Broker Liability for Negligent Hiring Expands, Due Diligence Obligations Increased

In the February 2008 Logistics Journal, I wrote about Jones v. D'Souza, a U.S. District Court case in Virginia, in which the driver of a tractor trailer lost control of the truck, crossed the median, and struck Plaintiff's tractor trailer head on, causing a violent collision. The driver of the truck hired by C.H. Robinson (AKJ Motor Carrier) was killed; and Jones, the driver of the second truck, was seriously injured.

The claims asserted against Robinson included negligent hiring, negligent supervision, negligent entrustment, and claims that the carrier and its driver were employees (vicarious liability) and not independent contractors of Robinson.

After reviewing all of the evidence, the Court found that the driver of the AKJ truck was negligent, and that her negligence was a proximate cause of the accident.

The facts in this case, like the facts in the Schramm case, showed that Robinson was conducting routine brokerage operations. Robinson argued that it had no control over the carrier, its drivers, driver's training times, compensation routes, discipline, or any other aspects of hauling the load. Robinson argued that it had no power to fire any of the motor carrier's drivers, and had no control over how the driver was operating the vehicle, and therefore could not be held "vicariously liable" for the negligence of the carrier's drivers. This defense was successful.

The Contract Carrier Agreement between Robinson and AKJ plainly stated that the carrier was acting as an independent contractor. It was similar to that one in the Schramm case. The Court concluded that the carrier was an independent contractor of Robinson and that as a result, Robinson could not be held liable for the negligence of the carrier or its driver under the theory of respondent superior. (vicarious liability)

Plaintiff asserted that Robinson was liable under the theory of negligent hiring of the motor carrier. In order to succeed, Plaintiff must be able to prove that the contractor was in fact incompetent or unskilled to perform the job for which it was hired, that the harm that resulted arose out of that incompetence, and that the principal (Robinson) knew or should have known of the incompetence.

The parties agreed that Robinson did not conduct any investigation into the carrier's safety and fitness as a carrier beyond ascertaining that it was insured, that it had a conditional safety rating, and that it had valid operating authority from the FMCSA. The dispute focused on the appropriate duty of inquiry required of Robinson under the facts of the case. Robinson claimed that there was no evidence to demonstrate that it knew or should have known that the carrier would be likely to be involved in a collision. One of the problems for Robinson was that its contract required that the carrier had a "satisfactory" safety rating. In fact, AKJ had received a "conditional" rating from the FMCSA prior to the accident. The Court goes into a long analysis of the SEA ratings for drivers and vehicles. The SEA scores and information indicated that this carrier had its insurance coverage cancelled eight times between 2001-2004, and that the carrier had previously been cited for numerous violations of federal safety regulations. Robinson had used this carrier previously, as well as its predecessor company which had numerous safety problems. Both companies were owned by the same persons. Robinson's records showed that there had been problems over three years, including incidents of equipment and vehicle breakdowns with varying degrees of severity, incidents where drivers were pulled over, vehicles were taken out of service for regulatory violations, and at least two different tractor trailer accidents, including one roll-over. Robinson's information did not indicate any causes for the equipment or vehicle breakdowns, or of the two accidents. Plaintiff argued that reasonable investigation would have allowed Robinson to find out that the carrier had a novice driver that had received her commercial driver's license only two months before the accident.

The Court quoted the Schramm case and said there was a duty to check safety statistics and evaluations of carriers with whom the broker contracts which were available on the Safestat web site maintained by FMCSA. The fact that Robinson's contract itself required a satisfactory rating which they violated, was a cause of considerable trouble for them.

Robinson hired Annette Sandberg, former head of the FMCSA, who testified at her deposition that if a third-party logistics provider became aware that a carrier had received a conditional rating, it should inquire with regard to the information gathered during the federal motor carrier compliance review and the carrier's plan for improvement. The Court expressly stated that it believed that Robinson held itself out as a "third-party logistics provider" and concluded that Robinson had a duty to investigate the fitness of the carrier prior to hiring it to transport the subject load on public highways. Robinson, citing the Schramm case, argued that the federal motor carrier web site had a disclaimer stating that the information was inaccurate and should not be relied upon. Apparently, Ms. Sandberg, whose testimony was not available in the Schramm case, offered an explanation of the agency's policy behind the web site warning stating that it should be made clear that the FMCSA was expressly warning companies against the very use recommended in Schramm and by the Plaintiff in this case. There is much discussion in the case about the value and problems with of the FMCSA web site. The Court concluded that the question of whether Robinson breached the appropriate duty of inquiry (into the web site) was a question for the jury.

The Court stated that in order to succeed on a claim for negligent hiring of an incompetent contractor, Plaintiff must prove not only that the contractor was incompetent, and that the employer knew or should have known of that incompetence, but also that the contractor's incompetence was a proximate cause of the injuries. In substance, the Plaintiff (Jones) had to demonstrate the necessary causal connection between the particular quality of the carrier that made it incompetent, and the crash in which the Plaintiff was injured.

At the end of trial, on May 8, 2008, a jury decided that Robinson was liable for Plaintiff's injuries.

Robinson immediately filed a Motion to set aside the jury verdict, or alternatively for a new trial. On July 7, 2008, Robinson's Motion was denied. The thrust of Robinson's Motion was that the Plaintiff failed to establish the required proximate causal link between the negligence in selecting the carrier, and cause of the accident that resulted in injuries. The Court in its Memorandum Opinion denying Robinson's Motion admitted that the evidence of proximate cause was "light", but that it was sufficient enough to support the jury's verdict. The Court concluded that Plaintiff demonstrated that the carrier had a propensity to hire incompetent, unsafe drivers and not to properly check the credentials and backgrounds of its drivers. The Court concluded that Robinson could have become aware of this propensity through a variety of public sources and information which were available at the time it hired the carrier to haul the subject load, including: (1) AKJ's driver SEA score of 97.8 (grossly deficient scores for two years); (2) roadside inspection reports from 2004; (3) study data on the web site of the FMCSA indicating that carriers with driver SEA scores greater than 75 were 63% more likely to be involved in a collision with other carriers; (4) problem logs from Robinson's internal express system showing various AKJ drivers operating in violation of safety regulations; (5) AKJ's conditional safety rating; and (6) May 2003 and July 2003 compliance reviews by FMCSA which included citations for failure to maintain employment applications, driving records and employment records of driver's files.

According to the Court: Given AKJ's propensity to hire unsafe, incompetent drivers and the fact that Robinson knew or should have known of this propensity, the relevant question then became whether AKJ did in fact hire and assign an unsafe, incompetent driver for the subject load and whether that driver's incompetence was the proximate cause of the crash. The Court concluded that the evidence presented at trial when considered in the light most favorable to Jones (Plaintiff) was

sufficient for a reasonable jury to find in favor of the Plaintiff. Other evidence which had been offered at trial concluded: AKJ's driver had her commercial driver's license only one month prior to the accident; the commercial driver's license of her co-driver was revoked at the time of the accident; AKJ had failed to check the backgrounds of either driver prior to assigning them to transport the subject load; the subject load was "hot" indicating that its delivery was time-sensitive and that AKJ was late in dispatching its drivers to pick up the load; it was necessary to haul a load over a significant distance from North Carolina to Massachusetts; the police report stated, "It appears that the main causative factor of the crash was error or inattention of the driver of Vehicle #1 (AKJ's driver). It is believed this person was a new driver for the company and inexperience might have been a contributing factor."; eye witness account testified to erratic driving behavior shortly before the crash; eyewitness account observing the tractor trailer pull off the highway to make an exit, ascend partway up the incline of an exit ramp, and then suddenly re-enter the highway going down a small incline; eyewitness report of concern that the truck might tip over as it swerved back on to the highway; and eyewitness testimony that the AKJ vehicle passed it at a speed of approximately 70 MPH. In summary, the Court concluded that the jury's verdict was not against the clear weight of evidence on the element of proximate cause and that Robinson's Motion for a new trial was denied.

As in all cases, the question of liability lies in the facts.

One of the most troubling parts of this decision is that the Court allows the jury to place evidentiary value ton the SEA scores which are known to be unreliable at best. One of the important lessons of this case is that SEA scores should be checked when using carriers with "conditional" safety ratings. While the scores may not be determinative standing alone, they may provide a "tipping" point depending upon what the other carrier qualification factors show.

Also this case would appear to expressly subject third-party logistics providers to the same carrier qualification due diligence obligations, now imposed on brokers and shippers.

This case, like Schramm and Puckrein, should be required reading for all shippers, brokers and third-party logistics companies.

One final note, a bench trial on the issue of damages is scheduled for late July 2008.

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