[Cite as *Guappone v. Enviro-Cote, Inc.*, 2009-Ohio-5540.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

MICHAEL GUAPPONE	C. A. No. 24718
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ENVIRO-COTE, INC.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2007-12-8912

DECISION AND JOURNAL ENTRY

Dated: October 21, 2009

CARR, Presiding Judge.

{¶1} Appellant, Michael Guappone, appeals the judgment of the Summit County Court of Common Pleas, which granted summary judgment in favor of appellee, Enviro-Cote, Inc. ("Enviro-Cote"). This Court reverses and remands.

I.

{¶2} Guappone filed a complaint against Enviro-Cote, alleging an intentional tort claim for injuries he sustained at work on December 29, 2005, when he slipped on oil on the floor and fell onto the in-running rollers on a slitting machine. Enviro-Cote answered, denying the claim. Guappone then moved for leave to amend his complaint to allege that the current version of R.C. 2745.01, the employer intentional tort statute, is unconstitutional. The trial court denied the motion.

{¶3} Guappone filed a motion for summary judgment, arguing that R.C. 2745.01 is unconstitutional and inapplicable to this case, and that he is entitled to summary judgment on his

claim under an analysis pursuant to *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, and *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115. Enviro-Cote filed a brief in opposition, asserting that Guappone "generally misinterprets Ohio's intentional tort law[.]" Guappone replied.

{¶4} Enviro-Cote filed a motion for summary judgment, noting that the legislature enacted the current version of R.C. 2745.01 after earlier versions had been ruled unconstitutional. Enviro-Cote acknowledged that the constitutionality of the statute is currently on appeal to the Ohio Supreme Court, although the high court has yet to issue its decision on the matter. See *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App.3d 227, 2008-Ohio-1521, appeal allowed by *Kiminski v. Metal & Wire Prods. Co.*, 119 Ohio St.3d 1407, 2008-Ohio-3880. Enviro-Cote analyzed Guappone's claim under both R.C. 2745.01 and the *Fyffe* test. Guappone opposed the employer's motion, and Enviro-Cote replied.

{¶5} On March 25, 2009, the trial court issued its ruling on the competing motions for summary judgment. The trial court acknowledged the legislature's April 7, 2005 enactment of the current version of R.C. 2745.01 and stated that the statute renders the *Fyffe* common law definition of "substantially certain" more restrictive. The trial court declined to address Guappone's argument that R.C. 2745.01 is unconstitutional and inapplicable to this case because it concluded that summary judgment in favor of Enviro-Cote was proper under the less demanding standard set forth in *Fyffe*. The trial concluded that Guappone failed to establish the second and third prongs of the *Fyffe* test and, therefore, granted summary judgment in favor of Enviro-Cote. Guappone filed a timely appeal, raising two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE APPELLEE/EMPLOYER BECAUSE THERE WAS AMPLE CREDIBLE EVIDENCE THAT THE ADMITTEDLY UNGUARDED IN-RUNNING NIP POINTS OF THE SLITTING MACHINE WERE SUBSTANTIALLY CERTAIN TO CAUSE HARM, THUS RESULTING IN THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT FOR DETERMINATION BY A JURY."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE EMPLOYER AFTER CONCLUDING THAT THE EMPLOYER DID NOT REQUIRE ITS WORKER TO BE IN THE AREA WHERE THE INJURY OCCURRED DURING THE NORMAL PERFORMANCE OF HIS JOB DUTIES AND THEREBY BE SUBJECTED TO ANY KNOWN DANGEROUS PROCESSES, PROCEDURES OR INSTRUMENTALITIES WITHIN ITS BUSINESS OPERATION."

{¶6} Guappone argues that the trial court erred by granting summary judgment in favor of Enviro-Cote upon concluding that no genuine issues of material fact existed after application of the three-prong test of *Fyffe* to the evidence. This Court agrees.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶8} Pursuant to Civ.R. 56(C), summary judgment is proper if:

"(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

It is axiomatic that, before it may determine that one party is entitled to judgment as a matter of law, the trial court must apply the law which is applicable to claim.

{¶9} Guappone alleged a claim for employer intentional tort arising out of his injury which occurred on December 29, 2005. Because the accident in this case occurred after the effective date of the amendment to R.C. 2745.01, the current version of the statute is applicable to Guappone's claim. *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, at ¶17.

{¶10} The legislature has repeatedly attempted to codify this type of claim in R.C. 2745.01. The prior version of R.C. 2745.01 was held to be unconstitutional. *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, syllabus. The legislature modified the statute addressing employer intentional tort liability on April 7, 2005. Since then, at least three appellate district courts have held the current version of R.C. 2745.01 to be unconstitutional. *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App.3d 227, 2008-Ohio-1521, at ¶36 (Seventh District Court of Appeals); *Barry v. A.E. Steel Erectors, Inc.*, 8th Dist. No. 90436, 2008-Ohio-3676, at ¶21-27; *Fleming v. AAS Serv., Inc.*, 177 Ohio App.3d 778, 2008-Ohio-3908, at ¶40 (Eleventh District Court of Appeals). The issue has been certified to the Ohio Supreme Court, but has yet to be decided. *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App.3d 227, 2008-Ohio-1521, appeal allowed by *Kiminski v. Metal & Wire Prods. Co.*, 119 Ohio St.3d 1407, 2008-Ohio-3880; see, also, *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 119 Ohio St.3d 1405, 2008-Ohio-3880.[1] Unless and until the Ohio Supreme Court holds the current version of the statute to be unconstitutional, it continues to be the law in this district, as this Court has not spoken on the

[1] Both *Kaminski* and *Stetter* were argued before the Ohio Supreme Court on February 18, 2009.

issue. Accordingly, Guappone's claim must be considered within the context of R.C. 2745.01, rather than the common law test enunciated in *Fyffe*.

{¶11} The trial court in this case failed to consider any evidence presented in support of the motions for summary judgment within the context of R.C. 2745.01. Although our review is de novo, this Court is precluded from considering the motions for summary judgment in the first instance. The Ohio Supreme Court has rejected the idea that an appellate court's independent consideration of the record can cure the trial court's failure to conduct its own initial examination of the evidence in compliance with Civ.R. 56. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360. That necessarily includes an examination of the evidence within the applicable legal context. The *Murphy* court explained:

> "The grant of a Civ.R. 56 motion terminates litigation without giving the opposing party the benefit of a trial on the merits. The requirements of the rule must be strictly enforced. Compliance with the terms of Civ.R. 56(C) is of fundamental importance at the trial court level, where the initial examination of the evidence occurs, and where the issues framing the litigation are shaped. *** The rule mandates that the trial court make the initial determination whether to award summary judgment; the trial court's function cannot be replaced by an 'independent' review of an appellate court." Id.

{¶12} *Murphy* involved a situation in which the trial court granted summary judgment without having read or considered any evidence submitted pursuant to Civ.R. 56(C). Rather, the trial court issued its ruling on the basis of the oral arguments of the parties. This Court has applied the holding in *Murphy* under similar circumstances in which the trial court failed to consider some of the evidence presented pursuant to Civ.R. 56. See, e.g., *Wissel v. McDonalds Corp.* (Jan. 21, 1998), 9th Dist. No. 2702-M. In addition, we have applied *Murphy* in cases in which the trial court failed to consider alternate grounds in support of a motion for summary judgment. See, e.g., *B.F. Goodrich Co. v. Commercial Union Ins.*, 9th Dist. No. 20936, 2002-Ohio-5033; *Orvets v. Natl. City Bank, Northeast* (1999), 131 Ohio App.3d 180. The same

reasoning is applicable in a case in which the trial court failed to consider the evidence within the proper legal context.

{¶13} In this case, the trial court did not make a summary judgment determination, i.e., did not consider whether either party was entitled to judgment as a matter of law, where it did not apply the applicable law. Because the trial court failed to make a summary judgment determination in compliance with the mandates of Civ.R. 56, there is no determination for this Court to review. Were we to consider this matter, applying the appropriate law in the first instance, our decision would constitute a ruling on the motions for summary judgment in the first instance as well, effectively depriving the non-prevailing party of appellate review. Accordingly, this matter must be remanded to the trial court for a summary judgment determination in compliance with Civ.R. 56 in the first instance. Guappone's assignments of error are sustained.

III.

{¶14} Guappone's assignments of error are sustained. The judgment of the Summit County Court of Common Pleas is reversed and the cause remanded for further proceedings in accordance with this decision.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶15} I concur in the result. However, I would reverse because there are genuine issues of material fact that preclude summary judgment.

APPEARANCES:

ANGELA J. MIKULKA, and THOMAS L. MIKULKA, Attorneys at Law, for Appellant.

DARRELL N. MARKIJOHN, Attorney at Law, for Appellee.