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DISTRICT COURT DIGESTS

The following are digests of opinions selected by the judges of the District Courts of North Dakota as dealing with interesting or significant points of law. In view of the fact that these opinions are not regularly published, the North Dakota Law Review presents these digests in the hope that they will be of value to the bar.

AGENCY—SCOPE OF EMPLOYMENT

Lilke v. Trepanier Drug Company. District Court of Grand Forks County, North Dakota, O. B. Burtness, Judge.

This was an action for personal injuries resulting from the negligent operation of a motorcycle by one Verne Sanford, agent of the defendant, Trepanier Drug Company. Defendant moved for judgment notwithstanding the verdict or for a new trial on the ground that the evidence was insufficient to justify the verdict for plaintiff. The motion was denied by the District Court. The evidence amply supports a finding of negligence on the part of Sanford. The issue is whether it supports a finding that he was within the scope of his employment when the resulting injury occurred.

Most of the facts are undisputed. Sanford was employed to make deliveries for defendant. He used his own motorcycle for this purpose while defendant furnished him with certain miscellaneous equipment such as a charge purse and an order book. On the day of the accident Sanford had made his last delivery at about 6 P. M. He then proceeded to the intersection of Washington Street and Fifth Avenue in Grand Forks. Had Sanford turned right at this intersection he could have proceeded on Fifth Avenue directly to his home about six blocks away. Instead, he continued across the intersection and at the far cross walk collided with the plaintiff who was seriously injured. Sanford's testimony concerning his purpose in crossing the intersection is not clear. At one point he stated that he might have been returning to defendant's place of business, while he later stated that he may have intended to visit a personal friend. The evidence indicated that Sanford was paid by defendant until 6:30 P. M. the evening of the accident. He was not to report to work the next morning, since he had arranged for several days off.

Plaintiff has the burden of proving that Sanford was operating his motorcycle within the scope of his employment. This is normally a question of fact for determination by the jury. The District Court

concluded that there were two reasonable interpretations of the evidence that would support the jury's verdict.

First, the jury could reasonably have found that when Sanford crossed the intersection he intended to return to defendant's place of business. Since he was not to report to work the next day, it is possible that he intended to return the purse and order book to his employer before leaving on his vacation. If so, he of course was within the scope of his employment.

On the other hand, the jury also could have found that he was on his way to visit a friend for reasons personal to himself. The court reasoned that since the motorcycle was used in the course of Sanford's employment, rather than merely to convey him to and from his place of work, he would normally be within the scope of his employment in returning the motorcycle to his home each night, where it was kept while not in use. If, when Sanford crossed the intersection he did so for a personal reason, what is the effect of that deviation from the path he usually followed in returning the motorcycle to his home each night?

The North Dakota Supreme Court has stated, "Slight or immaterial deviations from course of employment by employee do not suspend master's liability for employee's acts." There is much authority in accord with this view. The Nebraska Supreme Court has quoted with approval the following statement:

"In cases where the deviation is slight, and not unusual, the court may, and often will, as a matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury."

The District Court concluded that the evidence presented in this case placed it squarely in the category of cases in which the effect of a deviation is a question for the jury. Their finding in favor of the plaintiff should not be overturned.