[Cite as *Holloway v. Area Temps*, 2010-Ohio-2106.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93842

SCOTT HOLLOWAY

PLAINTIFF-APPELLANT

vs.

AREA TEMPS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-615335

BEFORE: Gallagher, A.J., Dyke, J., and Sweeney, J.

RELEASED: May 13, 2010
JOURNALIZED:

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Scott Holloway, appeals the judgment of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of appellees, Area Temps, King Nut Co., and Kanan Enterprises (collectively "appellees"). For the reasons stated herein, we affirm.

{¶ 2} On February 7, 2007, Holloway filed a complaint against appellees. He asserted claims of employer intentional tort, violation of the frequenter statute (R.C. 4101.11), and negligence. The claims arose from a workplace accident that occurred on November 25, 2005, at a King Nut facility in Solon, Ohio.

{¶ 3} At the time of the accident, Holloway was a temporary employee of King Nut Co., a wholly owned subsidiary of Kanan Enterprises. Holloway was placed on assignment with King Nut Co. by Area Temps. His job consisted of delivering, loading, and unloading trucks. Although he had prior experience operating a tow motor, he was not certified.

{¶ 4} On the date of the accident, Holloway was operating a "stand up" tow motor. As he began to load a pallet of product onto the back of the truck, the truck moved forward. The tow motor began to fall backwards off the truck. Holloway attempted to jump clear of the tow motor. However, the tow motor fell on top of his leg, causing significant injury.

{¶ 5} King Nut provides wheel chocks at the loading and unloading area by chaining them to the docks. It is standard procedure for the driver to place a chock under a truck wheel to prevent movement of the vehicle. Holloway stated

that on occasions when he had driven a truck into the loading docks, he would chock the wheels, turn the engine off, and make sure the brake was engaged. It was his belief that this was the driver's responsibility.

{¶ 6} At the time of the accident, the driver of the truck claimed that he placed the chock under a wheel. However, Holloway did not observe any wheel chocks in use to prevent movement of the truck. Further investigation of the scene by King Nut employees revealed that chocks were not in use. Also, it was discovered that the truck was still running in neutral, with the parking brake only partially engaged. Holloway stated that he believed that the accident was the result of a mistake by the driver in not chocking the wheels of the truck and that there was "negligence someplace."

{¶ 7} King Nut Co. and Kanan Enterprises filed a joint motion for summary judgment. Area Temps also filed a motion for summary judgment. The motions were granted by the trial court.

{¶ 8} Holloway timely filed this appeal. He has raised one assignment of error for our review that provides as follows: "The trial court erred to the prejudice of appellant, Scott Holloway, in granting summary judgment in favor of appellees King Nut Co., Kanan Enterprises, and Area Temps, Inc."

{¶ 9} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine

whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12. Under Civ.R. 56(C), summary judgment is proper when all relevant materials to be considered under the rule reveal 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." The evidence must be construed most strongly in the nonmoving party's favor and "summary judgment shall not be rendered" unless those materials establish 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 * * *." Id.

{¶ 10} The Ohio Supreme Court recently ruled that R.C. 2745.01, as enacted by Am.H.B. No. 498, effective April 7, 2005, is constitutional. *Kaminski v. Metal & Wire Prods. Co.*, __ Ohio St.3d __, 2010-Ohio-1027, __ N.E.2d __; *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, __ Ohio St.3d __, 2010-Ohio-1029, __ N.E.2d __. "Because R.C. 2745.01 is constitutional, the standards contained in the statute govern employer intentional tort actions, and the statutory standards apply rather than the common-law standards of [*Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108]." *Kaminski*, supra at ¶ 103.

{¶ 11} Pursuant to the above authority, to the extent the trial court's decision and the arguments presented on this appeal relate to the common-law standard set forth under *Fyffe*, supra, that standard does not apply to this case.

Rather, we must follow the statutory standards under R.C. 2745.01 in conducting our review.

{¶ 12} R.C. 2745.01 sets forth the requirements for employer intentional tort liability. Only sections (A) and (B) of the statute are implicated in this matter, and provide as follows:

> **"(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."**

R.C. 2745.01(A) and (B).

{¶ 13} Ohio's employment intentional tort statute requires an employee to prove that his employer committed a tortious act with intent to injure another or with belief that the injury was substantially certain to occur, but with "substantially certain" statutorily defined as acting with deliberate intent to cause an employee to suffer injury. As explained in *Kaminski*: "the General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D)." *Kaminski*, supra at ¶ 56.

{¶ 14} In this case, the record is devoid of evidence showing that appellees acted with a specific or deliberate intent to cause Holloway to suffer an injury. Indeed, the record reflects that the accident that resulted in Holloway's injury was caused by mistake or negligence, rather than intentional conduct. Construing all materials in a light most favorable to Holloway, the only conclusion that can be reached on this record under R.C. 2745.01 is that there is no genuine issue as to any material fact.

{¶ 15} Holloway's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

ANN DYKE, J., and
JAMES J. SWEENEY, J., CONCUR