SCHRAMM TYPE NEGLIGENT HIRING LIABILITY IMPOSED ON SHIPPER

In PUCKREIN v. ATI TRANSPORT 2006, LEXIS 656 (NJ SUP CT MAY 22, 2006) the shipper, after initially being found not responsible for negligent hiring, or as they say in Jersey, hiring an incompetent independent contractor, was forced to go back to the trial court to let a jury decide whether it was negligent in hiring the independent contractor, a motor carrier.

(Underlinings are writer's emphasis; writer's comments are italicized.)

FACTS:

In 1998, Kevin and Alecia Puckrein were killed when their automobile was struck by an unregistered and uninsured tractor-trailer, GW 79,000 lbs., with seriously defective brakes when it ran a red light. The tractor-trailer was owned by ATI Transport, Inc., (ATI) and, at the time of the accident, had been transporting a load of glass residue for Browning-Ferris Industries of New York, Inc. (BFI-NY) from Brooklyn, New York, to an incinerator plant in Newark, New Jersey. BFI- NY actually had contracted with World Carting Corp., to transport the load and World Carting, in turn, had assigned its responsibilities to ATI.

Plaintiffs sued a series of defendants including Gaizka Idoeta (the driver of the tractor-trailer), ATI, World Carting, John Stangle (the owner of ATI and World Carting), and BFI-NY. The trial judge dismissed the case against BFI-NY on summary judgment. Plaintiffs prevailed at trial but all defendants were, by then, judgment proof.

Plaintiffs argue that BFI-NY had a duty to ensure the safety of the trucks it used under federal statutory and regulatory provisions relevant to interstate motor carriers and under common-law negligence principles applicable to the hiring of incompetent independent contractors.

THE ACCIDENT:

Idoeta, the driver, had picked up the residue at BFI-NY.

An automotive engineer retained by the State Police determined that at the time of the accident, a "maximum of 54 percent of the required braking existed" on the truck. According to a police report, the truck had markings identifying it as "ATI Transport."

The owners and drivers were charged with various criminal offenses.

In entering the pleas to the charges, the owner of ATI and World Carting admitted they knew that at least one of the brake drums on the truck that killed the Puckreins was completely missing and that, in sending the truck out onto the road, they consciously disregarded the risk of injury, making them reckless. They also acknowledged that the truck had neither registration nor insurance on the day of the accident.

At the time of the accident. BFI-NY was not registered as a federal motor carrier.

THE CONTRACT:

In July 1997, BFI-NY contracted with World Carting to haul glass residue to Morgantown, Pennsylvania, and American Ref-Fuel in Newark, and if no glass residue was available, to haul solid waste to American Ref-Fuel. Pursuant to the contract, World Carting was to provide necessary "services and equipment" with the equipment "comply[ingl with all applicable federal, state and local laws, rules, regulations, permits and licenses." Additionally, World Carting "warrant[ed] that it [had] all federal, state or local permits and licenses required to perform the work." World Carting was to perform the work as an independent contractor, "in compliance with all applicable statutes and regulations, including, without limitation, the rules and regulations of the Environmental Protection Agency. Department of Transportation and the Occupational Safety and Health Administration, and any similar federal, state or local law or regulations applicable." World Carting also agreed to maintain required insurance and to furnish BFI-NY with proof of insurance, as well as to indemnify BFI-NY for "injuries to or death of persons. . . caused by, resulting from, growing out of, or incidental to the work performed under [the] Agreement." Finally, the contract stipulated that World Carting was not to subcontract the work without prior written approval from BFI-NY.

According to documentation BFI-NY provided to investigating officers in June 1998, World Carting's liability insurance expired on April 15. 1998, two months before the accident, and BFI-NY had no updated information on file indicating that the insurance had been renewed.

Despite BFI-NY's contract with World Carting, Randazzo (an employee of BFI-NY) testified that ATI trucks "show[ed] up for World Carting," leading him to believe that "they were the same company." In fact, World Carting and ATI had the same address and leadership. World Carting listed 401 Ferncrest Court, Three Bridges, New Jersey as its address in its contract with BFI-NY. The same address was also listed for ATI on the registration of the truck involved in the accident. Furthermore, Stangle served as president and owner of both World Carting and ATI, and his wife, Kristen Stangle, served as general manager for World Carting. Randazzo explained that the invoices for loads hauled by ATI said "either...World Carting or ATI," he could not remember which, but he "believe[d] they were World Carting" and "[he] thought all the payments were issued to World Carting."

BFI-NY's managers said that in order to haul for BFI-NY, a hauler had to have an inspected and registered tractor and trailer along with insurance. He acknowledged that nobody at BFI-NY checked to determine if ATI's registration, insurance, and other licenses were in order. BFI-NY just "assumed" the hauler had what was "needed." Further, according to several BFI-NY employees, ATI was the hauler, not BFI-NY, who was responsible to ensure compliance with federal regulation.

The estate of Kevin Puckrein was awarded $424,624.50; the estate of Alecia Puckrein, $119,613; and Jean Greaves, $175,000. The jury also awarded One Million Dollars in punitive damages against Stangle.

Plaintiffs argue that BFI-NY qualified as a motor carrier under 49 U.S. C.A. § 13102(14) and was thus vicariously liable for the negligence of World Carting and ATI that BFI-NY hired an "incompetent" contractor for whose acts it was responsible; and that our "strong public policy" in

favor of highway safety devolved a non-delegable duty on BFI-NY to assure that its waste and recyclables were safely transported on the highways.

BFI-NY defended arguing that it was not a registered motor carrier under federal safety regulations and, therefore, did not qualify as a statutory employer of ATI; that it was not liable for ATI's actions because it did not contract with ATI but only with World Carting; that even if it had contracted with ATI it was insulated from liability because ATI was an independent contractor; and that it was not liable for hiring an "incompetent" independent contractor under *Mavrikidis v. Petullo*, 153 N.J. 117, 147, 707 A.2d 977 (1998).

Under New Jersey law, in order to prevail against the principal for hiring an incompetent contractor, a plaintiff must show that the contractor was, in fact, incompetent or unskilled to perform the job for which he/she was hired, that the harm that resulted arose out of that incompetence, and that the principal knew or should have known of the incompetence. (Citation)

Clearly, under New Jersey law, the hauler's basic competency included, at a minimum, a valid driver's license, a valid registration certificate, and a valid liability insurance identification card. Without those, the hauler has no right to be on the road at all. BFI-NY's own witnesses agreed with that conclusion.

According to the Court, "The allegations in this case strike at the heart of the competency issue in a trucking case." According to the Court, licensing, registration, and insurance are, the sine qua non to the transport of goods on the roadways. Registration, concomitant to inspection is a method of insuring the safety of vehicles that place the public at risk and insurance is the guarantee that innocent victims of errant truckers will be compensated.

The Court formulated the issue as follows:

Thus, the core question here is not whether World Carting was competent to transport BFI-NY's loads upon the public highways--it was not. The question is whether BFI-NY violated its duty to use reasonable care in selecting a trucker and whether it knew or should have known of World Carting's incompetence.

According to the Court, "an employer may be charged with negligence in hiring an independent contractor where it is demonstrated that he should have known, or might by the exercise of reasonable care have ascertained, that the contractor was not competent."(Citation) Translated into transportation language, the Court stated, "...**a casual [*32] shipper of goods has a right to assume that the carrier is not conducting business in violation of the law. On the contrary, a company whose core purpose is the collection and transportation of materials on the highways, has a duty to use reasonable care in the hiring of an independent trucker including a duty to make an inquiry into that trucker's ability to travel legally on the highways. At a minimum, BFI-NY was required to inquire whether its haulers had proper insurance and registration because without those items the hauler had no right to be on the road. Just as BFI-NY itself could not have transported products in unregistered and uninsured trucks, it was not free to engage an independent contractor that did so.**

There was no evidence that anyone at BFI-NY inquired about World Carting's ability to travel on the highways.

The Court held that BFI-NY was not entitled to summary judgment on the incompetent contractor issue. It reasoned that at the very least, the reasonableness of its inquiry to World Carting was a jury issue.

Even if it could be proved that BFI-NY made reasonable inquiry of World Carting at the time of its original retention, its duty did not end there. (Citation explaining that although originally unaware that contractor was incompetent, employer who acquires knowledge of incompetence thereafter may be liable for inaction

Despite its continuing duty to inquire, BFI-NY never did so although it continued to allow World Carting's trucks to transport its glass residue. In other words, at a point after the original retention but before plaintiffs' accident, BFI-NY should have known that World Carting had become incompetent to transport its products.

Further, although World Carting agreed in its contract with BFI-NY that it would not subcontract the job to an "independent contractor" without BFI-NY's permission, according to the record, it neither sought nor obtained that permission to use the ATI truck, inferentially holding out ATI as its employee or alter-ego. Indeed, that seems to be the way BFI-NY's employees viewed those entities. That evidence, viewed in a light most favorable to plaintiffs, the non-moving parties, suggests that World Carting and ATI were one and the same, and that BFI-NY knew it and treated them as one entity. That alone justified a denial of BFI-NY's motion for summary judgment regarding whether it could be vicariously liable for the acts of ATI.

For the reasons to which we have adverted, the judgment of the Appellate Division is reversed, plaintiffs' complaint against BFI-NY is reinstated, and the cause is remanded to the Law Division for further proceedings consistent with this opinion.

This case like Schramm involves catastrophic injuries and this case has the additional horror of wrongful death. This case like Schramm involves a purported "deep pocket" (BFI-NY).

Although this case does not involve broker liability, this case like Schramm sends the question of whether the party who hired the motor carrier, (in this instance the shipper), exercised reasonable care in making that selection to the jury. The New Jersey Supreme court even takes Schramm a step further. In this case the court imposes a continuing duty on the purchaser of motor carrier services to monitor the "competence" of the carrier.

Note that the contract between BFI-NY and World Carting prohibited subcontracting without BFI' 5 prior written approval. In the Puckrein case the parties obviously disregarded it and the court indicated that it allowed an inference that ATI (the actual carrier) was the "alter-ego" of World Cartage. In the TIA Model Broker/Carrier Contract there is a strict prohibition against co-brokering, assigning, or interlining shipments with prior written consent, and penalties including consequential damages and legal fees for violation. This Puckrein case speaks to the very reason why brokers do not want to allow subcontracting. Once the broker has exercised its due diligence in the selection of a motor carrier it does not want to (and should not) be placed a risk with delivery being made by an unknown and possibly unqualified carrier entity about which it knows virtually nothing!

Puckrein makes it clear that at least in the land of New Jersey, purchasers of motor carrier service would be wise to monitor the carriers liability insurance at the time of inception of their transportation agreement as well as immediately prior to any shipments being hauled. It is an open question as to whether the insurance would have to monitored daily while transportation services were in process. The question is, "How much care is enough?" without bringing transportation of freight to a screeching halt?

In Puckrein it is not too hard to understand the finding of liability where the carrier admitted that he knew that the truck had one brake drum completely missing, and that truck had neither registration or insurance.

It is interesting that the Puckrein Court did not mention the Schramm case to support its requirement of the exercise of reasonable care in the selection of motor carriers.

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