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TRUCKING BROKER LIABILITY

Joseph W. Pappalardo
jpappalardo@gallaghersharp.com

I. INTRODUCTION

This paper will address recent developments in federal case law where claimants injured in trucking-related traffic accidents attempted to place liability on trucking brokers/third party logistics companies ("broker/logistics companies").

Brokers provide a variety of transportation services to shippers, eliminating the necessity for shippers to manage and contract for their own freight carrying needs. For motor carriers, brokers alleviate the need to solicit individual contracts from each shipper by providing a centralized clearinghouse allowing the motor carrier to serve many different shippers. Brokers may also offer logistics services which would include designing routes. For the purposes of this paper, a broker offering logistic services will be referred to as a broker/logistics company.

Broker/logistics companies bring shippers and carriers together. As independent intermediaries, acting for the benefit of both shippers and carriers (but as agents or employees of neither), they are vital conduits that have the expertise to provide for the efficient transportation of goods throughout the country as well as internationally.

In the wake of deregulation of the trucking industry, broker/logistics companies came into existence to provide shipping capabilities by contracting with an aggregate of small or independent motor carriers. Moreover, these broker/logistics companies have emerged to design safe, efficient routes and practices. Although claimants injured by a trucking-related traffic accident typically recover from the motor carrier and/or the truck driver, many claimants also attempt to cast a wider net of potential liability, hoping to increase their recoveries by implicating broker/logistics companies. Claimants maintain that broker/logistics companies are in control of the motor carriers with whom they contract and thus, are considered liable via *respondeat superior*. Also, claimants argue for liability on these companies if their efficient route planning causes drivers to operate their trucks too long, too fast, or when fatigued. More specifically, claimants advanced the following legal theories: (1) negligent and reckless management of the drivers and carriers of the route (2) negligent design and implementation of delivery schedules; and (3) violations of the Federal Motor Carrier Safety Regulations ("FMCSR") promulgated under the Motor Carrier Act ("MCA"). These causes of action sound in negligence and negligence *per se*.

While claimants have sought to place liability on broker/logistics companies, those companies have not stood idle and allowed claimants to subject them to the liability attributable to motor carriers and/or truck drivers. Rather, they can demonstrate the FMCSR recognize them as separate entities:

> 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).

As an entity separate and apart from motor carriers, broker/logistics companies have meritorious arguments to demonstrate the absence of liability associated with their particular actions. In particular, broker/logistics companies counter that they are essentially general contractors and not responsible for the acts of independent contractor carriers and, in any case, are not motor vehicle carriers within the FMCSR. Further, they contend that the route designs, when designed and demonstrated to be accomplished within the limitations set by the FMCSR and other applicable laws, are not rendered defective merely by a driver's independent and voluntary violation of the FMCSR.

II. THE EMERGENCE OF BROKER/LOGISTICS COMPANIES

Brokers, as a direct and undisputably important part of the trucking industry, also have had to conform with the regulation and deregulation of the trucking industry. The regulations promulgated by the Interstate Commerce Commission pursuant to the MCA of 1935 stifled the brokering of shipping services by establishing extreme regulatory burdens that, among other impositions, required anyone applying to become a broker demonstrate their services would be consistent with the public interest.[1] Accordingly, prospective brokers needed to prove they would not unnecessarily duplicate existing brokerage services.[2] This meant that prospective broker applications were denied, even when unopposed, if the proposed broker would duplicate services an existing broker already provided.[3] Brokerage services were effectively monopolized by a few brokers. Many independent owner operators of trucks who would not or could not ally themselves with these brokers more often tended to associate themselves with larger motor carriers. Large motor carriers were a viable

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[1] Paul S. Dempsey, *Entry Control Under The Interstate Commerce Act: A Comparative Analysis Of The Statutory Criteria Governing Entry in Transportation*, 13 Wake Forest L. Rev. 729, 761-762 (1977).

[2] *Entry Control of Brokers*, 126 M.C.C. 476, 484 (1977), vacated and remanded, 591 F.2d 896 (D.C. Cir. 1978). Vacated and remand for rule-making procedural problems.

[3] *Id*. at 483-484. *See, also, Interstate Ticket Sales, Inc., Broker Application,* 8 M.C.C. 483 (1938).

alternative to brokers, providing shippers with "one stop shopping" of integrated motor carrier services.

However, the MCA of 1980 ushered in an era of virtual deregulation of brokers (as well as the trucking industry in general), allowing issuance of a broker's license upon the posting of a bond and agents for receiving service of legal process.[4] Predictably, the number of brokers burgeoned. The trucking industry was transformed as owner/operators began to associate themselves with the growing class of brokers. Some brokers, like the large carriers that preceded them, evolved to offer more comprehensive services, including logistics management of shipments to assure timely deliveries. Brokers are the primary facilitators of goods shipment in the transportation industry and are responsible for the movement of billions of dollars of goods each year.[5]

III. POTENTIAL CIVIL LIABILITY OF BROKERS/LOGISTICS COMPANIES

While broker/logistics companies' services necessarily exist between shippers and carriers, one might suppose that the associated civil liability would be limited to actions between those entities (i.e. unpaid freight charges; untimely shipping of goods). However, recently, broker/logistics companies have been exposed to civil liability through various legal theories for the tortious conduct of the motor carriers and drivers with whom they contract. Personal injury claims have not only been lodged against motor carriers and drivers for trucking-related accidents but against broker/logistics companies as well. To claimants, this is a creative way to increase recoveries by expanding the pool of defendants.

As an example, a Missouri court, in a case that immediately predated the MCA of 1980, found that a broker owed a duty of care to a third party injured in a trucking-related traffic accident.[6] In *Johnson*, a broker contracted with a motor carrier to transport a load of steel. Thereafter, the tractor trailer collided with a passenger car, killing the occupant of the car. Though the motor carrier was an independent contractor, the court reasoned that the broker and the carrier were engaged in a joint venture and, thus, held them to be joint tortfeasors, jointly and severally liable to the plaintiffs in that case. Of course, there is substantial authority that now establishes that brokers are independent intermediaries but, at least in the Missouri case, that status may not be appreciated by all courts and liability may attach.

However, recently, federal districts courts have addressed just such cases and have rendered decisions mostly favorable for the broker/logistics companies.

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[4] William E. Thoms, *Rollin' On To A Free Market Motor Carrier Regulation 1935-1980,* 13 Transp. L. J. 43, 73-75 (1983).

[5] Jeffrey S. Kinsler, *Motor Freight Brokers: A Tale of Federal Regulatory Pandemonium,* 14 NW. J. INT'L L. & BUS. 289, 295.

[6] *Johnson v. Pacific Intermountain Express Co.,* 662 S.W.2d 237 (Mo. 1983).

A. *Smith v. Spring Hill Integrated Logistics Management, Inc*. - The Factual Synopsis Of A Broker/Logistics Company Personal Injury Liability Case.

Spring Hill Integrated Logistics Management, Inc. ("Spring Hill") was a broker/logistics company which contracted with Chieftain Transportation Services ("Chieftain") as a motor carrier, along with other motor carriers, to provide deliveries of automobile parts to Saturn. The automobile parts were being shipped from Cleveland, Ohio to the main Saturn plant in Spring Hill, Tennessee where they were used in assembling new cars. On behalf of Saturn, Spring Hill not only hired Chieftain to ship these automobile parts but designed the round-trip route schedule, specifically developing the pick-up and delivery times while accommodating driver breaks and allowing ample time for the route to be completed safely. This was a frequently run route and the evidence showed that it had an on-time success rate of over 97 percent.

On June 22, 2000, two Chieftain team drivers, Mr. Mobley and Mr. Ashford, started the route an hour late. Initially, Mr. Ashford was to be sleep while Mr. Mobley drove. Unfortunately, Mr. Ashford had not been able to sleep and, instead, spent some time sitting in the passenger seat awake. After driving for five hours, Mr. Mobley switched positions with Mr. Ashford. Because Mr. Ashford had not been able get sufficient sleep, he began to drive while fatigued. Mr. Ashford once meekly attempted to wake Mr. Mobley, but was unsuccessful and continued to drive while fatigued. Tragically, Mr. Ashford fell asleep at the wheel on north-bound Interstate71 near Strongsville, Ohio. A resulting multiple vehicle collision included a car occupied by Mrs. Heidi Smith, her eight month old daughter Hailey, and her two year old son Austin. Mrs. Smith and Hailey were killed and Austin sustained life threatening injuries.

As a result of this tragic accident, Mr. Ashford was found guilty of vehicular homicide and was incarcerated. Additionally, a civil suit commenced. Plaintiffs settled with the motor carriers involved as well as the truck driver, the automobile parts manufacturer and the owner of the commercial motor vehicle. The suit, however, was refiled against the broker/logistics company and was subsequently removed on diversity grounds to the United States District Court for the Northern District of Ohio. The Court's Memorandum and Opinion granting defendant's motion for summary judgment is attached hereto as Exhibit "A".

B. Plaintiff Claims and Defense Arguments.

As mentioned above, plaintiffs claimed negligence and negligence per se based on negligent and reckless management of the drivers and motor carriers of the route, negligent design and implementation of the delivery schedule, and violations of the FMCSR promulgated under the MCA. Since tortious liability against broker/logistics companies is a relatively undeveloped area in trucking law, plaintiffs put forward numerous legal theories to attach civil liability to the broker/logistic company. In particular, plaintiffs alleged that defendant, as the hiring entity of the motor carrier as well as the designer of the trucking route,

controlled, managed or otherwise supervised the motor carrier and its drivers and, therefore was liable under *respondeat superior* principles. In addition, plaintiffs alleged negligence in hiring the motor carrier. Plaintiffs contended as well that the broker/logistics company owed plaintiffs various legal duties of care arising from the terms of the contract between the broker/logistics company and the motor carrier. Further, plaintiffs alleged that alleged that the route schedule was unsafe and negligently designed as it forced drivers to drive while fatigued. As such, the plaintiffs claimed, the injuries sustained by plaintiffs were consequently foreseeable.

Plaintiffs, using untested legal theories, also alleged the broker/logistics company was subject to liability under the FMCSR. Plaintiffs argued that the broker/logistics company was a *de facto* motor carrier and, thus, subject to all liability as if it were the actual motor carrier. Similarly, plaintiffs claimed that the broker/logistic company aided and abetted the driver in violating the FMCSR and other laws. Punitive damages were also claimed by the plaintiffs.

The defense aggressively countered these claims. As a result, plaintiffs in essence conceded that defendant could not be found liable under the *respondeat superior* theory as originally advanced. By utilizing time tested negligence and contracts legal principles, the defendant was able to defeat the claims that brokers/logistics companies owed any legal duties of care to plaintiffs. The defendant also used the FMCSR to demonstrate the distinction between the broker/logistics company and a motor carrier, thereby precluding any liability for the tortious conduct of the motor carrier or its drivers.

IV. THE LAW OF BROKER/LOGISTICS COMPANY CASES

A. Liability for the Conduct of Independent Contractors.

The black letter law of *respondeat superior* principles is relatively simple. However, it is important to address this principle in order to demonstrate how plaintiffs attempted to argue that the broker/logistics company was liable.

1. *Respondeat superior* and independent contractors.

An employer is liable for the negligent acts of an employee.[7] However, an employer of an independent contractor is generally not liable for the negligent acts of the contractor or of his servants.[8] The key determination to establish whether one is an employee or an independent contractor is the right to control the manner or means

[7] *Pusey v. Bator*, 94 Ohio St.3d 275, 278-279, 2002-Ohio-795.

[8] *Id.*

of performing the work.[9] The Supreme Court of Ohio has explained, "[i]f such right is with the employer, the relationship is that of employer and employee; but if the manner or means of performing the work is left to one responsible to the employer for the result alone, an independent contractor relationship is created."[10]

The mere fact that the employer reserves the right to supervise or inspect the work during the independent contractor's performance does not make the contractor an employee.[11] The party who claims that a principal is responsible for the acts of an employee is obligated to prove the agency and scope of the authority.[12] Generally, the determination of whether a person is an independent contractor is a matter of law to be decided by the court based upon the undisputed facts in the record.[13]

2. The three exceptions regarding independent contractors.

In Ohio, there are three recognized exceptions to the independent contractor rule which may hold the employer liable for the negligent acts of the independent contractor. First, an employer may be directly liable for injuries resulting from its own negligence in selecting or retaining an independent contractor.[14] Second, an employer may be held vicariously liable for the negligence of an independent contractor performing certain "non-delegable duties" which are either imposed by statute, contract, franchise or charter, or by the common law or duties imposed on the employer. These duties arise out of the work itself because its performance creates dangers to others, e.g., inherently dangerous work.[15] Third, an employer may be held vicariously liable for the negligence of an independent contractor under the doctrine of agency by estoppel.[16]

In *Spring Hill*, the contract between a broker/logistics company and a motor carrier expressly stated that the motor carriers's role was strictly that of an independent contractor. While such a contractual clause has been found to be of some merit in

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[9] *Id.* at 278-279.

[10] *Id.* at 279.

[11] *Conasauga River Lumber Co. v. Wade*, 221 F.2d 312, 315 (6th Cir. 1955).

[12] *Brown v. Christopher Inn.*, 45 Ohio App.2d 279, 283-284 (1975).

[13] *Bostic v. Connor*, 37 Ohio St.3d 144, 146 (1987).

[14] *Albain v. Flower Hosp.*, 50 Ohio St. 3d 251, 258 (1990).

[15] *Id.*

[16] *Id.*; *see, also, Rubbo v. Hughes Provision* Co., 138 Ohio St. 178 (1941).

recent federal district jurisprudence[17], it was obviated in *Spring Hill* because the motor carrier's status as an independent contractor was virtually undisputable. The plaintiffs could not seriously deny that the broker/logistics company could not be found liable under the principles of *respondeat superior*. On these facts, the court found that, absent an exception, the broker/logistics company was not liable for the injuries caused by the motor carrier's driver falling asleep at the wheel. The court went on to analyze two of three exceptions recognized in Ohio; whether the broker/logistics company negligently hired the motor carrier and whether the broker/logistics company had contracted for the motor carrier to perform a non-delegable duty. The court held the doctrine of agency by estoppel did not apply.

i. Negligent Hiring

An employer must exercise reasonable care in the selection of a competent and careful independent contractor.[18] An employer who engages an independent contractor with either actual or constructive knowledge that the contractor does not possess that measure of skill required for the proper performance of the work is liable for negligence in hiring the incompetent contractor.[19]

Ohio courts have found that employers who conduct only a cursory investigation of an independent contractor prior to engaging their services are not liable for negligent hiring. In *Mutual Ins. Co. v. Hunt*, the employer merely questioned the independent contractor briefly about his ability to perform the work at issue, without even inspecting any of the independent contractor's prior work.[20] The Court held[21]:

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[17] *Schramm v. Foster*, 341 F.Supp.2d 536 (D. Md. 2004). *See, also, Jones v. C.H. Robinson Worldwide, Inc.*, 558 F.Supp.2d 630 (W.D. Va., 2008) where the court overruled summary judgment. Safety data was available to the broker, the court noted the broker's "active interjection of itself into the relationship between shipper and carrier," and thus found that the broker had a duty to investigate the carrier's fitness.

[18] *Albain, supra* note 14, at 258.

[19] *McGregor v. Heitzman*, 98 Ohio App. 473, 476 (1953).

[20] *Mutual Ins. Co. v. Hunt*, 3d Dist. No. 5-200-07, 2000-Ohio-1854..

[21] *Id.* at *9; *See, also, Kuhn v. Youlten*, 118 Ohio App.3d 168, 177 (1977) (where employer failed conduct a criminal background check of independent contractor, summary judgment in favor of employer was appropriate because the independent contractor did not have a criminal history of the type of crime he committed).

> Although the appellants did not inspect any of Smith's prior work, did not request references from him, and did not conduct a background check, we cannot say they engaged Smith with either actual or constructive knowledge that Smith did not possess that measure of skill required for the proper performance of the work.

In *Smith v. Spring Hill*, plaintiff adduced no credible evidence that the broker/logistics company had negligently hired the motor carrier. In its defense, the broker/logistics company provided the following facts:

(1) testimony by plaintiffs' own expert that the broker/logistics company's hiring of the motor carrier was reasonable;
(2) the motor carrier was duly licensed, certified, and qualified to provide motor carrier services pursuant to the FMCSR;
(3) the motor carrier maintained the highest available "SAFER" safety rating from the U.S. Department of Transportation;
(4) the motor carrier met and exceeded its obligation to carry all necessary insurance coverage; and
(5) its driver hiring and training processes had been certified by an independent organization.

Consequently, the court summarily disposed of that exception.

Spring Hill is not the only case to address broker liability for negligent hiring. In *Schramm*, the plaintiffs brought suit against a broker/logistics company, the motor carrier and the truck driver for injuries sustained in a trucking-related traffic accident. The broker moved for summary judgment on all claims, including negligent hiring. The Court granted summary judgment on all issues except for the issue of negligent hiring. Critical to the court's decision was the fact that the motor carrier had a marginal safety rating from an independent rating organization. The court reasoned that " . . . imposing a common law duty upon third party logistics company to use reasonable care in selecting carriers furthers the critical federal interest in protecting drivers and passengers on the nation's highways."

Comparing the outcome of Spring Hill with that of *Schramm*, it can be concluded that a broker/logistics company's liability for negligent hiring is dependant upon the motor carrier's overall ability to demonstrate to the broker

that the motor carrier transports goods safely and operates competently. Brokers must scrupulously investigate and qualify motor carriers.

ii. Contracting Non-Delegable Duties

The Supreme Court of Ohio has explained the non-delegable duty doctrine. In *Richman Bros.*, the court stated: "Where danger to others is likely to attend the doing of certain work, unless care is observed, the person having it to do, is under a duty to see that it is done with reasonable care, and cannot, by the employment of an independent contractor, relieve himself from liability for injuries resulting to others from the negligence of the contractor or his servants."[22]

Further, "[e]mployers are held liable under the traditional non-delegable duty exception because the nature of the work contracted involves the need for some specific precaution, such as a railing around an excavation in a sidewalk, or the work involved is inherently dangerous . . ."[23]
"Inherently dangerous" means the work involves a recognizable risk of danger that is inherent in the work itself, or, when properly performed, may cause injury to others.[24]

Because the determination of what constitutes an "inherently dangerous" activity necessarily requires subjective assessments of the likelihood of injury to others as well as the magnitude of the potential harm, one might naively assume that freight shipping using semi-tractor trailers traveling at high speeds along the crowded highways would comprise just such an "inherently dangerous" activity. However, Ohio case law has held that **as a matter of law** the operation of commercial motor vehicles is not an "inherently dangerous" activity in and of itself.[25]

The use of team drivers, the buffer time built into the route, and the qualifications of the motor carrier were all argued as factors militating against a finding of "inherent danger".

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[22] *Richman Bros. v. Miller*, 131 Ohio St. 424, at paragraph one of the syllabus, (1936).

[23] *Albain, supra* note 14, at 261.

[24] *Bohme, Inc. v. Sprint Internatl. Communications Corp.*, 115 Ohio App. 3d 723 (1996).

[25] *George v. H. James Fry Trucking, Inc.*, (June 11, 1982), 6th Dist. No. L-82-074, 1982 Ohio App. Lexis 11552 at 6 (where the appellate court affirmed summary judgment in favor of the owner of a trucking company because the driver who caused injury to the plaintiffs was an independent contractor).

The *Spring Hill* court adopted the Ohio appellate court holding that operation of commercial motor vehicles was not an "inherently dangerous" activity and found that plaintiffs had produced no evidence otherwise warranting this exception to the general rule that parties are not liable for the tortious conduct of their independent contractors. As such, this exception should not apply to broker/logistics companies.

B. Negligence Principles Applied to Brokers/Logistics Companies

As detailed above, plaintiffs were unable to overcome the general rule that a party is not liable for the tortious conduct of its independent contractor and, thus, abandoned *respondent superior* as their main theory of liability. Nonetheless, the plaintiffs attempted to get around this legal road block by establishing that the broker/logistics company itself owed legal duties of care to the plaintiffs. Plaintiffs argued that the broker/logistics company had a duty to control the drivers of the motor carrier and that the contract between the broker/logistics company and the motor carrier gave rise to a duty to plaintiffs as third-party beneficiaries. Moreover, plaintiffs provided an expert opinion concluding that the broker/logistics company owed a legal duty of care to plaintiffs.

To establish actionable negligence in any type of civil legal context, one must show, in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom.[26] Determining whether a duty exists is crucial since "a person's failure to exercise ordinary care in doing or failing to do something will not amount to actual negligence unless such person owed to someone injured by such failure a duty to exercise such ordinary care."[27]

1. No Duty Where Driving While Fatigued Was Unforeseeable.

Plaintiffs' initial contention was that the broker/logistics company owed a legal duty to plaintiffs because the injuries sustained by plaintiffs were a foreseeable consequence of the broker/logistics company's failure to communicate the underlying timetable for the route to the drivers. Plaintiffs argued that the broker/logistics company should have realized that the driver, ignorant of the timetable upon which the route was designed, would feel pressured to continue driving while fatigued in order to quickly complete the route.

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[26] *Di Gildo v. Caponi*, 18 Ohio St.2d 125 (1969).

[27] *U.S. Fire Ins. Co. v. Paramount Fur Service, Inc.*, 168 Ohio St. 431, paragraph three of the syllabus (1959).

The test for foreseeability is whether a reasonable, prudent person would have anticipated that injury or damage was likely to result in the performance or non-performance of an act.[28]

The court found that the broker/logistics company could not foresee that the truck driver would elect to continue driving while fatigued when there was no particular time pressure to complete the route, there was no adverse consequence for resting the responsibility for communicating the route rested with the motor carrier, and the driver did not wake his team driver to operate the tractor trailer. Thus, the broker/logistics company did not owe a duty to plaintiffs.

2. No Duty To Control Without A Special Relationship.

As the duty element is the threshold element in determining whether a negligence action exists, plaintiffs focused their attention on ensuring that this element was satisfied. In a broker/logistics company civil liability context, the duty element focuses on whether the broker/logistics company was responsible to control the motor carrier and its drivers. In Ohio, broker/logistics companies will be found to have no legal duty to the injured plaintiffs unless the broker/logistics company controlled the conduct of its motor carrier and its drivers. The Supreme Court of Ohio stated that a duty to an injured party for a failure to control an actor can only be founded upon a defendant's duty to control the actor by virtue of a special relationship[29]:

> Ordinarily, there is no duty to control the conduct of a third person by preventing him or her from causing harm to another, except in cases where there exists a special relationship between the actor and the third person which gives rise to a duty to control, or between the actor and another which gives the other the right to protection. Thus, liability in negligence will not lie in the absence of a special duty owed by a particular defendant.

In other words, Plaintiff is required to prove that the broker/logistics company's relationship with the motor carrier and its employees was one which the broker/logistics company primarily controlled or that a special relationship existed between the entities.

In returning to *Spring Hill*, the defense argued authoritatively that in cases where the court has found that an independent contractor relationship existed, there was no special relationship which would cause liability of the person that hired the

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[28] *Thomas v. City of Parma*, 88 Ohio App. 3d., 523 (1993).

[29] *See Federal Steel & Wire Corp. v. Ruhlin Constr. Co.*, 45 Ohio St. 3d 171, 174 (1989).

independent contractor. For example, in *Arlen*, an employee of an independent contractor hired to deliver newspapers fell asleep behind the wheel while making deliveries and hit the plaintiff's car[30]. The Texas appellate court found that the defendant's control over the delivery times was not enough to impute liability to the defendant, stating that:

> Here, the Chronicle did not control how Valch-Koufski was to deliver the newspapers. The independent contractor, Yarbrough, controlled that. The Chronicle could only order that the work be started and stopped at a particular time, inspect the progress of the deliveries, and receive reports about the deliveries. We conclude that the Chronicle did not have the type of specific control required to impose a duty . . .

Id. at 328.

The Spring Hill court addressed this issue indirectly, finding that it was undisputed that the motor carrier was an independent contractor of the broker/logistics company. Thus, there was no need for the court to separately analyze this issue.

3. No Duty Arises From The Contract Between The Broker/logistics Company And The Motor Carrier.

Plaintiffs also attempted to create a duty based upon provisions in the contract between the motor carrier and the broker/logistics company. More specifically, plaintiffs alleged that because various provisions in the contract were not implemented, the trucking accident occurred. The subject provisions mainly dealt with the performance of the route and quality control evaluations between the contracting parties.

However, in order for contract provisions to create a duty, contract law states that plaintiffs must be parties to or third party beneficiaries of the contract. The Supreme of Court of Ohio has adopted the Restatement 2d with respect to intended and incidental beneficiaries found in Section 302 of the Restatement 2d, Contracts (1981) 439-440.[31] Section 302 states in pertinent part:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:

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[30] *Arlen v. Hearst Corp*., 4 S.W.3d 326 (Tex. App. 1999).

[31] *Hill v. Sonitrol of Southwestern Ohio, Inc*., 36 Ohio St. 3d 36, 39 (1988)

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Further, Comment e to Section 302 states: "[p]erformance of a contract will often benefit a third person. But unless the third person is an intended beneficiary as here defined, no duty to him is created. * * *" In *Hill*, the Supreme Court of Ohio explained the "intent to benefit" test, which is utilized by courts to determine whether a third party is an intended or incidental beneficiary.[32] Under this test, if the promisee, the broker/logistics company, intends that a third party (i.e. the motoring public) should benefit from the contract, then that third party is deemed an "intended beneficiary" who has endorsable rights under the contract. On the other hand, if the broker/logistics company had no intent to benefit a third party, then any third party to the contract is merely an "incidental beneficiary," who has no enforceable rights under the contract.

An analysis of the classification of the plaintiffs was required to determine whether a legal duty had arisen pursuant to the subject contract. Plaintiffs were not parties to the contract. Similarly, plaintiffs were not intended third party beneficiaries of the contract as neither the broker/logistics company nor the motor carrier had any intent to benefit the plaintiffs pursuant to the contract. However, as the plaintiffs were part of the general public which would ultimately benefit from the goods being shipped safely, there is a weak argument that the "intent to benefit" test could be applied. The better, and correct, reasoning is that if this were the case, then every person would be an intended beneficiary to every trucking law contract. Since this would be an absurd result, the plaintiffs could only be considered, at most, incidental third party beneficiaries, leaving them with neither rights nor any duty owed under the contract.

The court adopted defendant's argument and clearly stated that there was no privity of contract between the broker/logistics company and plaintiffs. Further the court saw no evidence nor any legal theory under which to find that plaintiffs were a third party beneficiary to the contract between the motor carrier and the broker/logistics company.

Even if plaintiffs were third party beneficiaries, their attempt to recover under a tort theory by the provisions of the contract would be futile. In reviewing these arguments,

[32] *Id.* at 40.

the court found that it is well settled in Ohio law that a tort action cannot arise under the provisions of a contract.[33]

4. No Duty Arises From Expert Testimony Attempting To Create A Duty.

While it is not unusual for experts to be instrumental in creating issues of fact to overcome summary judgment, they wrongly invade the province of the court when they provide opinions on matters of law such as the existence of a legal duty. While experts often opine that a legal duty exists and occasionally are of the opinion that a new legal duty should be created, it bears discussion here for the simple fact that plaintiffs utilized expert testimony in hopes of overcoming summary judgment by arguing the broker/logistic company owed plaintiffs a new legal duty. However, "an expert's opinions cannot create a duty where no such duty exists." [34] Expert testimony regarding matters of law is not appropriate because the court may not abdicate its role as finder of law.[35]

The Spring Hill court addressed this issue. The Court found that plaintiffs' expert could not create a legal duty and that the expert's testimony would likely not have been admissible.

C. The Motor Carrier Violations Of The FMCSR.

Brokers and motor carriers are defined and distinguished by the FMCSR:

> A "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." [36]
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> A "motor carrier" means "a person providing motor vehicle transportation for compensation." [37]

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[33] *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137 (1996).

[34] *Dickerson v. Kirk*, (Jan. 19, 1999) 12th Dist. No. CA98-09-186, 1999 Ohio App. Lexis 78, at 8.

[35] *Payne v. A.O. Smith Corp.*, 627 F. Supp. 226, 228-229 (S.D.Ohio 1985).

[36] 49 U.S.C. § 13102(2).

[37] 49 U.S.C. § 13102(12).

This distinction is critical because the FMCSR attributes liability for violations of the pertinent regulations to motor carriers, not to brokers. In particular, 49 U.S.C. § 14704(a) provides that motor carriers are to "provide safe and adequate service, equipment, and facilities." This distinction is consistent with the Ohio law, discussed *infra*, which nullifies nearly all *respondeat superior* based claims against parties for the acts of independent contractors they hire such that broker/logistics companies are not liable for the injuries caused by the motor carriers with which they contract.

To get around the *respondeat superior* distinction, plaintiffs advanced a couple of theories by which they sought to either hold the broker/logistics company liable directly for negligence or to prevent the imposition of the general rule that parties are not liable for the tortious acts of their independent contractors.

1. The "De Facto" Conjecture.

Plaintiffs' most notable and novel attempt to avoid the provisions of the FMCSR that shield brokers from the liabilities to which motor carriers are subject was to argue that the broker/logistics company's activities rendered it a *de facto* motor carrier. Plaintiffs contended that a *de facto* motor carrier would be subject to direct liability through a "public franchise" legal theory. They predicated this argument on the Restatement (2d) Torts, § 428. The Restatement (2d) Torts, § 428, as cited by plaintiffs, provides:

> An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.

Plaintiffs then cited a case from West Virginia and noted that courts in states other than Ohio had used this "public franchise" exception to hold motor carriers liable for the tortious acts of independent drivers. However, there were two weak links in plaintiffs' chain of logic. First, the broker/logistics company was a broker, not a motor carrier, which rendered plaintiffs argument irrelevant, and second, the Supreme Court of Ohio had already announced the law regarding "public franchise" liability, a binding authority unfavorable to the plaintiffs and nowhere mentioned by them.

In order to overcome the undisputed fact that the broker/logistics company was not a motor carrier, plaintiffs tried to convince the court that the broker/logistics company should be deemed a *de facto* motor carrier. The gist of plaintiffs' conjecture was that the broker/logistics company had all of the attributes and had assumed all of the duties of a "motor carrier" as that term is defined by 49 U.S.C. § 13102(12), which provides that a "motor carrier" means "a person providing motor vehicle transportation for

compensation."[38] Plaintiffs maintained that because the broker/logistics company's activities encompassed those of a motor carrier, including managing dispatch and routing for independent drivers, and that *activity* was the sort to which the Restatement referred, the court should ignore, for policy reasons, the distinctions between brokers and motor carriers as defined in the FMCSR and deem the broker/logistics company a *de facto* motor carrier.

The broker/logistics company contended that the FMCSR distinctions between brokers and motor carriers were clear and that there was no case law wherein a broker was ever deemed to be a *de facto* motor carrier. Moreover, FMCSR distinctions between motor carriers and brokers make clear that brokers are not liable for violations of the FMCSR by the independent motor carriers with whom they contracted. Lastly, the defense provided the court with a holding by the Supreme Court of Ohio which articulated the "public franchise" exception; ("Where such an operation may be carried out only by permission given by public authority, the relationship cannot be created for the purpose of escaping liability for harm to others which would otherwise attach.")[39] The Ohio "public franchise" exception is materially different from that described in the Restatement. In particular, "permission given by public authority" has been interpreted to mean situations where an activity requires a "permit, license or other public franchise." The defense then reminded the court that the broker/logistics company, as a broker under the FMCSR, was not required to have any license or permit in order to perform its broker service.

The *Spring Hill* Court analyzed plaintiff's *de facto* motor carrier proposition in the context of an exception to the general rule that parties are not liable for the tortious conduct of their independent contractors. The court found that plaintiffs had produced no evidence warranting this exception to the general rule. Importantly, the court was wholly unpersuaded by plaintiff's "public franchise"/*de facto* motor carrier conjecture. In granting summary judgment to the broker/logistics company, the court pointed out that plaintiff had not presented any Ohio authority to support its "public franchise" argument. Noting that it was bound by Ohio law, the court held plaintiffs could not prevail because, simply put, the broker/logistics company was a broker, not a motor carrier, under the FMCSR and was neither required to have a Department of Transportation nor Surface Transportation Board certification. Also the broker/logistics company was not required to provide the permit under which the the motor carrier's truck was operating.

Coincidentally, in a footnote, the court also briefly analyzed plaintiffs' contention under the West Virginia case plaintiffs had cited. The court concluded that even pursuant to the West Virginia law, the broker/logistics company was still due summary

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[38] *Id.*

[39] *May v. Pardee*, 165 Ohio St. 126, 129 (1956) .

judgment because the broker/logistics company had not caused the unlawful conduct and the broker/logistics company neither had knowledge of nor sanctioned the illegal conduct.

2. Aiding And Abetting The Truck Driver's Criminal Conduct.

Plaintiffs also tried to prevent the broker/logistics company from availing itself of the independent contractor rule. They contended that the independent contractor rule was unavailable because the broker/logistics company had somehow aided and abetted the criminal conduct (driving while fatigued) of its independent contractor, the motor carrier, in violating local, state, and federal laws, under FMCSR Part 390.13.

The gravamen of plaintiffs' argument was that the broker/logistics company had not followed procedures in its contract with the motor carrier and had not communicated the timing components in the underlying route design to the drivers. As a result, plaintiffs alleged, the broker/logistics company facilitated the criminal act of driving while fatigued.

The broker/logistics company countered that plaintiffs, as detailed *infra*, were not third party beneficiaries of the contract and, in any case, a tort claim may not arise from a contract. Regarding the aiding and abetting assertion, the defense explained that the standard in both civil and criminal cases was the same[40] and the standard required, among other things, proof that the broker/logistics company intended for the motor carrier driver to drive while fatigued.[41] Finally, the defense pointed out that plaintiffs had no evidence whatsoever showing that the broker/logistics company intended the motor carrier driver to operate his truck while fatigued.

The court agreed that no tort could arise from the contract. Additionally, the court analyzed the substance of plaintiffs aiding and abetting argument related to the alleged failure to communicate underlying route design to the drivers essentially as a claim of negligence. The court found that the statements of the drivers indicated that the route could be completed without pressure and that they knew they could rest without repercussions if fatigued . Further, the court held that any lack of communication by the broker/logistics company could not be the cause of the driver choosing to continue to operate the truck while fatigued.

V. POSSIBLE PREVENTATIVE MEASURES

1. It is advisable to make the independent contractor relationship explicit in the contract.

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[40] *Flowers v. Tandy Corp.*, 773 F.2d 585, 590 (4th Cir. 1985).

[41] *U.S. v. Medina*, 887 F.2d 528, 532 (5th Cir. 1989) .

2. The motor carrier should be able to provide evidence of compliance with driver safety and competency standards.

3. The broker/logistics company should periodically verify that its motor carriers are appropriately certified for compliance with safety and competency standards.

4. Because tort liability cannot be predicated upon a contract, the contract between the broker/logistics company is irrelevant to the case and a prudent practitioner should submit a motion *in limine* to prevent its introduction at trial and any prejudice that might result from its introduction.

5. Designing routes that would likely cause a driver to speed or drive while fatigued could result in a finding that the injuries occurring from a resulting truck-related traffic accident were, in fact, foreseeable and could render a broker/logistics company liable for negligence. For this reason, redesigning routes is warranted when communications with truck drivers indicates completion of the route is creating a time stress. Thus, the qualifications of the route designer are crucial. Consideration should be given to having routes reviewed by an outside logistics consultant and a fatigue expert.

VI. CONCLUSION

Recent federal case law is favorable for shielding broker/logistics companies from liability due to injuries caused by motor carriers and their drivers. However, the result in *Smith v. Spring Hill* could have easily gone the other way in the motion stage. Negligent hiring remains a concern where the motor carrier has a poor safety record or is poorly rated. And the broker/logistics company must be careful to and satisfy itself that the motor carrier is properly qualified, while not exercise the sort of control which would destroy the independent contractor relationship. Finally, the unwary broker/logistics company could design a route where injuries become foreseeable and thereby result in civil liability.