[Cite as *Hutton v. Estes*, 2010-Ohio-2793.]

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

Dennis L. Hutton	Court of Appeals No. OT-09-039
Appellant	Trial Court No. 08-CV-692
v.	
Ariel E. Estes, et al.	**DECISION AND JUDGMENT**
Appellee	Decided: June 18, 2010

* * * * *

Chad M. Tuschman and Peter O. DeClark, for appellant.

Larry P. Meyer, for appellee Ottawa County Agricultural Society.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas, in which the trial court granted summary judgment to appellee, the Ottawa County Agricultural Society ("OCAS"), and dismissed the complaint filed by appellant, Dennis

Hutton, in an action for damages incurred in an automobile accident. On appeal, appellant sets forth the following two assignments of error:

{¶ 2} "I. The trial court erred as a matter of law by granting summary judgment when issues of material fact exist as to whether Ariel Estes was a fixed-situs employee at the time of the accident and, consequently, whether the coming-and-going rule is applicable to the case at hand.

{¶ 3} "II. Whether, after viewing the evidence in a light most favorable to plaintiff-appellant, the trial court erroneously granted defendants-appellees [sic] motion for summary judgment when issues of material fact remain to be litigated regarding whether Ariel Estes was a fixed-situs employee and, therefore, whether the coming-and-going rule is applicable."

{¶ 4} Ariel Estes ("Estes") became the Ottawa County Fair Queen in July 2008. On July 21, 2008, while driving to the Seneca County Fair where she was to represent Ottawa County, Estes crossed an intersection and collided with another vehicle driven by appellant, Dennis Hutton. Hutton suffered injuries as a result of the accident.

{¶ 5} On December 8, 2008, Hutton filed a complaint against Estes and her parents, Phillip and Peggy Estes, in the Ottawa County Court of Common Pleas. The complaint contained allegations that Hutton was seriously injured due to Ariel Estes' negligence, and that Phillip and Peggy Estes were also at fault for negligently entrusting their vehicle to their daughter. Estes and her parents filed an answer on January 8, 2009. On April 22, 2009, with leave of court, Hutton filed an amended complaint in which he

alleged that OCAS was Estes' employer and was, therefore, vicariously liable for her negligent acts. OCAS filed an answer to the amended complaint on May 26, 2009. Estes and her parents answered the amended complaint on June 30, 2009.

{¶ 6} On August 6, 2009, Phillip and Peggy Estes filed a motion for partial summary judgment as to Hutton's claims for punitive damages and negligent entrustment. On August 14, 2009, Hutton filed a response, in which he stated that partial summary judgment was inappropriate because there was "conflicting evidence" as to whether Estes was talking on her cell phone at the time of the accident. On August 25, 2009, Phillip and Peggy Estes filed a reply.

{¶ 7} On September 10, 2009, OCAS filed a motion for summary judgment, in which it asserted that it had insufficient control over Estes to establish a master/servant or agent/principal relationship and was, therefore, not liable for Estes' negligent acts. Alternatively, OCAS argued that Estes was, at best, a "fixed-situs" employee. As such, OCAS would not be liable for her negligent acts pursuant to the "coming-and-going rule," which exempts an employer from respondeat superior liability for employees' negligent acts that occur while traveling to or from work. In support of its assertions, OCAS relied on the deposition testimony of Estes; Ottawa County Junior Fair coordinator Deborah Heiks; and Ottawa County King and Queen Superintendent, Samantha Phillips. In addition, OCAS relied on Heiks' affidavit. Also attached to OCAS's motion was an authenticated copy of the 2008 Ottawa County Fair Handbook.

{¶ 8} In her deposition, Estes testified that she drove to pick up her first runner-up, Kelsey Gahler, and was on the way to pick up her second runner-up, Sara Harder, when the accident occurred. Estes stated that she and the other two girls were en route to the Seneca County Fair, where they were to appear and represent Ottawa County.

{¶ 9} Heiks stated in her deposition that Estes received no specific guidelines as to how to represent Ottawa County during her reign as queen. Heiks also cited to the 2008 Ottawa County Fair Handbook which states that, as fair queen, Estes' duties included representing Ottawa County "at other fairs, festivals and parades as well as attend[ing] Kiwanis, Rotary Club, and schools to promote the Ottawa County Fair." She further stated that kings and queens are not required to attend such events, and OCAS does not provide or otherwise coordinate their transportation. In her affidavit, Heiks stated that a fair queen is not paid to attend additional events such as fairs outside Ottawa County; however, the queen may receive gift certificates at the time she is elected, and may receive free admission to neighboring county fairs during her reign. Phillips stated in her deposition that a fair queen's attendance at a minimum number of events is not required, and that Estes would not have begun her official duties as queen until she arrived at the Seneca County Fair.

{¶ 10} On September 24, 2009, the trial court granted Phillip and Peggy Estes' motion for partial summary judgment and dismissed Hutton's claims for punitive damages and negligent entrustment. On September 28, 2009, Hutton filed a brief in opposition to OCAS's motion for summary judgment, in which he asserted that summary

judgment was not appropriate because genuine issues of fact remain as to whether Estes was a "fixed-situs" employee. Hutton further argued that, even if Estes was a fixed-situs employee, OCAS is not entitled to summary judgment because an issue of fact remains as to whether Estes' acts were performed in the service of her employer.

{¶ 11} OCAS filed a reply in support of summary judgment on October 8, 2009, in which it stated that, as a matter of law, Estes was not an employee. OCAS further asserted that, throughout the course of this litigation, Hutton erroneously argued that a "fixed-situs employee" must have only one place of employment.

{¶ 12} On November 24, 2009, the trial court filed a decision and judgment entry, in which it found that no principal/agent or master/servant relationship existed between Estes and OCAS. After considering the evidence and resolving all inferences in favor of Hutton, the trial court concluded that OCAS was not liable for Estes' negligent acts. Based on its findings, the trial court granted summary judgment to OCAS and dismissed the complaint against OCAS. A timely notice of appeal was filed by Hutton[1] on December 22, 2009.

{¶ 13} In his two assignments of error, which will be considered together, Hutton asserts that: (1) Estes, while acting as the 2008 Ottawa Fair Queen, was an employee/agent of OCAS; (2) she was, however, not a "fixed-situs" employee because

[1]The trial court's judgment did not resolve Hutton's outstanding claims against Ariel Estes. Nevertheless, it is final and appealable pursuant to Civ.R. 54(B), since the trial court stated that there is "no just cause for delaying an Appeal herein." *Roberts v. Reyes*, 9th Dist. No. 9CA009576, 2010-Ohio-1086, ¶ 14.

she did not report to one fixed place of employment; and (3) because Estes was not a "fixed-situs" employee, OCAS is not exempt from respondeat superior liability for negligent acts she performed while "coming-and-going" from work. OCAS responds that Estes was, in fact, not its employee or its agent at any time.

{¶ 14} We note at the outset that an appellate court reviews a trial court's granting of summary judgment de novo, 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 Edison Co.* (1996), 77 Ohio St.3d 102, 105. 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 non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 15} Initially, the party seeking summary judgment bears the burden to inform the trial court of the basis for the motion and identify portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The motion may be filed "with or without supporting affidavits[.]" Civ.R. 56(A). Thereafter, the burden shifts to the non-moving party to show why summary judgment is inappropriate. Civ.R. 56(E). "If the non-movant fails to respond, or fails to support its response with evidence of the kind required by Civ.R. 6(C), the court may enter summary judgment in favor of the moving party." *Snyder v. Ford Motor Co.*, 3d Dist. No. 1-05-41, 2005-Ohio-6415, ¶ 11; Civ.R. 56(E).

{¶ 16} It is well-settled that "[t]he relationship of principal and agent or master and servant exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks." *Parrett v. Univ. of Cincinnati Police Dept.*, 10th Dist. No. 03AP-1182, 2004-Ohio-6517, ¶ 11, citing *Hanson v. Kynast* (1986), 24 Ohio St.3d 171, 173. (Other citations omitted.) In any such case, the key factor to be determined is whether the purported employer "had the right to control the manner or means of doing the work." *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146.

{¶ 17} In this case, OCAS presented evidence, through Heiks' testimony and affidavit that, upon being designated as the 2008 Ottawa County Junior Fair Queen, Estes received some gift certificates; however, she did not receive, nor was she entitled to, any cash compensation. Heiks and Phillips both testified that the official fair handbook provided no specific guidelines directing the 2008 fair queen to perform any specific duties. They stated that, while the queen's duties in 2008 included attendance at other county fairs and participation in parades and other events throughout the year, her attendance was not mandatory and no transportation was provided by OCAS. Heiks further stated in her affidavit that the only consideration for Estes' attendance at the Seneca County Fair was free admission. No evidence was presented that OCAS was responsible to pay for Estes' admission to the Seneca County Fair, or to reimburse her for the cost of her transportation to any of the events she chose to attend.

{¶ 18} This court has reviewed the entire record that was before the trial court and, upon consideration thereof, we find no evidence that OCAS had a right to control which activities Estes chose to attend as fair queen, or how she was to transport herself to those events she chose to attend. Consequently, we agree with the trial court's conclusion that Hutton did not meet his burden to demonstrate that OCAS was Estes' employer. We further find that there remains no other genuine issue of material fact and, after considering the evidence presented most strongly in favor of Hutton, OCAS is entitled to summary judgment as a matter of law. Hutton's two assignments of error are, therefore, not well-taken.

{¶ 19} The judgment of the Ottawa County Court of Common Pleas is affirmed. Hutton is ordered to pay the costs of this appeal pursuant to App.R. 24.

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. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE