The Supreme Court of Ohio

CASE ANNOUNCEMENTS

April 5, 2023

[Cite as *04/05/2023 Case Announcements #2*, 2023-Ohio-1117.]

APPEALS NOT ACCEPTED FOR REVIEW

2023-0046. Mitchell v. Worley.
Medina App. No. 21CA0063-M, **2022-Ohio-4222**.
Brunner, J., dissents, with an opinion joined by Donnelly and Stewart, JJ.

BRUNNER, J., dissenting.

{¶ 1} S.Ct.Prac.R. 7.08(A)(1)(a) provides that in jurisdictional appeals, such as this one, we "will review the jurisdictional memoranda filed and determine whether to accept the appeal and decide the case on the merits." We may decline to accept jurisdiction over an appeal if we determine

> that one or more of the following are applicable after review of the jurisdictional memoranda:
>
> (a) The appeal does not involve a substantial constitutional question and should be dismissed;
>
> (b) The appeal does not involve a question of great general or public interest;
>
> (c) The appeal does not involve a felony;
>
> (d) The appeal does involve a felony, but leave to appeal is not warranted.

S.Ct.Prac.R. 7.08(B)(4).

{¶ 2} In this case, the memoranda and the appellate court's decision disclose that appellee, Travis Worley, was driving his truck to a jobsite at 6:30 a.m. on March 15, 2018, when he was involved in a traffic collision with appellant, Buddy Mitchell. 9th Dist. Medina No. 21CA0063-M, 2022-Ohio-4222, ¶ 2. Worley was employed at the time by Michels Corporation ("Michels"). *Id.* Mitchell filed claims against Worley and against Michels based on respondeat superior. *Id.* at ¶ 3. The trial court granted summary judgment in favor of Michels on the basis that Worley was not acting in the course of his employment at the time of the collision. *Id.* at ¶ 5.

{¶ 3} At the time of the collision, Worley lived in Missouri, but while working on a project for Michels in Seville, Ohio, he stayed in a hotel that was a 15-minute drive from the jobsite, and he received a weekly stipend of $235 from Michels to help offset the cost of food and lodging. *Id.* at ¶ 15. He used his own truck to travel to and from the jobsite. *Id.* at ¶ 16. The trial court concluded that Worley was not acting within the course of his employment when the collision occurred, because he was merely commuting to work and was not conferring any special benefit on his employer by driving (as opposed to someone who, for example, was a traveling employee). *Id.* at ¶ 18. The Ninth District Court of Appeals affirmed the trial court's judgment. *Id.* at ¶ 41.

{¶ 4} On appeal to this court, Mitchell set forth two propositions of law: first, that because Worley was an out-of-state employee who was in Ohio at the direction of his employer, he was acting within the scope of his employment at all times while in Ohio, and second, that the lower courts improperly engaged in fact-finding on summary judgment in characterizing Worley's activity as commuting rather than considering him a traveling employee. I agree with the implicit determination of the majority of the court that Mitchell's second proposition of law amounts to attempted error correction because he disagrees with the trial court's characterization of undisputed facts and does not raise a substantial constitutional question or a question of great general or public interest. *See* S.Ct.Prac.R. 7.08(B)(4)(a) and (b); Ohio Constitution, Article IV, Section 2(B)(2)(a)(ii) and (e).

{¶ 5} However, I respectfully dissent from the majority's decision not to accept jurisdiction over the first proposition of law in Mitchell's appeal. Generally, a worker is not within the course of his or her employment when commuting to and from a fixed residence to a fixed work location. *Boch v. New York Life Ins. Co.*, 175 Ohio St. 458, 462-463, 196 N.E.2d 90

(1964); *Senn v. Lackner*, 157 Ohio St. 206, 105 N.E.2d 49 (1952), paragraphs one through three of the syllabus. However, it is also true that travel may count as an action within the course of employment for respondeat superior liability when the employee's travel confers a special benefit on his or her employer. *Boch* at 462-463. For example, "getting to the place of work is ordinarily a personal problem of the employee and not a part of his services to his [employer], so that in the absence of some special benefit to the [employer] other than the mere making of the services available at the place where they are needed the employee is not acting in the scope of his employment in traveling to work." (Emphasis deleted.) *Id.*, quoting 52 American Law Reports 2d 350, 354. Yet here, the circumstance is that Worley's employer, Michels, apparently realized some benefit in maintaining Worley's presence in Ohio while he was assigned to the Seville jobsite, such that it paid him extra to temporarily assure his continuous presence in Ohio, rather than hire workers who live in Ohio.

{¶ 6} Whether Worley's extended presence in Ohio (where he does not reside and was temporarily located for work purposes) at the behest of his employer conferred a special benefit on Michels is a question that we should consider. The question whether workers who are sent from their state of residence to work at jobsites in Ohio are within the scope of their employment during their entire stay in this state holds special public interest for Ohioans. Whether the worker is an oil-and-gas worker in eastern Ohio or a railroad employee who works 20 hours off and 20 hours on and depends on his or her employer to provide transportation to a rail stop, the "coming and going" of employees who are not Ohio residents but who work in Ohio is an important issue on which we could provide employers with some clarity regarding vicarious liability. Because the majority declines to accept jurisdiction over the appeal in this important case and consider its merits, I respectfully dissent.

DONNELLY and STEWART, JJ., concur in the foregoing opinion.