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COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

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WILLIAM ANDREW CAMPBELL

Plaintiff,

v.

OHIO DEPARTMENT OF NATURAL
RESOURCES

Defendant.

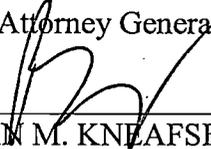
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: Case No. 2013-00502
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: Judge Patrick M. McGrath
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: Magistrate Anderson M. Renick
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DEFENDANT OHIO DEPARTMENT OF NATURAL RESOURCES'
MOTION FOR SUMMARY JUDGMENT

Defendant Ohio Department of Natural Resources ("DNR") moves this Court under Ohio Civ. R. 56(C) for an Order granting summary judgment in favor of DNR on all claims asserted by Plaintiff. Construing the evidence in the light most favorable to Plaintiff, there is no genuine issue as to any material fact, and DNR is entitled to judgment as a matter of law. The reasons in support of this Motion are set forth in the attached Memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case is about an employee's unilateral safety omissions while performing an inspection of a seeder attachment to a tractor. DNR employee Andrew Campbell was performing grass seeding operations on the golf course at Shawnee State Park near Portsmouth, Ohio. After operating the tractor and seeder, he exited the tractor (without turning it off) to see if the grass seed was level in the seeder (approaching from behind the seeder). Then, to clear off some dirt from the seeder, he went between the seeder and tractor and reached into an area of the seeder where the **power take-off (PTO) shaft was still operating** (as it provides the power from the tractor to operate the seeder). Plaintiff's jacket and left hand became entangled in the drive shaft powering the seeder. Entering the location of the PTO and drive shaft was unnecessary in the first place. But even if he did need to enter, Mr. Campbell failed to follow safety protocol about turning off or properly disabling the tractor's PTO and seeder's drive shaft before entering this area and reaching into it. Sadly, his arm was pulled into the drive shaft within seconds.

DNR deeply sympathizes with Mr. Campbell for his injuries. But its conduct had nothing to do with this accident, and comes *nowhere near* the stringent standard necessary to recover under Ohio's employer intentional tort statute. Finding in favor of Plaintiff—under these facts—would fundamentally undermine the legislature's intent of keeping workplace injuries governed by the workers' compensation system. DNR simply asks this Court to apply the statute and follow Ohio Supreme Court precedent in granting this Motion.

II. PROCEDURAL HISTORY

Plaintiff's original Complaint was filed on August 13, 2013 with this Court. After nearly a year, Plaintiff has filed a motion for leave to amend his complaint to add Ohio Bureau of

Workers' Compensation as a party. DNR has opposed this motion. A decision on that motion is also pending. Now, DNR seeks Summary Judgment of this intentional tort claim.

III. STATEMENT OF THE FACTS

A. The Tractor/Seeder job

Mr. Campbell previously worked for DNR at Shawnee State Park golf course in 1996-1997. (Campbell depo. p. 25) He has owned, since 2001 or 2002 (and still owns), a John Deere tractor (Model 4210) which is a smaller tractor than that he used at the time of his accident in 2011. His personal tractor also has a PTO like the tractor involved in his accident. (Id. p. 26-27)

Prior to his accident, Mr. Campbell began work for DNR at Shawnee State Park golf course (for a second time) beginning in March, 2011. He had used the tractor in question for twenty to twenty-five (20-25) hours that summer prior to his August 29, 2011 accident. (Id. pp. 30-31) During the time he used this tractor, it was connected to various equipment that required the PTO to be engaged in order to operate. (mower, Bush Hog, and seeder) (Id. pp. 31-32) He had used the seeder attachment the day prior to and the day of his accident. (Id. p. 33) The total time he used the seeder attachment those two days was about eight (8) hours. (Id. p. 40)

The day of the accident, Mr. Campbell had been using the slit seeder on the ninth fairway of Shawnee State Park's golf course when he stopped to make sure the seed was level in container bins at the rear of the seeder. He walked from the rear of the seeder to the side to "grab a chunk of sod and the PTO guard caught me on my left arm." (Id. pp. 5-6) He did not disengage the PTO when he got off the tractor to inspect the seeder. (Id. pp. 9-10) No one ever told him he had to clear sod/dirt off of the seeder box. (Id. p. 19) He doesn't even know if the sod on the inside portion of the seeder box was in any way preventing the seeder from functioning. (Id. p. 49) When plaintiff reached to clear off more sod from the seeder box with

his right hand (but this time from in between the tractor and seeder) his left hand was near the driveshaft controlling the seeder and his left sleeve got caught in the moving driveshaft. (Id. pp. 23-24)

B. DNR trained its employees (and Plaintiff) on the operation of its equipment and how to properly disable the PTO.

DNR employees, including Mr. Campbell, are trained to perform safety precautions before operating any golf course equipment, in particular, the tractor and its Power Take Off system (PTO). They are trained: (1) how to operate it; and (2) to disable it before getting near it.

1. *The PTO operation process*

Matthew Bourne, was golf course superintendent at Shawnee State Park golf course at the time of Mr. Campbell's accident. (he is now Assistant Park Manager) The tractor Mr. Campbell was using at the time of his accident was a John Deere 1070 model with a PTO. The PTO transfers the motion of the gears of the tractor to another device to operate it. (Bourne depo. p. 17) Both he and another DNR employee trained Mr. Campbell on the operation of the 1070 tractor. (Id. p. 28) The seed slitter is one of devices powered by the PTO of the tractor and slices a groove in the soil to place grass seed. (Id. p. 29) If the PTO is disengaged the driveshaft on the seeder cannot turn. Filed separately and with this motion are a diagram and photo of the driveshaft in question: Exhibit 14, page 3 of Patrick Brown's deposition shows part number 28 (highlighting added for emphasis) that is the unguarded driveshaft where Mr. Campbell placed his hand. (Brown depo. p. 57) The original guard would have only covered the joint of this driveshaft and the PTO from the tractor. (Id. p. 58) This same unshielded driveshaft is shown in Exhibit 17 of the same deposition. (again highlighted for emphasis) (Id. p. 62)

2. *Disengaging the PTO*

Plaintiff's exhibit 6 (Bourne depo.-attached and filed separately) shows that on May 23, 2011, plaintiff was trained on tractors. Plaintiff admits to signing this training sheet. (Campbell depo. p. 10) Specifically, the training sheet discusses operation of the PTO: "**NEVER stand close or over the PTO shaft while it is engaged. Always disengage PTO and turn of (sic) the tractor before working on the PTO shaft or piece of equipment.**" Mr. Bourne also testified that all operators should follow this training and disengage the PTO when getting off the tractor for any reason. (Bourne depo., p. 51) Mr. Campbell failed to disengage the PTO when he got off the tractor. (Id. p. 50, Campbell depo. pp. 9-10) He did not turn off the tractor and put it in neutral before getting off of it. (Id. p.45) Then, he put his left hand in/near the driveshaft powering the seeder than never had any guarding device since its manufacture. (Campbell depo. p. 23, Brown depo pp. 57, 58) Mr. Campbell failed to perform any of the safety measures to prevent his own injury: 1) he did not turn off the tractor; 2) he did not disengage the PTO; and 3) he placed himself near the operating PTO and driveshaft; and 4) he placed his hand(s) near a moving driveshaft.

C. **Mr. Campbell unnecessarily enters the area between the tractor and seeder, disregards his safety training, and is injure within seconds.**

1. *Entering the area between the tractor and seeder was unnecessary.*

Mr. Campbell, after checking on the level of seed at the rear of the seeder proceeded to the area between the tractor and the seeder to clean dirt/sod from the seeder. (Campbell depo. p. 5-6). But entering this area was unnecessary for two reasons. First, no one ever told him he had to clear sod/dirt off of the seeder box. (Id. p. 19) Second, he doesn't even know if the sod on the inside portion of the seeder box was in any way preventing the seeder from functioning. (Id. p. 49)

2. ***Mr. Campbell disregards his safety training and is injured within seconds.***

Mr. Campbell got off the tractor without turning it off and without disengaging the PTO. (Id. pp. 9,10,45) He then walked from behind the seeder to the area where the PTO and driveshaft controlling the seeder were actively running. He then reached with his right hand over the top of the driveshaft and had his left hand and sleeve touching the driveshaft of the seeder. (Id. pp. 23-24) His left arm was pulled into the driveshaft and his hand was partially severed.

D. Mr. Campbell's safety training would have prevented this accident even if "safety guards" were in place.

Plaintiff is going to argue that the accident was caused due to a safety guard had been removed from the seeder which covered the joint connecting the seeder driveshaft to the tractor PTO. (See Complaint, ¶ 8) The problem with this argument is that plaintiff placed his hand(s) in an area that was unguarded and would have been unguarded if all safety guards were in place. (Campbell depo. p. 23, Brown depo pp. 57, 58, 62)

When attached, the guard in question only covers the joint connecting the seeder driveshaft to the tractor PTO. Plaintiff put his hands in the area of the driveshaft, not the joint. First, Mr. Campbell never should have left the tractor without turning it off and/or disengaging the PTO. (Campbell depo pp. 9, 10, Bourne depo.. p. 50, 51). Second, Mr. Campbell never should have entered the area between the tractor and seeder and should not have placed his hand(s) near the moving driveshaft.

E. There is no evidence that DNR intentionally caused the accident.

No one has testified or will testify that anyone at DNR caused the safety guard to be removed from the joint on the seeder that connects to the PTO. (Clark depo. p. 20, Bourne depo pp. 38, 40, 42) Plaintiff offered no evidence that suggests DNR deliberately intended the

accident that caused his accident. And further, no other evidence in the record suggests that DNR, or its employees, did anything intentional to cause Mr. Campbell's unfortunate injury. Quite the opposite, plaintiff's supervisor, Matthew Bourne, testified that Mr. Campbell did two things that were improper and caused his injuries: 1) putting his hand "next to a spinning shaft" and 2) not turning off the tractor. (Bourne depo. pp. 50, 51). Either one would have prevented his accident. (Id.). This testimony remains undisputed.

IV. LAW AND ARGUMENT

A. Summary judgment standard

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Civ. R. 56(C). Three elements must be shown: "(1) that there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) 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." *Harless v. Willis Day Warehousing Co., Inc.* (1978), 375 N.E.2d 46, 54 Ohio St. 2d 64, 66. The moving party bears the initial burden of showing there are no genuine issues of material fact. *Id.* at 66. Once satisfied, the burden shifts to the non-moving party who must "set forth facts showing that there is a genuine issue for trial." *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293.

B. Plaintiff cannot satisfy Ohio's heightened employer intentional tort standard.

The Ohio worker's compensation system is the exclusive remedy for employees injured on the job—unless an employer commits an intentional tort. *Stetter v. R.J. Corman Derailment Servs., LLC*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 74. Mr. Campbell has received workers' compensation payments from his work accident. (Campbell depo. p. 73).

Under Ohio law, he cannot recover over and above these payments without proving that DNR committed an intentional tort.

In Ohio, the employer intentional tort threshold is “very high.” *Helpinstine v. Plasticolors*, 182 Ohio App.3d 430, 2009-Ohio-2442, 913 N.E.2d 470, ¶ 31. The burden significantly increased with the enactment of R.C. § 2745.01. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶¶ 56–57. In tandem opinions decided on the same day, the Ohio Supreme Court recognized the legislature’s objective of preserving the exclusivity of the workers’ compensation remedy by severely restricting an employee’s claim against his employer. *Id.*; *Stetter*, 2010-Ohio-1029 at ¶ 74.

Under the statute, which supersedes the common-law standard, an employee must show that an employer “committed the tortious act with the **intent to injure another** or with the belief that the injury was **substantially certain** to occur.” R.C. § 2745.01(A) (emphasis added). “Substantially certain” requires “**deliberate intent** to cause an employee to suffer an injury . . . or death.” *Id.* § 2745.01(B) (emphasis added). After satisfying this onerous threshold, an employee must prove that the employer’s conduct proximately caused the injury or death. *Helpinstine*, 2009-Ohio-2442 at ¶ 38. Plaintiff’s employer intentional tort claim fails because: (1) DNR did not intend to or deliberately injure Mr. Campbell, and (2) DNR’s conduct was not the proximate cause of his injuries.

1. DNR did not act with specific intent to cause an injury.

Taken together, R.C. § 2745.01(A) and (B) “permit recovery for employer intentional torts *only* when an employer acts with **specific intent** to cause an injury.” *Kaminski*, 2010-Ohio-1027 at ¶ 56 (emphasis added).

- a. Because DNR had no idea Mr. Campbell would enter the area where his injury occurred without turning off the tractor/PTO, (and

placing his hand(s) near the PTO/driveshaft) it could not have acted with specific intent to cause an injury.

DNR had no idea that Mr. Campbell would enter the area between the tractor and seeder without turning off the tractor/PTO. Matthew Bourne, plaintiff's supervisor testified that he and all others operating the tractor should disengage the PTO prior to exiting the tractor. (Id. p. 51) Even Mr. Campbell testified that he doesn't know if the sod on the inside portion of the seeder box was in any way preventing the seeder from functioning. (Campbell depo. p. 49) Obviously, no one could imagine that an employee like Mr. Campbell would place his hands "next to a spinning shaft" causing his injury. (Id. p. 50)

Because entering the area between the tractor and seeder was wholly unnecessary and then placing his hands near a spinning driveshaft, the result of actions he undertook *of his own initiative*, reasonable minds cannot differ in concluding that DNR's conduct was neither intentional nor deliberate.

b. There is no evidence of intentional conduct.

Moreover, there is *nothing in the entire record* to suggest that DNR deliberately intended the accident. Quite the opposite, Matthew Bourne, testified that Mr. Campbell did two things that were improper and caused his injuries: 1) putting his hand "next to a spinning shaft" and 2) not turning off the tractor. (Bourne depo. pp. 50, 51). That testimony remains undisputed. Because there is not one single act or omission in the record showing that DNR intended to injure Mr. Campbell or deliberately intended to cause the accident, DNR is entitled to judgment as a matter of law.

- c. The lack of prior accidents weighs further against a finding of an employer intentional tort.

Courts applying Ohio's previous (and more employee-friendly) employer intentional tort standard ruled that prior accidents are probative in establishing that an employer knew an injury was substantially certain to occur. *Taulbee v. Adience, Inc.*, 10th Dist. No. 96APE11-1502, 120 Ohio App.3d 11, 696 N.E.2d 625, 631 (1997). As a corollary, the *absence* of prior accidents strongly suggested a lack of knowledge by an employer that injury was substantially certain to occur. *Drazetic v. Coe Mfg. Co.*, 11th Dist. No. 2005-L-035, 2006-Ohio-1688, 2006 Ohio App. LEXIS 1546, ¶ 22. In this case, there are no prior accidents capable of satisfying even the earlier, less-stringent standard of substantially certain. Because the lack of prior accidents under the common-law was indicative that the employer did not commit an intentional tort, certainly under the current, more stringent standard the lack of prior accidents should have a similar effect.

- d. No safety guard was removed.

Plaintiff's only out is a last-ditch attempt to show intent to injure by alleging a safety guard was removed. This conclusory allegation accuses DNR of "removed[ing] at least three safety guards from the Jacobsen seed splitter" (Pl.'s Compl. ¶ 8). "Deliberate removal by an employer of an equipment safety guard... creates a rebuttable presumption that the removal... was committed with intent to injure another if an injury... occurs as a direct result." R.C. § 2745.01(C) (emphasis added). However, this presumption only arises when a *supervisor*—rather than another *employee*—removed the safety guard. *Smith v. Inland Paperboard & Packaging*, 11th Dist. No. 2008-P-0072, 2009-Ohio-3148, 2009 Ohio App. LEXIS 2678, ¶ 38. In short, a plaintiff must satisfy three elements before relying on the presumption: (1) the employer removed a safety guard, (2) removal was deliberate, and (3) injury occurred as a direct result. Plaintiff fails to show all three.

Plaintiff's bare allegation fails for *at least* three reasons. First, there is no evidence in the record that a safety guard was removed. (there is evidence that the guard was missing, but no evidence as to whether it was missing due to vandalism, intentional removal, or wear and tear) Second, even if a safety guard was removed, Plaintiff could not show it was removed by a supervisor. Third, even if Plaintiff overcomes these two obstacles, the claim still fails because entering the area between the tractor and seeder and placing his hands near the driveshaft was not part of Campbell's job duties—the removal of a safety guard does not constitute an intentional tort when the employee was not required to expose himself to the potential hazard as part of his job duties. *Shanklin v. McDonald's USA, LLC*, 5th Dist. No. 2008-CA-00074, 2009-Ohio-251, 2009 Ohio App. LEXIS 228, ¶ 32. Because Plaintiff fails to show that a safety guard was even *removed*—let alone whether that removal was deliberate or that it caused the accident—the naked allegation that a safety guard may have been removed is totally without merit.

2. *Plaintiff fails to show the essential element of proximate cause.*

A plaintiff in an employer intentional tort case has the burden of showing the employer's conduct was the proximate cause of his injuries. *Helfinstine*, 2009-Ohio-2442 at ¶ 38.

- a. Mr. Campbell's failure to follow safety protocol proximately caused his death.

Matthew Bourne, plaintiff's supervisor testified that he and all others operating the tractor should disengage the PTO prior to exiting the tractor. (Id. p. 51) Plaintiff's exhibit 6 (Bourne depo.) shows that on May 23, 2011, plaintiff was trained on tractors. Plaintiff admits to signing this training sheet. (Campbell depo. p. 10) Specifically, the training sheet discusses operation of the PTO: "**NEVER stand close or over the PTO shaft while it is engaged. Always disengage PTO and turn of (sic) the tractor before working on the PTO shaft or piece of equipment.**" Campbell knew how PTOs worked on tractors since he has owned

beginning in 2001 or 2002 (and still owns) a John Deere tractor, (Model 4210) a smaller tractor than that he used at the time of his accident in 2011. His personal tractor also has a PTO like the tractor involved in his accident. (Id. p. 26-27)

Quite frankly, there is no evidence that DNR provided inadequate safety training to its employees. But even if Plaintiff *could* show that DNR provided inadequate training “it would constitute negligence or recklessness at best, and would not rise to the level of substantial certainty.” *Vance v. Akers Packaging Servs., Inc.*, 12th Dist. No. CA2006-05-105, 2006-Ohio-7032, 2006 Ohio App. LEXIS 7025, ¶ 37 (even insufficient under the more lenient standard).

If he was going to access the area where the driveshaft was located for the seeder, plaintiff had been instructed to disengage the PTO by either turning off the tractor or the PTO. (Campbell depo. p. 10, Bourne depo. Exh. 6) Mr. Campbell failed to perform any of the safety measures to prevent his own injury: 1) he did not turn off the tractor; 2) he did not disengage the PTO; and 3) he placed himself near the operating PTO and driveshaft; and 4) he placed his hand(s) near a moving driveshaft. In short, he disregarded the proper safety procedures for several layers of protection.

Even under the earlier, less-onerous employer intentional tort standard, courts continuously barred recoveries for employees—like Mr. Campbell—whose failure to follow safety precautions caused their injury or death. *Eilerman v. Cargill, Inc.*, 195 F. App’x 314, 315–19 (6th Cir. 2006) (Applying Ohio law, the Sixth Circuit ruled that a grain elevator operator’s failure to follow lockout/tagout procedures before performing maintenance could not establish an employer intentional tort); *see also Robinson v. Icarus Indus. Constr. & Painting Co.*, 3rd Dist. No. 4-01-05, 145 Ohio App.3d 256, 762 N.E.2d 463, 465–67 (2001).

There is no causal nexus between Mr. Campbell's safety omissions and DNR's conduct. Instead, plaintiff's supervisor, Matthew Bourne, testified that Mr. Campbell did two things that were improper and caused his injuries: 1) putting his hand "next to a spinning shaft" and 2) not turning off the tractor. (Bourne depo. pp. 50, 51). If either one had not been done by plaintiff he would not have been injured. This testimony remains undisputed. Because Plaintiff fails to produce *any* evidence of the essential element of proximate cause, DNR is entitled to judgment as a matter of law.

b. Whether guards were attached is irrelevant.

Plaintiff will argue that the accident was caused due to a safety guard had been removed from the seeder which covered the joint connecting the seeder driveshaft to the tractor PTO. (See Complaint, ¶ 8) The problem with this argument is that plaintiff placed his hand(s) in an area that was unguarded and would have been unguarded if all safety guards were in place. (Campbell depo. p. 23, Brown depo pp. 57, 58)

When attached, the guard in question only covers the joint connecting the seeder driveshaft to the tractor PTO. Plaintiff put his hands in the area of the driveshaft, not the joint. First, Mr. Campbell never should have left the tractor without turning it off and/or disengaging the PTO. (Campbell depo. pp. 9, 10, Bourne depo. p. 50, 51). Second, Mr. Campbell never should have entered the area between the tractor and seeder and should not have placed his hand(s) near the moving driveshaft.

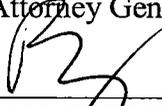
IV. CONCLUSION

Mr. Campbell's injury is unfortunate. But nothing in the record shows that DNR intended to injure Mr. Campbell or deliberately intended to cause the accident. Rather, the undisputed testimony shows that Mr. Campbell's failure to follow safety precautions proximately caused his accident and injury. This court has recently ruled the same way on a motion for

summary judgment in a very similar case. In *Higgins v. Oracle, et al.*, Case No. 2013-00134-PR, Judge McGrath held that plaintiff killed in an elevator shaft failed to prove their intentional tort claim against the employer as the employee failed to follow his safety training and there was no evidence the employer removed a “safety guard”. (Decision Dec. 11, 2013) Likewise, reasonable minds cannot differ in concluding that DNR lacked the requisite intent to attach liability under the Ohio employer intentional tort statute and that its conduct was not the proximate cause of plaintiff’s injury. DNR simply asks this Court to apply the Ohio employer intentional tort statute and follow Ohio Supreme Court precedent in granting this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Defendant Ohio Department of Natural Resources' Motion for Summary Judgment* was sent by regular U.S. Mail, postage prepaid, this 7th day of July, 2014 to:

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