[Cite as *Barton v. Simpson*, 2016-Ohio-2998.]

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COLTON BARTON	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
JEFFREY SIMPSON, et al.	:	Case No. 15AP0016
	:	
Defendants - Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Morgan County Court of Common Pleas, Case No. 11CV01014
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	May 11, 2016

APPEARANCES:

For Plaintiff-Appellant

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Baldwin, J.

{¶1} Plaintiff-appellant Colton Barton appeals from the August 9, 2012 Order of the Morgan County Court of Common Pleas granting the Motion for Summary Judgment filed by defendant-appellee Jeffrey Simpson and the October 19, 2015 Journal Entry of the Morgan County Court of Common Pleas granting the Motion for Summary Judgment filed by defendant-appellee John Jourdan.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 12, 2010, appellant, who was working in a summer work program administered through Hocking Technical College, was a passenger in a motor vehicle operated by appellee John Jourdan, who was also employed through Hocking College in the program as a work crew supervisor. Appellee Jeffrey Simpson also was working in the summer program and was operating a motor vehicle behind appellee Jourdan's vehicle.

{¶3} After appellee Jourdan stopped his vehicle, appellee Simpson's vehicle struck the rear of appellee Jourdan's vehicle, causing injury to appellant. Prior to the accident, appellant was sitting in the rear of appellee Jourdan's vehicle, squirting water at appellee Simpson's vehicle.

{¶4} Appellant filed a workers' compensation claim as a result of his injuries. The claim was disallowed pursuant to an order dated August 6, 2010 on the basis that appellant's injury was the result of horseplay and was not sustained in the course of and arising out of employment. Appellant then filed an appeal with the Ohio Industrial Commission. The Ohio Industrial Commission, in an ex parte order mailed on September 22, 2010, vacated the August 6, 2010 order stating, in relevant part, as follows: "Pursuant

to the letter from the Injured Worker's representative dated 8/31/2010, the FROI-1 filed 07/15/2010 is withdrawn. Therefore, the Injured Worker's appeal filed 08/17/2010 is dismissed as the issue is moot."

{¶5} On May 31, 2011, appellant filed a complaint against appellees, alleging that they were negligent. On June 21, 2012, appellee Simpson filed a Motion for Summary Judgment based on the fellow servant doctrine codified at R.C. 4123.741. Appellant filed a memorandum in opposition to the same on July 6, 2012, arguing that in order for such doctrine to apply, the injury must be compensable under the Workers' Compensation Act. Appellant argued that since his Workers' Compensation claim was denied, it was determined that his injuries were not compensable under the Workers' Compensation Act. The trial court, pursuant to an Order filed on August 9, 2012, granted appellee Simpson's Motion for Summary Judgment.

{¶6} Subsequently, appellee Jourdan filed a Motion for Summary Judgment on May 1, 2015. As memorialized in a Journal Entry filed on October 19, 2015, the trial court granted such motion.

{¶7} Appellant now raises the following assignment of error on appeal:

{¶8} WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEES (SIC) MOTION FOR SUMMARY JUDGMENT.

I

{¶9} Appellant, in his sole assignment of error, argues that the trial court erred in granting the two Motions for Summary Judgment filed by appellees.

{¶10} We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case 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.* * * A summary judgment shall not be rendered unless it appears from such 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.

{¶11} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 1996–Ohio–107, 662 N.E.2d 264. The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a "triable issue of fact" exists. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶12} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1977–Ohio–259, 674 N.E.2d 1164, citing *Dresher v. Burt,* supra.

{¶13} Both appellees raised the fellow servant doctrine in their Motions for Summary Judgment. R.C. 4123.741 sets forth the fellow servant doctrine as follows:

> 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 or occupational disease, received or contracted by any other employee of such employer in the course of and arising out of the latter employee's employment, or for any death resulting from such injury or occupational disease, on the condition that such injury, occupational disease, or death is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code. (Emphasis added)

{¶14} In *Kaiser v. Strall,* 5 Ohio St.3d 91, 94, 449 N.E.2d 1 (1983), the Ohio Supreme Court held: "[A] party who is injured as a result of a co-employee's negligent acts, who applies for benefits under Ohio's workers' compensation statutes, and whose injury is found to be compensable thereunder is precluded from pursuing any additional common-law or statutory remedy against such co-employee."

{¶15} In the case sub judice, appellant argues that the Bureau of Workers' Compensation denied his claim on the basis that his injury was the result of "horseplay" and was therefore, not compensable under the Workers' Compensation Act. According to appellant, the fellow servant doctrine, therefore, is not applicable.

{¶16} R.C. Chapter 4123.511 and 4123.512 set forth the appeal process for Workers' Compensation claims. R.C. 4123.511(E) provides: "Upon the filing of a timely appeal of the order of the staff hearing officer issued under division (D) of this section, the commission shall determine whether to hear the appeal. * * * If the commission

determines not to hear the appeal, within fourteen days after the filing of the notice of appeal, the commission shall issue an order to that effect and notify the parties and their respective representatives in writing of that order. * * * "

{¶17} In turn, R.C. 4123.512(A) provides as follows: "The claimant or the employer may appeal an order of the Industrial Commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability, to the court of common pleas of the county in which the injury was inflicted * * *." As noted by the court in *Ward v. Kroger Co.,* 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E.2d 1155 at paragraph 9, "To this extent, the statute clearly contemplates the general nonappealability of commission orders and, in the case of claims for initial allowance, withholding judicial review until after the claim runs the gamut of successive administrative hearings provided for under R.C. 4123.511."

{¶18} Thus, under the unequivocal language of R.C. 4123.511 and 4123.512, a party must appeal an adverse decision of a Staff Hearing Officer to the Industrial Commission, before it can seek review in the Common Pleas Court. Where a party fails to appeal the decision of a staff hearing officer to the Industrial Commission first, an appeal to the Common Pleas Court is properly dismissed. *Hamilton v. Cuyahoga Community College*, 167 Ohio App.3d 114, 2006-Ohio-3017, 854 N.E.2d 218 (8th Dist.).

{¶19} In the case sub judice, while appellant did appeal to the Industrial Commission, appellant dismissed his appeal and the order dated August 6, 2010 finding that appellant's injury was the result of horseplay and was not sustained in the course of and arising out of employment was vacated. We find that appellant has failed to exhaust his administrative remedies and that there has been no finding that appellant's injury was

not compensable under the Workers' Compensation Act. Based on the foregoing, we find that the trial court did not err in granting both Motions for Summary Judgment.

{¶20} Appellant's sole assignment of error is, therefore, overruled.

{¶21} Accordingly, the judgment of the Morgan County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. concurs.

Hoffman, J. concurs separately.

Hoffman, J., concurring

{¶22} I concur in the majority opinion.

{¶23} R.C. 4123.741 does not specify by whom a finding of compensability under the Workers' Compensation Act is to be made. In the absence of a final determination by the Industrial Commission, I find such determination can be made in the common pleas court.[1]

{¶24} Appellant's conduct in squirting water at Simpson's vehicle did not cause Jordan to suddenly stop his vehicle thereby causing Simpson's vehicle to strike Jordan's vehicle. I find Appellant's involvement in the "horseplay" was not the proximate cause of his injury so as to preclude a determination his injury arose out of and in the course of his employment; therefore, compensable under the Workers' Compensation Act.

[1]Peculiar to me is the decision of the Ohio Industrial Commission to "vacate" the initial denial of Appellant's workers' compensation claim based upon Appellant's withdrawal of his FROI-1. While I understand such action may have rendered Appellant's appeal to the Industrial Commission moot, why should Appellant's withdrawal have the effect of rendering the initial determination of no coverage for naught? The briefs do not address this question. It would seem such tactic may allow Appellant a second bite at the apple under the workers' compensation system.