[Cite as *Nickles Bakery, Inc. v. Estate of Molina*, 2004-Ohio-4006.]

IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY

ALFRED NICKLES BAKERY, INC.

PLAINTIFF-APPELLANT **CASE NO. 1-04-05**

v.

ESTATE OF NICO W. MOLINA, DECEASED **O P I N I O N**

DEFENDANT-APPELLEE

CHARACTER OF PROCEEDINGS: **Civil Appeal from Common Pleas Court**

JUDGMENT: **Judgment Affirmed**

DATE OF JUDGMENT ENTRY: **August 2, 2004**

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CUPP, J.

{¶1} Plaintiff-appellant, Alfred Nickles Bakery, Inc., appeals the judgment of the Common Pleas Court of Allen County granting Sheriff-Goslin Company's motion for summary judgment.

{¶2} Nico Molina ("Molina") and Randy Marshall ("Marshall") were employed as roofers for Sheriff-Goslin. On April 5, 2001, Molina and Marshall were assigned two roofing jobs at two separate sites. However, after completing the first job, Molina and Marshall, never went to the second job site, but rather, went to a bar. Later that same night, at approximately 10:50 p.m., Molina, while traveling on North Sugar Street in Bath Township in a Sheriff-Goslin Company truck, collided with a semi-truck owned by plaintiff-appellant, Alfred Nickles Bakery, Inc. ("appellant"). Marshall was a passenger in the truck at the time of the accident. Both Molina and Marshall were killed. The coroner's report revealed that Molina had a blood alcohol level of 0.38%.

{¶3} On April 8, 2002, appellant filed a complaint against the Estate of Nico Molina and Sheriff-Goslin Company. Appellant prayed for relief against the Estate of Nico Molina in an amount in excess of $25,000 and also sought judgment against Molina's employer, Sheriff-Goslin Company, based upon the theory of respondeat superior.

{¶4} Sheriff-Goslin Company filed a motion for summary judgment on the grounds that the doctrine of respondeat superior is inapplicable to the case at bar because Molina and Marshall were not acting either within the course or scope of their employment at the time of the accident. On December 12, 2003, the trial court granted Sheriff-Goslin Company's motion for summary judgment.

{¶5} The appellant now appeals the judgment of the trial court and sets forth one assignment of error for our review.

ASSIGNMENT OF ERROR NO. I

> **The trial court erred in granting Sheriff-Goslin Company's motion for summary judgment pursuant to Ohio Civil Rule 56 by finding as a matter of law that defendants, Nico Molina and Randall K. Marshall, were not acting within the scope of their employment with Sherriff-Goslin.**

{¶6} Our review of the record reveals that the trial court has thoroughly addressed all of the relevant factual and legal issues pertaining to this appeal in its judgment entry in which it granted Sheriff-Goslin Company's motion for summary judgment. Accordingly, for the purposes of ruling on appellant's assignment of

error herein, we hereby adopt the well-reasoned final judgment entry of the trial court dated December 12, 2003, incorporated and attached hereto as Exhibit A, as our opinion in this case.

{¶7} For the reasons stated in the final judgment entry of the trial court, attached and incorporated herein as Exhibit A, appellant's assignment of error is overruled and the judgment of the Common Pleas Court of Allen County is affirmed.

Judgment affirmed.

SHAW, P.J., and BRYANT, J., concur.

IN THE COMMON PLEAS COURT OF ALLEN COUNTY, OHIO

ALFRED NICKLES BAKERY, INC.

Plaintiff

VS.

ESTATE OF NICO MOLINA

Defendant

CASE NO. CV2002 0386

JUDGMENT ENTRY GRANTING SUMMARY JUDGMENT TO SHERRIFF-GOSLIN COMPANIES

This matter is before the Court upon defendant Sherriff-Goslin Company's Motion for Summary Judgment and Plaintiff Nickles Bakery's Response. The Court has considered the respective Memorandums, Affidavits and Transcripts.

Nico Molina ("Molina") and Randy Marshall ("Marshall") were employees of Sherriff-Goslin. Sherriff-Goslin furnished trucks for employees. Each workday they reported to the Sherriff-Goslin office/warehouse before going to work.

By written policy and manager's instructions, employees were strictly prohibited from using the Sherriff-Goslin trucks for personal reasons.

On April 5, 2001, Molina and Marshall were assigned to do two jobs. The first roofing job was on Pro Drive and was estimated to take four (4) hours. The second job was for repairs on Eversole Drive and was estimated to take two (2) hours (three (3) at the most). Seitz Tr. Pg. 18-21. The

shingles for the Eversole job were in the Sherriff-Goslin truck driven by Molina.

It was later determined that Molina and Marshall never reported to the Eversole Drive job. Instead, Molina and Marshall, at some point, stopped to drink alcohol.

At around 10:50 P.M. on April 5, 2001, Molina, with Marshall as passenger, were proceeding in Sherriff-Goslin truck on North Sugar Street in Bath Township when the truck went left of center and collided with semi-truck owned by plaintiff.

Both Molina and Marshall were killed. At the time of the accident, and by the Coroner's Report, Molina registered an alcohol level of 0.38% W.A. – almost 4 times over the legal limit. There is no question that liability for the accident rested with the driver of the Sherriff-Goslin truck.

Plaintiff's Complaint claims that the decedent tortfeasor (Molina) was operating the truck in the course and scope of his employment and therefore Sherriff-Goslin is liable for negligent acts of its employee, Molina, pursuant to the doctrine of respondeat superior.

Pursuant to Civil Rule 56, summary judgment is appropriate if: (1) there is no issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his or her favor. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Ed.* (1994), 69 Ohio St.3d 217, 219; *See Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. The burden of showing no genuine issue exists as to any material fact falls upon the moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

The Ohio Supreme Court has established the standards for granting summary judgment under Civ. R. 56 when a party asserts that a nonmoving party has no evidence to establish an essential element of the nonmoving party's case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Civ. R. 56(E) requires the nonmoving party to go beyond the pleadings, affidavits, or by the depositions, answers to interrogatories, and admissions on file, and designate specific facts showing that there is a genuine issue for trial. *Dresher* at 289 (citing *Celotex Corp. v. Catrett* (1986), 477 U.S. 317). The last two sentences of Civ. R. 56(E) provide that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Accordingly, if the moving party has satisfied its initial burden, the nonmoving party then must set forth specific facts showing that there is a genuine issue for trial, and if the nonmovant does not respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Dresher* at 293.

Ohio law provides that in order for an employer to be liable under the doctrine of respondeat superior, the tort must be committed within the scope of employment. *Boch v. New York Life Ins. Co.* (1964), 175 Ohio St. 458. In *Boch, supra,* the Supreme Court of Ohio observed that the necessary elements of the cause of action were:

1. The express or implied authorization by the employer for the use of the automobile;

2. The employee be in the performance of the work he was employed to do at the time of the accident;

3. The employee was under the direction or control of the employer.

Absent any of these elements, the cause of action fails.

Plaintiff makes various arguments in attempt to show that Molina was within the course and scope of his employment. Plaintiff points to the fact that Molina was driving Sherriff-Goslin's truck in a northerly direction on North Sugar Street and that this was in the general vicinity of various places that may show that Molina was heading to the job site on Eversole Drive. Plaintiff further points to the fact that the shingles for the Eversole project were still in the truck at the time of the accident. Plaintiff further points to the fact that Molina and Marshall previously worked on some roofing jobs after normal business hours.

The Court finds that these arguments are mere speculation and not grounded on any facts to this particular case. The fact is that Molina disobeyed his manager, failed to report to the Eversole Drive project, did not return the truck to the office and clock out, was drinking alcohol for a considerable period of time that therefore registered a .38% blood alcohol, and was in an accident at 10:50 P.M. in the evening – some four to five hours after normal quitting time.

The Court further finds not to grant summary judgment on the facts of this case would be an injustice to the policy that prohibits recovery from an employer when an employee acts outside the scope of his employment. There is nothing but speculation that Molina and/or Marshall were doing anything to further or promote Sherriff-Goslin's business at 10:45 P.M. in the evening.

Therefore, the Court finds that there are no material issues of fact and as a matter of law Molina and Marshall were acting outside the scope of their employment in clear violation of the Sherriff-Goslin rules and regulations at the time of the instant accident.

Further, for the reasons set forth in defendant's argument, Summary Judgment is also appropriate on the negligent entrustment claim because there has been no evidence submitted that Molina was known to be unlicensed or incompetent to drive the Sherriff-Goslin Company truck.

Pursuant to Civ.R. 54(B), the Court finds that this is a final judgment as to one but fewer than all of the claims or parties and further makes an expressed determination that there is no just reason for delay.

IT IS SO ORDERED.

Richard K. Warren, Judge

RKW/mjm
DATE: December 12, 2003
cc: Gregory Swope
J. Alan Smith
James Utrecht