

[Cite as *Wright v. Campbell Soup Co.*, 2004-Ohio-4164.]

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
HENRY COUNTY**

TERESA WRIGHT

PLAINTIFF-APPELLANT

CASE NO. 7-04-02

v.

CAMPBELL SOUP COMPANY, ET AL.

OPINION

DEFENDANTS-APPELLEES

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: August 9, 2004

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SHAW, P.J.

{¶1} The plaintiff-appellant, Teresa Wright, appeals the April 1, 2004 judgment of the Common Pleas Court of Henry County, Ohio, granting summary judgment in favor of the defendants-appellees, Campbell Soup Co. and Campbell Soup Supply Co., LLC (hereinafter collectively referred to as “Campbell Soup”).

{¶2} In 1988, Wright began working for Campbell Soup as a general laborer. However, in 1993, she changed positions with the company and became an emulsion attendant. As an emulsion attendant, Wright operated the emulsion system, which mixes the cream for its cream-based soups. In addition to mixing the appropriate ingredients in the machine, Wright’s duties included cleaning the system, which was cleaned once every twenty-four hours during the third shift.

{¶3} In order to clean the system, third shift emulsion attendants, such as Wright, removed the lid of the creamer tank and placed a cleaning agent in the tank. The employee would also run hot water into the tank from a water pipe connected to the tank for approximately twenty minutes or longer, depending upon the amount of time the creamer had been operating, and then run steam into the tank from a nearby steam hose until the water temperature reached the boiling point. The attendant would then pump the chemical from the tank up to the system’s top tank and continue running hot water in the lower tank, allowing it to

overflow. In addition, the attendant would hose down other components of the system, such as the hydroflaker, which was used to break down the large frozen chunks of cream that were mixed in the creamer tank. Once the cleaning process was complete, the emulsion attendant would resume making the emulsion for the company's soups.

{¶4} Wright received a medical leave of absence from Campbell Soup in 1995, and remained on medical leave until December of 1998. Upon her return, Wright worked in the filling department until June 11, 1999, when she returned to the position of emulsion attendant. On the night of June 19, 1999, Wright volunteered for a cleanup shift on the emulsion system. Early into her shift, she began the process of cleaning the emulsion system. As she began ascending a ladder located near the creamer tank in order to attend to the hydroflaker, which was located above the creamer tank, the water pipe rose up and sprayed her left leg with hot water. As a result, Wright received a severe burn to her left thigh, which caused later scarring.

{¶5} On June 19, 2001, Wright filed a complaint against Campbell Soup for employer intentional tort. Campbell Soup filed its answer, denying liability, and discovery proceeded. At the conclusion of the discovery stage, Campbell Soup filed a motion for summary judgment, which was granted by the trial court. This appeal followed, and Wright now asserts three assignments of error

The trial court erred in granting Appellees' motion for summary judgment because a genuine issue of material fact exists on

Appellee’s knowledge of the danger in the swing hot water pipe located in Appellee’s plant.

The trial court erred in granting Appellees’ motion for summary judgment because a genuine issue of material fact exists on Appellee’s knowledge that the harm to Appellant caused by the swing hot water pipe was substantially certain.

The trial court erred in granting Appellees’ motion for summary judgment because a genuine issue of material fact exists on [sic] that Appellees required Appellant to use the swing hot water pipe to clean the creamer tank at the emulsion platform.

{¶6} Although Wright asserts three assignments of error, they involve the same issue: Whether the trial court erred in granting summary judgment on Wright’s employer intentional tort claim against Campbell Soup. As these assignments of error are related, we elect to discuss them together.

{¶7} This Court begins its analysis of this issue by noting that the standard for review of a grant of summary judgment is one of de novo review. *Lorain Nat’l Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Thus, such a grant will be affirmed only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). In addition, “summary judgment shall not be rendered unless it appears * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence construed most strongly in his favor.” *Id.*

{¶8} The moving party may make his motion for summary judgment in his favor “with or without supporting affidavits[.]” Civ.R. 56(B). However, “[a]

party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.” *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus. Summary judgment should be granted with caution, with a court construing all evidence and deciding any doubt in favor of the nonmovant. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360. Once the moving party demonstrates that he is entitled to summary judgment, the burden then shifts to the non-moving party to show why summary judgment in favor of the moving party should not be had. See Civ.R. 56(E). In fact, “[i]f he does not so respond, summary judgment, if appropriate, shall be entered against him.” *Id.*

{¶9} In order to establish a workplace intentional tort by an employer against his employee, the plaintiff must show:

(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 v. Jenos, Inc. (1991), 59 Ohio St.3d 115, paragraph one of the syllabus. The “intent” on the part of the employer that an injured employee must demonstrate requires something more than “mere knowledge and appreciation of a risk[.]” *Id.* at paragraph two of the syllabus. Rather, “[a]s 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.” Id.

{¶10} The first prong of the *Fyffe* test requires this Court to determine whether a genuine issue of material fact exists as to whether Campbell Soup knew that a dangerous process, procedure, instrumentality, or condition within its business operation existed. On this element, Wright produced the deposition of Kevin Rippee, one of three shift managers for Campbell Soup, and Randy Puckett, who was the third shift production supervisor at the time of Wright’s incident. Both Rippee and Puckett testified that the water pipe that caused Wright’s injury was equipped with a chain to secure the pipe from moving. However, the incident investigation report generated by Campbell Soup stated: “Infeed pipe safety chain restraint not secured to prevent pipe pivoting[.]” This report also stated that this chain had an inadequate design because it “was not permanently affixed, allowing for operators to constantly have to connect/disconnect” the chain.

{¶11} In addition, Wright testified that the hot water pipe could move vertically and that she had to move the water pipe slightly upward in order to remove the lid of the creamer tank for cleaning. However, she also testified that she did not detach the restraint chain in order to move the pipe nor had she touched it at all on the night of the incident. In further support of her position, Wright submitted Campbell Soup’s “Job Safety Analysis” sheet for the position of emulsion attendant. This sheet included among its list of potential accidents or

hazards the potential for hot water burns, hot liquid burns, and hot product burns in the operation of the emulsion system.

{¶12} This evidence, when construed in a light most favorable to Wright, demonstrates that Campbell Soup knew that using hot water in the operation and cleaning of the emulsion system presented a danger. In acknowledgement of this danger, the company attached a chain restraint to the hot water pipe to prevent it from moving. However, the company failed to have the restraint permanently affixed, opting to use a c-clip that allowed the attendants to connect and disconnect the chain for whatever purpose was necessary. While Campbell Soup disputes that it had knowledge of a dangerous condition/process within its plant, its actions, coupled with the dangers inherent in the usage of hot water, create a genuine issue of material fact as to whether it had this requisite knowledge. Therefore, Wright demonstrated the existence of a genuine issue of material fact on this element, thus requiring this Court to proceed to examine the second element.

{¶13} The second prong of the *Fyffe* test requires that we determine whether a genuine issue of material fact exists as to whether Campbell Soup knew that if Wright was subjected by her employment to this danger, then harm to her would be a substantial certainty. As previously noted, this requires something more than “mere knowledge and appreciation of a risk[.]” *Fyffe*, 59 Ohio St.3d at paragraph two of the syllabus. Instead, the Ohio Supreme Court has determined that,

proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer’s conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result.

Id.; see, also, *Gibson v. Drainage Prods., Inc.*, 95 Ohio St.3d 171, 2002-Ohio-2008, ¶ 17. While the Court has defined the intent necessary to prevail in a workplace intentional tort action, it has also noted that “cases involving workplace intentional torts must be judged on the totality of the circumstances surrounding each incident.” *Gibson*, 2002-Ohio-2008, at ¶ 27. Thus, it is with these standards in mind that we consider the evidence submitted in regards to the second element of the *Fyffe* test.

{¶14} In the case sub judice, Wright maintains that Campbell Soup knew that an injury to an employee was substantially certain to result from the use of the hot water pipe, which was improperly secured, because it could move in such a way that it could burn an employee. In support of this contention, Wright provided the deposition of Kandy Hostettler, a co-worker at Campbell Soup. Hostettler testified that she was injured by the hot water pipe in November of 1998, while cleaning the emulsion system. Specifically, she stated that she was pouring a cleaning agent into the creamer tank when “the water pipe kicked back from the pressure from the water from kettles.” This water was sprayed on her

right shoulder, upper chest, and left eye. As a result, she suffered mild burns. She went to the medical department, was treated by the nurse, and then returned to work.

{¶15} Wright asserts that this incident placed Campbell Soup on notice that injury was substantially certain to result. However, Hostettler did not report the incident to her supervisor, and the nurse did not submit this report to management. Although the policy manual in effect at the time of Hostettler's injury informed employees that they were to report all injuries, "no matter how slight it may seem," to their supervisor, Hostettler did not do so. Thus, Campbell Soup was not directly made aware that an injury had been sustained because of the water pipe. Nevertheless, Wright contends that by Hostettler's action of informing the nurse of her injuries, Campbell Soup was on notice of the injury from the water pipe under general agency principles.

{¶16} General agency principles provide that "the principal is chargeable with and bound by the knowledge of or notice to his agent received by the agent in due course of his employment, with reference to matters to which his authority extends[.]" *Raible v. Raydel* (1954), 162 Ohio St. 25, 29. Here, the evidence revealed that the nurse was an independent contractor rather than an employee of Campbell Soup, and no evidence was presented that Campbell Soup retained any control over the mode or manner of the work performed by the nurse. As such, her knowledge cannot be imputed to Campbell Soup. See *Laderer v. St. Rita's Med. Center* (1997), 122 Ohio App.3d 587, 594. In addition, the policy of

Campbell Soup at the time of Hostettler's incident was for the medical department to only forward to management injury reports that were OSHA recordable rather than reporting all injuries, as the company charged its *employees* with the responsibility of reporting their injuries to their supervisors. Because Hostettler's injuries were only minor and she was able to return to work after seeing the nurse, management was not notified of her injuries until sometime after Wright was injured.

{¶17} Given these facts, Campbell Soup had neither direct nor imputed knowledge of a prior incident involving the hot water pipe. However, our inquiry does not end here, as notice that harm would be substantially certain "need not take the form of a previous workplace incident." *Miller v. Trafzer*, 150 Ohio App.3d 695, 2002-Ohio-6800, ¶ 13, citing *Gibson v. Drainage Prods, Inc.*, 3rd Dist. No. 11-99-14, 2002-Ohio-6258, ¶ 17, 2002 WL 31538968. In this regard, Wright asserts that Campbell Soup had knowledge that harm to an employee was substantially certain because it failed to properly train employees on cleaning the emulsion system, had a defective design for the water pipe, had not performed or developed a job safety analysis for cleaning the system, and implemented an inadequate incident reporting system. After reviewing the record, we find these contentions to be without merit.

{¶18} First, Wright, herself, testified that she believed she was more than adequately trained by other experienced employees on the system, including testifying that those who trained her did not leave her unattended until she felt

entirely comfortable with using and cleaning the system. In addition, although she had been on medical leave for three years and had only recently returned to the position of emulsion attendant, Wright did not express any concern with the operation and/or cleaning of the emulsion system, a job she had performed on numerous occasions, or with the use of the chain. As for the remaining assertions, they indicate that Campbell Soup knew that utilizing the hot water pipe in the cleaning of the system posed some risk and that the probability of injury was increased by not properly restraining the pipe. However, this knowledge is not tantamount to substantial certainty. Rather, Wright's contentions raise issues of negligence on her employer's part, possibly even rising to the level of recklessness, but they fall short of presenting a genuine issue of material fact as to whether Campbell Soup was substantially certain that its employees would be injured as a result of using the hot water pipe while cleaning the system.

{¶19} Lastly, Wright maintains that Campbell Soup knew injury to an employee was substantially certain to occur because it failed to ensure that the safety showers were properly working. This assertion is based on the fact that once Wright was burned by the hot water emitting from the pipe, the safety shower closest to her location was inoperable and she had to be taken to a sink, which only provided her with hot water. After realizing that only hot water was running from the sink, Wright was carried by a supervisor to another shower, where she was able to run cold water on her burns. While these facts were undisputed, Wright presented no evidence that the shower was the cause of her

injuries or that her injuries were exacerbated by the slight delay in running cold water on her burns. Thus, this contention is also without merit in regards to the second prong of the *Fyffe* test.

{¶20} In short, Wright failed to demonstrate a genuine issue of material fact as to whether Campbell Soup’s knowledge rose to the level of substantial certainty. Having made this determination, we need not examine the third prong of the *Fyffe* test. Accordingly, the assignments of error are overruled.

{¶21} For these reasons, the judgment of the Common Pleas Court of Henry County, Ohio, is affirmed.

Judgment affirmed.

BRYANT and ROGERS, JJ., concur.