[Cite as *Sanders v. Fridd,* 2010-Ohio-2321.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Amy K. Sanders,	:	
Plaintiff-Appellant,	:	
		No. 09AP-596
v.	:	(C.P.C. No. 07CVC07-9532)
Ryan Fridd,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on May 25, 2010

Granger Co., L.P.A., *Mark S. Ganger*; *Oliver Law Office*, and *Jami S. Oliver*, for appellant.

Frost, Maddox & Norman Co., LPA, *Mark S. Maddox*, and *Andrew D. Webster*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Amy K. Sanders, appeals from an order of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Ryan Fridd. Because the trial court failed to apply the correct legal standard in granting appellee's motion for summary judgment, we reverse.

{¶2} Appellant worked at Premierfirst Banc as a loan processor. Appellee was appellant's immediate supervisor at Premierfirst Banc. On February 26, 2006, both appellant and appellee were present in the Premierfirst Banc office. While appellant was

walking toward an office fax machine carrying a stack of papers, appellee engaged in horseplay causing appellant to injure her left wrist and arm. Appellant applied for and received workers' compensation benefits as a result of her injuries.

{¶3} Appellant filed a complaint against appellee, Premierfirst Banc and the Ohio Bureau of Workers' Compensation for the injuries she sustained due to appellee's alleged negligence.[1] In her complaint, appellant specifically alleged that appellee did not intend to injure her with his horseplay. Appellee filed a motion for summary judgment, which the trial court granted. Appellant appeals the trial court's grant of summary judgment in favor of appellee, assigning the following errors:

> 1. THE TRIAL COURT ERRED AS A MATTER OF LAW BECAUSE THE TEST FOR IMMUNITY UNDER R.C. 4123.741 IS THE WORKERS' COMPENSATION TEST WHICH IS EQUALLY APPLICABLE TO BOTH THE INJURED WORKER AND THE TORTFEASOR CO-WORKER.
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> 2. THE TRIAL COURT ERRED AS A MATTER OF LAW BECAUSE A WORKER ENGAGED IN "HORSEPLAY" THAT HE INSTIGATED IS NOT "IN THE SERVICE OF" HIS EMPLOYER AND THEREFORE IS NOT AN "EMPLOYEE" ELIGIBLE FOR R.C. 4123.741 IMMUNITY.
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> 3. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DETERMINED THAT ONCE AN INJURED WORKER FILES FOR AND RECEIVES WORKERS' COMPENSATION BENEFITS HE IS ESTOPPED FROM FILING ANY OTHER COMMON-LAW OR CIVIL CLAIMS AGAINST A TORTFEASOR CO-WORKER.
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> 4. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE REASONABLE MINDS COULD CONCLUDE THAT FRIDD INITIATED AND ENGAGED IN HORSEPLAY CAUSING SANDERS' INJURIES; CONDUCT WHICH WAS NOT PART OF HIS

[1] The parties filed various counterclaims, cross-claims, and third-party claims, which are not relevant to this appeal.

> JOB DUTIES NOR APROVED BY HIS EMPLOYER SUCH THAT THERE WAS NO CONNECTION BETWEEN THE EMPLOYER'S BUSINESS AND FRIDD'S CONDUCT.

{¶4} Appellate review of summary judgment motions is de novo. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607. " 'When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court.' " *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶11 (quoting *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103). Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that: (1) there is no genuine issue of 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. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6.

{¶5} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis of the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R.

56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶6} In her first assignment of error, appellant contends that the trial court erred in granting summary judgment in favor of appellee because the trial court failed to apply the correct test under R.C. 4123.741. We agree.

{¶7} R.C. 4123.741 states in relevant part:

> No employee of any employer, as defined in division (B) of section 4123.01 of the Revised Code, shall be liable to respond in damages at common law or by statute for any injury * * * received or contracted by any other employee of such employer in the course of and arising out of the latter employee's employment, * * * on the condition that such injury * * * is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code.

{¶8} The trial court interpreted this statute as granting immunity to appellee if appellant was in the course and scope of her employment at the time appellant was injured by appellee. Because appellant received workers' compensation for her injuries, the trial court determined that appellant was in the course and scope of her employment at the time of her injury. Therefore, the trial court held that appellee was immune from liability as a matter of law. Explaining its rationale, the trial court stated:

> * * * By the very wording of R.C. 4123.741[,] it does not matter whether [appellee] was in the course and scope of his employment at the time of the accident. R.C. 4123.741 requires that the injured employee be in the course and scope of his/her employment, not the employee seeking immunity. No such qualification is made of that employee. All that the non-injured employee has to be is an employee of the employer, which [appellee] was. * * *

(R. 117 at 4.)

{¶9} The trial court erred in its interpretation of R.C. 4123.741. In *Donnelly v. Herron*, 88 Ohio St.3d 425, 2000-Ohio-372, the court held that "R.C. 4123.741 extends immunity to a coemployee only when the actionable conduct occurs 'in the course of, and arising out of,' the coemployee's employment, within the meaning of that phrase in the Workers' Compensation Act." Id. at syllabus. The *Donnelly* court further explained that R.C. 4123.741 requires that both the injured employee and the coemployee who allegedly caused the injury must have been in the service of the employer at the time of the injury for immunity to apply.

{¶10} Here, the trial court did not consider whether appellee was in the service of his employer at the time of appellant's injury. Consequently, the trial court failed to address a requirement of the immunity defense. Because the trial court failed to apply the correct test in determining as a matter of law that appellee was entitled to immunity, we sustain appellant's first assignment of error. This ruling renders the remainder of appellant's assignments of error moot.

{¶11} For the foregoing reasons, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for further proceedings consistent with law and this decision.

Judgment reversed and cause remanded.

TYACK, P.J., and McGRATH, J., concur.