



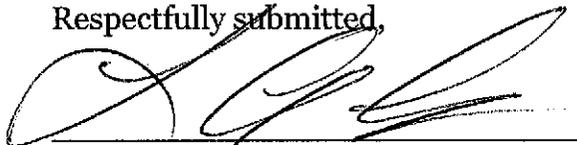
## Notice of Certified Conflict by Appellant Tony Flint

Appellant Tony Flint hereby gives notice of a certified conflict to the Supreme Court of Ohio from the judgment of the Lorain County Court of Appeals, Ninth Appellate District entered in Court of Appeals case number 06CA008918.<sup>1</sup> On March 19, 2007, the Ninth District Court of Appeals issued a Journal Entry finding that a conflict of law exists between its holding in its decision on the merits in this matter journalized on February 21, 2007,<sup>2</sup> and the holding of the Eleventh District Court of Appeals in *Walton v. Springwood Products, Inc.* (July 24, 1995), 105 Ohio App.3d 400.<sup>3</sup>

Pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, the Ninth District Court of Appeals has certified a conflict as to the following issue:

Whether an employer's omission of the primary protective device on equipment causing injury to an employee creates a factual issue, in and of itself, which would be sufficient to overcome a motion for summary judgment under the elements set forth by the Ohio Supreme Court in *Fyffe v. Jenó's, Inc.* (1991), 59 Ohio St.3d 115.

Respectfully submitted,



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COUNSEL FOR APPELLANT

<sup>1</sup> See March 19, 2007, Journal Entry attached hereto as "Exhibit 1".

<sup>2</sup> See February 21, 2007, Decision and Journal Entry attached hereto as "Exhibit 2".

<sup>3</sup> See July 24, 1995, Decision of the Eleventh District Court of Appeals in *Walton v. Springwood Products, Inc.* (1995) 105 Ohio App. 400, attached hereto as "Exhibit 3".

**Certificate of Service**

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail, postage prepaid, to counsel for Appellee, Orville L. Reed, III, Esq. and Christopher Esker, Esq. at Buckingham, Doolittle & Burroughs, LLP, 50 South Main St., P.O. Box 1500, Akron Ohio 44309, on March 27, 2006.



\_\_\_\_\_  
L. Christopher Coleman (0075528)

COUNSEL FOR APPELLANT,  
TONY FLINT

STATE OF OHIO )  
 )ss: COURT  
COUNTY OF LORAIN )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

Tony Flint

Appellant

v.

International Multifoods, Inc.

Appellee

2007 MAR 19 P 1:52

C.A. No. 06CA008918

CLERK OF COMMON PLEAS  
RON NABAKOWSKI

9th APPELLATE DISTRICT

JOURNAL ENTRY

Appellee has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on February 21, 2007, and the judgment of the Eleventh District Court of Appeals in *Walton v. Springwood Products, Inc.* (July 24, 1995), 105 Ohio App.3d 400. Appellant has not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment \*\*\* is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596.

Appellees have proposed that a conflict exists between the districts on the following issue:

**Whether an employer's omission of the primary protective device on equipment causing injury to an employee creates a factual issue, in and of itself, which would be sufficient to overcome a motion for summary judgment under the elements set forth by the Ohio Supreme Court in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115.**

We find that a conflict of law exists; therefore, the motion to certify is granted.

*Berk Whitmore*

Judge

*Carl Stone*

Judge

STATE OF OHIO  
COUNTY OF LORAIN

TONY FLINT

Appellant

v.

INTERNATIONAL MULTIFOODS,  
et al.

Appellees

COURT OF APPEALS  
IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT  
2007 FEB 21 A 9:36

C.A. No. 06CA008918  
CLERK OF COMMON PLEAS  
RON MABAKOWSKI

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No. 04CV139370

DECISION AND JOURNAL ENTRY

Dated: February 20, 2007.

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

---

WHITMORE, Presiding Judge.

{¶1} Plaintiff-Appellant Tony Flint has appealed from the judgment of the Lorain County Court of Common Pleas which awarded summary judgment to Defendant-Appellee International Multifoods, Inc. This Court affirms.

I

{¶2} On August 19, 2004, Plaintiff-Appellant Tony Flint filed a complaint against Defendant-Appellee International Multifoods, Inc. ("IMF") in the Lorain County Court of Common Pleas. The complaint alleged that IMF committed an employer intentional tort against Appellant while he was a temporary employee at

IMF's Elyria facility. The complaint alleged that while attempting to clean his assigned area, Appellant lost three fingers when he placed his right hand into a spindle-equipped airlock mechanism incorporated into IMF's central vacuuming system. Appellant alleged that IMF's failure to install a manufacturer suggested safety guard on the airlock constituted an employer intentional tort. On October 1, 2004, IMF filed an answer to the complaint. On January 10, 2006, IMF filed a motion for summary judgment. Appellant filed a brief in opposition on February 24, 2006. On April 3, 2006, IMF filed a reply in support of its motion for summary judgment. The trial court granted IMF's motion for summary judgment on April 7, 2006.

{¶3} Appellant has timely appealed, asserting one assignment of error.

## II

### Assignment of Error

"THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT BY DETERMINING THAT NO GENUINE ISSUES OF MATERIAL FACT REMAINED TO BE LITIGATED WITH RESPECT TO WHETHER [APPELLANT'S] INJURIES WERE THE RESULT OF AN EMPLOYER INTENTIONAL TORT AS ARTICULATED IN *FYFFE V. JENO'S INC.* (1991), 59 OHIO ST.3D 115."

{¶4} In his sole assignment of error, Appellant has argued that the trial court improperly granted summary judgment to IMF. Specifically, Appellant has argued that genuine issues of material fact remained as to whether his injuries were caused by IMF's intentional tort. This Court disagrees.

{¶5} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St .3d 102, 105. This Court applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the nonmoving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12. Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶6} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of a genuine issue of material fact as to some essential element of the non-moving party’s claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. To support the motion, such evidence must be present in the record and of the type listed in Civ.R. 56(C). *Id.*

{¶7} Once the moving party’s burden has been satisfied, the non-moving party must meet its burden as set forth in Civ.R. 56(E). *Id.* at 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings, but instead must point to or submit some evidentiary material to

demonstrate a genuine dispute over the material facts. *Id.* See, also, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶8} Pursuant to Civ.R. 56(C):

“Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show 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.”

{¶9} Appellant has alleged that IMF committed an employer intentional tort against him. In *Fyffe v. Jeno’s Inc.* (1991), 59 Ohio St.3d 115, the Ohio Supreme Court articulated the legal standard by which courts determine whether an employer committed an intentional tort against an employee:

“[I]n order to establish ‘intent’ for the purpose of proving the existence of an intentional tort committed by an employer against an 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.” *Id.* at paragraph one of the syllabus.

Furthermore, mere knowledge and appreciation of a risk by an employer is not enough to establish intent. *Barger v. Freeman Mfg. Supply Co.*, 9th Dist. No. 03CA008313, 2004-Ohio-2248, at ¶10, citing *Fyffe*, 59 Ohio St.3d at paragraph two of the syllabus.

{¶10} Moreover, in order to establish an intentional tort by an employer, a plaintiff must demonstrate proof beyond that required to prove negligence or recklessness. *Fyffe*, 59 Ohio St.3d at paragraph two of the syllabus. If a plaintiff can show that harm or consequences will follow the risk, that the employer knows that injuries to employees are certain or substantially certain to result from the risk, and yet the employer still requires the employee to proceed, the employer is treated by the law as if he had in fact desired the end result. See *Id.*

{¶11} This Court has held that it is the element of substantial certainty which differentiates negligence from an intentional tort. *Marks v. Goodwill Industries of Akron, Ohio, Inc.* (Mar. 27, 2002), 9th Dist. No. 20706, at \*2, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 116. According to this Court in *Marks*, “[t]he line must be drawn where the known danger ceases to be a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the [employer] a substantial certainty.” (Quotations omitted). *Marks* at \*2.

{¶12} When determining intent, “this Court proceeds on a case-by-case basis and considers the totality of the circumstances.” *Id.* Concerning substantial certainty, we have stated that:

“Some of the relevant facts and circumstances which support the conclusion that an employer’s knowledge that harm to the employee was a substantial certainty include, but are not limited to: prior acts of a similar nature, the employer’s concealment or misrepresentations concerning the danger, and federal and/or state

safety violations or noncompliance by the employer with industry safety standards.” *Id.*

{¶13} We begin the analysis by noting that the *Fyffe* test is a conjunctive test. That is, all three elements must be established in order to maintain a prima facie case of an intentional tort by an employer. It follows, therefore, that if there remains no genuine issue of material fact as to one of the elements discussion of the other elements becomes moot. See *Pintur v. Republic Technologies, Internatl., LLC*, 9th Dist. No. 05CA008656, 2005-Ohio-6220, at ¶11 (finding the issue of substantial certainty dispositive and not addressing the other *Fyffe* elements). Accordingly, since we find it to be dispositive in the instant matter, we begin our discussion with the substantial certainty prong.

{¶14} This Court has stated that prior acts of a similar nature constitute “relevant facts and circumstances which support the conclusion that an employer’s knowledge that harm to the employee was a substantial certainty[.]” *Marks* at \*2. Here, the record indicates that Appellant’s injury is the sole reported accident related to the air lock or the vacuum system at issue. Appellant has argued that while prior similar accidents are one factor to consider in the substantial certainty analysis, it is not dispositive by itself. We agree. However, “[t]he absence of prior accidents strongly suggests that injury from this procedure was not substantially certain to occur.” *Thomas v. Barberton Steel & Iron, Inc.* (Apr. 1, 1998), 9th Dist. No. 18546, at \*3. The fact that no person had ever been injured in the absence of a guard on the airlock is a significant indicator that IMF could not

have been aware to a substantial certainty that exposure to the vacuum and airlock would result in injury.

{¶15} Another factor to be considered with regard to substantial certainty is federal or state safety violations. *Marks* at \*2. Appellant has argued that he presented expert testimony that IMF's failure to install a guard violated OSHA standards and thus is indicative that IMF had knowledge to a substantial certainty that the accident would occur. This argument is unpersuasive. It is undisputed that prior to the accident, IMF had never been cited or ordered by OSHA with regard to the unguarded airlock and this Court refuses to impute this knowledge to IMF after the fact. Appellant has also noted that since his injury, IMF has installed a safety guard. This fact does not prove that IMF was substantially certain that the injury would occur prior to the accident happening. It only proves that IMF acquired such knowledge after the accident occurred. Moreover, it is well established that evidence of subsequent remedial measures is not admissible to prove culpability in connection with an accident. Evid.R. 407.

{¶16} There is no question that working around heavy machinery with moving parts is inherently dangerous work. However, "dangerous work must be distinguished from an otherwise dangerous condition within that work. It is the latter of which that must be within the knowledge of the employer before liability could attach." *Naragon v. Dayton Power & Light Co.* (Mar. 30, 1998), 3d Dist. No. 17-97-21, at \*7. "Were it otherwise, any injury associated with inherently

dangerous work \*\*\* could subject an employer to intentional tort liability, whatever the cause.” Id.

{¶17} Appellant has also argued that the failure to install a protective guard over the airlock is dispositive. Appellant has cited *Walton v. Springwood Products, Inc.* (1995), 105 Ohio App.3d 400 to support his argument. In *Walton*, the Eleventh Appellate District held:

“[W]here the safety feature omitted is not a secondary or ancillary guard, but the primary protective device, the failure of the employer to attach such a guard creates a factual issue which would be sufficient to overcome a summary judgment exercise under the rule announced in *Fyffe*.” *Walton*, 105 Ohio App.3d at 405.

{¶18} Appellant has argued that the absent guard was mandated by the manufacturer of the airlock and was the primary protective device. Accordingly, Appellant has argued that IMF’s failure to install it created a factual issue sufficient to overcome summary judgment. We disagree.

{¶19} While this Court respects the decision of its sister district, we decline to apply *Walton’s* holding in the present matter. This Court’s precedents firmly state that removal of a safety guard is not dispositive, but simply one factor to consider in the substantial certainty analysis. *Trojan v. Ro-Mai Industries, Inc.* (Aug. 19, 1998), 9th Dist. No. 18778, at \*4. This Court’s position is supported by *Fyffe*:

“[W]here the facts in a given case show that the employer has deliberately removed a safety guard from equipment which employees are required to operate, *trial courts may* in their determination of motions for summary judgment pursuant to Civ.R.

56, and in the application of our common-law pronouncements of what may constitute an ‘intentional tort,’ *consider this evidence, along with the other evidence in support of, and contra to, such motion for summary judgment.*” (Emphasis added). *Fyffe*, 59 Ohio St.3d at 119.

In *Trojan*, this Court found that ordering a protective guard and never installing it perhaps indicated negligence, but did not rise to the egregious level required for an employer intentional tort. *Trojan* at \*5, citing *Fyffe*, 59 Ohio St.3d at paragraph two of the syllabus. As we have held as recently as 2006, “[t]here are many acts within the business or manufacturing process which involve the existence of dangers, *where management fails to \*\*\* institute safety measures*[.] Such conduct may be characterized as gross negligence or wantonness on the part of the employer. However \*\*\* such conduct should not be classified as an intentional tort.” (Emphasis added) (Quotations omitted). *Harris v. Bekaert Corp.*, 9th Dist. No. 05CA0056, 2006-Ohio-1487, at ¶18.

{¶20} After analyzing the totality of the circumstances, we cannot conclude that IMF was substantially certain that injury would result from Appellant cleaning the area around the airlock.

{¶21} Appellant has further argued that *Fyffe* is factually and legally on point with the instant matter. While *Fyffe* bears some resemblance to the case sub judice, there are glaring and significant differences. In *Fyffe*, the injured party was a sanitation employee whose job duties actually included cleaning machinery in the Jenó’s plant. See *Fyffe*, 59 Ohio St.3d at 119. On the night *Fyffe* was injured,

he was instructed by his supervisors to clean the conveyor system which ultimately caused his injuries. *Id.* Further, Fyffe testified that it was common practice to reach into the conveyor belt to retrieve objects, that sanitation employees were trained to do just that, and that the conduct was sanctioned by Jenó's because it was faster to clean the machines with them running. *Id.* Fyffe's testimony was corroborated to an extent by Jenó's safety manager when he "stated that the conveyors were cleaned while they were running 'because they clean faster that way.'" *Id.*

{¶22} The present case presents a contrary factual scenario. Here, the record is unclear whether Appellant was required to clean the machine which caused his injuries. In his deposition testimony, Appellant conceded that his sole job on the date he was injured was to keep the floor clean. At other points, he contradicted himself and testified that he was required to clean the "area." Still other times he testified that he was required to clean the "chute." Then, Appellant testified that he had never received specific instructions to clean any part of the central vacuum system. Appellant also testified that he was not instructed to clean the shaft housing the airlock, but instead was told to clean the area near the machine. Moreover, IMF has denied that Appellant was required to clean the airlock or the chute. IMF has asserted that it only required Appellant to clean the area.

{¶23} Regardless of whether Appellant was required to clean the machine, the area, or the simply the floor, *Fyffe* is still inapposite because there is no indication in the record that IMF sanctioned, trained, or condoned the practice of reaching into this particular machine while cleaning to remove obstructions. In fact, IMF safety coordinator Robert Jackson testified that IMF specifically instructed temporary employees to not stick their hands into moving equipment.

{¶24} This Court finds its decision in *Trojan*, supra, to be more akin to the present case. In *Trojan*, the injured employee was responsible for operating plastic injection molding machines. *Id.* at \*1. While operating one of these machines, Trojan reached into the machine to dislodge a part stuck in the mold. *Id.* Trojan inadvertently hit the “mold close” button, causing the mold to close on his left hand. *Id.* Trojan sued, alleging that RMI’s failure to install safety guards constituted an intentional tort. *Id.* This Court disagreed, holding in part that Trojan had exceeded the normal operation of his machine by voluntarily placing his hand within the operating area of the machine. *Id.* at \*5.

{¶25} In a similar fashion, even if Appellant had been tasked to clean around the chute, he exceeded the scope of his employment by voluntarily putting his hand up into the airlock. There was no reason for Appellant to stick his hand into a shaft connected to an operative machine with which he was unfamiliar. Appellant has argued it would be foreseeable that a temporary laborer, hoping to parlay his opportunity into fulltime work, would do his best when told to clean an

area. While that may be true, to a reasonably prudent person, doing one's best does not include reckless conduct. Further, Appellant's argument does not demonstrate that IMF knew to a substantial certainty that instructing an employee to clean an area would result in said employee sticking his hand into a running machine.

{¶26} The *Fyffe* test requires more than an employee being injured from exposure to a dangerous condition at work. It requires that an employer has knowledge to a substantial certainty that an employee will be harmed if that employee *is subjected by his employment to such dangerous process, procedure, or instrumentality*. Here, there is no evidence that Appellant was subjected to a dangerous instrumentality by his employment with IMF. IMF could not have known that ordering Appellant to clean the area near a running machine would result in Appellant reaching his hand into the moving parts of that machine, whatever the reason.

{¶27} Based upon the lack of substantial certainty and the lack of any evidence to indicate IMF required Appellant to clean the airlock, we find that Appellant has failed to establish facts to demonstrate that the level of risk-exposure was so egregious as to amount to an intentional wrong. See *Sanek v. Duracote Corp.* (1989), 43 Ohio St.3d 169, 172

{¶28} Appellant's sole assignment of error lacks merit.

## III

{¶29} Appellant's sole assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



BETH WHITMORE  
FOR THE COURT

CARR, J.  
MOORE, J.  
CONCUR

APPEARANCES:

L. CHRISTOPHER COLEMAN and WILLIAM D. BROWN, Attorneys at Law,  
for Appellant.

ORVILLE L. REED, III, and CHRISTOPHER ESKER, Attorneys at Law, for  
Appellees.

Westlaw.

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▶

Walton v. Springwood Products, Inc. Ohio App. 11  
Dist., 1995.

Court of Appeals of Ohio, Eleventh District,  
Ashtabula County.  
WALTON, Appellant,

v.

SPRINGWOOD PRODUCTS, INC., Appellee.<sup>FN\*</sup>

FN\* Reporter's Note: A discretionary  
appeal to the Supreme Court of Ohio was  
not allowed in (1995), 74 Ohio St.3d 1478,  
657 N.E.2d 785.

No. 94-A-0060.

Decided July 24, 1995.

Injured employee brought intentional tort action  
against employer. The Court of Common Pleas,  
Ashtabula County, granted employer's motion for  
summary judgment, and appeal was taken. The  
Court of Appeals, Ford, P.J., held that material  
issues of fact precluded summary judgment for  
employer.

Reversed and remanded.

Christley, J., filed dissenting opinion.  
West Headnotes

[1] Judgment 228 ⇌ 181(21)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(21) k. Employees, Cases

Involving. Most Cited Cases

Material issues of fact precluded summary  
judgment for employer on intentional tort claim  
brought against employer by injured employee.

[2] Workers' Compensation 413 ⇌ 2093

413 Workers' Compensation

413XX Effect of Act on Other Statutory or  
Common-Law Rights of Action and Defenses

413XX(A) Between Employer and Employee

413XX(A)1 Exclusiveness of Remedies  
Afforded by Acts

413k2093 k. Willful or Deliberate Act  
or Negligence. Most Cited Cases

To establish intentional tort claim against employer  
within workers' compensation exclusivity exception,  
employee had to present facts which demonstrated  
that: employer had knowledge of existence of the  
dangerous condition; employer knew that, if  
employee was subjected by his employment to the  
dangerous condition, harm to employee would be  
substantially certain; and employer directed  
employee to continue to perform the dangerous task  
despite this knowledge.

[3] Judgment 228 ⇌ 181(21)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(21) k. Employees, Cases  
Involving. Most Cited Cases

Where safety feature omitted is not a secondary or  
ancillary guard, but the primary protective device,  
failure of employer to attach such a guard creates  
factual issue which is sufficient to overcome  
employer's motion for summary judgment with  
respect to employee's intentional tort claim.

\*401 Patrick T. Murphy and Alec Berezin,  
Painesville, for appellant.

James D. Masur II and Jeffrey A. Ford, Ashtabula,  
for appellee.

FORD, Presiding Judge.

Appellant, Joseph Walton, on June 10, 1991, was  
injured in the course and scope of his employment  
with appellee, Springwood Products, Inc. Two  
fingers on his left hand were amputated, and his

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thumb was nearly severed by an Oliver cut-off saw ("the Oliver") when his hand got caught in a hydraulic ram which was connected to the machine.

The Oliver is used to cut blocks of wood or "cants," ranging in size between six and ten feet, to the proper length for use by appellee for building wooden pallets. As the cants are readied for cutting, they are held in place by a clamp or the "ram." The Oliver also houses a conveyor which collects the waste pieces and moves them outside for resale as firewood.

Appellant was hired by appellee in 1980, primarily as a laborer, not to operate any machinery. However, in 1984 or 1985, appellant began running various saws, including the Oliver. Appellant was permanently assigned to the Oliver in 1987, and he ran the saw until he was injured on June 10, 1991.

Appellee, in 1982, made a number of alterations to the Oliver. Prior to this time, employees physically held the cants with their hands and would push a button, which was located on the motor cover, to activate the saw. Appellee had purchased another saw which performed essentially the same functions as the Oliver, and appellee reproduced or incorporated many of the design features from the second saw when it modified the Oliver. Appellee added the ram and relocated the on/off switch to a separate control box. However, one feature that appellee did not duplicate was the safety guard that housed the saw blade.

As part of the sizing process, the front portion of the wood blocks must be trimmed or "squared" before the actual cut can be made. On occasion, certain bad pieces of wood, rotten or splintered sections, cannot be used, and they need to be cut up into smaller bits. These smaller pieces "fall through" the rollers on to the conveyor belt. The opening through which these segments fall is approximately twelve to thirteen inches long. However, appellant claims that appellee advised him that pieces larger than nine inches caused the conveyor to jam. Appellant, therefore, would use the Oliver to cut these segments into smaller sections. To do this, appellant would hold the smaller blocks and then activate the cutting cycle. As the ram would close

on the block, appellant would drop the piece he was holding, and it would be caught by the ram and then be cut into the \*402 smaller sections. It was during the cutting of such a piece that appellant was \*\*1367 injured when the ram closed unexpectedly quickly, catching his glove and fingers.

As a result of the accident, appellant filed a claim for and is receiving workers' compensation benefits. He also filed suit against appellee for his injuries, based upon the claim of intentional tort. Appellee filed a motion for summary judgment. The court granted the motion, dismissing the suit. Appellant, in his sole assignment of error, claims it was error for the court to grant summary judgment for appellee.

In a summary judgment exercise, the standard to be employed was announced in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, at paragraph seven of the syllabus:

"Upon motion for summary judgment pursuant to Civ.R. 56, the burden of establishing that the material facts are not in dispute, and that no genuine issue of fact exists, is on the party moving for summary judgment. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 8 O.O.3d 73, 375 N.E.2d 46. However, in that Civ.R. 56(E) requires that a party set forth specific facts showing that there is a genuine issue for trial, such party must so perform if he is to avoid summary judgment. Accordingly, in an action by an employee against his employer alleging an intentional tort, upon motion for summary judgment by the defendant employer, the plaintiff employee must set forth specific facts which show that there is a genuine issue of whether the employer had committed an intentional tort against his employee."

It is with this standard in mind that this court will review the trial court's decision to grant appellee's motion for summary judgment.

This court, in *Burns v. Presrite Corp.* (1994), 97 Ohio App.3d 377, 646 N.E.2d 892, recently addressed the intentional tort issue. We held:

"In *Osborne v. Lyles* (1992), 63 Ohio St.3d 326,

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327, 587 N.E.2d 825, 827, the Supreme Court of Ohio stated:

“ ‘Civ.R. 56(C) specifically 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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party.’” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274. Moreover, “ \* \* \* upon appeal from summary judgment, the reviewing court should look at the record in the light most favorable to the party opposing the motion.” \*403 *Campbell v. Hospitality Motor Inns, Inc.* (1986), 24 Ohio St.3d 54, 58, 24 OBR 135, 138, 493 N.E.2d 239, 242.’

“The trial court relied upon the tripartite test first set forth in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, and subsequently modified in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108. The test, as it currently stands, reads as follows:

“ ‘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.)

“ ‘2. To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where \*\*1368 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 the 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 risk-something short of substantial certainty-is not intent. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph six of the syllabus, modified as set forth above and explained.)’ *Fyffe, supra*, at paragraphs one and two of the syllabus.” *Burns*, 97 Ohio App.3d at 379-380, 646 N.E.2d at 893-894.

[1] Applying this three-prong test to the facts in the instant action, we conclude that it was error for the trial court to grant summary judgment for appellee.

[2] The first prong of the *Van Fossen/Fyffe* test requires appellant to present facts which demonstrate that appellee had knowledge of the existence of the dangerous condition.

\*404 There is evidence, when viewed in a light most favorable to the nonmoving party, that appellee was aware of a dangerous process or condition in the plant. The plant manager testified that “[a]ny saw is a dangerous instrument.” Furthermore, appellee had placed a warning sticker on the Oliver which depicted a bloodied hand with severed fingers. This, for summary judgment purposes, was sufficient to overcome the first hurdle under the *Van Fossen/Fyffe* standard.

The second element requires that the employee set forth sufficient facts to demonstrate that if he was subjected by his employment to the dangerous condition, the harm to him would be substantially certain. For purpose of summary judgment, we are

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of the opinion that appellant has fulfilled his burden.

Appellant claims that appellee's failure to install the safety guard on the Oliver, after it had copied the ram from the other saw, was "tantamount to deliberate removal" of a safety feature and, therefore, pursuant to *Fyffe* and *Watson v. Aluminum Extruded Shapes* (1990), 62 Ohio App.3d 242, 575 N.E.2d 235, sufficient to overcome a motion for summary judgment. We agree.

In *Fyffe*, 59 Ohio St.3d 115, 570 N.E.2d 1108, the Supreme Court of Ohio, at paragraph three of the syllabus, noted:

"Upon a motion for summary judgment, when a court is asked to inquire as to whether an employer has committed an intentional tort and evidence is submitted tending to show the employer has deliberately removed a safety guard from equipment which an employee is required to operate, and such equipment occasions an employee's injury, this evidence should be considered along with other evidence in support of, and contra to, the motion for summary judgment \* \* \*."

The court in *Fyffe* indicated that the deliberate removal of the guard was evidence which needed to be considered by the trial court. While the evidence here does not show that appellee willfully removed a safety feature, it failed to copy protective measures implemented on the other machine. This action would be equivalent to purchasing a machine from the manufacturer, and rather than remove the guard, simply fail to attach it during assembly.

Appellee, on the other hand, argues that this case is more akin with *Hanlin v. E. Mfg. Corp.* (Dec. 7, 1990), Portage App. No. 90-P-2180, unreported, 1990 WL 199107, where we rejected a similar contention. This court stated:

"While OSHA safety regulations require a second type of safety mechanism to prevent injuries caused by such a malfunction, it cannot be said that appellee's failure to install this second level of defense, presents a question of appellee's intent." *Id.* at 9.

\*405 [3] *Hanlin* is distinguishable from the instant case. In *Hanlin*, the shield was a supplemental measure rather than the primary guard. In the instant action, appellee modified a piece of equipment. It copied the \*\*1369 design of another machine, but it did not copy a safety feature which was built into the model. Further, appellant offered expert testimony which indicated that the failure to incorporate the guard, which is required under OSHA standards, created a dangerous condition.<sup>FN1</sup> Therefore, we hold that where the safety feature omitted is not a secondary or ancillary guard, but the primary protective device, the failure of the employer to attach such a guard creates a factual issue which would be sufficient to overcome a summary judgment exercise under the rule announced in *Fyffe*.

FN1. Appellee filed a motion to strike the expert's testimony from the record as the deposition had not been signed by the witness. However, the court did not rule upon this motion, and, therefore, this court will presume that it was overruled. *Cremeans v. Willmar Henderson Mfg. Co.* (1991), 57 Ohio St.3d 145, 566 N.E.2d 1203, syllabus.

The third element requires proof that the employer directed the employee to continue to perform the dangerous task despite this knowledge. When construing the evidence in a light most favorable to appellant, he met his burden so as to overcome summary disposition of the matter. He presented evidence that after appellee redesigned the Oliver, it required him to operate the machine. Additionally, he testified that he did so "[b]ecause I am an employee, [and when] the foreman tells you what to do, you do it." Therefore, the third prong of the test was fulfilled.

For the foregoing reasons, appellant's assignment of error has merit, and the judgment is reversed and the cause remanded for proceedings consistent with this opinion.

*Judgment reversed and cause remanded.*

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NADER, J., concurs.

CHRISTLEY, J., dissents

CHRISTLEY, Judge, dissenting.

I respectfully dissent from the majority in that I would affirm and adopt the well-reasoned opinion of the trial court. I particularly agree with the trial court's observations that no concern or complaint had ever been raised through the union/management safety committee, and there had been no previous incident of the hydraulic ram malfunction.

\*406 Thus, while there may have been some awareness of risk, such awareness did not rise to the level of recklessness equated with an intentional tort.

I would, therefore, affirm.

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