plaintiff had presented sufficient evidence on the third prong of *Fyffe* even though the employee was merely expected, not compelled, to participate in the dangerous task. *Id.* at 487.

Although it is undisputed that Mike Gibson was not directly ordered to assist Tim Jewell, several witnesses testified that it was expected that employees would assist each other in performing job tasks. Specifically, Tim Jewell testified that when he had previously worked as a mixer (the job held by plaintiff's decedent on the day of the accident), it was expected for employees to assist in performing other tasks. See Transcript at *104-05. Robert Hughes testified in both his deposition and at trial that there would have been times in the course plaintiff's decedent's employment that he was "expected to find other work." Transcript at *72.

Moreover, it is perhaps more important to note that Mr. Hughes testified that if Mike Gibson ran out of work, he *would have been required* to ask his foreman for another assignment:

> **Q: Now Mike Gibson, I think you told us, didn't do a single thing wrong, did he?**

A: He left his protected work area.

Q: Did you tell us that your employees were expected to got out and find a job to do if they run out of work?

*** * * ***

A: They were to find work in their own area such as sweep the area, possibly grind scrap material.

Q: Did you ever tell Mike not to leave the area where he was working?

A: No.

*** * * ***

A: Company policy is to clean your area if you do not have anything else to do.

Q: What if your area is clean, then what are you supposed to do?

A: There is a possibility of grinding scrap. *He should have checked with his supervisor to find out if there was anything the supervisor needed him to do.*

*** * * ***

Q: [I]sn't that what Mike did, walk over and say, "Can I help you out?"

A: Yes.

Q: Isn't that what you'd expect of your good employees?

A: *He was to ask his supervisor.*

*** * * ***

Q: Wasn't John Meggitt his supervisor?

> **A: Yes. *John Meggitt wasn't in the plant* from the time the question was asked from my—**
>
> *** * * ***
>
> **Q: *[Mike Gibson] went over to the exact spot where his Supervisor was and said, "Can I help out?" [Mike] didn't know his supervisor wasn't there, did he?***
>
> *** * * ***
>
> **A: *I don't know if he knew he was there or not.***

Transcript, at **45-7 (emphasis added). The majority, however, contends that "the record indicates that Gibson remained standing in the area, apparently merely observing the repairs, for approximately two to five minutes before the accident occurred." Majority opinion, *ante* at *10. Both the majority and the defendant seem to argue that this evidence is sufficient to defeat the plaintiff's claim as a matter of law. I am not persuaded. The two-to-five minute time frame relied upon by the majority appears to come from plaintiff's safety expert, who testified he had obtained that information from reading pre-trial depositions. Trial Transcript at **364-66. However, Tim Jewell's trial testimony indicates that the time frame may have been much shorter:

> **Q: Now Mike came up and said, "Do you need any help?"**
>
> **A: (Witness nods head.)**
>
> **Q: You have to answer out loud.**
>
> **A: Yes.**
>
> **Q: When Mr. Bullinger came in, what did he have to say?**

A: As Randy walked up, if I remember correctly, that's when the accident happened.

Q: Do you recall how long Randy was there before the accident happened?

A: No, I don't.

Q: Did Mr. Bullinger ever say anything to you when he walked up like, is this machine locked out?

A: No.

Q: Did he ask you any questions about it?

A: No, not that I remember. But if I do remember correctly, as he walked up, though, he was still walking up to me, that's when the accident happened.

Q: Now, before the accident happened, did you hear a noise?

A: Yes. I heard like a popping sound, a pop.

Q: Did you hear a hiss at all before the pop?

A: Yes.

Q: This all took place in, what, how long?

A: A couple seconds.

Transcript, at **105-106. It is undisputed that John Meggitt had left the area of the extruder to locate bolts immediately prior to Mike Gibson's approach, and the defendant presented no evidence to refute the foregoing testimony. Based on the testimony of Tim Jewell and Robert Hughes, a jury could reasonably determine

either that Mike Gibson had been in the area in an attempt to find John Meggitt to get more work as Mr. Hughes asserted that he was required to do, or to directly offer assistance with the problem as Tim Jewell indicated he was expected to do. Either determination would satisfy the plaintiff's burden on the third prong of *Fyffe*. Cf. *Hannah*, 82 Ohio St.3d at 485-86.

Taken together with all the other evidence as to plaintiff's decedent's duties, I believe that the foregoing evidence presents a disputed issue of fact upon which reasonable minds could differ as to the third prong of the *Fyffe* test, and should have precluded a directed verdict in this case. Because I believe that the plaintiff has presented sufficient evidence to survive a motion for directed verdict under Civ.R.50, I would reverse the judgment of the Paulding County Court of Common Pleas and remand this case for further proceedings.

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