[Cite as *Switzer v. Sewell Motor Express Co.*, 2009-Ohio-3825.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

DOUGLAS R. SWITZER,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-02-026
	:	O P I N I O N
- vs -		8/3/2009
	:	
SEWELL MOTOR EXPRESS CO., et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CV70412

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RINGLAND, J.

{¶1} Plaintiff-appellant, Douglas Switzer, appeals the decision of the Warren County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Sewell Motor Express.[1] We reverse the decision of the trial court.

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

{¶2} On August 10, 2007, Switzer, an employee of Sewell, was involved in a traffic accident on State Route 63 near Lebanon, Ohio. As a result of the accident, Switzer sustained multiple injuries and filed a workers' compensation claim.

{¶3} Sewell operates approximately 100 semi-tractors and 200 trailers in their cross-country shipping business. At the time of the accident, one of Sewell's major customers was DHL Express, which entered into an agreement with Sewell to deliver cargo within specific periods of time. In order to meet DHL's delivery schedule, Sewell required its drivers to use the most practical route, often utilizing interstate highways to minimize drive time and wear and tear on the vehicle, as well as maximize fuel efficiency.

{¶4} Switzer was hired as a long haul driver by Sewell in 2006. As part of his responsibilities, Switzer and his partner, Edward Gee, were assigned a route transporting DHL's cargo between Wilmington, Ohio and Franklin Park, Illinois. Gee and Switzer were assigned a Sewell long distance semi-tractor, equipped with bunks in the cab where the off-duty driver rested. The Wilmington to Franklin Park route was to take eight hours each way, and DHL provided Switzer with a recommended set of directions when he picked up the cargo. Because Switzer and Gee knew of a route that would eliminate an hour's drive time, the team often took an alternate route to and from the delivery drop-off point.

{¶5} On August 9, 2007, Gee and Switzer picked up the load from DHL and drove to Illinois. Once they dropped off the load and reloaded for the return trip, the team headed back to Ohio. Normally, the team would leave the Illinois terminal at 1:15 a.m. and return to Ohio by 9:30 a.m. However, on that night, there was a delay in the loading process and Switzer did not get on the road until approximately 2:45 a.m. Switzer and Gee estimated their return time as 10:45 a.m.

{¶6} Gee had a court hearing in Hamilton, Ohio on August 10, 2007, set to commence at 10:00 a.m. Switzer and Gee planned on delivering the load in time for Gee to

make his hearing, however the wait at the Illinois terminal delayed their arrival. While in route, Switzer decided to go directly to the courthouse, drop off Gee, and then deliver the load to the Ohio terminal. In order to get to Hamilton, Switzer exited the highway and took State Route 128. While stopped at a red light in front of the courthouse, Gee jumped out of the truck, and Switzer drove on.

{¶7} In order to get to the Ohio terminal, Switzer took I-75 north and then drove east on State Route 63 toward Lebanon. At approximately 9:00 a.m., the accident occurred, and Switzer was cited and fined for operating his vehicle without reasonable control. Switzer filed a workers' compensation claim for the injuries resulting from the accident. The Industrial Commission of Ohio approved the workers' compensation claim, finding that Switzer was injured while in the course of his employment. Sewell appealed to the Warren County Court of Common Pleas, moving the court for summary judgment in its favor.

{¶8} The trial court granted Sewell's motion, finding that Switzer was not in the scope of his employment at the time of the accident and therefore not entitled to workers' compensation. Switzer now appeals the trial court's decision, raising the following assignment of error:

{¶9} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE SEWELL MOTOR EXPRESS COMPANY."

{¶10} In his assignment of error, Switzer asserts that the trial court erred by granting summary judgment because there exists genuine issues of material fact to be litigated. Finding this argument meritorious, we sustain Switzer's assignment of error.

{¶11} This court's review of a trial court's ruling on summary judgment is de novo. *Broadnax v. Greene Credit Servs.* (1997), 118 Ohio App.3d 881, 887. Civ.R.56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable

minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶12} Employees are entitled to receive workers' compensation benefits if they are injured while acting in the scope of their employment. *Lohnes v. Young* (1963), 175 Ohio St. 291. Therefore, summary judgment turns on whether or not reasonable minds could determine that Switzer was in the scope of his employment at the time of the accident. The trial court found that Switzer was acting outside the scope of his employment when he had the accident, and was therefore not entitled to workers' compensation.

{¶13} "The test of the right to participate in the Workers' Compensation Fund is not whether there was any fault or neglect on the part of the employer or his employees, but whether a 'causal connection' existed between an employee's injury and his employment either through the activities, the conditions, or the environment of the employment." *Lord v. Daugherty* (1981), 66 Ohio St. 2d 441, 444.

{¶14} Because Switzer is a truck driver, he would be considered a traveling employee. According to the traveling employee doctrine, "employees whose work entails travel away from the employer's premises are * * * *within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown*." *Pascarella v. ABX Air, Inc*. (Aug. 10, 1998), Clinton App. No. CA98-01-002, *4. (Emphasis in original.)

{¶15} Because determining the pertinent issues is so fact specific and contingent in nature, whether an employee's act falls within the scope of his employment is a question of fact and is usually left within the province of a jury. *Benner v. Dooley* (Aug. 2, 2000), Lorain App. No. 99CA007448. Therefore, summary judgment is appropriate only in cases where

reasonable minds can come to but one conclusion and the issue can be determined as a matter of law. Id. The issue becomes a matter of law when the facts are undisputed and no conflicting inferences are possible. Id.

{¶16} Mindful that during our review we are to construe the facts in a light most favorable to Switzer, we are unable to say that reasonable minds could come to but one conclusion regarding whether Switzer was in the course of employment at the time of his accident. Instead, the case turns on whether Switzer made a distinct departure from his normal course of employment to perform a personal errand by driving Gee past the courthouse instead of taking a direct route back to the Ohio terminal.

{¶17} In order to determine whether a causal connection existed between Switzer's injury and his employment, the jury could consider the factors set forth in *Lord v. Daugherty*. 66 Ohio St. 2d 441. More specifically, "whether there is a sufficient 'causal connection' between an employee's injury and his employment to justify the right to participate in the Worker's Compensation Fund depends on the totality of the facts and circumstances surrounding the accident, including, (1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee's presence at the scene of the accident." Id. at syllabus.

{¶18} In *Lord*, the court found that Lord was not acting in the scope of his employment because the proximity of the scene of his accident was too remote from the geographical area of his regular duties; Lord's employer exercised no control over the scene of the accident, and had no knowledge of him being there; and there was nothing in the record to indicate that Lord's employer received any benefit from his activity at the scene of the accident. Id.

{¶19} Here, when considering the *Lord* factors, it is reasonable that the jury could

conclude that the scene of the accident was proximate to Switzer's place of employment because as a traveling employee, Switzer's place of employment was his truck and the accident occurred while Switzer drove the Sewell truck. Second, while it is obvious that Sewell has no control over State Route 63, it would not have any degree of control over any public roadway on which its drivers work. For that reason, failure to prove one factor of the *Lord* test does not preclude judgment in favor of the employee. See *Ruckman v. Cubby Drilling, Inc.,* 81 Ohio St.3d 117, 122, 1998-Ohio-455 (noting that an "employee's failure to satisfy the three enumerated factors of the *Lord* test, however, does not foreclose further consideration. When applying the *Lord* test, the enumerated factors are not intended to be exhaustive and the totality-of-the-circumstances test may continue to evolve").

{¶20} Third, regarding the benefit Sewell received from the injured employee's presence at the scene of the accident, the jury could reasonably draw competing inferences from the facts. It is reasonable that based on the facts presented, including Switzer's deposition and various affidavits, the jury could draw competing inferences regarding Switzer and Gee's choice to drive directly to the courthouse and whether or not Sewell drew any benefit from Switzer being at the scene of the accident.

{¶21} It is not disputed that at the time of the accident, Switzer was driving a Sewell truck, loaded with DHL freight. According to Switzer's assertion, if the accident had not occurred, he would have been able to unload the freight within the eight hours allotted for delivery. Therefore, the jury could conclude that Switzer's detour to drop Gee off at the courthouse had not taken him unreasonably far off of his direct route back to the Ohio terminal.

{¶22} The jury could also reach different conclusions regarding the beginning and end of the detour. See *Houston v. Liberty Mut. Fire Ins. Co.,* Lucas App. No. L-04-1161, 2005-Ohio-4177 (reversing summary judgment where reasonable inference existed that appellant

ran a personal errand but had returned from the detour and could have been in the scope of her employment at the time of her accident). It is reasonable that a jury could conclude that the trip to the courthouse had ended by the time Switzer had his accident. According to his deposition, Switzer stated that after he dropped Gee off at court, he used I-75 north to connect to State Route 63. Therefore, it is reasonable that a jury could conclude that Switzer had completed the detour and was back on the road to deliver the freight at the time of the accident.

{¶23} We note that State Route 63 is not an interstate, and was not included on the suggested route to and from the Ohio terminal. While Sewell claims that it prohibited its drivers from using state routes and single-lane highways, Switzer stated that when he asked Sewell management if he was required to use DHL's directions, they told him he was not required to follow a certain route. Gee also averred that no one at Sewell ever told him that they had to take a specific route when delivering DHL's freight, and Switzer stated that he used different routes when it would save time. Therefore, an issue exists concerning what routes were permitted and at what point in time Switzer's detour had ended.

{¶24} Additionally, and according to Gee's affidavit, at the time he was hired, Gee informed Sewell that he anticipated several disruptions to his driving schedule because of custody and child support hearings. Gee stated that Sewell told him to do whatever was necessary to deliver the load and to get to the hearings. Therefore an issue remains regarding whether the trip to the courthouse to ensure Gee's attendance at his hearing was sanctioned by Sewell's management and therefore could be considered part of Switzer's normal course of employment.

{¶25} We also note that an issue of fact exists regarding whether or not going past the courthouse was a distinct departure from Switzer's regular course of employment. It is possible that a reasonable jury could conclude that the reason for the detour was based on

the delay at DHL. Had the delay not occurred, Switzer asserts that he and Gee would have made it back in time for Gee to drive himself to court. However, because of the delay in unloading and reloading the truck, Gee would not have made it back in time for his hearing. Considered in conjunction with facts alleging that Sewell told Gee to do whatever was necessary to deliver the freight and make it to his hearing, an issue exists regarding whether Sewell derived a benefit from Switzer being on State Route 63 at the time of the accident.

{¶26} Sewell asserts that it did not derive any benefit because its property was damaged by the accident, and it breached its contract with DHL by not delivering the freight on schedule. However, the jury would consider this and weigh these damages against the benefit of Switzer being on State Route 63 to ensure that the freight was delivered before the eight-hour deadline. Accepting as true Switzer's claim that the freight would have been delivered on time had the accident not occurred, it is reasonable that a jury could determine that Sewell did benefit from Switzer's presence on State Route 63.

{¶27} Therefore, after reviewing the record, we determine that there are genuine issues of material fact to be litigated so that summary judgment was inappropriate. Switzer's assignment of error is sustained, and the cause remanded for proceedings consistent with this opinion.

{¶28} Judgment reversed.

POWELL, P.J., and HENDRICKSON, J., concur.

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