

**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 2006-2085**

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**KEITH E. NIELSEN, et al.**  
**Plaintiffs-Appellants,**  
**-vs-**  
**THE ANDERSONS, INC., et al.**  
**Defendant-Appellee.**

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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 RESPONSE**  
**OF JURISDICTION OF DEFENDANT-APPELLEE**

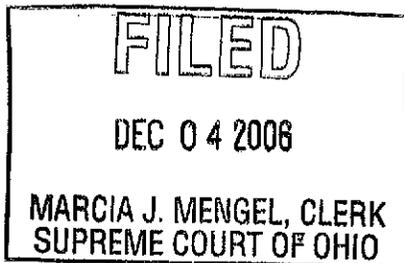
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**TABLE OF AUTHORITIES**

**Cases**

*Russell v Interim Personnel, Inc.* (1999) 135 Ohio App. 3d 301, 306..... 1, 3

**Rules**

O.R.C. §4123.35 ..... 1, 4  
O.R.C. §4123.74 ..... 1, 2

**I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

The sole issue raised by Keith and Andrea Nielsen (“Niensens”) in their Memorandum in Support of Jurisdiction is not a matter of public and great interest. Niensens claim that both the Trial Court and the Court of Appeals improperly applied an inference in favor of The Andersons, Inc. (“Andersons”) in finding Andersons had indirectly paid premiums on Mr. Nielsen’s behalf into the Workers’ Compensation Fund. Based on this finding, both Courts found that Andersons had immunity from the Niensens’ tort claims.

Both Courts made this inference relying on the Sixth District Court of Appeals decision in *Russell v Interim Personnel, Inc.* (1999) 135 Ohio App. 3d 301, 306. The Sixth District Court of Appeals held as follows in *Russell*:

In our view, this means 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. Here, it is undisputed that appellant obtained workers’ compensation benefits. Thus, it is reasonable to infer that someone, most likely the cross-appellant paid workers’ compensation premiums or he would not have obtained benefits from the Bureau of Workers’ Compensation. Absent evidence to the contrary, this satisfied the compliance requirement of O.R.C. §4123.74 and O.R.C. §4123.35 and entitles appellee to immunity from negligence suits.

*Russell* at 306.

The Sixth District Court of Appeals decision in *Russell* is well settled law. There is no question that Mr. Nielsen, a temporary employee, received workers’ compensation benefits for his injury. Mr. Nielsen was hired by Renhill Staffing Services, Inc. to be a temporary worker provided by Renhill Staffing Services, Inc. to employers hiring temporary workers. Andersons was such an employer and was provided Mr. Nielsen by Renhill Staffing Services, Inc. to work at Andersons’ Rail Shop. Renhill Staffing Services, Inc. billed and was paid by Andersons for

Mr. Nielsen's services. Andersons controlled the manner and means by which Mr. Nielsen did his assigned work for Andersons.

As in *Russell*, Andersons indirectly paid the workers' compensation premiums for these benefits through Andersons' payments to Renhill Staffing Services, Inc. ("Renhill"). Such payments by Andersons to Renhill covered Mr. Nielsen's wages, his workers' compensation premiums, unemployment taxes, Renhill's operating expenses and profit. Andersons controlled the manner and means of Mr. Nielsen's employment and, therefore, is Mr. Nielsen's employer for workers' compensation purposes. Andersons is, therefore, immune from suit for Mr. Nielsen's tort claims. There is no injustice in such circumstances that warrant review by the Supreme Court. The law is settled and makes perfect sense. The facts of this case do not present issues of public or great general interest.

## **II. STATEMENT OF THE CASE AND RELEVANT FACTS**

This case involves the claims of Keith Nielsen ("Mr. Nielsen"), an employee of a temporary agency, Renhill. Mr. Nielsen was assigned to work at the Rail Shop of Andersons sandblasting railcars. Employees of Andersons supervised and directed Mr. Nielsen's work. Mr. Nielsen was injured as a result of his use of rubber bands to over ride the safety device on a sandblast gun. Mr. Nielsen decided to use the rubber bands to over ride the safety device on his own, without the direction of any Andersons' employee.

The Niensens sued Andersons based on the legal theories of negligence, malice, negligence per se, intentional tort and loss of consortium. Renhill was also named as a defendant, but settled with the Niensens and was dismissed from the case.

Andersons filed for Summary Judgment on Mr. Nielsen's claims of negligence, malice, and negligence per se based on the provisions of O.R.C. §4123.74. Under this section, as an

employer of Mr. Nielsen, Andersons has immunity from tort claims because of the provision of workers' compensation benefits to Mr. Nielsen. Andersons argued that it was entitled to Summary Judgment on the intentional tort claim because Andersons' conduct with regard to Mr. Nielsen's injury did not constitute an intentional tort. The Trial Court granted Andersons' Motion for Summary Judgment. The Court of Appeals affirmed.

### III. ARGUMENT

#### **A. Response to Proposition of Law: The Trial Court and the Court of Appeals Correctly Made the Inference that The Andersons had Indirectly Contributed to the Workers' Compensation Fund on Mr. Nielsen's Behalf.**

There is no question that Mr. Nielsen received workers' compensation benefits for his injury. In response to Plaintiff's request for Product, Renhill stated as follows concerning payment of workers' compensation benefits to Mr. Nielsen as a result of Mr. Nielsen's accident:

...As of July 2004, \$7,920.57 in compensation has been paid and \$35,092.19 in medicals have been paid.

See Defendant Renhill Staffing Services, Inc.'s Responses to Plaintiff's Request for Production attached as Exhibit 10 to Plaintiff's Brief in Opposition to Defendant Andersons' Motion for Summary Judgment.

The issue raised by the Niensens is whether Andersons is entitled to claim that it indirectly made payments to the Workers' Compensation Fund on Mr. Nielsen's behalf. The Trial Court found as follows on this issue:

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 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.

Keith E. Nielsen, et al. v The Andersons, Inc., et al. Case No. C10-03-6124, Opinion and Judgment Entry Filed February 1, 2006, p. 7.

The Court of Appeals ruled as follows on this issue:

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 satisfied the compliance requirement of O.R.C. §4123.74 and O.R.C. §4123.35 and entitles appellee to immunity from negligence suits.

Keith E. Nielsen, et al. v The Andersons, Inc., et al. Court of Appeals No. L-06-1073 decided September 29, 2006, p. 6.

Both Courts relied on the Sixth District Court of Appeals decision in *Russell* in granting and then affirming the granting of Andersons' Motion for Summary Judgment. *Russell* was correctly decided by the Sixth District Court of Appeals. A temporary employment agency such as Renhill provides a service to its customers such as Andersons by supplying the customer's need for temporary workers. Renhill pays the workers' compensation premiums for workers such as Mr. Nielsen with Andersons being responsible for reimbursing Renhill for such payments through the fees paid Renhill by Andersons.

As in *Russell*, Andersons indirectly paid the premiums for Mr. Nielsen's workers' compensation benefits through its payments to Renhill. Therefore, Andersons is Mr. Nielsen's employer for workers' compensation purposes. The Trial Court and the Court of Appeals correctly determined that because of such payments, Andersons is immune from the Niensens' tort claims.

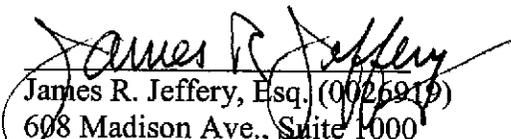
**IV. CONCLUSION**

For all of the foregoing reasons, this Court should decline to exercise its discretionary jurisdiction in this matter. This case was correctly decided by both the Trial and Appellate Courts and does not present a case of great public importance. The Niensens were not prejudiced by these decisions.

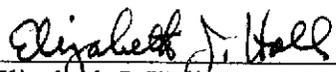
Respectfully submitted,

**SPENGLER NATHANSON**

By:

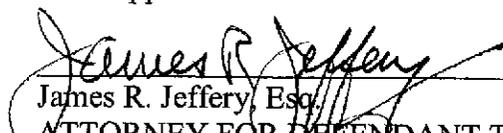
  
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**CERTIFICATION**

This is to certify that on the 30 day of ~~December~~ <sup>November</sup>, 2006, a copy of the foregoing was placed in the United States Mail, postage prepaid and addressed to Andrew S. Goldwasser and L. Jason Blake, Ciano & Goldwasser, L.P., MK Ferguson Plaza, 1500 West Third Street, Suite 460, Cleveland, OH 44113, attorneys for Plaintiffs-Appellants.

  
James R. Jeffery, Esq.  
ATTORNEY FOR DEFENDANT THE  
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