

Broker Wins Negligent Hiring Case

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The cases, both of which are combined in this one opinion, arose when a tractor-trailer driven by Johnny Moody, who was in an intoxicated condition, struck a pickup truck driven by Jimmy McLaine, which forced McLaine's truck into a tractor being driven by Bradford Register. The collisions resulted in the deaths of McLaine, his five-year-old daughter, and Register's two-year-old son. Register and his five-year-old son, were critically injured. The injured individuals, as well as the families of the deceased and injured collectively "the plaintiffs", filed wrongful death and personal injury claims against Peggy and John McLeod, d/b/a Container South Export & Import Service ("Container South", a broker) and other defendants.

The plaintiffs contended that Container South was serving as a motor carrier and the de facto employer of the tractor-trailer driver, Johnny Moody at the time of the collision and, therefore, Container South was vicariously liable for Moody's negligence. They also asserted that Container South was directly liable for negligently hiring Moody. Container South filed a motion for summary judgment, contending that Moody and his employer, Knight Trucking, were independent contractors; that Container South did not negligently retain Moody, and that Moody was on a personal mission at the

time of the collision.

The trial court granted the motion after concluding that the evidence of Container South's limited involvement in directing how its goods were shipped was insufficient as a matter of law to impose vicarious liability on Container South for Moody's negligence. The plaintiffs appealed, contending the court erred in granting summary judgment because material issues of fact remained as to whether Container South was liable for Moody's negligence. The cases were consolidated on appeal. The Georgia appellate court found no error and affirmed the trial court.

It was undisputed on appeal that Moody's negligence caused the collision and the resulting injuries. There was no allegation or evidence that any part of the tractor-trailer, which was not carrying cargo at the time of the collision, malfunctioned or otherwise caused or contributed to the collision.

Moody is currently serving a prison sentence for his role in the vehicular homicides. Prior to filing suit against Container South, (the broker), the plaintiffs settled with Moody and his employer, Knight Trucking Company.

The main thrust of the Plaintiffs claim was that Container South was vicariously liable, because of the control it asserted over the carrier. The contract between the parties included language that Knight Trucking was an independent contractor. As we know, the courts in Schramm and Jones v D'Sousa

(C.H. Robinson cases) have rejected the vicarious liability theory where the facts showed that the brokers were performing customary brokerage operations and the contracts expressly stated independent contractor status of the parties. This case, without citing Schramm, came to the same conclusion.

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Now for the negligent hiring theory:

Plaintiffs asserted that Container South was liable for negligently hiring Knight Trucking's driver, Mr. Moody. Plaintiffs asserted that, even if Container South was not Moody's employer (which it wasn't), but was acting as a broker (which it was) at the time of the collision, the company could still be liable for Moody's negligence. This is because it negligently hired Moody as a driver and failed to investigate his driving record prior to dispatching him on the day of the collision.

Although the plaintiffs contend that Moody's incompetence as a driver was "obvious," it is undisputed that Moody drove tractor-trailers for two months for Knight Trucking without incident. Also, in its contract with Container South, Knight Trucking warranted that its drivers were competent and properly licensed. Further, the plaintiffs cited no authority that would have allowed Container South, who was neither Moody's employer nor potential employer, to have access to Moody's driving records.

Note: The Schramm case would seem to indicate that brokers must investigate a carrier's driver's driving record by any means possible including any information on The Federal Motor Carrier Safety Administration's Safety and Fitness Electronic Records (SAFER) System, or Safety Status Measurement System (SafeStat) websites even though the carrier has no-safety rating. No mention was made that the carrier signed a contract stating in some form that it provided drivers that complied with federal safety standards. Jones v D Sousa (C.H. Robinson) says the same thing without dealing with the question of whether the broker justifiably relied on the representations in the carrier's contract.

Both the Schramm and Jones cases examined

the contracts to see what representations the broker made, with out analyzing the representations of the carrier and the brokers right to rely on them! The court in this case (McClaine), without discussing the contractual representation that the carrier warranted competent and properly licensed drivers, and whether Container South justifiably relied on it, concluded that the plaintiffs' claim that Container South negligently hired Moody failed. (Citation)

The court went on to cite 49 CFR § 391.23 (k) (2), which provides that a prospective motor carrier employer must use information about a driver's previous accidents and his history of drug and alcohol abuse only as part of deciding whether to hire the driver, and "must take all precautions reasonably necessary to protect the records from disclosure to any person not directly involved in deciding whether to hire the driver." Based on this regulation, how can a broker investigate a drivers driving record? More importantly why should it when the contract between the parties warrants compliance with federal safety regulations?

According to the court, it was undisputed that Knight Trucking provided tractor-trailers and drivers

for Container South for over a year without any problems, and in May 2003, the U. S. Department of Transportation performed a safety audit of Knight Trucking and determined that it met the government's safety fitness standards. Thus, without acknowledging it directly, there was evidence showing that Container South did rely on its prior satisfactory experience with Knight Trucking.

The Court stated, "...even if Container South could be held liable for negligently hiring Knight Trucking, there was no evidence in the record to support a finding that Container South should have known that Knight Trucking had hired an incompetent or unsafe driver. Absent such knowledge, the plaintiffs' negligent hiring claim must fail." (Citation) The court does not discuss in any detail the actions taken by Container South to "qualify" the carrier and thus prove that it exercised "reasonable care" in its selection process.

This case, while favorable to the broker where there are catastrophic personal injuries, brings into focus the still undecided critical question: can a broker justifiably rely on carrier representations in a broker/carrier contract that the carrier (and its drivers) complies with applicable federal safety regulations? The Georgia Court of Appeals decision provides some help; by citing to the federal regulation mentioned above, requiring confidentiality of the drivers records, and by implying that the brokers prior one year of satisfactory experience with the carrier, coupled with the carriers DOT successful safety audit several months before the accident was sufficient for the broker to rely on hiring the carrier. (See *McLaine et al vs. McLeod et al* 661 SE 2d 695 (Ga App. 2008))

There was no evidence in the record that Container South was a "deep pocket" as we have seen in prior cases. We can only speculate as to whether that played any part in the Georgia court's decision.

Note: Based on Schramm, Jones v D'Sousa, and Puckrein cases, the analysis of a broker's liability for alleged negligent hiring of a motor carrier in cases of catastrophic personal injuries applies equally to third party logistics companies, shippers and by implication freight forwarders and anyone hiring a motor carrier.

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