Your Actions May Determine Liability for Personal Injuries

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This month Ron Usem, Esq., examines LOLA CAMP, Plaintiff-Appellant, v. TNT LOGISTICS CORPORATION and TRELLEBORG YSH, INCORPORATED, Defendants-Appellees. 553 F.3d 502 (7th Cir 2009) and provides insight.

Factual Background:

During the relevant time period, Mitsubishi Motors North America, Inc.("Mitsubishi") manufactured automobiles using a cost-effective "just-in-time" inventory system. Under this system, automotive parts from suppliers were delivered to plants "just in time" to be used on assembly lines. TNT provided logistics services to Mitsubishi, coordinating the purchase and transportation of automobile parts from suppliers as Mitsubishi's needs arose. TNT contracted with DeKeyser Express, Inc. ("DeKeyser"), a motor carrier, to transport the parts. Lola Camp worked for Transport Leasing Company ("TLC") and TLC leased Camp's services as a tractor-trailer driver to DeKeyser.

On January 21, 2003, TNT directed DeKeyser to transport some parts from several suppliers (one of which was Trelleborg, the shipper) to Mitsubishi's factory in Illinois. DeKeyser dispatched Camp to make the LTL pick-ups and delivery.

The next day Camp arrived at Trelleborg's facility. At Trelleborg's loading dock, Camp noticed that the three pallets of parts scheduled for pick-up would fit inside the trailer only if the third pallet was stacked on top of one of the other two pallets. Camp was concerned that the load "would not ride" i.e., that the unsecured pallet might shift due to the vacant space next to it and be damaged. She told Trelleborg personnel of her concern and contacted the DeKeyser dispatcher and TNT transport supervisor Alan Marten to advise them of the problem. Marten contacted Dave Finck, TNT's onsite liaison at Mitsubishi's Illinois factory.

After the conversation with Finck, Marten advised Camp and the DeKeyser dispatcher that TNT wanted the entire load delivered and directed Camp to write on the bill of lading that TNT was aware of the situation and was releasing the shipper (Trelleborg) and the driver (Camp) from responsibility for any cargo damage. Camp then wrote the following on the bill of lading: "Shipper and Driver released of liability for any product damage as called TNT and told them didn't think would ride. Ship anyway per Dave Fink."

After Trelleborg loaded the three pallets, Camp drove to TNT's cross-dock facility located across the street from the Mitsubishi plant. Before backing up to TNT's dock, Camp stopped in the parking lot and opened the right trailer door; when she did, the unsecured third pallet began to fall. When she attempted to close the trailer door to prevent the pallet from falling out, Camp injured her shoulder and arm. The opinion does not disclose the extent of Camp's injuries but since the case went all the way to this appellate court, it can be assumed that it was serious.

The District Court Opinion:

The district court granted summary judgment in favor of the defendants on Camp's negligence claims. In doing so, the court rejected Camp's claim asserting TNT liable under two provisions of the Federal

Motor Carrier Safety Administration Regulations ("FMCASR") and found that Camp had not presented sufficient authority in support of her "common law standpoint" argument to survive TNT's motion for summary judgment. The district court also held that Trelleborg (the shipper) was not liable to Camp under the FMCSAR and that Trelleborg owed no duty to her in light of Illinois's law. Camp appealed.

Court of Appeals Opinion:

On appeal, Camp first claimed that TNT and Trelleborg were liable for negligence based on two provisions of the FMCSR, **49 C.F.R. §390.13 and §392.9(a)(1). Parts 390 and 392 (among several others) of the FMCSR are adopted by reference into the Illinois Vehicle Code by 625 ILCS 5/18b-105(b), 1 part of the Illinois Motor Carrier Safety Law. (citation)"In a common law negligence action, a violation of a statute or ordinance designed to protect human life or property is prima facie evidence of negligence (which means liability will not be imposed unless there is a preponderance of evidence to the contrary; the violation does not constitute negligence per se." (which means liability will be imposed automatically) (citation).** "To recover damages based upon a defendant's alleged statutory violation, a plaintiff must show that (1) she belongs to the class of persons that the statute was designed to protect; (2) her injury is of the type that the statute was designed to prevent; and (3) the violation proximately caused her injury." **(Citation).** The court next reviewed the application of **§390.13** and **§392.9(a)(1)** to TNT and Trelleborg.

According to the court, it had to determine whether the relevant safety regulations applied to TNT, because if they did not TNT could not have violated them. Here's where the analysis gets interesting. **Under 49 C.F.R. § 392.9(a)(1),** "[a] driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless 1) the commercial motor vehicle's cargo is properly distributed and adequately secured as specified in §§ **393.100 through 393.136** of this subchapter." According to **49 C.F.R. § 390.5,** a "motor carrier" is "*a for-hire motor carrier* or a private motor carrier." (Court's emphasis added). The same regulation defines a "for-hire motor carrier" as "a person engaged in the transportation of goods or passengers for compensation." **49 C.F.R. § 390.5.** A "person" includes a corporation like TNT.

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Camp, the injured plaintiff, argued that § 392.9(a)(1) applied to TNT because: (1) TNT had a motor carrier license and was acting as a motor carrier; (2) that the following facts demonstrated that **TNT maintained de facto control over the cargo shipment and thus acted as a motor carrier:** (a) TNT planned the configuration of the load with its software; (b) determined the supplier stops Camp made; mapped the route that Camp took; (d) TNT employee Dave Finck made the decision that all three pallets had to be transported; and (e) TNT decided that the trailer would not have the load-bar bracing equipment that helps to secure the cargo.

TNT, on the other hand, claimed that its mere possession of a motor carrier license was not by itself, conclusive proof of liability as a motor carrier and asserted that it was acting as a broker rather than a motor carrier. **In addition, TNT argued that it did not provide motor carrier services for Mitsubishi and that DeKeyser was the motor carrier because it was contractually obligated to supply the driver, truck, and equipment.** (Interestingly, the terms of the contract were not disclosed in the opinion.)

The court agreed with TNT's claim that **"the fact TNT possessed a motor carrier license was not determinative of the applicability of § 392.9(a)(1). According to the court, the crucial inquiry is in what capacity TNT was acting during the transaction.** See, e.g., Paul Arpin Van Lines, Inc. v. Universal Transp. Servs., Inc., 988 F.2d 288, 292 (1st Cir. 1993); Schramm v. Foster, 341 F. Supp. 2d 536, 549 (D. Md. 2004). As you may recall, in **Schramm, id.,** the plaintiff asserted that C.H. Robinson was liable because it held motor carrier authority and was, therefore, liable as a motor carrier. The **Schramm** court applied the same analysis as the court in the **Camp** case by examining the factual capacity in which Robinson operated and found Robinson not liable as a carrier because it had acted as a broker. According to the **Camp** court in this case, only if TNT was functioning as "a person engaged in the transportation of goods or passengers for compensation" would the safety regulations **49 CFR § 392.9(a)(1),** and **49 C.F.R. § 390.5** apply.

The court next examined the statutory definition of transportation in order to determine whether TNT's actions fit the definition.

"Transportation" as found in **49 U.S.C. § 13102(23)**

> (A) a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

According to the court, **TNT did not engage in the actual movement of the automobile parts under the first prong of the transportation definition. Indeed, the contract between TNT and DeKeyser provided that DeKeyser was responsible for supplying the truck, driver, and associated equipment for the movement of the cargo, and there is no question that DeKeyser (not TNT) provided the driver and truck that moved the auto parts.** Again, the Court refers to the contract between TNT and DeKeyser, but does not report its terms.

Camp argued that TNT provided "services related to th[e] movement" of the cargo under the second prong of the transportation definition. **49 U.S.C. §**

13102(23) (B). The court disagreed. According to the Court, although TNT determined the stops Camp made and the route she took, rather than being *services* pertaining to the movement of the automobile parts these actions were merely details upon which TNT insisted to ensure that the delivery of the parts by DeKeyser would be on time. The same was also true of TNT's decision that the third pallet had to be delivered despite its instability. TNT's determination that the trailer would not have load-bar bracing equipment was also not a service germane to the movement of the cargo but was instead a condition under which the actual movement of the goods by DeKeyser was to take place. That TNT planned the configuration of the load on the trailer with its software might, at first glance, seem to be a service by which TNT "arrang[ed] for" the movement of the cargo; however, this configuration scheme is more accurately viewed as a detail pertaining to the positioning of the cargo on DeKeyser's trailers upon which TNT insisted in order to facilitate the smooth operation of Mitsubishi's "just-in-time" system. For these reasons, TNT's actions did not rise to the level of providing services related to the movement of the parts and thus TNT was not acting as a "motor carrier." Rather, TNT was a third-party logistics company whose main focus was the timely and efficient procurement of auto parts for Mitsubishi. TNT's role was that of a "broker" who, on behalf of Mitsubishi, "negotiat[ed] for . . . transportation" by DeKeyser that would satisfy the demands of the "just-in-time" system, citing. 49 U.S.C. § 13102(2) which defines a broker. It is noteworthy that the court defined a "third party logistics company", to include a "broker" even though there is no mention of whether TNT held operating authority issued by the FMCSA. Therefore, according to the court the carrier safety regulation 49 C.F.R. § 392.9(a)(1) (carrier responsibility for safe loading) did *not* apply to TNT and thus it owed no duty to Camp. The district court grant of summary judgment for TNT on this issue was affirmed on appeal.

The district court also held that Camp could not hold TNT liable under § 390.13 because she would be suing TNT for aiding and abetting her own violation of the FMCSR. Under 49 C.F.R. § 390.13, "[n]o person shall aid, abet, encourage, or require a motor carrier or its employees to violate the rules of this chapter." Camp argued that TNT violated § 390.13 when it encouraged her to transport the third pallet in an unsecured state as

proscribed by § 392.9(a)(1). Camp was correct that the plain language of § 390.13 applies to a "person" regardless of its function, and not just persons acting as drivers and motor carriers as with § 392.9(a). However, like the district court, the court of appeals concluded that Illinois case law precluded Camp's recovery under § 390.13.

Under Illinois law, a plaintiff cannot recover from a defendant for the defendant's aiding and abetting the plaintiff's own tortious conduct. The case of *Hudkins v. Egan*, 364 Ill. App. 3d 587, 847 N.E.2d 145, 301 Ill. Dec. 486 (Ill. App. Ct. 2006), established this principle of law

Camp's aiding and abetting claim is controlled by this common-law principle from Hudkins: Camp, as the person who operated the tractor-trailer with the unsecured pallet contrary to § 392.9(a)(1), cannot recover from TNT as a third-party victim under § 390.13 for its role in encouraging her to violate § 392.9(a)(1). Therefore, the district court properly granted TNT summary judgment on this theory as well.

The court also held that Illinois law did not permit Camp to hold Trelleborg liable under § 390.13 for aiding and abetting her own violation of § 392.9(a)(1). In addition, the court concluded that neither TNT nor Trelleborg owed Camp a common-law duty of care. The district court's grant of summary judgment in favor of the defendants was AFFIRMED.

What is curiously absent from this case was a claim against TNT for "negligent hiring". Also although the Court makes two different references to the contract between TNT and DeKeyser, and obviously places some reliance on it, its terms are not included in the opinion. We further learn that while there is no statutory definition for a "third-party logistics" company, the term includes an entity acting as a "broker" within its meaning, even though it is not clear whether the "broker" has FMCSA operating authority. The final lesson here is that the Court will examine closely the actions of the parties in deciding liability (or not) based on whether those actions are those of a "motor carrier" or third-party logistics company/broker.

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