[Cite as *Wemer v. Walker*, 2015-Ohio-1713.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES R. WEMER, ET AL.

Plaintiffs-Appellants/Cross-Appellees

-vs-

JOHN WALKER AKA
JOHNNIE WALKER

Defendant-Appellee/Cross-Appellant

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Patricia A. Delaney, J.

Case No. 14CA20

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Knox County Court of Common Pleas, Case No. 11PI03-0146
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 1, 2015

APPEARANCES:

For Plaintiffs-Appellants/Cross-Appellees	For Defendant-Appellee/Cross-Appellant
ROBERT E. CESNER, JR. Cesner Law, L.L.C. 456 Haymore Avenue North Worthington, Ohio 43085-2445	BRUCE A. CURRY Curry, Roby & Mulvey Co., LLC 8000 Ravine's Edge Court, Suite 103 Columbus, Ohio 43235

Hoffman, P.J.

{¶1} Plaintiffs-appellants/cross-appellees James R. Wemer and Clara Wemer appeal the September 24, 2013 Judgment Entry entered by the Knox County Court of Common Pleas granting summary judgment in favor of Defendant-appellee/cross-appellant John Walker, aka Johnnie Walker.

STATEMENT OF THE CASE AND FACTS

{¶2} The within action was commenced by Appellants/cross-appellees on March 11, 2011 alleging personal injuries sustained by James Wemer due to the negligence and wanton recklessness of Appellee/cross-appellant Walker. The complaint alleges Walker invited Wemer to remove two ponies from his barn knowing the ponies had a vicious propensity for violence likely to cause serious physical harm, and Walker failed to warn Wemer regarding the known vicious propensity of the ponies.

{¶3} On the date of the incident, Appellant Wemer removed the first pony from the barn, and tied it to a ring located outside the barn. Wemer then went into the barn and brought the second pony out, tying it to the same ring. Appellee Walker then told Wemer, "They're going to fight." The ponies commenced fighting. Walker attempted to grab one of the pony's leads. Wemer went to help Walker. After the ponies stopped fighting, one of the horses looked Wemer in the eye, and then bit him on the neck. The bite caused physical injury, including nerve damage and pain and discomfort.

{¶4} On March 30, 2011, Appellee Walker filed an answer to the complaint herein. The complaint did not assert an affirmative defense.

{¶5} On March 20, 2012, Appellee obtained leave to file a motion for summary judgment. Appellee's motion for summary judgment relied solely on the Equine Immunity Statute, set forth in R.C. 2305.321.

{¶6} Via Judgment Entry of July 24, 2012, the trial court granted Appellee's motion for summary judgment.

{¶7} Appellants filed an appeal to this Court in *Wemer v. Walker*, Knox No. 12CA000017, 2013-Ohio-2005. On May 16, 2013, this Court issued its opinion and judgment entry reversing the judgment of the trial court and remanding the matter for further proceedings. This Court held Appellee did not assert the affirmative defense of immunity in the answer under R.C. 2305.321; therefore, could not raise the defense for the first time on summary judgment.

{¶8} On remand, Appellee filed a motion for leave to file an amended answer. On May 21, 2013, Appellee sought leave to file a second motion for summary judgment. Appellants filed a memorandum contra.

{¶9} On November 19, 2013, the trial court granted Appellee leave to file the amended answer. On November 21, 2013, Appellee filed the amended answer.

{¶10} On November 22, 2013, Appellee filed the second motion for summary judgment. Appellants filed a memorandum contra.

{¶11} Via Judgment Entry of September 24, 2014, the trial court granted Appellee's motion for summary judgment.

{¶12} Appellants appeal, assigning as error:

{¶13} "I. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT'S MOTION FOR LEAVE TO FILE AN AMENDED ANSWER ON NOVEMBER 19, 2013,

FOLLOWING REVERSAL AND REMAND BY THE FIFTH DISTRICT COURT OF APPEALS IN APPEAL CASE NO. 12 CA 17, WHICH FOR THE FIRST TIME ALLEGED A NEW AFFIRMATIVE DEFENSE UNDER THE EQUINE IMMUNITY STATUTE, R.C. 2305.321, AND SUBSEQUENTLY GRANTED DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT ON SEPTEMBER 24, 2014, ALL OF WHICH WAS OVER THE OBJECTION OF PLAINTIFFS.

{¶14} "II. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT. APPELLANTS ARE ENTITLED TO A TRIAL UPON THE MERITS, BECAUSE THE EVIDENCE PRESENTS A JURY QUESTION ON THE ISSUE OF WHETHER THE ACTS OR OMISSIONS OF THE APPELLEE CONSTITUTE A FORFEITURE OF IMMUNITY UNDER O.R.C. SECTION 2305.321(B)(2)(b) and (d).

{¶15} "III. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLANT'S MOTION FOR SUMMARY JUDGMENT UPON THE BASIS THAT THIS DECISION DENIED THEM A SUBSTANTIVE RIGHT TO A REMEDY, AS GUARANTEED IN SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

I.

{¶16} Civ.R. 15(A) provides that a party may amend its pleading by leave of court and that such leave “shall be freely granted when justice so requires.” The decision of whether to grant a motion for leave to amend a pleading is within the discretion of the trial court. *Wilmington Steel Products, Inc. v. Cleveland Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 121–122, 573 N.E.2d 622, 624. While the rule allows for liberal amendment, motions to amend pleadings pursuant to Civ.R. 15(A) should be

refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party. *Hoover* at paragraph two of the syllabus.

{¶17} Appellants cite *Turner v. Central Local School District* (1999), 85 Ohio St.3d 95, 706 N.E.2d 1261, arguing undue delay and abuse of discretion in allowing Appellee to amend the answer herein.

{¶18} In *Turner,* the motion to amend was filed after a trial date was set and two years and ten months after the litigation had commenced. The Supreme Court held,

> We find that the trial court abused its discretion in allowing this prejudicial and untimely filing.
>
> Appellants were forced to expend time, resources, and money to oppose the first motion for summary judgment, which was appealed all the way up to this court (although we declined jurisdiction in the first appeal). Then, after all experts were in place and discovery was complete, Central was permitted to amend its answer and file a second summary judgment motion to assert and argue an obvious defense, which most likely would have terminated the litigation in the first instance, or at the very least, would have narrowed the issues remaining for resolution. Moreover, we are particularly troubled by the fact that Central's motion did not give a rationale for its failure to properly assert this affirmative defense in its answer to its original complaint or for its failure to do so in the ensuing two years and ten months. Thus, in the absence of any explanation, we find that Central should have attempted to amend its answer to include the immunity defense prior to its initial motion for summary judgment, rather

> than in piecemeal motions which served no purpose but to delay the trial of this matter. Because of Central's failure to do so, we find that appellants were unnecessarily forced through the appellate system on two separate occasions.
>
> Under these facts, we determine that the trial court abused its discretion in granting the motion to amend. Therefore, we find that Central has waived its statutory immunity defense, and hold that R.C. Chapter 2744 has no application to this case.

{¶19} We find *Turner* distinguishable from the facts sub judice. Here, while Appellee did not raise the affirmative defense in the initial answer to his first complaint, he did argue the Equine Immunity Defense and assert the same in his first motion for summary judgment. While we recognize Appellants were then forced to appeal the propriety of the granting of summary judgment to this court and we reversed the trial court, we note Appellee promptly sought leave to amend their answer after remand. We find Appellants have not been prejudiced by Appellee's amended answer. One year passed between the filing of the complaint and Appellee's initial filing of summary judgment. In said time, discovery had proceeded, but there is no indication Appellants were blindsided by the raising of the affirmative defense.

{¶20} The first assignment of error is overruled.

II.

{¶21} In the second assignment of error, Appellants maintain the trial court erred in granting summary judgment in favor of Appellee.

{¶22} Ohio Civil Rule 56(C) governs motions for summary judgment, providing,

> (C) Motion and proceedings
>
> *The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits.* 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis added.)

{¶23} The applicability of R.C. 2305.321, which establishes immunity for equine activity, is undisputed herein. Rather, Appellants maintain Appellee was not entitled to summary judgment pursuant to R.C. 2305.321(B)(2)(d) as Appellee acted willfully and wantonly toward Appellant James Wemer.

{¶24} The statute reads, in pertinent part,

> (B)(1) Except as provided in division (B)(2) of this section and subject to division (C) of this section, an equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person is not liable in damages in a tort or other civil action for harm that an equine activity participant allegedly sustains during an equine activity and that results from an inherent risk of an equine activity. * * *
>
> (2) The immunity from tort or other civil liability conferred by division (B)(1) of this section is forfeited if any of the following circumstances applies:
>
> ***
>
> (d) An act or omission of an equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person constitutes a willful or wanton disregard for the safety of an equine activity participant and proximately causes the harm involved.

{¶25} Upon review of the statute and the evidence for summary judgment, we find the trial court did not err in granting summary judgment in favor of Appellee. From our review of the record, we agree with the trial court, Appellants did not establish Appellee's conduct rose to the level of willful and wanton misconduct.

{¶26} In *Anderson v. Massillon*, 134 Ohio St.3d 280, 983 N.E.2d 266, 2012-Ohio-5711, the Supreme Court of Ohio held,

> However, as the historical development of these terms in our jurisprudence demonstrates, “willful,” “wanton,” and “reckless” describe different and distinct degrees of care and are not interchangeable. We

therefore disavow the dicta contained in *Thompson,* 53 Ohio St.3d at 104, 559 N.E.2d 705, fn. 1, that "willfulness," "wantonness," and "recklessness" are equivalent standards.

Willful misconduct implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. *Tighe v. Diamond,* 149 Ohio St. at 527, 80 N.E.2d 122; *see also Black's Law Dictionary* 1630 (8th Ed.2004) (describing willful conduct as the voluntary or intentional violation or disregard of a known legal duty).

Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. *Hawkins,* 50 Ohio St.2d at 117–118, 363 N.E.2d 367; *see also Black's Law Dictionary* 1613–1614 (8th Ed.2004) (explaining that one acting in a wanton manner is aware of the risk of the conduct but is not trying to avoid it and is indifferent to whether harm results).

Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. *Thompson,* 53 Ohio St.3d at 104–105, 559 N.E.2d 705, adopting 2 Restatement of the Law 2d, Torts, Section 500, at 587 (1965); *see also Black's Law Dictionary* 1298–1299 (8th Ed.2004) (explaining that

reckless conduct is characterized by a substantial and unjustifiable risk of harm to others and a conscious disregard of or indifference to the *risk,* but the actor does not desire harm).

{¶27} Here, the evidence demonstrates, Appellee John Walker warned Appellant James Wemer the ponies were going to fight before they did so. Appellee stepped in to stop the ponies from fighting, and Appellant James Wemer thereafter decided to join Appellee to help him stop the ponies from fighting. Given the parties mutual knowledge regarding equine activity, we find Appellants have not established Appellee's conduct was willful or wanton under the circumstances presented.

{¶28} The second assignment of error is overruled.

III.

{¶29} In the third assignment of error, Appellants assert the trial court's decision denied them a substantive right to a remedy, as guaranteed in Section 16, Article I of the Ohio Constitution. Appellant cites *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, as support. Upon review, we find that case is distinguishable and not applicable to the factual scenario presented herein.

{¶30} Accordingly, the assignment of error is overruled.

CROSS-ASSIGNMENT OF ERROR

{¶31} Appellee/Cross-appellant assigns as error:

{¶32} "THE TRIAL COURT ERRED BY FAILING TO GRANT SUMMARY JUDGMENT TO APPELLEE BASED UPON APPELLANT'S PRIMARY ASSUMPTION OF RISK."

{¶33} Based upon our analysis and disposition of Appellants/Cross-appellees' assignments of error presented above, we find the cross-assignment of error moot.

{¶34} The judgment of the Knox County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur