

[Cite as *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 2009-Ohio-6574.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

James A. Sidenstricker, II,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-523
Miller Pavement Maintenance, Inc.,	:	(C.P.C. No. 98CVH-10-7775)
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 15, 2009

Ferron & Associates, John W. Ferron, Lisa A. Wafer and Jessica G. Fallon, for appellant.

Dinsmore & Shohl, LLP, and Jan E. Hensel, for appellee.

Thompson & Bishop, and Christy B. Bishop, for amicus curiae Ohio Employment Lawyers Association.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} This is the third appeal of this case. The prior appeals ultimately resulted in a remand of the case for trial on the merits. The trial court delayed conducting the trial and then granted summary judgment for Miller Pavement Maintenance, Inc. ("Miller Pavement") based upon a finding that the case of *Bickers v. W. & S. Life Ins. Co.*, 116

Ohio St.3d 351, 2007-Ohio-6751, dictated that result. James A. Sidenstricker, II ("appellant"), has appealed, assigning two errors for our consideration:

Assignment of Error No. 1:

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING AND REFUSING TO PROMPTLY COMPLY WITH THE ORDERS OF THIS COURT AND THE OHIO SUPREME COURT TO RETRY THIS CASE TO A JURY.

Assignment of Error No. 2:

THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING APPELLANT'S CLAIMS UPON APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

{¶2} Addressing the first assignment of error, counsel for appellant's frustration with the delays in resolving this case is easy to understand. The case has been pending since 1998 and no resolution favorable to his client is in sight. However, we cannot find reversible error based solely upon the delays. We cannot know what a trier of fact would decide ultimately or would have decided in this case and therefore cannot say that appellant has been harmed by the delays. As a result, we have no choice but to overrule the first assignment of error.

{¶3} The second assignment of error presents a more difficult legal question. The question centers upon the impact of the *Bickers* case on this particular fact situation. The syllabus for *Bickers* reads:

An employee who is terminated from employment while receiving workers' compensation has no common-law cause of action for wrongful discharge in violation of the public policy underlying R.C. 4123.90, which provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act. (*Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61, limited.)

{¶4} The facts of the *Bickers* case indicate that Shelley Bickers was fired because she was unable to do her work. She was unable to work due to injuries she received on the job. She was receiving workers' compensation benefits as a result of her injuries. Specifically, she was receiving temporary total disability compensation. After she was fired, she filed a lawsuit in which she alleged that firing her was against public policy and that public policy was the basis for a tort claim. Her counsel relied upon *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, in pursuing the litigation.

{¶5} The Supreme Court of Ohio issued its opinion in the *Bickers* case with the syllabus set forth above. The body of the Supreme Court opinion makes it clear that the court was addressing situations where a person is discharged for nonretaliatory reasons.

The court stated:

In addition to concluding that *Coolidge* is inapplicable to Bickers's situation, we also hold that the constitutionally sanctioned, and legislatively created, compromise of employer and employee interests reflected in the workers' compensation system precludes a common-law claim of wrongful discharge in violation of public policy when an employee files a workers' compensation claim and is discharged for nonretaliatory reasons.

Id. at ¶17.

{¶6} The facts in appellant's case, as alleged for purposes of summary judgment, are far different. Appellant was a construction worker for appellee Miller Pavement between 1996 and 1998. In April 1998, he began experiencing pain in his lower abdomen, which a doctor later diagnosed as a hernia. Appellant initially tried to work through the pain, but after telling his supervisor about the hernia, he was immediately demoted to a more labor-intensive position, and advised to file a workers'

compensation claim. When appellant attempted to file the claim, the company's owner, Pete Miller, threatened appellant that he would deny the claim and "make things hard on him." Appellant continued to work for Miller Pavement, despite the many hurdles that Miller Pavement placed in his path, and when appellant kept coming back to work, Pete Miller had him fired. The reasons appellant's supervisor gave for his termination were poor work performance and bad attitude.

{¶7} Appellant sued Miller Pavement for various employment violations, including wrongful discharge, and workers' compensation retaliation, under R.C. 4123.90. The matter was tried to a jury in August 2000, but at the conclusion of the plaintiff's case-in-chief, Miller Pavement moved for, and the trial court granted, a directed verdict for the defendant on all counts. (Decision & Entry Granting Defendant's Motion for Summary Judgment, April 30, 2009, at 2.) Appellant appealed to this court, and we reversed the trial court as to the wrongful discharge and retaliation counts, and remanded the case for a new trial. See *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 10th Dist. No. 00AP-1460, 2001-Ohio-4111 (hereafter "*Sidenstricker I*"). On remand, the trial court initially failed to adhere to this court's instructions, and held a special hearing to determine whether appellant had a prima facie wrongful discharge claim sufficient to go to the jury. Then, the trial court decided to hold a bench trial on the statutory claim (retaliation), and only if appellant prevailed on the statutory claim would the trial court allow the public policy claim of wrongful discharge to be heard by the jury. The trial court proceeded with the bench trial, and summarily determined that appellant had not met his burden of proof, granted judgment for Miller Pavement, and kicked the remaining claim as well.

{¶8} Appellant again appealed to this court, and again we reversed the trial court: “The trial court’s determination that the first two elements of the public-policy claim are established as a matter of law is *res judicata*, the court’s determination having been properly made[.]” *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 158 Ohio App.3d 356, 2004-Ohio-4653, ¶16 (hereafter "*Sidenstricker II*").

{¶9} Miller Pavement appealed this court’s ruling in *Sidenstricker II* to the Ohio Supreme Court, which accepted the appeal for review on January 26, 2005, but dismissed the appeal as having been improvidently granted on August 16, 2006. See *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 110 Ohio St.3d 1258, 2006-Ohio-4203, ¶1. Immediately after the case returned to the trial court—for re-trial as instructed by this Court in *Sidenstricker II*—Miller Pavement filed a motion to stay trial, pending the Supreme Court of Ohio’s ruling in another case, which was *Bickers*. (See Final Order, at 3.) Appellant opposed the stay, but six months later, the trial court granted Miller Pavement’s motion. On December 20, 2007, the supreme court released the *Bickers* case, which prompted Miller Pavement to file a motion for summary judgment two months later. Appellant again opposed Miller Pavement’s motion for summary judgment. The trial court granted Miller Pavement’s motion about 13 months later. It is from the trial court’s entry of summary judgment for Miller Pavement on appellant’s claims for wrongful discharge and retaliation on May 1, 2009 that appellant now appeals.

{¶10} The theory in appellant’s case has always been that he was fired for retaliatory reasons, namely his pursuit of a workers’ compensation claim as a result of injuries he sustained on the job. Thus, the body of the *Bickers* opinion makes it clear that the Supreme Court of Ohio was not intending to address the very situation presented by

appellant's case and indicates that the *Bickers* case should not dictate the outcome of appellant's case.

{¶11} However, we, as an appellate court, are bound by Rule 1 of the Supreme Court Rules for the Reporting of Opinions. Rule 1(B)(1) and (2) reads:

(B)(1) The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes.

(2) If there is disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls.

{¶12} Since the syllabus for the *Bickers* case does not indicate that the rule of law contained in that syllabus applies only to nonretaliatory discharges, the syllabus holds that persons who are fired for retaliatory reasons are also barred from pursuing a public policy claim based upon the policies underlying R.C. 4123.90. In short, the syllabus for the *Bickers* case, as read through the lens of Rule 1 of the Supreme Court Rules for the Reporting of Opinions, supports the trial court's ruling ending appellant's case. We note the substantial differences in the facts of appellant's case from those of the *Bicker* case. We also note that R.C. 4123.90 is a statutory remedy and provides only equitable relief. Therefore there is no right to a jury trial. See *Sidenstricker II* at ¶10 citing *Hoops v. United Tel. Co. of Ohio* (1990), 50 Ohio St.3d 97 (“Section 5, Article I, Ohio Constitution preserves 'inviolable' the right to a jury trial for those civil actions where the right existed prior to the adoption of the state Constitution.”) Where a statute sets forth a new civil right that affords equitable relief for which there was no right to trial by jury at common law, there is no right to a jury trial for an action brought under the statute unless the legislature specifically grants such a right. *Hoops* at 98–100. On the other hand, the common-law claim of wrongful discharge sounds in tort; it is a purely legal claim, insofar as it seeks

money damages only (i.e., does not seek reinstatement with back pay, etc.). There is a right to trial by jury for such a common-law wrongful discharge claim. See, e.g., *Sidenstricker II*, ¶111 (citing *Boyd v. Winton Hills Med. & Health Ctr., Inc.* (1999), 133 Ohio App.3d 150, 162; *Brunecz v. Houdaille Indus., Inc.* (1983), 13 Ohio App.3d 106; *Kent v. Chester Labs, Inc.* (2001), 144 Ohio App.3d 587; *Collins v. Rizkana*, 73 Ohio St.3d 65, 70, 1995-Ohio-135).

{¶13} However, we are not at liberty to overrule the syllabus of a Supreme Court opinion which is on point on the determinative legal issue. We therefore overrule the second assignment of error.

{¶14} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER, J., concurs in part and concurs in judgment.

KLINE, J., concurs in judgment only.

KLINE, J., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District.

SADLER, J., concurring in part and concurring in judgment.

{¶15} While I agree with the disposition of the case and concur that the trial court's judgment be affirmed, I write separately to express my rationale with regard to each assignment of error. With respect to appellant's first assignment of error, the trial court did not abuse its discretion in its handling of this case, in light of its particular circumstances. With respect to the second assignment of error, I agree that we are bound to follow the syllabus set forth in *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d

351, 2007-Ohio-6751. For these reasons, I respectfully concur in part and concur in judgment.