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RECENT CASE SHEDS LIGHT ON BROKER LIABILITY IN CATASTROPHIC PERSONAL INJURY CASE: Schramm v. Foster, 341 F. Supp 2d 536 (D.C. Ct. Md. Aug 2004)

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One of the most difficult risks to assess as a broker is the risk of being drawn into a lawsuit in a motor vehicle accident case where there are serious personal injuries. Since brokers usually do not take physical possession of the freight, nor do they physically transport the freight, one would think that there is little risk of personal injury liability. Ordinarily that thinking would be correct except in cases of catastrophic loss. This is such a case. While claims were asserted against the driver and the driver's employer, the focus of this case was the broker's liability and obvious "deep pocket". The case is significant because so many claims and theories of legal liability are asserted against the broker and are, for the most part, thoroughly analyzed by the Court. The case has been edited for readability. The writer's comments appear in (parentheses), and underlines are also the writer's emphasis. Indented portions contain the court's analysis and opinion.

The case involved the following facts:

I.

In May 2002, Groff Bros. (Groff), a motor carrier, was hired by CH Robinson (acting as a broker) to transport a shipment of soy milk from Missouri to New Jersey. Groff assigned the job to Foster, one of its driver employees. In route with the shipment, Foster failed to stop or yield the right away at an off ramp exiting an interstate highway. It was learned that Foster had been driving in excess of the maximum hours allowed by federal regulations. In a collision with a pickup truck, the pickup traveled under the trailer, with the roof being severed. Schramm, the Plaintiff, suffered severe neurological injuries from which he is not expected to recover. He is in a semi-vegetative state, suffers seizures caused by brain injuries. As a result of the injuries, he requires assistance with all basic life activities. A passenger in the pickup sustained severe and permanent injuries to his head and body.

(Plaintiffs asserted no less than ten different theories of liability against Robinson. They were:

1. Respondeat Superior. Broker was liable because the truck driver was an "agent" of broker.

2. Negligent Entrustment under Maryland Statutes.

3. That broker was liable because Plaintiffs had a private right of action under 49 USC 14704 (a)(2).

4. That broker was liable because it has an obligation under 49 USC 14704(a) to provide safe

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service.

5. Broker was liable because the driver violated the federal hours of service regulations. 49 CFR 390.5.

6. Broker was liable because the driver was a "statutory employee", under 49 CFR 390.5.

7. Broker was liable because it held itself out as a "carrier".

8. Since broker was also an authorized carrier and could have transported the shipment as a carrier, it is liable as a carrier.

9. The broker was liable because it aided and abetted carrier in violating 49 CFR 390.13, hours of service regulations.

10. The broker was liable because it was negligent in hiring the carrier.

(The court described the size of CH Robinson's business and pointed out the increasing importance of third-party logistics companies. Additional facts further disclosed that Robinson's promotional materials included advertising that stated:)

> "Just as CHRW [Robinson] takes responsibility for freight claims, we also step forward when liability issues arise. We insulate the shipper in three important ways:
> 1. We work only with carriers who carry full insurance coverage. When CHRW begins to do business with a carrier, we verify their insurance coverage and keep a copy in our files of documents that prove the carrier has Federal Operating Authority and a current insurance certificate, with a minimum of $25,000 and $750,000 auto liability coverage. In addition, we check in with carriers regularly to make sure their coverage is current and renewed at necessary levels.
> 2. If an accident occurs, the carrier indemnifies both the shipper and CHRW from liability.
> 3. In the rare event that the damage goes beyond the carrier's insurance limits, CHRW maintains a liability insurance policy that pays the rest. "

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(Except for the insurance in Par. #3, this outlines some of the usual procedure for exercising due diligence that any good broker would follow. Apparently, Robinson had an umbrella liability insurance policy to cover the described risk although the dollar amount is not disclosed in the opinion. Facts further disclosed that:)

> Groff had entered into a contract carrier agreement with Robinson on January 26, 2001. Before that date, Groff, doing business as "RG

Transportation," had been a carrier for Robinson under a master transportation contracts dated March 18, 1998, and November 21, 2000. Robinson's contract carrier agreement with Groff, like its agreements with other carriers, required Groff to have a "Satisfactory" U.S. Department of Transportation rating. (The issue of safety rating becomes crucial in the courts ultimate decision.) Groff did not have such a rating at the time it entered into the agreement with Robinson because it was a new company. Robinson was aware of this fact by virtue of a response Groff had submitted to a Carrier Information Survey sent out by Robinson. (The opinion goes to state that) the FMCSA provides information regarding carriers on several web sites and Internet pages. This information includes "Safestat," which reports on and rates carriers' safety performance. [FN4] "Safety Evaluation Area" values used on this site range from 0 (best) to 100 (worst). According to Safestat, only SAE ratings of 75 or higher are deemed to be deficient. In September, 2001, Groff had an SEA rating of 74.00 in the driver safety evaluation area. By March 23, 2002, this rating had decreased to 70.63.

FN4. Robinson pointed out the following, in a caution page that appears before the Safestat information is accessed:

"WARNING

Because of State data variations, FMCSA cautions those who seek to use the Safestat data analysis system in ways not intended by FMCSA. Please be aware that use of Safestat for purposes other than identifying and prioritizing carriers for FMCSA and state safety improvement and enforcement programs may produce unintended results and not be suitable for certain uses."

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II. Claims of Negligence/Respondeat Superior

A.

Plaintiffs argue that Robinson is liable for Foster's negligence under a respondeat superior theory because Foster acted as an "agent" of Robinson in the transportation of the Jasper load. (How many times have we seen this argument?) Under the doctrine of respondeat superior, an employer is vicariously liable for the tortious conduct of his employee or agent when that employee or agent is acting within the scope of the master-servant relationship (Citing cases.) The court goes on to state that An agency relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.". An agency relationship may be established by written agreement or inference. In this case, there was no written agreement in which Robinson and Foster or Groff manifestly consented to have Foster act as Robinson's agent. Rather, plaintiffs contend that an agency relationship may be inferred from the circumstances. In order to establish a principal-agent relationship by inference, plaintiffs must show that 1) the agent was

subject to the principal's right of control; 2) the agent had a duty to primarily act for the benefit of the principal; and 3) the agent held the power to alter the legal relations of the principal. Plaintiffs argue that Robinson asserted its control over Foster under the terms of the contract carrier agreement it executed with Groff. The contract (which contains commonly used terms) states that Robinson controls the transportation of freight on behalf of its customers. It further instructs the carrier to obtain instructions concerning the handling of the load, to inspect the goods before loading to ensure that they are in good condition, and to notify Robinson if they are not. According to plaintiffs, by these provisions, Robinson exercised control when it dispatched Foster, directed him to pick up and deliver the load at specific times, and gave him directions from the Jasper warehouse to the warehouse in New Jersey. Robinson also gave Foster specific instructions regarding the load, including requiring Foster to use load locks on the trailer. Finally, according to plaintiffs, Robinson monitored Foster's performance by requiring him to call when he had successfully picked up the load and then periodically throughout the trip.

However, both the written agreement and the conduct of the parties belie plaintiffs' arguments. The contract expressly provides that: the "relationship of Carrier to Robinson is solely that of an independent contractor." ; the carrier shall employ all drivers transporting goods under the contract; "such persons are not employees or agents of Robinson or its Customers."; Groff was to pay Foster's salary and all expenses incurred in transporting the load and was to provide all necessary equipment and fuel required for the shipment; "the Parties agree that Carrier shall be the party solely responsible for operating the equipment necessary to transport commodities under this Contract." Clearly, Groff and Robinson understood that Groff was to maintain control of the means and method of transportation, including the performance of the driver.

Additionally there is no evidence that Robinson controlled Foster's actual performance through its coordination of the shipment. Groff remained at all times an independent contractor. An independent contractor is "one who contracts to perform a certain work for another according to his own means and methods, free from control of his employer in all details connected with the performance of the work except as to its product or result." (Citations) The rule of respondeat superior does not impose liability on an employer for the wrongdoing of an independent contractor. (citations). The mere fact that Robinson had Foster call Robinson directly to receive the dispatch information, rather than receive it from Groff does not demonstrate that Foster was under Robinson's control in the performance of his work. Furthermore, although Robinson provided Foster with directions to and from the Jasper warehouse, it explicitly stated that the directions provided were simply for informational purposes. (This is a good drafting point for your load/rate confirmations...see FN 5 below.) The driving directions and special loading instructions provided by Robinson did not circumscribe Foster's performance to the extent that the details of his performance were precisely determined by Robinson's authority over the transaction. (The court citing a case concludes that the fact that broker controlled the location where cargo was picked up and delivered did not establish an agency relationship because such control involved only the result of the work and not the manner in which it was undertaken.)

FN 5. The Carrier Load Confirmation sent by Robinson to Groff stated:
"Directions supplied by C.H. Robinson or its Customers either orally and/or

in written form are for informational purposes only. It is the Carrier's sole responsibility to confirm that it may lawfully operate a loaded vehicle of any weight, commodity, or dimension over any highway, bridge or route."

(The court next discusses whether Foster could be considered an employee of Robinson thereby subjecting it to liability.) The court stated that,

"Complete control over the result to be accomplished is not enough to make an independent contractor an employee ... '[An employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee.' " (citation). Thus, the fact that Robinson provided driving directions and required Foster to inspect the load upon pick-up, use load locks, and arrange for the shipment to be unloaded did not destroy Foster's status as an independent contractor; rather, such instructions simply served to secure performance of Robinson's agreement with Jasper according to its terms. (What has been described by the court is standard practice in the industry. The Court cited another decision which considered whether an agency relationship existed between a broker and a carrier hired to transport a shipment of cell phones.) As evidence of the agency relationship, the plaintiffs in that case presented a "Driver Trip Sheet" which included a heading with attention to the broker and contained instructions for the driver to report any delays to the broker. The court in that case found that these instructions were consistent with the broker's role and did not indicate a principal-agent relationship. The court concluded that "[a] mere contract to ship goods does not establish an agency relationship." (What a relief that is!)
Finally, the fact that Robinson provided Foster with a number to call in case he experienced any problems during the transportation of the load, and Robinson's desire to have Foster call periodically to check in do not indicate that Robinson exercised sufficient control over Foster's movements as to make him an agent of Robinson. "Even some reservation of control to supervise the manner in which the work is done, or to inspect the work during its performance does not destroy the independent contractor relationship where the contractor is not deprived of his judgment in the execution of his duties." (Citations)

Plaintiffs also claim that Foster exercised the authority to alter Robinson's legal relations with Jasper when he signed the bill of lading which designated Robinson as "carrier." Foster's signature on the bill of lading is insufficient to establish an agency relationship, however, because Foster

> was not authorized, either expressly or implicitly, to alter Robinson's legal relations in that manner. The court explained that the authority of an agent must come from the principal, and the principal must either knowingly permit the agent to exercise the authority or hold out the agent as possessing it . (Citations) . Although Foster was authorized to sign the bill of lading on behalf of Geoff upon picking up the load, Robinson never expressly authorized Foster or held him out as authorized to legally bind Robinson by signing a bill of lading which, erroneously and without Robinson's knowledge, named Robinson as the carrier.

(Our own TIA member, Allan Hauptman, helped put this issue to rest in *Chubb Group of Ins. Companies v. H.A. Transp. Systems, Inc.*, 243 F. Supp.2d 1064, 1070 (C.D.Cal.2002) where HA Transp Syst's did not prepare or assist in preparing the bill of lading which listed it as the "carrier", in the bill of lading, could not be relied upon as basis for imposing carrier liability on H.A. Transp. Systems. Next, the court goes on to analyze the distinction between and agent and a servant.:)

B.

Even if Foster were deemed to have acted as an agent of Robinson, Robinson would only be liable for Foster's negligence if Foster acted as Robinson's servant in the context of a master-servant relationship. The distinction between an agent and a servant is important because a principal will not ordinarily be liable for the negligence of an agent who is not a servant. (Citations)An agent is a person who represents another in contractual negotiations or transactions. A servant is a person who is employed to perform personal services for another in his affairs, and who, in respect to his physical movements in the performance of the service is subject to the other's control or right of control. Persons who render service but retain control over the manner of doing it are not servants ... A principal employing an agent to accomplish a result, but not having the right to control the details of his movements, is not responsible for incidental negligence while such agent is conducting the authorized transaction. (citation).

> "One may be an agent of another, owing to his principal the fiduciary obligations of loyalty and general obedience, but at the same time not be sufficiently under the control of the principal to be considered a servant. The relationship of master and servant exists only when the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done." (Citation) A principal is not liable for any physical injury caused by the negligent acts of his agent, who is not a servant, unless the act was done in a manner authorized or directed by the principal, or the result was one the principal authorized or intended. In applying these rules to this case the court goes on to explain: If Foster was merely an agent rather than a servant of Robinson, Robinson could only be liable for Foster's negligent acts if Robinson authorized or directed Foster to drive in a fatigued condition in excess of his hours. Furthermore, it is not enough that Robinson retain general control over Foster's

participation in the transaction. To subject the principal to vicarious liability, "the key element of control, or right to control must exist in respect to the very thing from which the injury arose." (Citation). Thus, unless Robinson had control over Foster's driving time and the condition in which he drove, it will not be vicariously liable for Foster's negligence. There is no evidence that Robinson directed or authorized Foster to drive in excess of the maximum allowable hours or that Robinson had any control whatsoever of the manner in which Foster conducted his work. Robinson did not have the power to fire Foster or to control his activities in transit. The only thing Robinson had a right to control was the ultimate result--the delivery of the load to its final destination in New Jersey. The fact that Robinson instructed Foster on incidental details necessary to accomplish that goal is not enough to subject Robinson to liability for Foster's negligent acts during the course of the shipment when Robinson had no control over Foster's movements.

III. Claims of Negligent Entrustment

Plaintiffs next asserted that Robinson is liable for plaintiffs' injuries under a theory of negligent entrustment. According to plaintiffs, Robinson was negligent in permitting Foster to operate a tractor-trailer, which Robinson borrowed from Geoff , when it was foreseeable that Foster might cause harm by driving in a fatigued condition. (Note the claim of a “borrowed” truck is completely contrary to the evidence that the truck was furnished pursuant to the contract between Robinson and Geoff.) Under Maryland law, negligent entrustment is defined as: "(1) The making available to another a chattel which the supplier (2) knows or should have known the user is likely to use in a manner involving risk of physical harm to others (3) the supplier should expect to be endangered by its use."(Citations). Plaintiffs failed to establish a claim for negligent entrustment because Robinson did not supply Foster with a chattel (ie, the truck). In order to be considered a "supplier" of chattel, one must have the right to control the chattel. (Citation). The truck Foster used was provided by his employer, Groff . At no point did Robinson exercise control over the truck or play any part in assigning the load to Foster. The contract carrier agreement expressly required Groff to provide both the truck and the driver to deliver the load. Thus, Robinson was not a "supplier" of chattel subject to liability for negligent entrustment.

IV. Claims Under The Motor Carrier Act and The Federal Motor Carrier Safety Regulations A.

The first question presented by plaintiffs' claims under the Motor Carrier Act ("MCA") and the Federal Motor Carrier Safety Regulations ("FMCSR") is whether 49 U.S.C. § 14704(a)(2) creates a private right of action for persons who have suffered personal injuries. That section states: "A carrier or broker providing transportation or services is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part."

At first blush, this language appears to confer a right of action upon any person who has sustained damages as a result of a carrier's or broker's breach of its statutory duties.(The court in this case after

analysis of the legislative history of the section concluded it did not create a private right of action. Note: Courts around the country are split on this issue).

B.

(The court went on to state that even if section 14704(a)(2) did create a private right of action for personal injuries, plaintiffs' claims asserted under it nevertheless would fail.)

(1)

(a)

Section 14704(a) requires carriers to "provide safe and adequate service, equipment, and facilities." 49 C.F.R. § 395.3 prescribes the maximum driving time allowable for property-carrying vehicles. According to plaintiffs, Robinson was liable under both of these sections because it failed to inquire about Foster's hours of service and ability to transport the load within the statutory maximum driving time before dispatching him. According to the court, Robinson had no obligation to ensure Foster's compliance with the FMCSRs pertaining to hours of service and driver safety because Robinson was not Foster's employer. 49 C.F.R. § 390.3 states that the regulations "are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce." Employer is further defined as "any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it ..." 49 C.F.R. § 390.5. (The court concluded that Robinson did not fall within the scope of this definition.)

(b)

Plaintiffs next contend that Foster was a “statutory employee” of Robinson because the regulatory definition of employee in 49 C.F.R. § 390.5 encompasses independent contractors hired by motor carriers to transport freight. Department of Transportation Federal Motor Carrier Safety Regulations Handbook. However, plaintiffs have failed to prove that Robinson acted as a motor carrier in the specific transaction at issue.

Motor carrier is defined in 49 U.S.C. § 13102(12) as "a person providing motor vehicle transportation for compensation." The term "broker" means a "person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." 49 U.S.C. § 13102(2). 49 C.F.R. § 371.2(a) further distinguishes motor carriers from brokers: "Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport."

Plaintiffs claim that Robinson held itself out to Jasper (the shipper) as a carrier and is precluded from being considered a broker with respect to the Jasper load because it offered to arrange the transportation of a shipment which it was authorized to transport and which it accepted and legally bound itself to transport. Plaintiffs point to several factors regarding Robinson's general method of operation and

specific conduct in this transaction to support their assertion that Robinson acted as a carrier: (1) Robinson marketed itself as "one-point of contact" which would handle all of its customers' shipping needs; (2) Robinson had FMCSA authority to operate as a carrier; (3) Robinson was listed as the carrier on the bill of lading; (4) Robinson takes responsibility for freight claims and maintains insurance coverage beyond that which is required of brokers; (5) Robinson dispatched the driver; and (6) Robinson has performed carrier services in previous contracts and has an affiliate that holds motor carrier authority. (The Court next) addresses each of these factors in turn.

First, plaintiffs argued that Robinson held itself out to customers as a carrier because it promoted itself as a comprehensive transportation company that provided for all of its customers' shipping needs and offered them "one point of contact." However, although, as stated infra, see section V, the court found that the "one point of contact" strategy was relevant to Robinson's common law duty to select carriers with reasonable care, it is not sufficient to convert Robinson into a carrier under federal law.

In *Chubb Group of Ins. Companies v. H.A. Transp. Systems, Inc*., 243 F. Supp.2d 1064 (C.D. Cal.2002), the court determined that the plaintiff failed to establish the defendant's status as a carrier rather than a broker despite statements by the defendant's president stating that the defendant was to arrange for the shipment of goods and would "meet the distinct needs of shippers as it relates to the movement of their goods from point A to point B in their specified amount of time in the time frame they require at the cost that they require." The court concluded that these statements did not indicate that the defendant held itself out as a carrier or represented to the plaintiff that it would transport the goods itself.

In the instant case, Teresa Rhodes, the Jasper employee who coordinated the shipment with Robinson, identified Robinson as a "truck broker", and Edward Beam, president of Jasper, testified that he understood Robinson's role to be that of an "intermediary" that finds trucks and arranges for delivery appointments. Nothing in the record suggests that Jasper believed Robinson was accepting responsibility to ship the load itself pursuant to its motor carrier authority. This finding should provide brokers with an important lesson, ie., to be sure that your customers understand that you are a broker, and not a carrier.

Second, the fact that Robinson had FMCSA authority to operate as a motor carrier is irrelevant to the instant transaction. A transportation entity may have authority to operate as both a broker and a carrier. (Citation) The focus of the court's inquiry must be on Robinson's role in the specific transaction with Jasper and the nature of the relationship between Jasper, Robinson, and Geoff.

Third the identification of Robinson as the “carrier” on the bill of lading does not prove that Robinson was in fact the carrier in this transaction. In Chubb the court found that an erroneous bill of lading prepared by a third party, which identified the defendant as the "carrier" of the load was insufficient to establish the defendant's carrier status since the defendant played no role in its preparation. Similarly, the bill of lading here was prepared by Jasper without any involvement by Robinson.FN 7. In fact, Robinson did not become aware that it was listed as the carrier until after the accident occurred.

FN7. According to Rhodes, the bill of lading was automatically prepared with information in Jasper's computer system. Robinson was identified as the carrier because Robinson was entered into the computer system, for accounting purposes, as the company hired by Jasper to coordinate transportation of the load. Rhodes testified that she did not believe that

Robinson was the carrier simply because it was so identified on the bill of lading.

Fourth, plaintiffs argue that Robinson's voluntary acceptance of responsibility for freight claims, not imposed upon it by law, and its maintenance of insurance coverage beyond that which is required of brokers shows that Robinson was performing as a motor carrier. [FN8] However, the fact that Robinson takes responsibility for freight claims does not itself render it liable for personal injuries. It simply does not follow from an entity's voluntary assumption of liability for one type of claim that it is accepting liability for all other claims. Moreover, that fact that Robinson had expanded insurance coverage for its operations conducted under its own motor carrier authority does not mean that it operated at all times under that authority.

FN8. Robinson does not accept total responsibility for freight claims, as plaintiffs suggest. Its policy is to pay to the shipper what it deems as viable freight claims and then proceed as shipper's subrogee against the carrier with whom it contracted to ship the load.

Fifth, plaintiffs contend that when Robinson dispatched the driver, it assumed a traditional carrier responsibility and took control of the transportation of the load. However, the fact that Robinson instructed Foster as to the time and place of pick-up and delivery does not amount to an assumption of control as the carrier's dispatcher. In fact, both Foster and Geoff understood that Ronald Geoff performed the role of dispatcher in the Jasper transaction. It was Geoff, not Robinson, that assigned the load to Foster and had the right to control Foster's route. Robinson provided timing, location, and special loading information consistent with its role as a third-party logistics company which had the responsibility of coordinating the shipment of the load in accordance with Jasper's needs.
Finally, the fact that Robinson performed carrier services in previous contracts is irrelevant to determining Robinson's role in the transaction at issue. As discussed above, a transportation entity may possess both carrier and broker authority. The dispositive issue is not whether Robinson had performed carrier services pursuant to previous contracts, but whether, in the specific transaction with Jasper, Robinson chose to use its carrier authority to ship the load or chose to simply broker the shipment to another authorized carrier. Likewise, the fact that Wagonmaster, a Robinson affiliate, holds motor carrier authority bears no relevance to this case. Wagonmaster is a separate entity that played no part in the shipment of the Jasper load.

(c)

Plaintiffs also argue that Robinson should be precluded from claiming broker status because it arranged the transportation of a shipment it was authorized to transport as a motor carrier and which it legally bound itself to transport. In other words, plaintiffs assert that because Robinson could have transported the load itself as a motor carrier, it should be treated as a carrier because it legally bound itself to transport the load. However, an entity may be considered a motor carrier, as opposed to a broker, only if it engages in solicitation for its own account. Although there is no written contract memorializing the agreement between Jasper and Robinson, plaintiffs have presented no evidence that

Robinson engaged in solicitation of the Jasper load for its own account as a motor carrier. Employees of the shipper Jasper testified that they viewed Robinson as an intermediary which would "find trucks and arrange for delivery appointments," and that Robinson provided no other services to Jasper other than arranging transportation of loads. In summary, there is no evidence that Robinson conveyed to Jasper that it would be transporting the load itself or that it engaged in anything other than "selling, providing, or arranging for, transportation by motor carrier for compensation." 49 U.S.C. § 13102(2).

(2)

Plaintiffs also assert a claim under 49 C.F.R. § 390.13, alleging that Robinson aided and abetted Geoff and Foster in violating the hours of service regulations by failing to inquire about Foster's available driving hours and by prescribing a pick-up and delivery time that would require Foster to drive in excess of his allowable hours

In this case, plaintiffs have failed to provide sufficient evidence establishing that Robinson intended to assist Geoff or Foster in violating the hours of service regulations. While Robinson may have brought about the arrangement that made it possible for Geoff and Foster to violate the regulations, this alone is insufficient to show that Robinson knew that Geoff and Foster would violate the regulations. Robinson's failure to inquire about Foster's available driving hours does not show an intent to assist Foster in exceeding the permissible limit; nor does the time-frame Robinson established for pick-up and delivery of the load. According to Ronald Geoff, who accepted the load from Robinson, Foster should have been able to transport the load within that time-frame without violating any hours regulations.

V. Negligent Hiring

(Are you feeling pretty good about this decision? After plaintiff had thrown every possible theory of liability at Robinson and in each instance the court had agreed with Robinson's defenses, here's what happened:)

> The court explained that Maryland law recognized that an employer could be held liable for negligence in "selecting, instructing, or supervising ... [an independent] contractor." (Citation). Although, for the reasons that the court stated it did not believe that Robinson could be deemed to be a carrier under federal law, it went on to state that Robinson's self-proclaimed status as a "third party logistics company" providing "one point of contact" service to its shipper clients was sufficient under Maryland law to require Robinson to use reasonable care in selecting the truckers whom it maintains in its stable of carriers.

> FN9. To the extent that plaintiffs rely upon a theory that Robinson could be held liable for negligence in hiring Foster himself, the court found their position unpersuasive. The court stated that Robinson could not properly be viewed as Foster's employer or equivalent.

(And now for the finale. Remember that plaintiffs are both permanently injured, with one them in a semi-vegetative state. Remember that Robinson is a $2-billion enterprise which has an "umbrella" liability policy with limits that are not disclosed in this case. The court went on to state:)

> The duty to use reasonable care in the selection of carriers includes, at least, the subsidiary duties (1) to check the safety statistics and evaluations of the carriers with whom it contracts available on the Safestat database maintained by FMSCA, and (2) to maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory Safestat ratings. (Citation). These obligations are not onerous, and I do not find that imposition of such a common law duty would be incompatible with the regulations promulgated by the FMCSR. See 49 C.F.R. § 355.25 (prohibiting any State law or regulation pertaining to commercial motor vehicle safety which is incompatible with the provisions of the FMCSR); 49 CFR Pt. 355, App. A(2)(b) (state requirements that are more stringent than federal requirements must not "create 'an undue burden on interstate commerce,' e.g., do not delay, interfere with, or increase that cost or the administrative burden for a motor carrier transporting property or passengers in interstate commerce"). To the contrary, imposing a common law duty upon third party logistics companies to use reasonable care in selecting carriers furthers the critical federal interest in protecting drivers and passengers on the nation's highways. Here, although evidence of Robinson's alleged negligence is somewhat thin, I find it sufficient to withstand a motion for summary judgment. (That means that the case will have to go to trial!) Robinson itself recognizes the importance of a carrier's safety when it requires the carrier to have a "Satisfactory" rating from the U. S. DOT in its contract carrier agreements. While it is true, as Robinson asserts, that generally the breach of a contractual duty does not give rise to a tort claim by a third party, by their very nature contract carrier agreements involve the public interest. Where, as here, one party (Robinson) knows from information provided to it by the other (Geoff Brothers) that the latter is in breach of a contractual provision whose very purpose is to protect the safety of innocent third parties, a duty of inquiry necessarily is implied. [FN10] Likewise, although as Robinson points out, the Safestat website contains a disclaimer page and although, as Robinson also points out, Geoff did not have an unsatisfactory Safestat score, its rating was a marginal one. This too implies a duty of further inquiry, and from the existing record it can be inferred that Robinson should have been reasonably alerted to the fact that Geoff provenance was suspicious. Its predecessor, RG

Transportation, had experienced a safety performance problem which prompted the formation of Geoff. (The record does not disclose how or when Robinson became aware of this crucial fact. Nor does the court discuss whether Robinson argued that although it knew of this fact, that in its business judgment the newly formed company (Geoff) was being operated safely.)

> FN10. Robinson discounts the importance of the fact that Geoff did not have a DOT safety rating on the ground that Geoff was a new company. Although, as Robinson contends, new carriers should not be foreclosed from the market because they do not have established safety records, it seems entirely reasonable to require firms, including third party logistics companies, who assist newcomers with market entry, to evaluate their safety control measures in the absence of a DOT rating.

Finally, it cannot be ignored that Robinson increased the risk of harm to innocent third parties by its own actions. When seeking business, Robinson advertises to shipper customers that "[i]n the rare event that the damage [caused in an accident] goes beyond the carrier's insurance limits, CHRW maintains a liability insurance policy that pays the rest." Robinson contends that because shippers cannot be held liable for personal injuries caused by a carrier's driver and thus would not care about the existence of excess insurance coverage for such injuries, this promotional statement and ones like it are of no practical effect. I am not willing to take such a cynical view. Responsible shippers are entitled to receive from firms with which they contract honest and accurate information about the insurance available to compensate victims of catastrophic accidents, such as the one involved in this case. It should not be assumed, as implicit in Robinson's argument, that American businessmen and businesswomen are concerned only about saving every nickel and dime and protecting themselves from liability. It is not only government regulators and others in the public sector who have a sense of public responsibility. Moreover, even if business executives engaged only in a cost/benefit analysis, they may very well conclude that the loss to their goodwill resulting from a source of adequate compensation for third parties suffering dreadful injuries in accidents caused by carriers shipping their products far outweighs the marginal increase in cost they must pay for excess insurance coverage to third party logistics companies through whom they arrange their shipments.
In the last analysis, this is a case in which the law may simply have to catch up with an obligation that Robinson has voluntarily assumed, presumably in

response to the demands of the market. [FN11] Although strenuously contesting its liability in these proceedings, in conducting its everyday affairs Robinson apparently recognized the ambivalence of its position and purchased excess liability coverage, both to protect itself and to gain new customers. It has actively interjected itself into the relationship between shipper and carrier, and it has chosen to do business in a context heavily tinged with the public interest. I find the common law imposes upon it a duty commensurate with its undertakings. (The court seems to imply that Robinson assumed the risk by selling its liability coverage insurance, although the final opinion does not say that.)

(Interestingly the court suggests that some regulatory changes should be employed in the industry to require insurance for catastrophic losses.)

FN11. It appears that regulators could assist market forces in furthering sound public policy by requiring that all carriers, at least those carrying loads of a certain weight and/or over a certain distance, have excess insurance for catastrophic accidents. As the facts of this case demonstrate, $750,000 (the present limit of minimally required coverage) is insufficient when such accidents occur. Although independent owner/ operators might find the cost of excess insurance too steep, presumably if an excess insurance coverage requirement were in place, the firms with which independent owner/operators associate themselves, be they larger carriers, third party logistics companies, or major shippers who contract directly with small carriers, would provide the excess coverage.

(The court concluded that :)

(Defendant C.H. Robinson's motion for summary judgment was granted, meaning that all their defenses were upheld except plaintiffs claim for negligent hiring. The claim of negligent hiring under this decision now goes to the trier of fact, the jury, or the case must be settled.

While the facts surrounding Robinson's selection of a carrier appears on its face to meet normal selection standards (new carrier), the fact the Geoff was formed due to safety problems with the predecessor carrier company RG Transportation, and the fact that this accident occurred approximately six months after the new contract was entered into was all that the court needed to keep Robinson in the case. Exactly what the prior safety problems were is not disclosed in this opinion. As a practical matter, one wonders what could Robinson have learned by further investigation? Even if the carrier represents that it will comply with all federal safety requirements how can a broker "know" that the carriers drivers will comply with applicable driving regulations? The short answer is that it can't. This decision is not an

unusual "deep pockets" ruling. The lesson to be learned here is that no matter how well brokers conduct their due diligence in selecting a carrier, a catastrophic loss umbrella insurance policy is the best protection. NOTE: This decision comes from the US District court in Maryland. Therefore it is technically only the law of that state. However any other court is free to follow it.

The second lesson here is that brokers must conduct their due diligence on safety records, and if none can be found publicly, ask the carrier for its safety record as well as an explanation of its safety programs, how the programs are implemented and how they comply with federal and state safety requirements. Both the questions and the answers should be documented. That may help brokers prove that they exercised reasonable care in the selection of the carrier, and help absolve them from liability.

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