



Court of Claims of Ohio

The Ohio Judicial Center
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Columbus, OH 43215
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WILLIAM ANDREW CAMPBELL

Plaintiff

v.

OHIO DEPARTMENT OF NATURAL
RESOURCES

Defendant

Case No. 2013-00502

Judge Patrick M. McGrath
Magistrate Anderson M. Renick

ENTRY DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

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On July 7, 2014, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On August 8, 2014, plaintiff filed a response and a motion for an oral hearing, which is DENIED. On August 8, 2014, defendant filed a reply and a motion to file the same. Defendant's motion for leave is GRANTED. The motion for summary judgment is now before the court for a non-oral hearing. L.C.C.R. 4.

Civ.R. 56(C) states, in part, as follows:

"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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

Plaintiff's claims arise from an accident that occurred on August 29, 2011, while he was working for defendant at the Shawnee State Park golf course. At the time of the

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accident, plaintiff was operating a tractor with an attached aerator and seeder. Plaintiff testified in his deposition that he had only approximately 20 to 25 hours of experience with the tractor and had operated the seeder for only one day. Plaintiff stopped the tractor to check the level of the seed in the container and he then reached to remove pieces of sod off of the tractor near the aerator. While plaintiff was reaching with his right hand to retrieve a piece of sod, the left sleeve of his clothing was caught on a bolt of the universal joint that connected the drive shaft to the right angle gear box. As a result, plaintiff sustained injuries to his left arm, including the amputation of his left hand.

Defendant contends that plaintiff cannot prevail on his claim for employer intentional tort inasmuch as it did not act with the specific intent to cause an injury and that plaintiff's own negligence proximately caused the accident.

Employers who comply with the workers' compensation law found in R.C. 4123.35 are entitled to civil immunity for injuries of an employee that occur during the course of employment. R.C. 4123.74. However, employer immunity does not extend to employer intentional torts. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027.

R.C. 2745.01 provides:

“(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

“(B) As used in this section, ‘substantially certain’ means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

“(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.”

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Plaintiff alleges that defendant's employees had deliberately removed safety guards, including: 1) a guard that covered the right angle gear box and 2) a safety switch that automatically disengages the power take off (PTO), which drives the shaft connecting the tractor to the seeder attachment.

There is no dispute that plaintiff's injury occurred during the course of plaintiff's employment with defendant. Defendant argues that plaintiff cannot demonstrate that it intentionally caused his injuries or that it knew that such an injury was substantially certain to occur.

The evidence shows that the tractor was originally equipped with a seat switch that automatically cuts off power to the PTO when the operator stands up or otherwise moves so that weight is not on the seat. Patrick Brown, an investigator for defendant testified in his deposition, that the switch had been bypassed, allowing the PTO to operate without weight on the seat.

Plaintiff argues that the seat switch constitutes an equipment safety guard in violation of R.C. 2745.01(C). Defendant argues that such a switch is not an equipment safety guard within the meaning of R.C. 2745.01(C) in that it does not "guard" anything and does not physically shield an employee from placing his hand near a moving driveshaft.

In *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, the Supreme Court of Ohio held that the term "equipment safety guard" in R.C. 2745.01(C) means "a device that is designed to shield the operator from exposure to injury by a dangerous aspect of the equipment." *Id.* at ¶ 26, quoting *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. Williams No. WM 10-016, 2011-Ohio-2960, ¶ 43. Such a definition does not include "any generic safety-related item." *Hewitt* at ¶ 24. However, in a case decided after *Hewitt*, the Supreme Court of Ohio remanded an intentional tort case for the trial court to determine whether a backup alarm was an equipment safety guard under the *Hewitt* definition. *Beary v. Larry Murphy Dump Truck Serv.*, 134 Ohio St. 3d 359 (2012). The court of appeals in *Beary* relied upon the holding in *Fickle, supra*, wherein an employee was injured in an accident while using a machine that was equipped with a "jog switch."

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Id. ¶ 17. If the “jog switch” had been activated, the machine would have stopped running when the operator’s finger came off the button. *Id.* Construing the evidence most strongly in plaintiff’s favor, the court finds that questions of fact exist concerning how and when the tractor seat switch was bypassed and whether the seat switch was an equipment safety guard.

Defendant argues that plaintiff has presented no evidence that it deliberately removed the driveshaft joint guard. Plaintiff maintains that there is no evidence to show that the tractor was ever outside defendant’s possession and control and that defendant did not keep any maintenance or repair records for either the tractor at issue or any of its machinery.

Although defendant contends that plaintiff placed his hand in an area that was unguarded and would have been unguarded if all safety guards were in place, plaintiff asserts that his left arm sleeve was caught by a protruding bolt on a rotating universal joint that connected the drive shaft and the right angle gear box. (Deposition Exhibit C.) Brown testified regarding his case summary report, wherein he states “[o]ne of the guards would have partially covered the area Mr. Campbell had become entangled during the accident.” (Deposition Exhibit 22). Thus, plaintiff has demonstrated that questions of fact exist whether the guard at issue could have prevented the accident if it had been installed.

Finally, defendant maintains that plaintiff cannot establish a rebuttable presumption of intent under R.C. 2745.01(C) because plaintiff’s accident was the direct result of his failure to comply with defendant’s safety policies and procedures. Defendant notes that plaintiff signed a training form which warned against standing near the PTO shaft while it is engaged. However, while plaintiff acknowledged that he signed the training form, the boxes on the form that are intended to document specific areas of training are blank and plaintiff testified that he did not recall receiving any training. Furthermore, plaintiff testified that he had operated the tractor for only 20 to 25 hours prior to the seeding assignment and that he had used the seeder attachment only once before the day in question.

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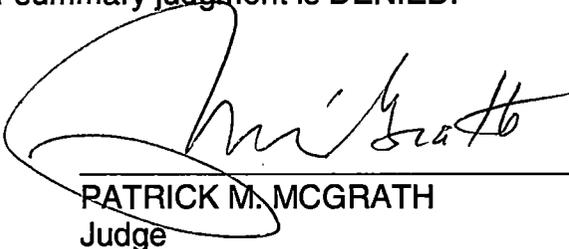
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Upon review of the memoranda and evidence filed by the parties, the court concludes that genuine issues of material fact exist that preclude the rendering of summary judgment. As a result, defendant is not entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment is DENIED.



PATRICK M. MCGRATH
Judge

cc:

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