[Cite as *Brown v. CDS Transport, Inc.*, 2010-Ohio-4606.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Carl A. Brown,	:	
Plaintiff-Appellant,	:	
		No. 10AP-46
v.	:	(C.P.C. No. 07CVD09-12520)
CDS Transport, Inc. et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 28, 2010

Philip J. Fulton Law Office, and *Ross R. Fulton*, for appellant.

Kegler, *Brown*, *Hill & Ritter*, *David M. McCarty*, and *Traci A. McGuire*, for appellee CDS Transport, Inc.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Carl A. Brown ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas granting summary judgment in favor of appellee, CDS Transport, Inc. ("appellee").

{¶2} On March 22, 2004, appellant entered into a contract with appellee whereby appellant, a truck driver, agreed to deliver loads on appellee's behalf. Under

the contract, appellant agreed that he would be responsible for traffic and overweight violation fines; all use, fuel, and income taxes; and truck maintenance. The contract further stated that appellant would maintain workers' compensation insurance. Appellant's compensation under the contract called for him to receive 70 percent of the gross revenue per load.

{¶3} On February 15, 2005, appellant was involved in a motor vehicle accident while driving his truck, which resulted in appellant being injured. Appellant filed a workers' compensation claim with the Bureau of Workers' Compensation ("BWC"). BWC denied the claim, and the matter was then referred to the Industrial Commission for further consideration. A District Hearing Officer denied the claim, but on appeal, a Staff Hearing Officer allowed the claim. The Industrial Commission denied appellee's appeal, and appellee filed a notice of appeal on December 6, 2005.

{¶4} Appellant then filed the complaint in this case asking that he be found to be entitled to participate in the workers' compensation fund. Appellee filed a motion for summary judgment, arguing that appellant was an independent contractor at the time of the accident that gave rise to appellant's injuries, and was therefore not entitled to participate in the workers' compensation fund. Appellant filed a memorandum contra, arguing that the evidence showed that he was an employee of appellee's at the time of the accident. The trial court granted appellee's motion, finding that reasonable minds could only conclude that appellant was an independent contractor and not an employee.

{¶5} Appellant filed this appeal, and alleges two assignments of error:

> 1. This Court should vacate the Trial Court's entry of summary judgment and remand the case to the Trial Court for further proceedings because the Trial Court misapplied

> Ohio R. Civ. P. 56(C) in granting summary judgment despite the fact that material issues of fact remain, particularly because whether one is a[n] employee or independent contractor is ordinarily an issue for the trier of fact.
>
> 2. The Trial Court improperly applied Ohio R. Civ. P. 56(C) by failing to take all facts in a light most favorable to the non-moving party.

{¶6} Appellant's assignments of error are interconnected, and will therefore be addressed together. Essentially, appellant argues that the trial court erred when it granted summary judgment in favor of appellee on the issue of whether appellant was an independent contractor or an employee at the time of the accident giving rise to appellant's claim.

{¶7} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶8} Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion, and to point to portions of the record that indicate that there are no genuine issues of material fact on a material element of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-

Ohio-107. Once the moving party has met its initial burden, the non-moving party must produce competent evidence establishing the existence of a genuine issue for trial. Id.

{¶9} Whether a person is an independent contractor or an employee depends on the specific facts in the case, with the key question being who has the right to control the manner or means of performing the work. *Bostic v. Connor* (1988), 37 Ohio St.3d 144. Factors that are considered in determining who has the right of control include: who controls the details and quality of the work; who controls the hours worked; who selects the materials, personnel, and tools used; who selects the routes traveled; length of employment; the type of business; the method of payment; and any pertinent agreements or contracts. Id.

{¶10} Generally, the independent contractor-employee issue is one that must be determined by the trier of fact. Id. However, when the evidence is not in conflict or where the facts are not in dispute, the issue becomes a matter of law that may be decided by the trial court. Id. When sufficient evidence has been submitted to allow reasonable minds to come to different conclusions on the issue, a person's status as an independent contractor or employee is one that must be submitted to a jury. Id. See also *Chickey v. Watts*, 10th Dist. No. 04AP-818, 2005-Ohio-4974.

{¶11} In support of its motion for summary judgment, appellee pointed to evidentiary materials in the record in the form of appellant's deposition testimony; an affidavit executed by Dan Schutte, owner of CAP City Cargo, a company acting as an agent for appellee providing, among other things, dispatching services; and an affidavit executed by Tim Worth, an employee of CAP City Cargo, who worked as a dispatcher. The evidence cited by appellee was addressed to the factors identified in *Bostic*.

Details and Quality of the Work

{¶12} The affidavits of Schutte and Worth stated that appellant had the sole discretion to decide whether to accept a load from appellee, and could choose not to drive to a particular location. (Schutte aff., ¶8; Worth aff., ¶6.) Appellee also pointed to appellant's deposition testimony, in which appellant testified that he had refused loads before, and believed the dispatchers were angry as a result, which led to appellant being given fewer loads for a period of time. (Brown depo., 217.) In his memorandum contra the motion for summary judgment, appellant pointed to other testimony from his deposition regarding his ability to refuse routes:

> Q. * * * Were you free to refuse loads?
>
> A. No. I won't say that.
>
> Q. And why do you say that?
>
> A. Because if you refuse those, you might not get another load.

(Brown depo., 60.)

Hours Worked

{¶13} The Schutte and Worth affidavits each stated that when appellant was given a load to deliver, he was given a deadline by which the delivery had to be completed, but was otherwise free to determine for himself the hours it was necessary to drive in order to meet the deadline. (Schutte aff., ¶12; Worth aff., ¶9.) In his deposition testimony, appellant agreed that he was given deadlines by which to deliver loads, but denied that he was free to choose the hours in which he drove. In his deposition, appellant testified:

> Q. * * * What I'm asking is, within those confines you're free to choose when you can drive - - when you want to drive, right?
>
> We'll use the example of Florida. You pick up a load and you have to deliver it to Fort Lauderdale, and it has to be there in two days, in 48 hours. You have 18 hours of driving time. You're free to choose the 18 hours - - when those actual driving hours take place within those 48 hours, correct?
>
> A. I'm kind of finding that hard to figure out if you got a schedule to meet. I don't - - I don't - -
>
> Q. I don't understand your hesitation. You have a destination, you have a deadline, and you have a period of time that includes downtime.
>
> My question is: You're not mandated by the company when you drive and when you don't, are you?
>
> A. I don't know if - -
>
> Q. What don't you know?
>
> A. I don't know if you're mandated. I mean, I don't know if you're mandated, say, you got to drive here or this time or that time.

(Brown depo., 75-76.)

Materials, Personnel, and Tools Used

{¶14} In his deposition, appellant testified that he owned the truck he used to deliver loads for appellee. (Brown depo., 34.) After purchasing the truck, appellant formed a company, CabOne Trucking. (Brown depo., 43.) Appellant also testified that, as long as steps were taken to satisfy certain regulations governing commercial drivers, another driver could have driven appellant's truck, with the agreement not requiring that appellant perform all of the driving. (Brown depo., 64.) In his memorandum contra,

appellant pointed to his deposition testimony that appellee provided appellant with a fuel card that was used to pay for fuel for appellant's truck, and that appellee provided appellant with blank checks that could be used to pay expenses while carrying a load, with appellee's approval. (Brown depo., 210-12.) In response, appellee pointed out that any expenses appellant paid for by use of the fuel card or blank checks were deducted from the amount paid to appellant at the end of a delivery run. (Brown depo., 103.)

Control of Routes

{¶15} The affidavits of Schutte and Worth also stated that appellant was free to choose the specific route he would follow to reach a load's destination, although cards with suggested routes were provided to drivers as a courtesy. (Schutte aff., ¶9; Worth aff., ¶7.) In his deposition, appellant generally testified that he believed there would be consequences from the dispatcher if he ever took a route other than the one suggested by appellee. (Brown depo., 80-86.)

Length of Employment

{¶16} The evidence showed that appellant and appellee entered into the operating agreement on March 22, 2004. (Schutte aff., ¶6.) The accident that gave rise to appellant's injuries occurred on February 15, 2005. (Complaint, ¶2.) Thus, the business relationship between appellant and appellee lasted approximately 11 months.

Type of Business

{¶17} Appellee argued, without citing any evidence, that the trucking business has a large number of independent contractors serving as drivers. Evidence cited by appellee in support of its motion for summary judgment showed that appellant testified that the benefit for a driver who acts as an independent contractor rather than an

employee is that an independent contractor driver has the ability to make more money. (Brown depo., 173.)

{¶18} In his memorandum contra, appellant pointed to his deposition testimony regarding the exclusive nature of his work for appellee. Appellant testified that, although nothing in the operating agreement prohibited him from driving for other companies, he did not believe he was free to do so:

> Q. Now, is there anything in this contract that prohibited you from entering into contracts with any other carriers?
>
> A. Yeah. I mean, nothing in here. But they don't want you - - when you drive for these companies like this, intermodal is what they call it, you're not allowed - - they don't want you driving for someone else. They need you for themselves and you - - they really look down on it, and they probably won't - - you won't be driving for them if you're going to be driving for them and somebody else.
>
> Q. Okay. There's nothing in the contract that says you can't do it, correct?
>
> * * *
>
> A. There's nothing in here that says that.
>
> Q. Okay. But there's something that you understood outside of the contract that prohibited you from doing that?
>
> A. Yeah, they tell you, if you can't drive for me I don't want you driving for anybody. They didn't put it down in black and white, but they don't want you driving for anybody else.

(Brown depo., 109-10.)

Method of Payment

{¶19} Under the operating agreement, appellant was paid 70 percent of the gross load delivered. (Brown depo., 84-85.) Appellant was responsible for payment of

all of his costs, including payment of highway use taxes, income taxes, and social security taxes. (Brown depo., 102.) For the year 2004, and possibly for the year 2005, appellee provided appellant with IRS 1099 forms showing the amounts he had received under the agreement. (Brown depo., 103.)

Pertinent Agreements or Contracts

{¶20} The operating agreement under which appellant delivered loads for appellee actually identifies the company formed by appellant, CabOne, as the contracting party, rather than appellant individually. (Brown depo., Exhibit 1.) The agreement also states that "CONTRACTOR agrees and acknowledges by his signature herein that he operates for CDS TRANSPORT, INC. as a contractor and not an employee." (Brown depo., Exhibit 1, ¶14.) With regard to maintaining workers' compensation insurance, the agreement makes it clear that appellant as the contractor was responsible for maintaining such insurance. (Brown depo., Exhibit 1, ¶4.)

Other Factors Relating to Control

{¶21} Appellant points to a number of other facts that he argues indicate a level of control exercised by appellee over appellant sufficient to establish genuine issues of material fact regarding his status as an employee or independent contractor. For example, in his deposition, appellant testified that if he was sick and unable to work, appellee's dispatcher would tell appellant he was "basically screwing [appellee] over by not being here." (Brown depo., 62.) Appellant also points to evidence that: he was required to view safety videos provided by appellee, to undergo drug tests, and was given appellee's "Driver's Handbook and Safety Manual" to follow (Brown depo., 148-51); he was given a hat and jacket bearing appellee's logo to wear (Brown depo., 113-

14); he was given a placard with appellee's logo to place on the side of his truck (Brown depo., 205-06); and appellee directed him to take pictures with a camera provided by appellee when he was involved in the accident (Brown depo., 199-201).

{¶22} Based on the undisputed evidence, we conclude that, as a matter of law, appellant was an independent contractor rather than an employee. The agreement between appellant and appellee was unambiguous in its intention that appellant's status be that of an independent contractor. Appellant's argument that the evidence shows appellee exercised sufficient control over the manner in which he performed under the agreement to change his status to that of an employee is unavailing. Specifically, appellant's evidence established his belief that if he took actions that were allowed under the contract, e.g., by refusing loads or not following the routes suggested by appellee, he would suffer adverse consequences. However, the consequences about which he was concerned involved angering appellee's dispatchers such that the dispatchers would give more loads to other drivers and fewer to him. This is not the type of control sufficient to overcome the clear intent of the contract that appellant's status would be that of an independent contractor. Furthermore, the other facts pointed to by appellant, such as requiring appellant to watch training videos, giving appellant a hat, jacket, and truck placard bearing appellee's logo, and providing appellant with a copy of appellee's manual, are insufficient, as a matter of law, to make appellant's status that of an employee.[1]

[1] Arguably, appellant's argument that the trial court did not view the evidence in a light most favorable to appellant as the non-moving party is correct, since some of the language employed by the trial court in its decision appears to reflect a credibility determination being made by the court. However, because our review is de novo, any error made by the trial court in considering the evidence is harmless.

{¶23} Viewing the facts established in the evidentiary materials in the record in a manner most favorable to appellant, we can only conclude that appellee was entitled to judgment as a matter of law on the issue of whether appellant was an independent contractor. Thus, the trial court did not err in granting summary judgment in favor of appellee. Therefore, appellant's assignments of error are overruled.

{¶24} Having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
