[Cite as *Cottrill v. Thermo Electron N. Am., L.L.C.*, 2010-Ohio-2238.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

TONDA COTTRILL,	:	
	:	
Plaintiff-Appellant,	:	Case No. 09CA34
	:	
v.	:	
	:	
THERMO ELECTRON NORTH AMERICA, LLC,	:	**DECISION AND JUDGMENT ENTRY**
	:	
Defendant-Appellee.	:	File-stamped date: 5-17-10

APPEARANCES:

Sanford A. Meizlish, Columbus, Ohio, for Appellant.

Thomas L. Davis, Columbus, Ohio, for Appellee.

Kline, J.:

{¶1} Tonda Cottrill ("Cottrill") appeals from the trial court's summary judgment in favor of Thermo Electron North America, LLC ("Thermo Electron").[1] On appeal, Cottrill contends that the trial court erred because Adecco, her direct employer, retained the right to control the manner or means of her performing the work, and therefore the loaned servant doctrine is inapplicable. However, we find that the trial court correctly determined that Thermo Electron was Cottrill's employer for the purposes of Ohio's workers' compensation system. Accordingly, we affirm the judgment of the trial court.

I.

[1] We note that Thermo Electron has apparently changed its name since the accident. But both parties refer to the relevant entity as Thermo Electron, and so we will follow that convention for the sake of consistency.

{¶2} Thermo Electron is a Delaware Corporation with its principle place of business in Massachusetts. Thermo Electron is in the business of manufacturing controlled environmental equipment including incubators, ultra low temperature freezers, and biological safety cabinets. Adecco is also a Delaware Corporation but has its principle place of business in New York. Adecco is in the business of providing temporary employees to allow its customers to meet their short term productivity needs. Thermo Electron and Adecco entered into a contract on October 25, 2004. Under the terms of this contract, Adecco would provide temporary employees to Thermo Electron.

{¶3} Cottrill filled out a job application for Adecco. On August 28, 2006, Adecco informed Cottrill that she should report to work at Thermo Electron. Cottrill worked at Thermo Electron's facility for about a month until she had an accident on September 27, 2006.

{¶4} On that particular day, one of her coworkers tasked Cottrill with "tapping" a part known as a cam latch. In this particular operation, Cottrill used a cordless electric drill to drill out paint residue left in the cam latch. There was no particular fixture that the cam latch was fitted into for this operation. Instead, Cottrill secured the part with one hand and then used the other hand to drill out the hole. The record is unclear as to whether Cottrill wore gloves on both hands, but she certainly wore a glove on her left hand. According to Cottrill, one of the more senior operators retrieved the gloves. Initially, this operator retrieved gloves that were far too big. A second pair was obtained, and this pair was also too large. Cottrill nonetheless used the ill-fitting gloves because there were no smaller gloves available.

{¶5} Another employee momentarily distracted Cottrill while Cottrill was tapping a cam latch. While she was distracted, the drill bit caught the glove on her left hand. In so doing, the drill twisted Cottrill's finger and caused substantial permanent injuries.

{¶6} On September 25, 2008, Cottrill filed a complaint alleging that her injuries were caused by the negligence of Thermo Electron and its agents. Thermo Electron filed a motion for summary judgment on May 12, 2009. Thermo Electron argued that while Cottrill was technically employed by Adecco, nonetheless the exclusive remedy provision of the Ohio's workers' compensation system applied. Therefore, Thermo Electron argued that Cottrill could not maintain her negligence action.

{¶7} Cottrill argued that she was an employee of Adecco, and as such, Thermo Electron was not protected by the exclusive remedy provision. On July 17, 2009, the trial court granted Thermo Electron's motion for summary judgment.

{¶8} Cottrill appeals from this decision and assigns the following error for our review: "The trial court erred in granting summary judgment in favor of Defendant-Appellee Thermo Electron North America, LLC, when the case presents genuine issues of material fact and Thermo Electron was not entitled to judgment as a matter of law. (Decision, July 17, 2009; Judgment Entry, August 5, 2009)"

II.

{¶9} Cottrill's assignment of error requires that we review the trial court's entry granting summary judgment. "Because this case was decided upon summary judgment, we review this matter de novo, governed by the standard set forth in Civ.R. 56." *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, at ¶8.

{¶10} Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C). See, also, *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 535, 1994-Ohio-531.

{¶11} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 1996-Ohio-107, citing *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 114-15. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). See, also, *Dresher* at 294-295.

{¶12} In reviewing whether an entry of summary judgment is appropriate, an appellate court must independently review the record and the inferences that can be drawn from it to determine if the opposing party can possibly prevail. *Morehead* at 411. "Accordingly, we afford no deference to the trial court's decision in answering that legal question." Id. at 412. See, also, *Schwartz v. Bank One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809.

{¶13} In the present case, Thermo Electron argues Cottrill's present suit is barred by Ohio's workers' compensation system. "It is generally recognized that the workers' compensation system 'operates as a balance of mutual compromise between the interests of the employer and employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability.'" *Page v. Taylor Lumber, Inc.*, 161 Ohio App.3d 644, 2005-Ohio-3104, at ¶12, quoting *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St.2d 608, 614.

{¶14} "Employers who [make the appropriate payments to the state workers' compensation insurance fund] shall not be liable to respond in damages at common law or by statute for any injury * * * received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury * * * occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer[.]" R.C. 4123.74.

{¶15} There does not seem to be any question whether Thermo Electron paid the appropriate sums to the state workers' compensation insurance fund. Rather the question is whether Thermo Electron was Cottrill's employer for the purpose of Ohio's workers' compensation system. "Where an employer employs an employee with the understanding that the employee is to be paid only by the employer and at a certain hourly rate to work for a customer of the employer and where it is understood that that customer is to have the right to control the manner or means of performing the work, such employee in doing that work is an employee of the customer within the meaning of

the Work[ers'] Compensation Act; and, where such customer has complied with the provisions of the Workmen's Compensation Act, he will not be liable to respond in damage for any injury received by such employee in the course of or arising out of that work for such customer." *Daniels v. MacGregor Co.* (1965), 2 Ohio St.2d 89, syllabus. This rule is commonly referred to as the loaned servant doctrine.

{¶16} In *Daniels*, the plaintiff was employed by Manpower, a temporary employment agency. Id. at 89. Manpower retained "the exclusive right to hire and discharge its employees and to determine which of its employees are to be assigned to its customers. It also reserve[d] the right to remove and to reassign its employees from one customer to another even during the course of a workday." Id. at 90. Manpower also deducted "from its employees' wages the income and social security taxes and similar deductions, and no such deductions are made by its customers. Manpower, and not its customers, pay[ed] all workmen's compensation premiums and unemployment compensation payments for the protection of its employees." Id. An agreement between Manpower and its customer indicated that the customer would not employ Manpower's workers "now or for a period of ninety days following the completion of work for the [customer.]" Id. Nonetheless, the Supreme Court of Ohio upheld the trial court's grant of summary judgment concluding that "reasonable minds could conclude only that the right to control the manner and means of performing the work which plaintiff was doing when injured was in [the temporary employment agency's customer.]" Id. at 95.

{¶17} Cottrill contends that the trial court erred when it determined that she was the employee of Thermo Electron for the purpose of Ohio's workers' compensation system.

Cottrill argues that the following facts indicate that the question of whether she was a loaned servant within the meaning of *Daniels* was a question for a jury. "Cottrill received her timesheets from Adecco, returned them to Adecco, was paid by Adecco, reported her problems to Adecco, requested days of[f] from Adecco, was trained by Adecco, applied to work at Adecco, and took a placement test at Adecco. In order for Cottrill to get promoted within Thermo Electron's work structure[], Adecco's approval was necessary. * * * Thermo Electron could not terminate or discipline Cottrill without Adecco's approval. * * * Thermo Electron had to call Adecco after Cottrill's injury to get permission to investigate because any correspondence with Cottrill had to go through Adecco." Cottrill's brief at 13. Cottrill also contends that the original contract between Adecco and Thermo Electron specifies that employees of Adecco remain independent contractors as to Thermo Electron. "[N]othing contained in this Agreement shall be construed or implied to create an agency, partnership or employer and employee relationship between Thermo Electron and [Adecco] or between any party hereto and any officer or employee of the other party." Paragraph 17.2 of the Master Agreement between Thermo Electron and Adecco, dated October 25, 2004.

{¶18} We note that there are few if any actual factual disagreements between the parties. Instead, the parties dispute the legal ramifications of the agreed facts. In short, the contract and the parties' actions clearly demonstrate that Cottrill remained in the employ of Adecco. This is demonstrated by Adecco's payment of Cottrill's salary, overall control of any disciplinary action, control of any termination decision, and overall control of human resources matters. The agreement between Thermo Electron and Adecco also indicated that Thermo Electron was responsible for training and

supervising Cottrill while she was working at Thermo Electron's facility. Of course, the fact that Cottrill remained an employee of Adecco is consistent with the application of the loaned servant doctrine. This doctrine necessarily presumes that the servant remains in the overall employ of the original employer. See *Campbell v. Cent. Terminal Warehouse* (1978), 56 Ohio St.2d 173, 176 ("Moreover, there existed an implied contract of hire between [the employment agency's customer] and [the plaintiff], whereby [the plaintiff] in effect authorized [the employment agency] to offer his services for hire, and [the customer], by approving the referral, accepted [the plaintiff's] offer. * * * Although [the employment agency's customer] did not directly pay [the plaintiff], [the customer] did pay [the employment agency] a certain sum which covered the reimbursement of [the plaintiff] for his services.") (internal citation omitted). In other words, the temporary employee entered into a contract for employment with the employment agency, and authorized the agency to offer his services to the agency's customer. And when the customer accepted this contract between itself and the employment agency, the plaintiff effectively had an employment contract with both the agency and its customer.

{¶19} The question before us is whether the undisputed facts indicate that Thermo Electron so controlled the manner or means of performing the relevant work that Thermo Electron was also Cottrill's employer for the purpose of Ohio's workers' compensation system. Cottrill's counsel conceded at oral argument that the only distinction between Cottrill's employment and the plaintiff in *Daniels* is the contract between Thermo Electron and Adecco.

{¶20} Cottrill cites *Sellers v. Leibert Corp.*, Franklin App. No. 05AP-1200, 2006-Ohio-4111, and she argues that the contract between Thermo Electron and Adecco in the present case is indistinguishable from that in *Sellers*. In *Sellers*, the plaintiff was an employee of a temporary employment organization and was assigned to work in the paint shop of a customer of the temporary employment organization. Id. at ¶1. The *Sellers* court concluded that the contract between the temporary employment agency and its customer expressly reserved "all rights of supervision and control" to the temporary employment agency. Id. at ¶9, 16. The *Sellers* court concluded that this language created a genuine issue of material fact on the question of whether the plaintiff was in fact a loaned servant to the customer of the employment agency. We are not persuaded by Cottrill's application of *Sellers* to the present case for two reasons. First, the contract in the present case is distinguishable from that in *Sellers*. Second, those cases that have considered this issue have focused on the day-to-day control of the worker in terms of the relevant work rather than administrative matters, and it is uncontested that Thermo Electron controlled what jobs Cottrill performed at its facility, as well as how she performed those particular jobs.

{¶21} First, Cottrill points to paragraph 17.2 of the agreement between Adecco and Thermo Electron, and she argues that this paragraph indicates that the relationship between Adecco and Thermo Electron is similar to that of the parties in the *Sellers* case.

{¶22} The language in the agreement between Thermo Electron and Adecco indicates that the temporary employees would remain independent contractors, and this language is comparable in substance to that included in the agreement in the *Daniels*

case. See *Daniels* at 90 ("[the temporary employment agency's customer] will not employ the [temporary worker] now or for a period of ninety days following the completion of work").

{¶23} The language in the *Sellers* case expressly reserved the right to retain "all rights of supervision and control" to the temporary employment agency. *Sellers* at ¶9. Whereas the relevant language in the present contract merely indicated that nothing in that contract established an employment relationship between Thermo Electron and Adecco's temporary employees. We therefore find that the language the *Sellers* court relied upon was materially different from the present case. And we conclude that the language in the present agreement cannot be meaningfully distinguished from that in the *Daniels* case, where the Supreme Court of Ohio upheld the grant of summary judgment.

{¶24} Second, Ohio Courts that have considered the question of whether a loaned servant is an employee of the customer organization have focused on the day-to-day control of tasks in the workplace rather than administrative human resources matters. See *McNeal v. Bil-Mar Foods of Ohio, Inc.* (1990), 66 Ohio App.3d 588, 589-592; *Wolf v. Big Lots Stores, Inc.*, Franklin App. No. 07AP-511, 2008-Ohio-1837, at ¶13; *Carr v. Cent. Printing Co.* (Oct. 13, 2000), Montgomery App. No. 18281; *Waugh v. Tri-Star Packaging Prod. Corp.* (Nov. 24, 1997), Auglaize App. No. 2-97-22. See, also, *Carrico v. Drake Constr.*, Stark App. No. 2005 CA 00201, 2006-Ohio-3138, at ¶33.

{¶25} This focus is understandable because of the origin of the loaned servant doctrine. The doctrine originated in the context of respondeat superior. *Daniels* at 93. In terms of respondeat superior, the doctrine would find the master liable for the tortious

actions of its servant. As such, the focus should not be on the administrative concerns or structure of business relationships, but rather on who was controlling the actual labor that resulted in an alleged tort. Similarly, Ohio's workers' compensation system exists for the purpose of providing assured compensation for laborers in return for those same laborers giving up their right to pursue common law actions. Here, it is uncontested that Thermo Electron, through its agents, both trained Cottrill how to tap the cam latch and assigned her to perform that particular task. It is also uncontested that Adecco had no supervision at Thermo Electron's facility when Cottrill worked there. There is no evidence that Adecco in any way controlled what tasks Cottrill would be expected to undertake at Thermo Electron's facility. The record includes evidence that Adecco only retained overall control of Cottrill's employment. We find that reasonable minds could only come to the conclusion that Thermo Electron controlled the manner and means of Cottrill's performing the relevant work.

{¶26} In conclusion, we find that the trial court appropriately granted summary judgment for Thermo Electron. Specifically, after construing the record and all inferences therefrom in Cottrill's favor, we find that Thermo Electron has established: (1) that there is no genuine issue as to any material fact; (2) that Thermo Electron is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to Cottrill.

{¶27} Accordingly, we overrule Cottrill's sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.