

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-1340

EDWARD & AMY MARTIN, :
 Appellees, :
 v. :
 MORGAN COUNTY :
 AGRICULTURAL SOCIETY, :
 Appellant. :
 :

Supreme Court Case No. _____
 On Appeal from Morgan County
 Court of Appeals, Fifth Appellate
 District
 Court of Appeals Case No. 12AP0009

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, MORGAN
 COUNTY AGRICULTURAL SOCIETY

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case, as it stands following the Appellate Court's decision, is of public or great general interest because it stands to divest trial courts of their broad discretion to permit amendments to the pleadings under Civ. R. 15(A). In this case, the Court of Appeals ignored a defense that was clearly pleaded in Appellant's answer and then went on to arguably hold that the defense was waived because it had not been pleaded in the answer, or in a motion, or in an amended answer. However, Appellant never sought to amend its answer because it had properly pleaded the defense in its original answer. That aside, if the Court of Appeals believed the defense was not properly pleaded for purposes of summary judgment, that is within the Appellate Court's purview to decide. It is not, however, within the Court of Appeals' authority to decide that the defense is permanently waived because that decision implies that Appellant has no right to seek leave from the trial court to amend the answer and implies that the trial court has no discretion to permit such amendment.

Had Appellant moved for leave to amend the answer and the trial court denied that motion, perhaps the Appellate Court would have been correct that the defense was waived. However, not only was the defense pleaded in the original answer, but Appellant still had the right to move to amend the answer to plead the defense more specifically if the Appellate Court felt it was not pleaded specifically enough in the original answer. Essentially, the Appellate Court's decision states that a) Appellant did not plead the defense specifically enough in its original answer to rely on it for summary judgment and b) the Appellate Court, on its own, and with no authority to do so, cuts off Appellant's right to seek leave to amend under Civ. R. 15(A) and also divests the trial court of the authority granted to it by the Ohio legislature via the Rules

of Civil Procedure to use its broad discretion to decide whether amendments should be permitted.

Simply put, the Court of Appeals holding should have stopped at its determination that, in its current form, Appellant's answer did not properly assert the exclusive remedy defense and, as such, that defense could not form the foundation of summary judgment in favor of Appellant. Instead, the Court of Appeals took it a step further and arguably also held that Appellant could not seek leave to amend the answer to assert the defense more specifically. It is this second step that is of public or great general concern. It is not up to the Court of Appeals to decide whether a party can amend a pleading when no party has even moved to do so yet. Further, the decision ignores Ohio jurisprudence strongly favoring a liberal amendment policy so that cases can be decided on their merits.

The Court of Appeals decision opens the door for cutting off a trial court's discretion and for ignoring the Civil Rules of Procedure as enacted by the Ohio legislature. Therefore, it is of public or great general concern.

STATEMENT OF THE CASE

Plaintiffs/Appellees filed their lawsuit against Defendant/Appellant Morgan County Agricultural Society ("Morgan County") alleging *both* negligence *and* an employer intentional tort on July 21, 2011. Based on the information available at the time, Morgan County timely filed an answer stating that Plaintiff/Appellee Edward Martin was not its employee. The answer also asserted that "Plaintiffs' claims are barred by the exclusive remedies set forth in the Ohio Constitution and the Ohio Revised Code and, therefore, Plaintiffs cannot recover from this Defendant." Because Plaintiffs/Appellees pleaded in the alternative in their complaint, and based on the information available at the time, Morgan County answered and asserted alternative

defenses. Finally, in its answer, Morgan County provided “notice of its retention to rely on other affirmative defenses as may be discovered or become apparent hereafter and specifically reserves the right to amend this answer to assert additional affirmative defenses as discovery progresses.”

On May 1, 2012, the parties deposed Dee-Ann VanDine. Ms. VanDine’s deposition testimony provided new information, which revealed that Plaintiff/Appellee Martin did, in fact, satisfy the statutory definition of being an “employee” of Morgan County.

On July 30, 2012, Defendant/Appellant filed a motion for summary judgment based, in part, on the fact that Plaintiff/Appellee Martin was its employee and that, as such, his claims for negligence were barred by the exclusive remedies in the Ohio Revised Code (the workers’ compensation statutes), as had been asserted in its answer. The trial court, in an order dated the very next day (July 31, 2012), set a non-oral hearing date of August 21, 2012, at 8:00 a.m. for the summary judgment decision. For reasons unknown to Morgan County, Plaintiff/Appellee waited until August 21, 2012, the date set for the non-oral hearing, to file his opposition to summary judgment. On August 22, 2012, the trial court entered summary judgment in favor of Morgan County.

Plaintiff/Appellee appealed the entry of summary judgment. In the appeal, Plaintiff/Appellee phrased the first assignment of error as “THE TRIAL COURT ERRED BY PERMITTING APPELLEE TO ASSERT AN AFFIRMATIVE DEFENSE IT HAD PREVIOUSLY WAIVED.” On July 12, 2013, the Court of Appeals for the Fifth Appellate District entered its opinion and entry overturning the trial court’s summary judgment entry. Defendant/Appellant Morgan County appeals that decision because it wrongly concluded that Morgan County had waived a defense and because it improperly divested the trial court of its discretion to permit amendments to pleadings.

STATEMENT OF RELEVANT FACTS

This lawsuit arose out of an accident that happened on July 24, 2009, at the Morgan County Fairgrounds golf course while Edward Martin was operating a Toro reelmaster riding lawnmower. The Morgan County Agricultural Society, the golf course, and the fairgrounds are the same entity for the purposes of this memorandum, and will be referred to as “Morgan County” or “the golf course” or “Appellant.” This is a public golf course incorporated into the county fairgrounds that operates on limited public funds.

Appellee Martin was injured when he stuck his hand into the moving blades of the Toro mower. On the date of the accident, Martin was working at the golf course as a Public Works Relief employee, as defined by O.R.C. 4127.01.

Former defendant Morgan County PWR, the county’s public relief employment coordinator, had assigned Martin to work off his public assistance benefits at the golf course for Appellant Morgan County Agricultural Society as part of its Public Works Relief program. Once the PWR assigns the worker to a worksite, such as the golf course, then that worksite becomes responsible for the worker. This information came to light on May 1, 2012, during the deposition of Dee-Ann VanDine.

As a result of sticking his hand into the mower blades, Martin received several lacerations and incurred medical bills, which were paid through workers compensation pursuant to Martin’s claim under Ohio’s workers compensation and Public Work Relief statutes. Martin separately filed this lawsuit against, among other parties, the Morgan County Agricultural Society (the golf course), alleging: 1) an employer intentional tort under R.C. 2745.01 for “deliberately remov[ing]” safety devices from the mower and for “deliberately intend[ing] to

injure Martin by removing the safety devices *or, alternatively*, 2) negligence if the golf course is found not to have been Martin's employer.

Appellant Morgan County filed an answer based on the facts as known at the time of filing and prospectively pled various defenses. Because Martin's complaint was pleaded in the alternative (alleging both an employer intentional tort and negligence), Morgan County answered and pleaded alternative defenses, including that Martin was not an employee of Morgan County **and** that Martin's claims were barred by the exclusive remedies set forth in the Ohio Revised Code (workers' compensation statutes). Morgan County's answer also included a statement in its answer that "Defendant hereby provides notice of its retention to rely on other affirmative defenses as may be discovered or become apparent hereafter and specifically reserves the right to amend this answer to assert additional affirmative defenses as discovery progresses."

Despite the content of Morgan County's answer, the Court of Appeals stated, on pp. 4-5 of its opinion that Morgan County never "took the legal position" that Plaintiff/Appellee Martin was barred from asserting an ordinary negligence claim against his employer because Morgan County had never asserted the defense of "statutory immunity" in its answer "or by filing an amended answer with such a defense." However, Morgan County clearly asserted the defense of exclusive remedies set forth in the Ohio Revised Code in its answer, as set forth above. The Court of Appeals decision seems to ignore that the answer indeed included that defense. More disturbingly, the Court of Appeals decision arguably goes one step further to possibly hold that, not only has Morgan County not yet properly asserted the defense, but now it never can, even though it has never sought leave of the trial court (and been denied) to amend its answer.

The Court of Appeals, in regards to Martin's first assignment of error, held "the trial court erred as a matter of law in permitting [Morgan County] to rely on the statutory immunity

provided in R.C. 4127.10 for purposes of summary judgment under the circumstances of this case. In so holding, we do not reach the issue of whether [Martin] was an employee of [Morgan County] under R.C. Chapter 4127. Appellants' First Assignment of Error is sustained." Although the Appellate Court's decision never stated outright that Morgan County waived the defense of exclusive remedies, that holding might be implied by the fact that the Court sustained the first assignment of error.

The Appellate Court's decision states that an affirmative defense has to be asserted in a pleading, a motion, or in an amended pleading or that defense is waived. It also states (incorrectly) that Morgan County did not assert the exclusive remedies defense in its answer. It correctly noted that Morgan County did not assert the defense by motion or in an amended pleading. Indeed, Morgan County has never moved to file an amended answer in this case.

Morgan County did assert the defense, although the Appellate Court opinion did not recognize it. Further, the Appellate Court decision said that, because the defense had not been asserted, it could not serve as the foundation of summary judgment in favor of Morgan County. The decision took it one step further, though, and sustained Martin's first assignment of error, thereby creating the possibility of an interpretation that Morgan County has permanently waived the defense, instead of merely holding that the pleadings in present form did not adequately assert the defense. If the Court of Appeals had merely held that, in its current form, Morgan County's answer did not properly plead the defense, Morgan County would be entitled to file a motion to amend the answer to assert it more clearly and then rely on it for moving for summary judgment. As it stands, however, the Appellate Court's decision is open to the interpretation that the defense is permanently waived and that the trial court no longer has discretion to permit an amended pleading.

First, Morgan County contends the defense was sufficiently pleaded in the original answer. Second, Morgan County contends that, even if the Court of Appeals decided it was not sufficiently pleaded, Morgan County can still file a motion to amend the answer, and the trial court has broad discretion to freely allow amendments to pleadings. The Court of Appeals decision might be construed as holding that Morgan County cannot move for leave to amend its answer and that the trial court no longer has discretion to permit such amendment. In that respect, the Court of Appeals improperly divests the trial court of its broad discretion to permit amendments under Civ. R. 15(A).

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

THE COURT OF APPEALS' DECISION IMPROPERLY DIVESTS THE TRIAL COURT OF ITS DISCRETION TO ALLOW APPELLANT/DEFENDANT TO AMEND ITS ANSWER TO MORE SPECIFICALLY PLEAD AFFIRMATIVE DEFENSES.

The issue in this case is actually fairly simple and elementary: which court has the authority to grant or deny leave to amend a pleading? The trial court or the Court of Appeals? According to the Rules of Civil Procedure, Rule 15(A), it is the trial court.

Civ. R. 15(A) states, in part:

A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. **The court shall freely give leave when justice so requires**

(Emphasis added). Further, the question of which court has authority to decide whether a party can amend its pleading has already been answered by the Supreme Court of Ohio. The

decision to grant leave to amend pleadings rests with the sound discretion of a trial court. *Csejpes v. Cleveland Catholic Diocese*, 109 Ohio App.3d 533, 539, 672 N.E.2d 724 (1996)(Emphasis added).

In this case, Morgan County never even moved to amend its answer because it had already pleaded the defense of exclusive remedies in its original answer. On appeal, the Appellate Court decided that, not only did it not believe the defense had been properly pleaded, but also seemed to decide that the defense had been waived. In short, the Appellate Court decided to take away the trial court's broad discretion of whether to permit amendments to the pleadings before Morgan County could even move the trial court for such permission. The Appellate Court circumvented that entire process and, with no explanation in its opinion, said that the defense was waived.

According to the Ohio Rules of Civil Procedure and Ohio Supreme Court precedent, it is up to the trial court, not the appellate court, to permit or deny amendments to the pleadings. Indeed, no cases could be located in which the Court of Appeals ruled on a party's ability to amend its pleading when the party had not previously moved to do so in the trial court. The Appellate Court's decision in this case skipped the step of the trial court granting or denying leave to amend a pleading and jumped right to it on its own, which is not procedurally proper.

The Court of Appeals decision conflicts with long-standing Ohio precedent supporting a liberal amendment policy. In *Hoover v. Sumlin*, 12 Ohio St.3d 1, 4-5, 465 N.E.2d 377 (1984), the Supreme Court of Ohio explained that a court we "must look at the role Civ.R. 15 plays in pleading to develop the scope of the doctrine of waiver as it relates to the timeliness of a party's assertion of either a claim or an affirmative defense." In terms of asserting affirmative defenses,

the Court noted that an affirmative defense “could be raised by any Civ. R. 15(A) amendment.”
Id.

The Court then stated that Civ. R. 15(A) “bear[s] a strong resemblance to [its] federal counterparts in all substantive ways and in the policies underlying the rules * * *[and that] Federal R.Civ.P. 15 reflects two of the most important policies of the federal rules.” *Id.* (citations omitted). “First, a liberal amendment policy provides the maximum opportunity for each claim to be decided *on the merits rather than on procedural deficiencies.*” *Id.* (citations omitted). “Second, the rule reflects the fact that pleadings are assigned the limited role of providing the parties to a lawsuit with notice of the nature of the pleader's claim or defense. Discovery is available to paint a more detailed picture of the facts and issues.” *Id.*

This Court’s opinion in *Hoover* clarified that Ohio courts should not elevate form over substance; that is, that deciding a case on its merits is far favorable to deciding a case on procedural issues. It stated:

Rule 8(c) requires a party to set forth any affirmative defense in a responsive pleading. Failure to do so may waive the right to present evidence at trial on that defense. * * * In the real world, however, failure to plead an affirmative defense will rarely result in waiver. Affirmative defenses--like complaints--are protected by the direction of Rule 15(a) that courts are to grant leave to amend pleadings freely * * * when justice so requires. Accordingly, failure to advance a defense initially should prevent its later assertion only if that will seriously prejudice the opposing party.

Id. at p.5.

In the present case, however, the Court of Appeals decision not only disregards the liberal amendment policy and the importance of deciding a case on its merits, it also seems to prohibit, with no explanation, a consideration by the trial court of whether to permit amended pleadings and simply seems to say that the exclusive remedy defense is waived. That approach does not at

all comport with the foregoing Ohio precedent that amendments should be freely granted so that cases can be decided on the merits.

This Court should accept jurisdiction to overturn the Appellate Court's decision in that regard. Appellant contends that its original answer properly pleaded the defense of exclusive remedies. If, however, the Court of Appeals believes otherwise, then Appellant should have the opportunity to seek leave from the trial court to amend its answer to more properly plead it so that the case can be decided on the merits. At the very least, this Court should accept jurisdiction to clarify that the Rules of Civil Procedure and Supreme Court precedent give the trial court, not the appellate court, the authority to grant or deny leave to amend a pleading. As it stands, the Appellate Court decision arguably permits a court of appeals to deny leave before it has even been sought. This is not correct under the rules.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court accept jurisdiction so the issues of public and great general interest described above can be reviewed.

Respectfully submitted,



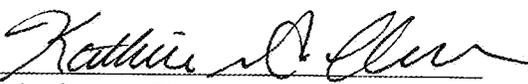
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CERTIFICATE OF SERVICE

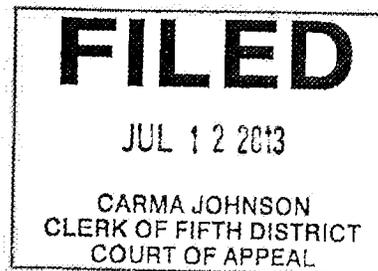
I hereby certify that a true and accurate copy of the foregoing was served, via regular U.S. Mail, postage pre-paid, upon:

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on this 16th day of August, 2013.


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COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT



EDWARD and AMY MARTIN

Plaintiffs-Appellants

-vs-

MORGAN COUNTY AGRICULTURAL
SOCIETY

Defendant-Appellee

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 12 AP 0009

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 11 CV 0130

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

07-12-2013

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Wise, J.

{¶1} Appellants Edward and Amy Martin appeal the decision of the Court of Common Pleas, Morgan County, which granted summary judgment in favor of Appellee Morgan County Agricultural Society in an action alleging employer intentional tort, negligence, and other claims. The relevant facts leading to this appeal are as follows.

{¶2} In February 2009, Appellant Edward began working at appellee's golf course, as part of the county's public works relief program. Among his job duties was cutting grass with a Toro Reelmaster 216 riding lawn mower.

{¶3} On July 24, 2009, Edward was allegedly injured when he reached with his hand to clean off the Toro's rollers while the blades on the mower's reels were still spinning. According to Edward's deposition testimony, he had hit the switch to shut the blades off, but he subsequently theorized that the switch may have only turned off halfway and then popped back into an "on" position. See Edward Martin Depo. at 72-73.

{¶4} On July 21, 2011, appellants filed a complaint in the Morgan County Court of Common Pleas alleging, inter alia, employer intentional tort and negligence. Appellants named as defendants the Morgan County PWRE (a relief program under the Morgan County DJFS), the Morgan County Fairgrounds Golf Course, the Toro Company, one John Doe Corporation, and five John Does.

{¶5} Appellants subsequently substituted, as defendants, Morgan County for Morgan County PWRE, and Appellee Morgan County Agricultural Society for the Morgan County Fairgrounds Golf Course. However, Morgan County was dismissed in June 2011, and the Toro Company was dismissed in November 2011. Furthermore, it

does not appear that service was ever perfected on the John Doe corporation or the individual John Does.

{¶16} On July 30, 2012, Appellee Morgan County Agricultural Society, the sole remaining party-defendant, filed a motion for summary judgment.

{¶17} On August 22, 2012, the trial court rendered a judgment entry granting summary judgment in favor of appellee.

{¶18} On September 4, 2012, appellants filed a notice of appeal. They herein raise the following three Assignments of Error:

{¶19} "I. THE TRIAL COURT ERRED BY PERMITTING APPELLEE TO ASSERT AN AFFIRMATIVE DEFENSE IT HAD PREVIOUSLY WAIVED.

{¶10} "II. BECAUSE THE DEFENSE OF EMPLOYER IMMUNITY PURSUANT TO R.C. § 4123.74 AND R.C. § 4127.10 WAS WAIVED, THE TRIAL COURT ERRED BY APPLYING AN INTENT STANDARD, AS OPPOSED TO A NEGLIGENCE STANDARD.

{¶11} "III. IF APPELLANT MARTIN IS CONSIDERED TO BE APPELLEE'S 'EMPLOYEE,' THE TRIAL COURT ERRED BY DETERMINING THAT HE DID NOT SATISFY THE REBUTTABLE PRESUMPTION OF INTENT TO INJURE PURSUANT TO R.C. § 2745.01(C)."

I.

{¶12} In their First Assignment of Error, appellants contend the trial court erred in implicitly permitting appellant to assert certain statutory employer immunity defenses. We agree.

{¶13} R.C. 4127.10 addresses the liability of employers participating in public work relief. It states as follows: "Employers who comply with sections 4127.01 to 4127.14 of the Revised Code, are not liable to respond in damages at common law or by statute for injury or death of any work-relief employee, wherever occurring. ***." For purposes of R.C. Chapter 4127, "employer" is defined, inter alia, as a "state agency having supervision or control of work-relief employees." See R.C. 4127.01(C).

{¶14} R.C. 4127.10 utilizes language similar to that in R.C. 4123.74, which states in pertinent part: "Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment ***."

{¶15} Appellee Morgan County Agricultural Society herein asserts in its response brief that during the development of the case below, "it became apparent that Appellee indeed met the statutory definition of employer, as defined by R.C. 4127.01." Appellee Brief at 9. Appellee also seems to assert, with little explanation, that it is a "state agency" for purposes of the statute. See Appellee Brief at 12. Appellee thus urges that appellants' exclusive remedy in this case is the workers' compensation system. Appellee Brief at 9.

{¶16} We note that in its motion for summary judgment, appellee argued that Edward "either has to successfully present an intentional tort claim pursuant to the statute, or he has no cause of action against the fairgrounds because he is barred from asserting an ordinary negligence claim against his employer." Summary Judgment Motion at 6. However, appellee never took this legal position via asserting a defense of

statutory immunity in its answer or by filing an amended answer with such a defense. In fact, it is undisputed that appellee originally asserted that Edward was *not* appellee's employee. Although there appears to be no case law on point as to work-relief situations under R.C. 4127.10, appellants direct us to *Hamilton v. East Ohio Gas Co.* (1973), 47 Ohio App.2d 55, for the proposition that the employer immunity defense set forth in R.C. 4123.74 must be pled as an affirmative defense under App.R. 8(C). In *Hamilton*, the Ninth District Court of Appeals held: "If all or any one of those causes of actions are barred by R.C. 4123.74 or 4123.74.1, the defendants should properly plead their contention as a defense, and then it could be tested by a proper motion under Civil Rule 56, or otherwise." *Id.* at 58. The Ninth District's decision in *Hamilton* has been relied upon by the First District Court of Appeals in *Merritt v. Saalfeld*, Hamilton App.No. C-840719, 1985 WL 11484, as well as the Third District Court of Appeals in *Schroerluke v. AAP St. Mary's Corp.*, Auglaize App.No. 2-95-27, 1996 WL 65595.

{¶17} Appellee did maintain in its answer that appellants' claims were "barred by the exclusive remedies set forth in the Ohio Constitution and the Ohio Revised Code. ***" See Answer of Appellee at para. 8. Appellee also included this statement in its answer: "This Defendant hereby provides notice of its retention to rely on other affirmative defenses as may be discovered or become apparent hereafter and specifically reserves the right to amend this answer to assert additional affirmative defenses as discovery progresses." *Id.* at para. 16. However, "[a] party seeking to assert an affirmative defense pursuant to Civ.R. 8(C) is instructed by the language of the rule that the listed affirmative defenses must be 'set forth affirmatively.' Courts construing this language have determined that a party must set forth the listed

affirmative defenses with specificity or else they are waived.” *Taylor v. Merida Huron Hospital of Cleveland Clinic Health System* (2000), 142 Ohio App.3d 155, 157, 754 N.E.2d 810, citing *Arthur Young & Co. v. Kelly* (1993), 88 Ohio App.3d 343, 348, 623 N.E.2d 1303, 1306.

{¶18} Accordingly, we hold the trial court erred as a matter of law in permitting appellee to rely on the statutory immunity provided in R.C. 4127.10 for purposes of summary judgment under the circumstances of this case. In so holding, we do not reach the issue of whether Edward was or was not an employee of appellee under R.C. Chapter 4127. Appellants’ First Assignment of Error is sustained.

II.

{¶19} In their Second Assignment of Error, appellants contend the trial court erred in applying an “intent” standard, as opposed to a “negligence” standard, in reaching its decision to grant summary judgment in favor of appellee. We agree.

{¶20} As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Porter v. Ward*, Richland App.No. 07 CA 33, 2007–Ohio–5301, ¶ 34, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

{¶21} Civ.R. 56(C) provides, in pertinent part: “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show 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. * * * 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * *

{¶22} Appellants in the case sub judice essentially present a two-pronged argument: First, appellants maintain that there is a genuine issue of material fact as to whether appellee negligently injured Appellant Edward. Secondly, appellants argue that to the extent that comparative negligence exists in this matter, such an issue should be resolved by a jury.

{¶23} The record before us provides evidence that during time periods when Edward was doing his mowing work, appellee was operating the mower contrary to Toro's safety specifications. Included in the record before us is the deposition of Herman "Bud" Christopherson, who was an engineer for Toro from 1965 to 2000 and assisted in the design and testing of the Reelmaster 216 mower. According to Christopherson's inspection of the mower in question, two safety interlocks had been bypassed or removed at the time of the incident. See Christopherson Depo. at 25-26.¹ The design of these interlocks was such that if the operator either raised the mowing reels or lifted his or her weight off the seat, the mowing reels would stop spinning. *Id.* at 24.

{¶24} In its response brief, appellee, while maintaining its appellate argument that Edward was an "employee" and that negligence is not the standard, does not

¹ Appellee maintains there were a total of two Reelmaster mowers at the golf course. See Appellee's Brief at 5.

dispute that “taking this as an ordinary negligence case, there may be genuine issues of material fact for a jury that could render the matter inappropriate for summary judgment.” Appellee Brief at 12. Furthermore, because appellants have alleged that the injury to Edward occurred when he used his hand to clean off the mower reels, comparative negligence may be extant in this case. This Court has recognized that “[i]ssues of comparative negligence are for the jury to resolve unless the evidence is so compelling that reasonable minds can reach but one conclusion.” *Ortner v. Kleshinski, Morrison, & Morris*, Richland App.No. 02-CA-4, 2002-Ohio-4388, ¶ 26, citing *Simmers v. Bentley Construction Company* (1992), 64 Ohio St.3d 642, 597 N.E.2d 504, 1992-Ohio-42.

{¶25} Upon review, we find that genuine issues of material fact exist as to negligence and comparative negligence, and that the trial court erred in granting summary judgment in favor of appellee.

{¶26} Appellants' Second Assignment of Error is sustained.

III.

{¶27} In their Third Assignment of Error, appellants contend that if he is considered to be appellee's "employee," the trial court erred by implicitly determining that he did not satisfy the rebuttable presumption of intent to injure pursuant to R.C. 2745.01(C).

{¶28} R.C. 2745.01, which addresses requirements for employer liability, states in pertinent part:

{¶29} "(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.

{¶30} " ***.

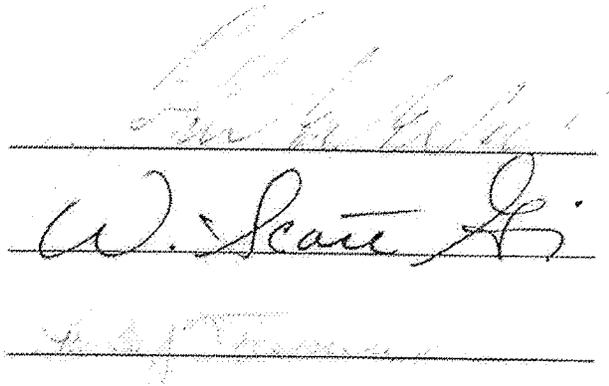
{¶31} "(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

{¶32} " ***."

{¶33} Based on our determinations in regard to appellant's previous assigned errors, we find the issues raised in appellants' Third Assignment of Error to be moot in the present appeal.

{¶34} For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Morgan County, Ohio, is hereby reversed and remanded for further proceedings.

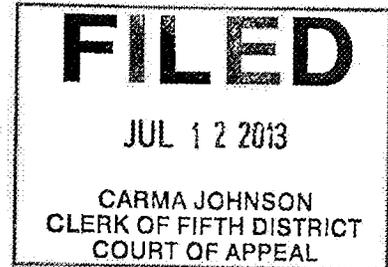
By: Wise, J.
Gwin, P. J., and
Farmer, J., concur.



The image shows three handwritten signatures in cursive script, each written over a horizontal line. The signatures are arranged vertically. The middle signature is the most legible and appears to read 'W. Scott G.'.

JUDGES

IN THE COURT OF APPEALS FOR MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT



EDWARD and AMY MARTIN

Plaintiffs-Appellants

-vs-

MORGAN COUNTY AGRICULTURAL
SOCIETY

Defendant-Appellee

JUDGMENT ENTRY

Case No. 11CV030

Case No. 12 AP 0009

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Morgan County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to appellee.

W. Scott G.

[Faint handwritten signature]

JUDGES