[Cite as *Alexander v. Boston*, 2015-Ohio-1799.]

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

JERRY D. ALEXANDER	C.A. No. 27376
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CODY BOSTON	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2013-06-2899

DECISION AND JOURNAL ENTRY

Dated: May 13, 2015

MOORE, Judge.

{¶1} Plaintiff, Jerry D. Alexander, appeals from the judgment of the Summit County Court of Common Pleas. This Court reverses and remands this matter for further proceedings consistent with this opinion.

I.

{¶2} In 2011, Mr. Alexander, an employee of J.B. Manufacturing ("J.B."), left J.B.'s building to eat lunch in his car, which was parked in the parking lot adjacent to the building. At that time, Cody Boston, also a J.B. employee, was driving his car in the parking lot, and he struck Mr. Alexander and ran over his foot and lower leg. Following the accident, Mr. Alexander filed for, and was awarded, workers' compensation benefits for his injuries.

{¶3} In 2013, Mr. Alexander filed suit against Mr. Boston in the trial court. Mr. Boston answered the complaint, asserting several affirmative defenses, including that he was immune from liability under the fellow servant immunity doctrine. Thereafter, Mr. Boston filed

a motion for summary judgment arguing that, because Mr. Alexander was eligible for, and in fact received, workers' compensation benefits as a result of the accident, Mr. Boston was immune from liability under the fellow servant immunity doctrine. Mr. Alexander responded in opposition, and Mr. Boston filed a reply. Thereafter, the trial court awarded summary judgment to Mr. Boston.

{¶4} Mr. Alexander timely appealed, and he now raises one assignment of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING [MR. BOSTON'S] MOTION FOR SUMMARY JUDGMENT BASED SOLELY ON THE FACT THAT [MR. ALEXANDER'S] INJURIES WERE FOUND TO BE COMPENSABLE UNDER OHIO WORKERS COMPENSATION LAW.

{¶5} In his sole assignment of error, Mr. Alexander argues that the trial court erred in granting summary judgment in favor of Mr. Boston based solely on the fact that Mr. Alexander's injuries were compensable under workers' compensation law. We agree.

{¶6} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). We apply the same standard as the trial court, viewing the facts of 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.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶7} Pursuant to Civ.R. 56(C), summary judgment is proper only 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., 50 Ohio St.2d 317, 327 (1977).

{¶8} Here, the parties' disagreement does not presently concern any disputed facts, but instead, it is focused on the trial court's application of the relevant law. We will confine our review accordingly.

{¶9} This case pertains to the application of the co-employee immunity provision of R.C. 4123.741, also known as the fellow servant rule, which provides:

> 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.

R.C. 4123.741. *See also Kobak v. Sobhani*, 8th Dist. Cuyahoga No. 94764, 2011-Ohio-13, ¶ 12, fn. 2. R.C. 4123.01 to R.C. 4123.94 contains Ohio's workers' compensation statutes.

{¶10} In *Kaiser v. Strall*, 5 Ohio St.3d 91, 94 (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."

{¶11} In *Donnelly v. Herron* ("*Donnelly I*"), 8th Dist. Cuyahoga No. 74324, 1999 WL 35345, *1 (Jan. 21, 1999), the Eighth District interpreted the requirements of R.C. 4123.741 and the holding of *Kaiser*. The Eighth District noted that "[e]mployee" is defined as "[e]very person in the service of any person, firm, or private corporation, including any public service corporation, that * * * employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written,* * *." *Id.* Therefore, the Eighth District held that, in order for immunity to attach under R.C. 4123.741,

both the injured employee and the co-employee must be "in the service of" the employer at the time of the injurious action. *See Donnelly I* at *2. On appeal to the Ohio Supreme Court, the Court agreed that both employees must be in the service of the employer at the time of the injury for the co-worker to be immune. *Donnelly v. Herron* ("*Donnelly II*"), 88 Ohio St.3d 425, 428 (2000). The Court held that, "R.C. 4123.741 extends immunity to a co[-]employee *only when* the actionable conduct occurs 'in the course of, and arising out of,' the co[-]employee's employment, within the meaning of that phrase in the Workers' Compensation Act." (Emphasis added.) *Id.* at syllabus.

{¶12} Here, in his motion for summary judgment, Mr. Boston argued that the collision occurred in the "zone of employment," allowing Mr. Alexander's injuries to be compensable under the Workers' Compensation Act.[1] *See Smith v. City of Akron*, 9th Dist. Summit No. 22101, 2004-Ohio-5174, ¶ 14-15 (discussing the "coming-and-going" rule which precludes compensation, and identifying the "zone of employment" exception to that rule), *Mitchell v. Cambridge Home Health Care, Inc.*, 9th Dist. Summit No. 24163, 2008-Ohio-4558, ¶ 20 (discussing the zone of employment exception), and *Miller v. Bur. Of Workers' Comp.*, 9th Dist. Summit No. 24805, 2010-Ohio-1347 (analyzing the coming-and-going rule). Because Mr. Alexander was eligible for, and in fact received workers' compensation benefits for his injuries resulting from this accident, Mr. Boston argued that he was immune from suit under R.C. 4123.741. Mr. Alexander responded that questions of fact remained as to whether Mr. Boston was in the service of J.B. at the time of the accident, whether Mr. Boston's conduct arose out of

[1] Nothing in the record establishes the basis upon which Mr. Alexander was ultimately awarded workers' compensation.

and occurred in the course of his employment, and whether the parties where "in the zone of employment" at the time of the accident.

{¶13} Relying on R.C. 4123.741 and *Kaiser*, the trial court concluded that Mr. Alexander could not "obtain Workers' Compensation benefits and then seek additional recovery for the same incident from his fellow employee." The trial court relied on the *Kaiser* holding that, "[a] party who is injured as a result of a co-employee's negligent acts, who applied for benefits under Ohio's Workers' Compensation statute, and whose injury is found to be compensable thereunder, is precluded from pursuing any additional common-law or statutory remedy against such co-employee."

{¶14} Thus, the trial court focused on the compensability of Mr. Alexander's injuries in determining whether he was precluded from pursuing a remedy against Mr. Boston. It is undisputed that Mr. Alexander received worker's compensation as a result of the accident. However, although the trial court referred to Mr. Boston as an "employee" in the context of the application of R.C. 4123.741, it does not appear that the trial court considered whether a question of fact existed as to whether Mr. Boston's "conduct occur[ed] 'in the course of, and arising out of,' [Mr. Boston's] employment, within the meaning of that phrase in the Workers' Compensation Act." (Emphasis added.) *Donnelly II*, 88 Ohio St.3d 425, at syllabus. Because the trial court appears to solely have considered the compensability of Mr. Alexander's injuries when granting summary judgment, without regard to Mr. Boston's conduct, the trial court erred in determining that Mr. Boston was entitled to judgment as a matter of law on the basis of R.C. 4123.741.

{¶15} We note that Mr. Boston has argued on appeal, as he did in his reply in support of summary judgment, that both parties were in the "zone of employment" at the time of the

accident, and thus Mr. Boston's conduct occurred in the course of and arose out of his employment. However, as set forth above, the trial court did not make a determination on this issue. This Court declines to render a decision on this issue in the first instance. *See Burr v. Nationwide Mut. Ins. Co.*, 9th Dist. Lorain No. 12CA010231, 2013-Ohio-4406, ¶ 23 (declining to consider arguments in support of summary judgment that were not considered by the trial court).

{¶16} Accordingly, Mr. Alexander's sole assignment of error is sustained.

III.

{¶17} Mr. Alexander's sole assignment of error is sustained. The judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.

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(C). 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.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

WILLIAM F. MIKESELL, Attorney at Law, for Appellant.

DAVID P. STADLER, Attorney at Law, for Appellee.