

FEDERAL EXPRESS DODGES LIABILITY BASED ON IMPUTED NEGLIGENCE OF DRIVER

Harris v. Velichkov, United States District Court, District of Nebraska, 2012 U.S. Dist. Lexis 63021, Decided May 4, 2012

This case arises out of an auto accident in which an individual was killed, represented by Plaintiff, Kena Harris. The defendants are Velichkov, the driver of the vehicle that struck the car in which the decedent was riding; Micky's Trucking Express, which owned the Velichkov vehicle; and Fresh Start, Inc., which employed Velichkov. Fed X hired Fresh Start for transportation services. Fed X filed a Motion for Summary Judgment, the primary issue being whether Fed X could be held liable for Velichkov's alleged negligence. Fed X hired Fresh Start to provide "line haul services", which provided "power only" service and furnished only the tractor to haul Fed X trailers. Fed X made the payment for transportation based on mileage to the carrier, Fresh Start, and not to the individual driver. Fed X did not pay expenses or allowances and did not withhold any taxes, pay for workers' compensation insurance, or any other benefits. Fresh Start, as a power only contractor, paid for its own liability insurance, hazmat materials, and cargo insurance. Importantly, there was a contract between Fed X and Fresh Start which specifically identified the relationship between them as that of "independent contractors". Plaintiffs alleged that Fed X "controlled" the drivers and asserted that they were told what routes to follow. Fed X countered that driver instructions provided only that the drivers should minimize time spent in high crime areas, park units in secure areas when possible, but did not dictate any particular highways / routes which were to be followed.

Plaintiffs alleged that: (1) the accident was caused by Velichkov's negligence in the scope of his employment by Fed X, and that his negligence was imputed to Fed X under the Doctrine of Respondeant Superior; (2) Velichkov was using drugs and that Fed X knew, or should have known, that he was incompetent to drive; and (3) Fed X negligently entrusted the vehicle to the driver causing the accident. It is important to note that approximately two years after the case began, Plaintiffs attempted to amend their complaint to add a claim for negligent hiring, in part based on Fresh Start and Micky's poor safety record. (The safety record is not disclosed in the opinion.) Because of the lateness of the attempted Motion to Amend, that Motion was defeated. This case,

the Summary Judgment Motion proceeded, based on the theory that the alleged negligence of the driver, Velichkov, was imputed to Fed X. Plaintiffs argued that Fed X was liable because under federal regulations (49 CFR 390.11), it had a non-delegable duty to comply with federal safety regulations. The Court ruled that, under the facts of this case, Fed X was not operating as a motor carrier, and therefore not subject to carrier regulations. Plaintiffs argued that because Fed X was licensed as a motor carrier, it was always acting as a motor carrier, and thus liable as a motor carrier. The Court did not agree. The Court concluded that Fed X was acting as a shipper and not a motor carrier, and that Fresh Start was the motor carrier hired by Fed X to provide the transportation services from one Fed X service center to another. According to the Court, "The fact that Fed X might have the authority to operate as a motor carrier is irrelevant to the transaction at issue in this case." (Citations) Under the facts of this case, Fresh Start, not Fed X, controlled the execution of the carrier services. The Court concluded that the federal regulation did not place a non-delegable duty on Fed X to guarantee Velichkov's compliance with federal regulations because it was not acting as a motor carrier.

Next, plaintiffs argued that the driver, Velichkov, was not an independent contractor but actually an employee of Fed X. The Court reviewed ten factors considered in determining whether a person is an employee or independent contractor and focused primarily on the issue of "control". Plaintiffs alleged the following items consisted of "control" making Velichkov an "employee" of Fed X. The contract between Fed X and Fresh Start provided that the driver: (1) was not to leave the load unattended except for meal breaks during which the tractor and trailer unit were to be visible; (2) was not to uncouple the trailer or take the Fed X unit to a private residence; (3) was to travel a minimum of 150 miles after loading and was to be alert to being followed especially when leaving a loading area; (4) was to minimize any time spent in high known theft areas; (5) was to park the unit in a secured area if possible but at least well lighted and lock the tractor at all times; (6) was not to discuss the cargo with anyone or mix the cargo with other shipments; and (7) in the event of

accident, theft or break-in, the driver was to call in to his carrier, and call “911” and Fed X immediately.

The Court concluded that these elements of “control” were not sufficient to make Velichkov a Fed X employee because: The Fed X contract was with Fresh Start, and the carrier agreed to exercise its authority over its employees to follow the required precautions to protect Fed X cargo. Additionally, the Court stated that the exercise of this control was necessary to perform the contract in accordance with its terms, and finally that Fed X paid Fresh Start, the carrier, and not Velichkov directly. Finally, the Court stated that it was important that the contract between Fed X and Fresh Start was explicit in that it clearly spelled out the relationship between them as that of an independent contractor. According to the Court, “...When there is a written contract between the parties which denominates and describes the relationship as that of an independent contractor and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is not deemed to be an employee as a matter of law.”

Plaintiffs further argued that Fed X was liable under a theory of negligent entrustment, and had a duty to determine whether Velichkov was properly trained to transport two trailers (piggybacks). The Court ruled that the driver qualification requirements were on the “carrier”, but not on Fed X because Velichkov was not an employee of Fed X. According to the Court, it is clearly the responsibility of the motor carrier to be sure that its drivers comply with the proper safety training regulations. Additionally, the Court ruled that the entrustment theory would be applicable where there was a lease of the equipment for 30 or more days. Under the facts of this case, it did not apply. The Fed X Summary Judgment Motion was granted in favor of Fed X.

The case provides a good analysis of the factors that determine “control”, and carefully distinguishes between control for purposes of protecting cargo from “control” over the functions of a

driver. Further, the critical importance of a well drafted contract with the carrier cannot be over-emphasized. (See TIA Model Broker/Carrier Contract).

Respectfully Submitted,

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