Next Generation

By Robert A. Voltmann

An exciting aspect of being a thirty-year old association in an industry roughly the same age is that we are seeing a generational change. The brokerage-based third party logistics industry really started after the Motor Carrier Act of 1980 removed barriers to entry. For many, if not most, you came into the businesses from someplace else. Maybe you worked for a trucking company, some of you worked for shippers and either left or were outsourced, or you saw the opportunity of this exciting industry and started a brokerage.

The result has been the phenomenal growth of family owned businesses. At some time, however, it is time to retire, and while one person or a couple may start a business, children inherit that business. The same children that could not sit next to each other in the back seat without bickering must now try to maintain and grow a business.

It struck me while on a trip last fall with three TIA members. One of the three started his business, but has family members involved and his father has a family owned business. One member has taken over the family owned business and is working with his sibling. The third member on the trip has not taken over yet, and was asking about how the transition takes place and how to sort things out with his siblings.

Many of our members are in the same position. So, at the TIA Convention in April, we will hold a lunch, on Saturday the 11th, to launch the TIA Next Generation Network. The idea is to form a significant relational group of those of you in, or coming up on, the transition from one generation of management/ownership to the next.

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Schramm Type Risks Continue

By Ron Usem

In a recent case in the US District Court in Virginia, Schramm type of liability was asserted against C. H. Robinson. Robinson tried to get the case dismissed and was partially successful but the court refused to allow it dismissal as to all claims. As you will see, the case was in the very early pleading stages and the court's refusal to dismiss Robinson is of little precedential value. Of significance are the theories of liability asserted and the courts willingness to allow the case to proceed.

WINFORD DALLAS JONES, Plaintiff, v. LORETTA M. D'SOUZA, Personal Representative of the ESTATE OF KRISTINA MAE ARCISZEWSKI, dec., Defendants.
U. S. DISTRICT CT WEST. DIST.VA. 2007
U.S. Dist. LEXIS 66993
September 11, 2007

Background

The court explained that at this stage of the proceedings the facts asserted in the plaintiffs complaint, are accepted as true for purposes of Robinson's motion to dismiss. On September 12, 2004, at approximately 8:15 p.m., the plaintiff was operating a 2004 Freightliner tractor-trailer on Interstate 81 South in Wythe County, VA. At the same time, Arciszewski was operating a 1997 Freightliner tractor-trailer on

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Interstate 81 North. As the two drivers approached one another, Arciszewski lost control of her tractor-trailer, abruptly crossed the median, and struck the plaintiffs tractor-trailer head-on, causing a violent collision. Arciszewski died on the scene and the plaintiff suffered serious injuries.

The plaintiff filed this action against the defendants on September 11, 2006. In Count I, the plaintiff asserted a claim for negligence against Robinson, based upon a theory of vicarious liability. In Count III, the plaintiff alleged that Robinson negligently hired and supervised AKJ. (the motor carrier). In Count V, the plaintiff asserted a claim for negligent entrustment against Robinson. Finally, in Counts VI and VII, the plaintiff alleged that Robinson violated the Motor Carrier Act and the Federal Motor Carrier Safety Regulations.

"...all drivers of motor vehicles and persons employed in connection with the transportation of commodities under this Contract are subject to the direction, control and supervision of Carrier..."

At this early procedural stage of the proceedings, Robinson was trying to get the case dismissed by employing a Rule 12 (b)(6) motion which means it was attempting to get the case dismissed on the grounds that there was not enough substance to plaintiffs claims to allow the case to go forward. When reviewing a claim under Rule 12(b)(6), the court must accept all of the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff and assuming the factual allegations in the complaint are true, there "must be enough to raise a right to relief above the speculative level."

I. Negligence Claim (vicarious liability)

Plaintiff asserted that Robinson was subject to vicarious liability for the alleged negligence of Arciszewski and AKJ. Robinson argued that it could not be held vicariously liable because AKJ was an independent contractor and Robinson had no control over Arciszewski or any other AKJ employee. To support its argument, Robinson submitted a copy of a contract carrier agreement, signed by Robinson and AKJ, as an exhibit to its reply brief the agreement stated, in relevant part, as follows:

> INDEPENDENT CONTRACTOR
> The Parties understand and agree that the relationship of Carrier to Robinson hereunder is solely that of an independent contractor, and that Carrier shall and does employ, retain, or lease on its own behalf all persons operating motor vehicles transporting commodities under this Contract, and such persons are not employees or agents of Robinson or its Customers. It is further understood and agreed that all drivers of motor vehicles and persons employed in connection with the transportation of commodities under this Contract are subject to the direction, control and supervision of Carrier, and not of Robinson or its Customers. Carrier represents and agrees that such employees are and will at all times be covered by adequate workmen's compensation insurance as provided by law.

Robinson relied on Schramm v. Foster, arguing that in Schramm, the Court granted summary judgment in favor of Robinson on the plaintiffs claim of negligence/respondeat superior, based, in part, on an agreement containing the above stated independent contractor provision. Specifically, the Schramm court held that both the written agreement and the conduct of the parties established that the individual truck driver was not an agent of Robinson.

In response, plaintiff argued that: he has alleged sufficient facts to establish an agency or employment relationship between AKJ and Robinson, and to state a claim for negligent hiring. However, the employer need not actually exercise this control; the test is whether the employer has the power to exercise such control. The court agreed with the plaintiff that his negligence claim based upon a theory of vicarious liability, was sufficient to survive Robinson's motion to dismiss. **Because the plaintiff disputed the authenticity of the agreement submitted as an exhibit with Robinson's reply brief, the court declined to consider the agreement in ruling on Robinson's motion to dismiss.** Accordingly, Robinson's motion to dismiss was denied with respect to the plaintiffs negligence

(vicarious liability) claim. However the court added, "If the agreement submitted by Robinson is, in fact, authentic, and considering the facts alleged by plaintiff in support of the vicarious liability negligence claim, the court entertains substantial doubt as to whether the negligence claim is viable."

II. Negligent Hiring and Supervision

In his response to Robinson's motion to dismiss, plaintiff labels this claim as one for "negligent hiring, retention, or supervision." However, the plaintiff's complaint does not assert a claim for negligent retention. According to the court, to the extent the plaintiff asserted a claim for negligent supervision, Robinson correctly argued that such claim must be dismissed, as negligent supervision is not recognized as a cause of action under Virginia law.

The Supreme Court of Virginia has, however, recognized the tort of negligent hiring. In contrast to tort liability predicated upon the doctrine of respondeat superior, "the tort of negligent hiring is a doctrine of primary liability; the employer is principally liable for placing an unfit individual in an employment situation that involves an unreasonable risk of harm to others."As this court previously explained in (another case) the tort of negligent hiring involves an element of knowledge. "Liability... is based upon an employer's failure to exercise reason-

"Liability... is based upon an employer's failure to exercise reasonable care in placing an individual with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others."

able care in placing an individual with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others. To support his negligent hiring claim, the plaintiff alleges that Robinson knew or should have known that AKJ had limited experience as a motor carrier; that AKJ had been assigned a conditional or unsatisfactory safety rating by the Federal Motor Carrier Safety Administration; that AKJ was impaired financially; and that AKJ was otherwise incompetent and unfit to operate safely as an interstate commercial carrier. The plaintiff further alleges that the likelihood of a major accident with a member of the public was foreseeable to Robinson.

In moving to dismiss this claim, Robinson argued: that it cannot be held liable for negligent hiring, because the contract carrier agreement entered into by Robinson and AKJ expressly provided that AKJ is not Robinson's employee; that the plaintiff has failed to allege that AKJ or Arciszewski had a prior propensity to cause fatal crashes as required under Virginia law; that plaintiffs negligent hiring claim should be dismissed on the basis that the plaintiff "failed to allege any sort of knowledge by the defendant prior to hiring that the defendant would create an unreasonable risk of harm or be unfit for the position."

The plaintiff further argued that even if AKJ was an independent contractor, the Supreme Court of Virginia had previously held that an employer who contracts with an independent contractor could be held liable for selecting and retaining an incompetent independent contractor. The court agreed with plaintiff that he had alleged sufficient facts in support of his negligent hiring claim to withstand a motion to dismiss. Although Robinson argued that the plaintiffs allegations of an employment relationship between AKJ and Robinson were belied by the **contract carrier agreement, the court concluded that this agreement could not be considered in ruling on Robinson's motion to dismiss.** The court concluded that the plaintiff had alleged sufficient facts to state a negligent hiring claim.

The court noted that even if it was conclusively settled that AKJ was an independent contractor, as

opposed to an agent or employee of Robinson, the court would permit the plaintiffs hiring claim to go forward at this stage of the litigation.

III. Negligent Entrustment Claim

The plaintiff next asserted a claim for negligent entrustment against Robinson. Specifically, the plaintiff alleged that:

Defendant Robinson, acting as a licensed broker for its own financial gain, negligently entrusted to defendant AKJ, an authorized motor common carrier of property, their direction for AKJ to transport a load of cable reels, when Robinson knew or should have known, that AKJ had limited experience as a motor carrier of property in interstate commerce, had been assigned a conditional or unsatisfactory safety rating by the FMCSA, was impaired financially, and was otherwise unfit to operate safely as required by FMCSRs; and Robinson was negligent in exercising its discretion as a licensed property broker in arranging for transportation by an unfit and unsafe motor carrier.

In moving to dismiss this claim, Robinson argued that the claim is without merit, because Robinson did not own the tractor-trailer that injured the plaintiff. Under Virginia law, liability under the doctrine of negligent entrustment requires that the owner of the instrumentality used to inflict injury knew, or had reasonable cause to know, that he was entrusting the instrumentality to a third person who was likely to use it in a manner that would cause injury to others.

In response, the plaintiff argued that: he had asserted a claim against Robinson for negligent entrustment to AKJ, "not of the tractor-trailer itself, but of the assignment to haul the cargo placed into Defendants' care by the shipper, Coleman Cable, Inc; that the claim was one for negligent entrustment of an activity, rather than an instrumentality and that such claim was cognizable under § 308 of the Restatement (Second) of Torts. In its reply brief, Robinson argued that neither the Virginia General Assembly nor the Supreme Court of Virginia has recognized a cause of action for negligent entrustment of an activity, and that "this Court should abstain from attempting to second-guess them, in the absence of clear guidance."

The court concluded that the Supreme Court of Virginia would recognize a cause of action for negligent entrustment of an activity, as set forth in § 308 of the Restatement (Second) of Torts and denied Robinson's motion to dismiss with respect to the plaintiffs claim for negligent entrustment.

IV. Claims under the Motor Carrier Act and the Federal Motor Carrier Safety Regulations

Plaintiff alleged that: Robinson failed to provide "safe and adequate service, equipment, and facilities," in violation of 49 U.S.C. § 14101(a) and that Robinson should have known that AKJ was unfit to operate safely; Robinson aided and abetted, encouraged, or required Arciszewski to drive an excessive number of hours, in violation of 49 C.F.R. § 390.13, and that Robinson permitted her to operate her truck in an impaired and/or fatigued condition; Robinson is liable for damages under 49 U.S.C. § 14704(a)(2).

The primary question presented by the plaintiff was whether § 14704(a)(2) created a private right of action for individuals who have suffered personal injuries. The court concluded that it did not and granted Robinson's motion to dismiss with respect to the plaintiffs federal claims.

Conclusion

For the reasons stated, Robinson's motion to dismiss was granted in part and denied in part. In Summary, the likely theories of liability facing Robinson going forward in this case are: negligent hiring of the carrier; and negligently entrusting the transportation activity to the carrier. **It should be carefully noted that this court (as in Schramm) did not rule that Robinson was legally liable under any theory of liability.** It only ruled that these legal theories of liability were viable. Ultimate liability will depend on the facts of the individual case.

It is obvious that Robinson in order to avoid liability and reduce risk of loss will need to prove that it exercised reasonable care and due diligence under the circumstances in the selection of the motor carrier. **This case should provide further notice to brokers of the need to establish written protocols for hiring motor carriers including a paper trail to prove the protocol was followed. See the TIA Carrier Selection Framework for assistance if you don't already have one in place.**