

IN THE SUPREME COURT OF OHIO

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CASE NO. **06-2085**

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**KEITH E. NIELSEN, et al.**  
**Plaintiffs-Appellants,**

-vs-

**THE ANDERSONS, INC., et al.**  
**Defendant-Appellees.**

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**ON APPEAL FROM THE LUCAS COUNTY COURT OF APPEALS  
SIXTH APPELLATE DISTRICT  
CASE NO. L-06-1073**

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**MEMORANDUM IN SUPPORT  
OF JURISDICTION OF PLAINTIFFS-APPELLANTS**

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Andrew S. Goldwasser (#0068397) (**Counsel of Record**)

L. Jason Blake (#0080320)

CIANO & GOLDWASSER, LLP

MK Ferguson Plaza

1500 West 3<sup>rd</sup> Street

Suite 460

Cleveland, OH 44113

Tel: 216-685-9900

Fax: 216-658-9920

Email: [agoldwasser@cianogoldwasser.com](mailto:agoldwasser@cianogoldwasser.com)

[jblake@cianogoldwasser.com](mailto:jblake@cianogoldwasser.com)

*Counsel for Plaintiffs-Appellants,  
Keith E. Nielsen, et al.*

James R. Jeffery (#0014239)

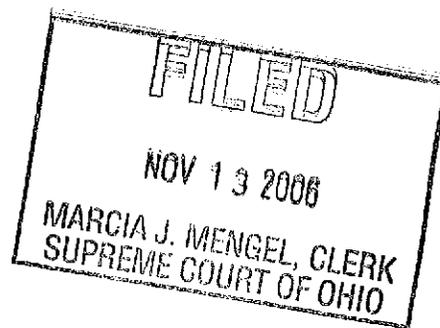
SPENGLER NATHANSON, PLL

608 Madison Avenue

Suite 1000

Toledo, OH 43604

*Counsel for Appellee-Defendant,  
The Andersons, Inc.*



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## STATEMENT OF PUBLIC AND GREAT GENERAL INTEREST

This case presents a critical issue of law and procedure, which if not properly resolved, will have a much greater effect than the granting of summary judgment based upon a limited fact pattern. If this decision is permitted to stand, courts across Ohio are permitted to circumvent the Ohio Rules of Civil Procedure, the Ohio Rules of Evidence, and well-established Ohio case law by (i) inferring evidence that is not in the record and (ii) construing inferences in favor of the moving party when ruling on a motion for summary judgment.

In this case, the Sixth Appellate District concluded that the Trial Court properly *inferred* evidence that was not in the record when granting the Andersons, Inc.'s ("TAI") Motion for Summary Judgment. Specifically, the Sixth District determined that TAI was immune from the Nielsen's negligence and other tort claims based on Worker's Compensation Immunity, pursuant to R.C. §4123.74.<sup>1</sup> The Sixth District reached this conclusion by "*inferring*" that TAI contributed to the Worker's Compensation Fund ("the Fund") on behalf of Appellant Keith Nielsen, even though TAI admittedly has no such evidence.

The implications of the Sixth District's decision set a dangerous precedent: Courts will be permitted to infer evidence that does not exist; courts will be permitted to look outside the record when ruling on a motion for summary judgment; courts will be permitted to infer information regardless of whether the information is properly before the court; courts will be permitted to construe inferences in favor of the moving party when ruling on a motion for summary judgment; and courts will be permitted to disregard the explicit language of Civil Rule 56(C).

The Sixth District's decision must be overruled.

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<sup>1</sup> The "Nielsens" refer to Appellants-Plaintiffs Keith and Andrea Nielsen.

## STATEMENT OF THE CASE AND FACTS

This case comes before this Court on the Niensens' appeal from the Sixth District's decision to uphold the Lucas County Court of Common Pleas' decision to grant TAI's Motion for Summary Judgment. The action arises out of an industrial accident. At the time of the incident, Keith Nielsen was working as an employee of Renhill Staffing, Inc. ("Renhill Staffing"). He was hired by Renhill Staffing and paid by Renhill Staffing and, most importantly, Renhill Staffing, not TAI, contributed to the Fund on behalf of Mr. Nielsen.

Renhill Staffing assigned Mr. Nielsen to work in the rail department of TAI's facility in Maumee, Ohio. While working in that capacity, Mr. Nielsen was operating an industrial sandblaster in a railcar. The sandblaster had been modified. Rubber bands were wrapped around the trigger to half alleviate hand fatigue. As Mr. Nielsen was re-positioning himself in the railcar, he tripped and fell. Unfortunately, the sandblaster failed to disengage because of the rubber bands. Consequently, Mr. Nielsen was severely injured.

Following the incident, Mr. Nielsen and his wife filed their Complaint in the Lucas County Court of Common Pleas (the "Trial Court"). They sued TAI for negligence, malice, negligence per se and loss of consortium.<sup>2</sup> The Nielsen's alleged, as an alternative theory, that TAI committed a workplace intentional tort.

Thereafter, TAI moved for summary judgment. In its motion for summary judgment, TAI argued that it was entitled to judgment as a matter of law based on the affirmative defense of Worker's Compensation Immunity.<sup>3</sup> In order to receive such immunity, TAI was required to

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<sup>2</sup> Renhill was also a named defendant in the Complaint; however, the Niensens have since settled and dismissed Renhill from this lawsuit.

<sup>3</sup> Worker's Compensation Immunity prevents an employee from asserting, inter alia, negligence, malice, negligence per se and loss of consortium claims against an employer who contributes,

produce evidence demonstrating it had contributed, either directly or indirectly, to the Fund. *See Foran v. Fisher Foods, Inc.* (1985), 17 Ohio St.3d 193.

TAI did not, nor could not, produce any such evidence. In fact, TAI acknowledged that it had no records or any other documentation evidencing that it contributed to the Fund. (See, TAI's Responses to Plaintiffs' First Request for Production of Documents, Request No. 13 attached to Plaintiffs' Brief in Opposition as Exhibit 9). Likewise, Renhill Staffing declared that it had no "records" evidencing TAI's "payment of Worker's Compensation premiums arising out of the subject incident." (See, Renhill Staffing's Responses to Plaintiffs' Request for Production No. 14).

Despite no evidence demonstrating that TAI contributed, either directly or indirectly, to the Fund, the Trial Court granted TAI's motion for summary judgment. The Trial Court concluded that it was "reasonable to infer" TAI's contribution because Mr. Nielsen was receiving Worker's Compensation benefits. (See, Exhibit A, at p. 7.)

The Niensens timely appealed this decision to the Sixth District, which, in response, upheld the Trial Court's decision, concluding that the Trial Court may grant summary judgment based upon an inference. The Sixth District reached this decision despite the fact that (1) the burden was on TAI to produce evidence demonstrating that it contributed to the Fund and (2) TAI produced no such evidence.

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either directly or indirectly, into a worker's compensation fund established on behalf of that employee.

## ARGUMENT

### **Proposition of Law: Ohio Courts May Not Grant Summary Judgment Based Upon A Mere Inference Made From Non-Existent Evidence.**

Ohio courts may not grant summary judgment based upon an inference made from non-existent evidence. Likewise, courts may not construe inferences against the non-moving party. Indeed, Civ.R. 56 specifically provides that a court may only grant summary judgment where a moving party establishes “*from the evidence ... and only from the evidence*” that the moving party is clearly entitled to summary judgment as a matter of law. See, Civ.R. 56 (emphasis added).

In this case, TAI was required to produce evidence demonstrating *that it* contributed, either directly or indirectly, to the Fund. See, *Daniels v. MacGregor Co.* (1965), 2 Ohio St. 2d 89, 92; see also R.C. 4123.74; R.C. 4123.01 (B)(2); see, also, *Carr v. Central Printing Co.* (1997), 2<sup>nd</sup> Dist. No. 16091, 1997 WL 324107, at \*3 (The moving party must come forward with solid evidence demonstrating that it actually made premium payments to the fund.). TAI, however, did not offer any evidence that it contributed, either directly or indirectly, to the Fund. In fact, TAI did not even address this requirement in its Motion for Summary Judgment despite its burden to do so. (See, generally, Motion for Summary Judgment.) Moreover, TAI has admitted that it has no documentation demonstrating that it contributed, either directly or indirectly, to the Fund. (See, Nielsens’ Brief in Opposition, at Exhibits 9 and 10 (TAI admits that there is no documentation evidencing that TAI contributed, either directly or indirectly, to the Fund.).)

Nevertheless, the Sixth District, upheld the Trial Court’s decision to grant summary judgment, concluding that the Trial Court was entitled to *infer* that TAI made contributions to the

Fund, pursuant to the Sixth District's previous decision in *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 733 N.E.2d 1186. In *Russell*, the Sixth District erroneously held that it is proper for a trial court to grant summary judgment upon a Worker's Compensation Immunity defense by *inferring* that a temporary employer contributed to a worker's compensation fund set up by its temporary employee's permanent employer, a staffing agency. See, *Russell*, 135 Ohio App.3d 301, 306, 733 N.E.2d 1186.

The Sixth District based its decisions in both this matter and *Russell*, upon its reasoning that, where a temporary employee receives some worker's compensation benefits, it is "reasonable to infer that someone, most likely the [defendant temporary-employer] paid worker's compensation premiums for [plaintiff temporary-employee] or he would not have obtained benefits..." (See, Exhibit B, at pp. 5-6); see, also, *Russell*, 135 Ohio App.3d 301, 306, 733 N.E.2d 1186. The Sixth District also concluded that, since the trial court may grant summary judgment based solely upon an inference, the burden is shifted to the plaintiff to produce "evidence to the contrary" in order to survive summary judgment. (See, Exhibit B, at p. 6); see, also, *Russell*, 135 Ohio App.3d 301, 306, 733 N.E.2d 1186.

The Sixth District's decisions in both this matter and *Russell* are contrary to well established case law regarding the burden to establish the affirmative defense of Worker's Compensation Immunity. Additionally, the Sixth District's decisions are contrary to the express language of Civ.R. 56 and well established case law regarding the burden to establish summary judgment.

A. *The Decision Is Contrary to Well Established Case Law Regarding the Burden to Establish Worker's Compensation Immunity*

It is a well established principle of Ohio case law that a defendant asserting Worker's Compensation Immunity must produce affirmative evidence demonstrating that it has, in fact,

made contributions, either directly or indirectly, to a worker's compensation fund on the plaintiff's behalf. See, *Carr v. Central Printing Co.* (1997), 2nd Dist. No. 16091, 1997 WL 324107, at \*3; see, also, *Lawson v. May Department Store* (2001), 7th Dist. No. 00 CA 191, 2001-Ohio-3453, 2001 WL 1539161, at \*9. The reasoning for this rule of law is clear: An employer should not be able to hide under the cloak of Worker's Compensation Immunity when that employer did not pay for protection under the Act.

For example, in *Carr*, there was evidence in the record demonstrating that a temporary agency was proportionally reducing its employees' hourly rates to make premium payments into a fund set up on the employees' behalf. See, *id.*, at \*3. However, there was no *conclusive* evidence demonstrating that the defendant compensated the temporary agency for making the payments to the fund. See, *id.* at \*3. Accordingly, the court reversed summary judgment, holding:

[T]he burden of establishing [Worker's Compensation Immunity] as a matter of law was upon the party moving for summary judgment. And in the application of the severe restrictions which must be imposed in summary judgment proceedings, see Civ.R. 56, the granting of the [summary judgment] motion \* \* \* was at least premature, and accordingly, the first assignment of error is well made.

See, *id.*

Likewise, in *Lawson v. May Department Store* (2001), 7th Dist. No. 00 CA 191, 2001-Ohio-3453, 2001 WL 1539161, at \*9, the Seventh District reversed summary judgment because the defendant failed to produce any affirmative evidence that it made payments into a worker's compensation fund on the plaintiff's behalf. Specifically, the Seventh District concluded that if the defendant had made contributions to the fund, it must have documentation evidencing such contributions; and since it failed to produce any such documentation, summary judgment was

improperly granted. See, *Lawson*, 7th Dist. No. 00 CA 191, 2001-Ohio-3453, 2001 WL 1539161, at \*9.

Accordingly, the Sixth District's decision that the Trial Court may infer that TAI made payments to the Fund is in direct conflict with this established case law, and must be reversed. Indeed, the Sixth District's holding that it is proper to grant summary judgment on the inference that TAI "*most likely*" contributed to the Fund abrogates the well established principle that the defendant must produce affirmative and *conclusive* evidence that it, in fact, contributed to the fund. See, *Carr*, 2nd Dist. No. 16091, 1997 WL 324107, at \*3; see, also, *Lawson*, 7th Dist. No. 00 CA 191, 2001-Ohio-3453, 2001 WL 1539161, at \*9.

*B. The Decision Is Contrary to Civ.R. 56 and Well Established Case Law*

It is a fundamental rule of Ohio law that a court may not grant summary judgment where the moving party has produced no evidence demonstrating that it is entitled to summary judgment. See, *Mitseff v. Wheeler* (1998), 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (The requirement that the moving party support its motion for summary judgment with evidence is well founded in Ohio law.); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66, 8 O.O.3d 73, 375 N.E. 2d 46, 47 ("The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment.") (citation omitted); see, also, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 1996-Ohio-107, 662 N.E.2d 264 (affirming the reversal of a summary judgment where the movant produced no evidentiary materials *clearly* demonstrating that it was entitled to summary judgment).

Furthermore, pursuant to Ohio law, it is improper for courts to grant summary judgment based upon inferences, not evidence. See, *Inland Refuse Transfer Co. v. Browing-Ferris Indus. of Ohio* (1984), 15 Ohio St.3d 321, 15 O.B.R. 448, 474 N.E.2d 271 (A trial court may not

resolve any ambiguities in the evidence presented.); see, also, *Mitseff*, 38 Ohio St. 3d at 115, 526 N.E.2d 798 (The moving party bears the burden of affirmatively demonstrating that, with respect to every essential issue, it is entitled to summary judgment.); see, also, *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St. 3d 108, 111, 570 N.E.2d 1095 (holding that an “inference” is not a sufficient basis to survive a motion for summary judgment).

These principles of Ohio law are consistent with the Ohio Rules of Civil Procedure, which expressly mandate:

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...

See, Civ.R. 56(C) (emphasis added).

Therefore, the Sixth Circuit's decision that the Trial Court may grant summary judgment based upon an inference, *not evidence*, that TAI “most likely,” *not clearly*, contributed to the Fund violates the fundamental rule of law that summary judgment is improper unless the moving party produces evidence clearly demonstrating that no genuine issue exists as to any material fact.

Furthermore, granting summary judgment based upon an inference of non-existent evidence drawn in favor of TAI violates the well settled rule of law that the trial court must construe evidence most favorably toward the non-moving party, i.e., the Niensens, when considering whether to grant summary judgment. See, Civ.R. 56(C) (requiring the court to construe the evidence “most strongly in the [non-moving] party’s favor.”); see, also, *Hounshell v. American Statins Ins. Co.* (1981), 67 Ohio St.2d 427, 433, 21 O.O.3d 267, 424 N.E.2d 311 (“The inferences to be drawn from the underlying facts contained in the affidavits and other

exhibits must be viewed in the light most favorable to the party opposing the motion, and if when so viewed reasonable minds can come to differing conclusions the motion should be overruled.”).

Moreover, the Sixth Circuit permitted the Trial Court to infer that TAI “most likely” contributed to the Fund despite the fact that the only evidence in the record on this issue established that TAI did not contribute to the Fund. (See, Niensens’ Brief in Opposition, at Exhibits 9 and 10 (TAI admits that there is no documentation evidencing that TAI contributed, either directly or indirectly, to the Fund.)) Consequently, the Sixth District's decision is in direct conflict with both well established case law and the Ohio Rules of Civil Procedure.

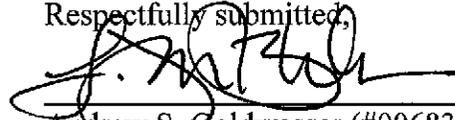
\* \* \* \* \*

Given that the Sixth District’s decision to permit the Trial Court to grant summary judgment based upon an inference is contrary to well established case law and the Ohio Rules of Civil Procedure, this Court must grant jurisdiction so that it may reverse this erroneous decision and properly return the burden to TAI, the moving party, to establish through evidence, not the Trial Court’s inference, that it clearly contributed, either directly or indirectly, to the Fund.

**CONCLUSION**

For the foregoing reasons, this case involves matters of great public and general interest. Accordingly, this Court should accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



Andrew S. Goldwasser (#0068397)

L. Jason Blake (#0080320)

CIANO & GOLDWASSER, LLP

MK Ferguson Plaza

1500 West 3rd Street

Suite 460

Cleveland, OH 44113

Tel: 216-658-9900

Fax: 216-658-9920

Email: [agoldwasser@cianogoldwasser.com](mailto:agoldwasser@cianogoldwasser.com)

[jblake@cianogoldwasser.com](mailto:jblake@cianogoldwasser.com)

*Counsel for Plaintiffs-Appellants*

**PROOF OF SERVICE**

A copy of the foregoing **Memorandum in Support of Jurisdiction** has been served, via regular U.S. Mail, postage prepaid, on this 6<sup>th</sup> day of November, 2006, upon the following:

James R. Jeffery, Esq.  
Spengler Nathanson, PLL  
608 Madison Avenue  
Suite 1000  
Toledo, OH 43604  
*Counsel for Appellee-Defendant,  
The Andersons, Inc.*



L. Jason Blake, Esq.

*Counsel for Plaintiffs-Appellants*

FILED  
LUCAS COUNTY

2006 FEB -1 A 11: 58

**THIS IS A FINAL  
APPEALABLE ORDER**

COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURT

COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

**Keith E. Nielsen, et al.**

\*

**Case No. CI0-03-6124**

\*

**Plaintiffs,**

\*

**Judge Charles Wittenberg**

\*

**-vs-**

\*

\*

**The Andersons, Inc. et al.**

\*

**OPINION AND JUDGMENT ENTRY**

\*

**Defendants.**

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This matter is before the Court upon a motion for summary judgment filed by Defendant, The Andersons, Inc. [Defendant] against Plaintiffs, Keith E. Nielsen, et al. [Plaintiffs], following a workplace accident. Defendant seeks summary judgment on the grounds that the Defendant is entitled to immunity from Plaintiffs' causes of action against Defendant for negligence, malice, violation of O.R.C. §4101.11 et seq., and further, that there is no cause of action for Plaintiffs' intentional tort claim. Plaintiffs filed an opposition which was followed by Defendant's reply. Upon review of the pleadings, memoranda of the parties, evidence, and applicable law, the Court finds it should grant the motion for summary judgment.

**I. FACTS**

In June, 2002, Keith Nielsen was hired by Renhill Staffing, Inc. to perform light industrial work. In August, 2002, Renhill assigned Nielsen to work at The Andersons, Inc. as a temporary

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worker. The Andersons supervised Nielsen, directed him to perform certain tasks, and compensated Renhill for Nielsen's services. Nielsen submitted his employment hours to Renhill who paid Nielsen's wages and Worker's Compensation benefits. Renhill retained control over the length of Nielsen's assignment at The Andersons.

Nielsen was required to sandblast railcars as part of his duties at The Andersons. The sandblasting occurred in a blast shop and involved the use of high-pressure hoses to blast gritty sand directly at metal surfaces. The sandblasting cleans the metal and is one step in the process of refurbishing the railcars. The sand is released from the hose through the use of a nozzle located at the tip of the hose. The nozzle has a trigger that, when squeezed, releases a high-pressure jet of sand. At the time of the incident, Nielsen was using a nozzle with an attached safety mechanism that must be depressed before the trigger can be squeezed. When the trigger is released, the safety mechanism engages and the equipment stops operating.

Two days before the incident in question, Charles Stimmage, a co-worker in the railcar, viewed Nielsen and co-worker Chuck Watson operating the high-pressure hoses with several rubber bands wrapped around the hose triggers. Nielsen and Watson placed the rubber bands around the nozzles in order to alleviate hand fatigue. Nielsen intended the rubber bands to be loose enough so as not to override the safety mechanism. Stimmage told Nielsen and Watson to remove the rubber bands due to the danger they posed to their safety. At the time, Stimmage did not inform any other personnel at The Andersons of the incident or of the conversation he had with Nielsen. Placement of rubber bands around the nozzle was neither The Anderson's official policy nor procedure and Stimmage testified to having never seen such utilization of rubber bands in his 11 years of employment at The Andersons.

On December 10, 2002, Nielsen told Stimmage that he had shot himself with the high-pressure hose. Nielsen was not injured in the incident. Stimmage then informed the blast shop foreman, Stan Demore, that an accident had taken place but failed to mention Nielsen's use of the rubber bands.

On December 11, 2002, the incident leading to the within cause of action occurred. Nielsen had again placed rubber bands around the nozzle of his hose. With the hose in operating mode, Nielsen attempted to step onto a ladder but missed the step and instead fell to the ground. As Nielsen fell, sandblast grit from the hose shred ligaments and tendons in his wrist, ankle, and foot. Nielsen testified that the high-pressure hose shut off after the incident demonstrating that the rubber bands did not override the safety mechanism.

Following the accident, Plaintiffs filed an action against the Defendant for negligence, intentional tort, malice, violation of O.R.C. §4101.11 and loss of consortium.

## II. SUMMARY JUDGMENT STANDARD

In *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66, the Supreme Court of Ohio stated the requirements that must be met before a Civ.R. 56 motion for summary judgment can be granted:

“The appositeness of rendering a summary judgment hinges upon the tripartite demonstration: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, and who is entitled to have the evidence construed most strongly in his favor.”

A party who claims to be entitled to summary judgment on the grounds that a non-movant cannot prove its case bears the initial burden of: 1) specifically identifying the basis of its motion, and 2) identifying those portions of the record that demonstrate the absence of a genuine issue of material fact regarding an essential element of the non-movant's case. *Drescher v. Burt* (1996), 75 Ohio St. 3d 280, 293. The movant satisfies this burden by calling attention to some competent summary judgment evidence of the type listed in Civ.R. 56 (C), affirmatively demonstrating that the non-movant has no evidence to support his or her claims. *Id.* Once the movant has satisfied this initial burden, the burden shifts to the non-movant to set forth specific facts, in the manner prescribed by Civ.R. 56(E), indicating that a genuine issue of material fact exists for trial. *Id.* Accord *Mitseff v. Wheeler* (1998), 38 Ohio St.3d 112, 114-115.

The Sixth District Court of Appeals has consistently held that motions for summary judgment should be granted with caution in order to protect the non-moving party's right to trial. As stated by the court in *Viocck v. Stowe-Woodward Co.* (1983), 13 Ohio App. 3d 7, 14-15:

“We recognize that summary judgment, pursuant to Civ.R. 56, is a salutary procedure in the administration of justice. It is also, however, a procedure which should be used cautiously and with the utmost care so that a litigant's right to a trial, wherein the evidentiary portion of the litigant's case is presented and developed, is not usurped in the presence of conflicting facts and inferences.\*\*\* It is settled law that '[t]he inferences to be drawn from the underlying facts contained in the affidavits and other exhibits must be viewed in the light most favorable to the party opposing the motion, \*\*\* 'which party in the instant case is appellant.\*\*\* It is imperative to remember that the purpose of summary judgment is not to try issues of fact, but rather to determine whether triable issues of fact exist.” (Citations omitted).

### III. ANALYSIS.

#### A. Workers' Compensation Immunity

In order to establish immunity from negligence and other tort claims under O.R.C.

§4123.74, The Andersons bears the burden of proving:

1. The existence of an employer-employee relationship between Nielsen and Renhill.
2. That Nielsen was paid a certain hourly rate by Renhill and was directed to work for Renhill's customer, The Andersons.
3. That The Andersons has the right to control the manner or means of performing the work thereby creating an employer-employee relationship between Nielsen and The Andersons.
4. That The Andersons complied with the requirements of the Workers' Compensation act.

*Daniels v. MacGregor Co.* (1965), 2 Ohio St. 2d 89, 92, 206 N.E. 2d 554

#### **1. The existence of an employer-employee relationship between Nielsen and Renhill.**

It is not in dispute that at the time of the incident an employer-employee relationship existed between Nielsen and Renhill. Thus, the first prong of the *Daniels* test has been satisfied.

#### **2. That Nielsen was paid a certain hourly rate by Renhill and was directed to work for Renhill's customer, The Andersons.**

Plaintiffs next contend that *Daniels* requires an agreement between Renhill and The Andersons on the hourly rate of pay for the employee. *Id.* However, *Daniels* contains no reference to such an hourly agreement between employer and customer and instead stipulates there is a requirement for a rate of hourly pay between the employer here Renhill, and the

employee, here Nielsen. *Id.* Such an agreement existed between Renhill and Nielsen.

**3. That The Andersons has the right to control the manner or means of performing the work thereby creating an employer-employee relationship between Nielsen and The Andersons.**

Next, Plaintiffs argue that the Defendant has failed to prove that The Andersons controlled the manner or means of Nielsen's work as contemplated in *Daniels*. Specifically, Plaintiffs point to the facts that it was Renhill and not The Andersons who interviewed Nielsen, hired Nielsen, retained and exercised the right to fire Nielsen, paid wages to Nielsen, paid Nielsen's Workers' Compensation payments, and set the hours and duration of The Anderson assignment.

The Supreme Court in *Foran v. Fisher Foods, Inc.* explained the decision in *Daniels* by outlining that "one who exercises day-to-day control over the employee will be considered as the employer for purposes of Workers' Compensation." *Foran v. Fisher Foods, Inc.* (1985), 17 Ohio St. 3d 193, *Daniels*, supra. The facts in *Daniels* are similar to the case at bar. *Id.* In *Daniels*, the Plaintiff was employed by Manpower, Inc. Manpower paid the Plaintiff's wages, paid the Workers' Compensation payments, retained the exclusive right to hire or fire, set the hours of operations, and retained the right to reassign the Plaintiff on any given day. *Id.* Plaintiff was assigned to a customer, MacGregor Co., and Plaintiff was required to carry out the requests of the customer's employees. *Id.* In *Daniels*, the Supreme Court determined the Plaintiff to be an employee of the customer MacGregor Co. for Workers' Compensation purposes. *Id.*

Here, The Andersons exercised day-to-day control over Nielsen. The Andersons supervised Nielsen daily and directed Nielsen to perform work that The Andersons required in

their operations. Therefore, Nielsen is considered an employee of The Andersons for Workers' Compensation purposes.

**4. That The Andersons complied with the requirements of the Workers' Compensation act.**

Lastly, Plaintiffs dispute that The Andersons have not demonstrated compliance with the requirement of O.R.C. 4123.35 to pay premiums into the Workers' Compensation Fund. Direct or indirect payments coupled with day-to-day control suffice to show an employer-employee relationship for Workers' Compensation purposes. *Foran*, at 194. Plaintiffs contend that The Andersons have provided no evidence that The Andersons contributed directly or indirectly to the Workers' Compensation fund on behalf of Nielsen notwithstanding the fact that Renhill made Workers' Compensation payments for Nielsen.

Plaintiffs point to the lack of evidence of an agreement between The Andersons and Renhill regarding what part of Renhill's recompensation for Nielsen's services was allotted for the purposes of paying the Workers' Compensation premiums. The Sixth District Court of Appeals, however, has held that as long as someone paid the premiums, it is reasonable to infer that such premiums came indirectly from the customer's recompensation to the provider of services. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301, 306. Applying *Russell* to the case sub judice, it is reasonable to infer that The Andersons made indirect payments into the Workers' compensation fund through their recompensation of Renhill and Renhill's payments into the fund on behalf of Nielsen. *Id.*

The Anderson's have satisfied all four prongs of *Daniels*, supra. As such The Andersons

is entitled to immunity from Plaintiffs' claims of negligence, malice, violation of O.R.C. §4101.11, and the loss of consortium claim. Summary judgment will be granted on those claims in favor of The Andersons.

**B. Employer Intentional Tort**

To establish an employer intentional tort claim Plaintiffs must prove:

1. Knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation.
2. Knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and
3. That the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

*Fyffe v. Jenos, Inc.* (1991), 59 Ohio St. 3d 115.

The third prong of the *Fyffe* test is not satisfied in this case even viewing the facts in the light most favorable to the Plaintiffs. *Id.* Plaintiffs argue, citing *Hannah v. Dayton Power and Light* (1998), 82 Ohio St. 3d 382, that an express order from The Andersons to Nielsen to perform the dangerous task is not required. Instead, all that is needed is sufficient evidence to raise an inference that The Andersons through its actions and policies expected Nielsen to engage in the dangerous task. *Id.* Furthermore, Plaintiffs maintain that a "mere expectation" to perform the dangerous task is sufficient to get to the jury. *Costin v. Consolidated Ceramic Products, Inc.* (2003), 151 Ohio App.3d 506.

The dangerous task in this case is the utilization of the sandblaster with rubber bands wrapped around the nozzle. Plaintiffs have failed to provide any evidence that The Andersons, through its actions and policies, expected Nielsen to use the sandblaster in such a way. The Andersons has specific safety procedures in its sandblasting operation including training, utilization of safety nozzles on its high pressure hoses, and a requirement that workers watch safety videos and wear safety equipment while engaged in sandblasting. There is no evidence that The Andersons attempted to circumvent their safety procedures or encouraged their employees to do so. In his 11 years at The Andersons, co-worker Stimmage had never seen the use of the rubber bands with the high-pressure hoses until he observed Nielsen two days prior to the incident. At that time, Nielsen was directly instructed not to use the rubber bands by Stimmage. Nevertheless, Nielsen continued to do so, eventually leading to injury.

For its part, The Andersons cite *Neal v. McGill Septic Tank* (Dec. 4, 1998) 11<sup>th</sup> Dist. No. 98-T-0022 to demonstrate they are not liable in intentional tort for Nielsen's action: "an employer is not liable for the injuries the employee suffered on an Intentional Tort theory where the employee voluntarily deviates from his employer's instructions or established operating procedure." This Court finds *Neal* apposite to the case herein. *Id.* Nielsen failed to follow The Andersons operating procedure and instead voluntarily retrofitted his hose with the rubber bands before sandblasting.

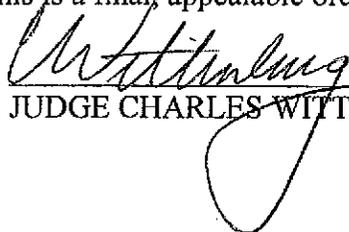
Plaintiffs have failed to prove that there was a policy or expectation by The Andersons that an employee engage in the dangerous task of sandblasting with a compromised nozzle. This Court need not address the first two prongs of the *Fyffe* test as it finds the failure to satisfy the third prong of the test to be dispositive to the cause of action.

Based on the foregoing, this Court finds the Motion for Summary Judgment filed by The Andersons to be well-taken and therefore granted.

**JUDGMENT ENTRY**

It is hereby ORDERED, ADJUDGED, and DECREED that Defendant, The Andersons' Motion for Summary Judgment filed against Plaintiffs Keith Nielsen, et al., is GRANTED. It is further ORDERED, ADJUDGED AND DECREED that judgment shall be rendered in favor of The Andersons and against Plaintiffs at Plaintiffs' costs. This is a final, appealable order.

Date: 11/27/06

  
JUDGE CHARLES WITTENBERG

{¶27} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

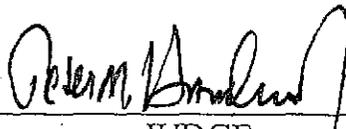
JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

William J. Skow, J.

Dennis M. Parish, J.  
CONCUR.

  
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This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

FILED  
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2006 SEP 29 A 8:05  
COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Keith E. Nielsen, et al.

Court of Appeals No. L-06-1073

Appellants

Trial Court No. CI0-03-6124

v.

The Andersons, Inc., et al.

DECISION AND JUDGMENT ENTRY

Appellees

Decided: SEP 29 2006

\*\*\*\*\*

Andrew S. Goldwasser and Katya Vyhouskaya, for appellants.

James R. Jeffery and Elizabeth J. Hall, for appellee.

\*\*\*\*\*

PARISH, J.

{¶1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that granted summary judgment in favor of appellee The Andersons, Inc. For the following reasons, the judgment of the trial court is affirmed.

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{¶2} Appellants Keith E. Nielsen, et al. set forth a single assignment of error:

{¶3} "Where The Andersons has no immunity under the Workers Compensation Act and where material facts remain as to whether The Andersons committed a ~~workplace intentional tort, the trial court erred in granting The Andersons' motion for~~ summary judgment."

{¶4} In June 2002, appellant Keith Nielsen ("Nielsen") was hired by Renhill Staffing Services, Inc. In August 2002, Renhill assigned Nielsen to work at The Andersons' railcar shop. The Andersons supervised Nielsen, assigned his tasks and compensated Renhill for his services. Nielsen submitted his hours worked to Renhill, who paid his wages and workers' compensation benefits.

{¶5} Nielsen was assigned to use a sandblaster to remove paint and rust from railcars. That is accomplished when sand is released from a hose through a nozzle; the nozzle has a trigger that, when squeezed, releases a high-pressure jet of sand. The nozzle is designed with a button on the side which must be depressed before the trigger can be squeezed. The button functions as a safety mechanism; when the operator lets go of the trigger, the button releases and the equipment turns off.

{¶6} The record reflects that two days before the incident in question, one of Nielsen's co-workers, Charles Stimmage, saw that Nielsen and another worker were using the high-pressure hoses with rubber bands wrapped around the handles to hold the triggers part of the way down. This made it easier to squeeze the trigger and less tiring

on their hands. Stimmage told the men to remove the rubber bands. He did not tell any other Andersons personnel of the incident. On December 10, 2002, Nielsen told Stimmage he had shot himself with the high-pressure hose but was not injured.

~~Stimmage informed the blast shop foreman of the accident but did not mention Nielsen's use of rubber bands to squeeze the trigger.~~

{¶7} On December 11, 2002, Nielsen was injured while using the sandblaster. While Nielsen was holding the hose, he slipped and fell; sandblast grit from the hose shredded ligaments and tendons in his wrist and foot. He had again wrapped several rubber bands around the trigger. After the accident, Nielsen filed an action against appellee The Andersons asserting claims of negligence, intentional tort, malice, negligence per se in violating R.C. 4101.11, and loss of consortium.<sup>1</sup>

{¶8} On February 4, 2005, appellee filed a motion for summary judgment, which the trial court granted on January 27, 2006. In so doing, the trial court held that: (1) appellee was entitled to immunity from appellants' claims of negligence, malice, violating R.C. 4101.11, and loss of consortium and (2) appellants had not established an intentional tort claim. This timely appeal follows.

{¶9} An appellate court must employ a de novo standard of review of the trial court's summary judgment decision, applying the same standard used by the trial court.

*Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio*

<sup>1</sup>Renhill Staffing Services, Inc. was also named as a defendant but appellants have settled and dismissed their claims against the company. The Andersons, Inc. is therefore the sole appellee.

*Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that ~~the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).~~

{¶10} As their sole assignment of error, appellants assert that the trial court erred by granting summary judgment in appellee's favor. Appellants present three arguments in support of this claim.

{¶11} Appellants first assert that the trial court erred by finding that appellee was entitled to immunity for several of the claims.

{¶12} Except in certain specific circumstances, employers who are in compliance with the workers' compensation statutes may not be held liable for an employee's injuries suffered in the course of, or arising out of, the worker's employment. R.C. 4123.74. Appellants herein claim that appellee has provided no evidence that it contributed directly or indirectly to the workers' compensation fund on Nielsen's behalf and thereby failed to establish its immunity.

{¶13} "Where an employer employs an employee with the understanding that the employee is to be paid only by the employer and at a certain hourly rate to work for a customer of the employer and where it is understood that that customer is to have the right to control the manner or means of performing the work, such employee in doing that work is an employee of the customer within the meaning of the Workmen's

Compensation Act; and, where such customer has complied with the provisions of the Workmen's Compensation Act, he will not be liable to respond in damages for any injury received by such employee in the course of or arising out of that work for such customer.

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(Section 35 of Article II of the Constitution and Section 4123.74 Revised Code, applied.)" *Daniels v. MacGregor Co.* (1965), 2 Ohio St.2d 89, syllabus.

{¶14} Based on *Daniels* and the facts of this case, it is clear that appellant was an employee of appellee The Andersons. Further, pursuant to *Carr v. Central Printing Co.* (June 13, 1997), 2d Dist. No. 16091, once this employment relationship is established, "\* \* R.C. 4123.74 requires compliance with R.C. 4123.35, which specifically requires that an employer shall make premium payments into the workers' compensation fund on behalf of its employees. And without such payments by the customer of the employment agency, *either directly or indirectly*, such customer cannot claim status as an employer nor the attending immunity provided by R.C. 4123.74. See R.C. 4123.01(B)(2)." (Emphasis added.)

{¶15} In a case factually very similar to the one before us, this court concluded based on *Carr*, supra, that "\* \* \* for an employer of a temporary employee to obtain immunity from a negligence suit, someone must pay the workers' compensation premiums and some evidence of that must be before the court." *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 306. We held in *Russell* that it is reasonable to infer that someone, most likely the temporary employment agency, paid

workers' compensation premiums for the appellant or he would not have obtained benefits from the Bureau of Workers' Compensation. In the case before us, it is clear from the record that appellant received workers' compensation benefits after he was injured. In keeping with our reasoning in *Russell*, we agree with the trial court that it is reasonable to infer that The Andersons made indirect payments into the workers' compensation fund through its payments to Renhill for Nielsen's services and Renhill's payments into the fund on Nielsen's behalf. As we found in *Russell*, absent evidence to the contrary, this satisfies the compliance requirement of R.C. 4123.74 and 4123.35 and entitles appellee to immunity from negligence suits. Accordingly, appellants' first argument is without merit.

{¶16} Appellants next assert the trial court erred by denying their motion to strike documents they claim were unauthenticated. Specifically, appellants refer to two items appellee submitted in support of summary judgment. In response to the disputed documents, appellants filed a motion to strike. The trial court did not rule on the motion, which appellants properly construe as a tacit denial. See *Temple v. Fence One, Inc.*, 8th Dist. App. No. 85703, 2005-Ohio-6628, ¶ 27, citing *Georgeoff v. O'Brien* (1995), 105 Ohio App.3d 373, 378.

{¶17} In dispute is a copy of a letter to The Andersons notifying the company that Nielsen had filed an "Application for Additional Award for Violation of Specific Safety Requirement in a Workers' Compensation Claim" with the Industrial Commission of

Ohio. A copy of the application was attached to the letter. Appellants argue that the items were not admissible evidence because they were not authenticated by way of affidavit or deposition testimony pursuant to Civ.R. 56(E) or self-authenticating evidence pursuant to Evid.R. 902(4).

{¶18} It was within the trial court's discretion to consider any improperly-brought documents in its determination of appellee's motion for summary judgment. See *Dunigan v. State Farm Mut. Auto Ins. Co.*, 9th Dist. No. 03CA008283, 2003-Ohio-6454. In any event, the trial court's judgment entry makes no mention of the application or letter, suggesting that the court did not consider them. Accordingly, we find this argument to be without merit.

{¶19} Finally, appellants assert the trial court erred in granting summary judgment because an issue of fact remains as to whether The Andersons required Nielsen to use an unsafe method of sandblasting by operating the sandblaster with rubber bands wrapped around the trigger. For the following reasons, we find this argument to be without merit.

{¶20} Pursuant to the Supreme Court of Ohio in *Fyffe v. Jeno's Inc.* (1991), 59 Ohio St.3d 115, to establish an intentional tort by an employer, an employee must prove all of the following: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such

dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty and (3) that the employer under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. The trial court in this case found that the third prong of the *Fyffe* test clearly was not satisfied and concluded that it therefore did not need to address the first two requirements. We agree.

{¶21} Appellants argue that to overcome a motion for summary judgment they only need to show that The Andersons "merely expected the employee to engage in a dangerous task." *Costin v. Consolidated Ceramic Products, Inc.* (2003), 151 Ohio App.3d 506, 511. They further cite *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 382, 387, in which the Supreme Court of Ohio stated that the party opposing summary judgment can satisfy the third element of *Fyffe* " \* \* \* by presenting evidence that raises an inference that the employer, through its actions and policies, required the [injured party] to engage in that dangerous task."

{¶22} Appellants assert that The Andersons expected Nielsen to operate the sandblaster in an unsafe manner. In support, they imply that the workers had to hold the trigger for eight hours without respite. They further imply that in order to relieve hand fatigue, Nielsen had no choice but to wrap rubber bands around the trigger. In support of summary judgment, appellee had submitted the affidavit of Tab Brown, a crew leader in The Andersons' railcar shop at the time of Nielsen's employment. Brown explained that

the workers sandblasting the railcars take a 15-minute break between the start of their shift and lunch, stop for a one-half hour to 45-minute lunch break (depending on the overall length of their shift), and work another one and one-half to two hours until the end of the shift when it is time to clean up. Brown further stated that when his hand gets tired, he switches the equipment to the other hand or changes the position of his hand on the hose. He also stated that workers are permitted to take a break to go to the bathroom or get a drink.

{¶23} Charles Stimmage submitted an affidavit in which he stated that on December 9, 2002, he went into the "pot room" to shut off the sandblast pots. Nielsen and another employee were sandblasting that morning. When Stimmage plugged the hoses back in, they started blasting by themselves because the triggers on the nozzles were held down by rubber bands. Stimmage stated he unplugged the hoses and told Nielsen and the other worker to "take the rubber bands off the trigger before someone gets hurt." He further stated, "I had told Keith Nielsen before not to use rubber bands on the nozzle."

{¶24} Appellants also infer that Nielsen should have received "formal training" or a safety course before using the sandblaster. Nielsen testified at deposition that he was shown how to use the sandblasting equipment by Steve Kropaczewski, the supervisor of The Andersons' fabrication shop, which was Nielsen's first assignment. This was confirmed by Kropaczewski's affidavit in which he stated he trained and supervised

Nielsen in the use of the sandblast equipment in the summer of 2002. He also stated he explained the safety button on the trigger and discussed the necessary protective clothing, which includes ear plugs, steel-toed shoes, welding gloves and a blasting helmet.

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Appellee also submitted the affidavit of employee Robert Beaver, who stated he trained Nielsen to use the sandblast equipment in the summer of 2002, and explained to Nielsen the "deadman switch" on the nozzle. He further stated he instructed Nielsen on the use of safety equipment when sandblasting.

{¶25} This court has thoroughly reviewed the record that was before the trial court on appellee's motion for summary judgment. There is no evidence The Andersons required or expected Nielsen to operate a sandblaster with rubber bands wrapped around the nozzle to circumvent the safety mechanism. Additionally, Nielsen received instruction from at least two other employees on the use of the sandblaster and on the appropriate safety equipment. Finally, despite being told not to use the rubber bands Nielsen continued to do so. We therefore find that appellants have not raised an inference that appellee, through its actions and policies, required Nielsen to engage in a dangerous task. They therefore have not established the elements of an intentional tort claim.

{¶26} Based on the foregoing, this court finds that the trial court did not err by granting summary judgment in appellee's favor and, accordingly, appellants' sole assignment of error is not well-taken.

{¶27} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

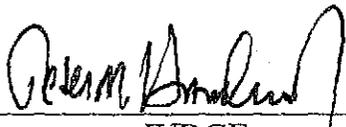
JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

William J. Skow, J.

Dennis M. Parish, J.  
CONCUR.

  
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JUDGE

  
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