IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

MOUNTAIRE FARMS, INC., a Delaware corporation, Plaintiff,	)
v.	) C.A. No. 03C-10-002-RFS
CARLOS WILLIAMS and MONTY D. HALL, Defendants.	)

Date Submitted: April 22, 2005
Date Decided: April 25, 2005

ORDER

WHEREAS, trial was held on Wednesday, April 6, 2005, with closing argument on Friday, April 22, 2005;

WHEREAS, as a consequence of the pretrial stipulation and by trial, the plaintiff established a *prima facie* case for breach of contract and respondent superior liability against defendant, Carlos Williams (hereafter "Williams");

WHEREAS, on August 3, 2004, default judgment was entered against defendant, Monty D. Hall (hereafter "Hall");

WHEREAS, by agreement, the counterclaim previously filed by Williams was dismissed;

NOW THEREFORE, on this 25th day of April, 2005, the following findings of

fact and conclusions of law are made.

Findings of Fact

_____(1) Mountaire Farms, Inc. (hereafter "Mountaire") hired Williams to deliver produce from its Selbyville, Delaware plant to two locations in New York State on or about February 20-21, 2003.

(2) Williams owned two trucks which he used to haul frozen chicken produce from Mountaire, Perdue Farms and Allen's Hatchery, which are major chicken suppliers.

(3) Williams had been in this business since 1986.

(4) Williams would drive one of the trucks himself and hired a driver to operate the other one.

(5) On or about February 21, 2003, Williams hired Hall to drive Williams' 1999 Freightline Corp. truck. Hall was to pick up frozen chicken produce from Mountaire and to deliver it to New York.

(6) Hall was acting on Williams' behalf to fulfill Williams' contract with Mountaire.

(7) When hiring Hall, Williams met with him personally.

(8) Hall contacted Williams through an advertisement that Williams had placed in a local paper.

(9) Williams hired Hall to pick up and deliver a load of frozen chicken produce on or about February 20, 2003 from one of the three chicken suppliers.

(10) Concerning Mountaire, Williams provided Hall with a CB radio, cell phone, and expense money to keep in communication with him. Hall was to deliver the produce to New York on February 23, 2003.

(11) Hall was to receive a percentage of the load as a salary, and Williams hired him as his employee. Williams' practice was to pay drivers as employees with the use of W-2 forms. Williams intended to withhold social security and other items required by the W-2 form for Hall.

(12) Williams had control over how Hall performed his job. The 1999 Freightliner truck was a valuable piece of equipment. The audio equipment gave Williams the ability to specifically direct Hall. Further, Hall was directed to follow specific routes to the New York destinations in documents delivered to him by Mountaire and known by Williams.

(13) Williams admitted he was subject to the United States Department of Transportation (hereafter "DOT") regulations as a carrier given the use of the 1999 Freightline truck. By necessary implication, Williams knew the truck was of such a size, weight and use to be subject to regulation. *See* The Federal Motor Carrier Safety Regulations in Ch. III of Title 49 of the Code of Federal Regulations.

(14) One regulation required that Hall be given a drug test and Williams was aware of this requirement. *See* 49 C.F.R. §382.301.

(15) Hall was not drug tested.

(16) When hired and picking up the frozen chicken produce, Hall was taking

illegal drugs.

(17) Because Hall was high on illegal drugs, Hall was not able to deliver the frozen chicken produce.

(18) Hall reached New Jersey but returned to New Castle County. He lived in the trailer for about 13 days. His illegal drug use continued over this period of time.

(19) Williams learned that the deliveries had not been made and contacted the police. During the police investigation, Hall's mother advised the officer on or about Thursday, February 27, 2003 that Hall had a drug problem.

(20) A warrant was issued to arrest Hall for the unauthorized use of a vehicle and Hall was arrested on or about March 5, 2003.

(21) At the time of arrest, the produce had spoiled and the value of the loss was $33,373.63.

(22) On April 10, 2003, Hall pled guilty to unauthorized use of a vehicle by unlawfully taking and failing to return Williams' Freightliner in the Court of Common Pleas of the State of Delaware in and for Kent County.

Conclusions of Law

Mountaire charges Williams with breach of contract and with liability for Hall's acts under the doctrine of respondent superior. Considering the course of conduct between Mountaire and Williams and the DOT requirement that carriers such as Williams have drivers drug tested, Williams agreed by implication to use drivers in the delivery of

Mountaire's goods who were competent, reliable and drug free. Because Hall was under the influence of illegal drugs, the delivery of the frozen chicken produce could not be made before spoilage. Further, the drug use prompted Hall to return to Delaware from New Jersey. As a result, Hall pled guilty to unauthorized use of a motor vehicle.

The defense argues that Hall was an independent contractor and that his actions involving drug use and the unauthorized use of the truck, are torts which cannot be Williams' responsibility. This argument seeks to avoid responsibility on grounds of respondent superior. As the parties know, the Supreme Court in *Fisher v. Townsend*, 695 A.2d 53, 58 (Del. 1997) analyzed vicarious liability in this fashion:

(1) "if the principal is the master of an agent who is a servant [i.e., an employee], the fault of the agent if acting within the scope of employment, will be imputed to the principal by the doctrine of respondent superior," and, (2) "an owner or contractor will not be held liable for the torts of an independent contractor which are committed in the performance of the contracted work." That court also recognized certain exceptions. For example, if the owner or contractor retains control over the independent contractor, he is responsible for the torts of that independent contractor.

Some of the factors which are pertinent to determine if one who acts for another is a servant or independent contractor include:

> (a) the extent of control, which, by the agreement, the master may exercise over the details of the work;
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> (b) whether or not the one employed is engaged in a distinct occupation or

business;

(c) the kind of occupation, with reference to whether, in the locality the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(I) whether or not the parties believe they are creating the relation of master an servant; and

(j) whether the principal is or is not in business.

Fisher, 695 A.2d at 59.

I find Hall was Williams' servant and was not an independent contractor. Williams intended to pay wages to Hall with a W-2, unlike the method of payment for an independent contractor. The Freightliner was a substantial piece of equipment, and Williams controlled its use and details of the operation. In *Fisher*, the use of radios was a factor showing control of the work in that case. Here, the cell phone and CB radio given to Hall demonstrated Williams' control and reservation of control over the pick up and delivery of the frozen chicken produce. Williams was a driver himself, and Hall's work was a regular part of Williams' business. If the produce had been delivered, Hall would have been employed by Williams with other jobs. Both Williams and Hall had

commercial driver's licenses, and no evidence suggests that the ability to obtain the license and drive a truck is so specialized that an independent contractor status must necessarily result. Finally, the conduct of Hall and Williams is consistent with a master/servant relationship.

Nevertheless, Defendant Williams argues that even if Hall was a servant, if he acted for his own benefit, then Williams would not be responsible for those actions. Williams cites two cases in support of this argument, *Bauldock v. Davco Food, Inc.,* 622 A.2d 28, 33-34 (D.C. Ct. App. 1993) (finding police officer who arrested person while working as a security guard for a restaurant was acting as an officer and not as a security guard, so that the restaurant was not vicariously liable for assault and battery that occurred during arrest) and *Sawyer v. Humphries*, 587 A.2d 467 (Md. Ct. App. 1991) (finding that where intentional tort committed by an employee was personal or a departure from the purpose furthering the employer's business, it was not within scope of employment). In *Sawyer*, the Court stated, "'[w]here the conduct of the servant is unprovoked, highly unusual, and quite outrageous,'courts tend to hold 'that this in itself is sufficient to indicate that the motive was a purely personal one' and the conduct is outside the scope of employment." 587 A.2d at 471, *citing*, Prosser and Keeton On the Law of Torts.

A Delaware case on this subject is *Draper v. Olivere Paving & Constr. Co.*, 181 A.2d 565 (Del. 1962). This question of whether an employer can be liable for the

intentional torts of an employee becomes one of foreseeability, i.e., the master may be liable for the servant's intended harm if "the act was not unexpectable in view of the duties of the servant." *Id*. at 569. In *Draper*, the Court refused to grant summary judgment because it found a jury could possibly find it not unexpectable that the employee, a traffic director on a construction job, might use excessive force. Under the circumstances of this case, I find that Hall failed to deliver the produce. As an experienced owner and driver, Williams was aware of the risks arising from illegal drug use by drivers and was aware of DOT regulations on this subject. The trip was made during the course of Hall's employment.

Furthermore, this result is supported by the dual purpose doctrine which was summarized by the Supreme Court, in the case of *Wilson v. Joma, Inc*., 537 A.2d 187, 189 (Del. 1988), as follows:

> The dual purpose rule was first articulated in *Ryan v. Farrell*, 208 Cal. 200, 280 p. 945 (1929): "Where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master." This rule was later followed and applied in *Gipson v. Davis Realty Co.,* 216 Cal. App.2d 190, 30 Cal. Rptr. 253 (1963), a case cited and adopted by this Court in *Coates v. Murphy*, Del. Supr., 270 A.2d 527, 528 (1970).
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> From the dual purpose rule it follows that conduct of an employee, although done in part to serve the purposes of the servant or a third person, may be within the scope of employment if the employer's business actuates the employee to any appreciable extent. *Best Steele Bldg., Inc. v. Hardin*, Tex.Civ.App. S.W.2d 122, 1218 (1977). The mere fact that the primary

motive of the servant is to benefit himself or a third person does not cause the act to be outside the scope of employment.

The Supreme Court in the case of *Storm v. Karl-Mil, Inc.*, 460 A.2d 519, 521 (Del. 1983), found:

> In *Children's Bureau v. Nissan*, 42 Del. 209, 29 A.2d 603, 607 (1942), the Superior Court correctly summarized the dual purpose test in the following manner:
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> > An injury may occur in the course of the employment without any essential causal relation between the employment and the injury. The requirements, "in the course of his employment," and "out of *** the employment" must conjoin. The former relates to the time, place and circumstances of the accident; the latter to its origin and cause. 71 C.J. 642 et seq. The relation of the accident to the service is the essential point of inquiry. The question is whether the employer exposed the employee to risk. Service to the employer must, at least, be a concurrent cause of the injury. Where a private purpose and service to the employer coexist, the facts of the case must permit the inference that the journey would have been made even thought the private purpose had been abandoned. The test is whether it is the employment or something else that impels the journey and exposes the traveler to its risks. If the service creates the necessity for the travel, the employee is in the course of his employment, even though, at the same time, he is serving some purpose of his own. On the other hand, if the service has not created the necessity for the journey, if it would not have been made at all except for the private purpose, and would have been cancelled upon its abandonment, the travel and the risk are personal.
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> To state the rule another way:
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> > When a trip serves both business and personal purposes, it is a personal trip if the trip would have been made in spite of the failure or absence of the business purpose and would have been dropped in the event of failure of the private purpose,

> though the business errand remained undone; it is a business trip if a trip of this kind would have been made in spite of the failure or absence of the private purpose, because the service to be performed for the employer would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey.

1 Larson, Workmen's Compensation Law § 18:12.

See also, Vandiest v. Santiago, 2004 Del. Super. Ct. LEXIS 416, at *15, holding:

> Under the dual purpose doctrine, even though an employee is primarily motivated for personal reasons, he may still be working within the course and scope of his employment if the employer's business actuates the employee to any appreciable extent.

Applying the law, I find Williams' business actuated Hall. The trip began in Sussex County, Delaware and benefitted Mountaire. It would have been made regardless of a private purpose. There is a sufficient relationship between the transportation of the produce and the loss.

Furthermore, Williams asks this Court to relieve his liability to Mountaire based on the doctrine of Discharge by Supervening Impracticability of Performance. However, this defense was not established by Williams. The impracticability doctrine holds that

> [w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 261 (1981).

Discharge by reason of impracticability requires the party claiming discharge to prove the following three elements:

1. the occurrence of an event the non-occurrence of which was a basic assumption of the contract;
2. continued performance is not commercially practicable; and
3. that the party claiming discharge did not expressly or impliedly agree to performance in spite of impracticability that would otherwise justify his non performance.

J & G Associates v. Ritz Camera Centers, Inc., 1989 WL 115216, at *4 (Del. Ch.).

First, Williams claims that when he contracted with Mountaire to transport the frozen chicken products to New York, neither he nor Mountaire assumed that Hall, the person Williams hired to deliver the goods, would subsequently abscond with the delivery, resulting in its spoilage. However, this occurrence is not the type of intervening action that the Restatement envisions as excusing contractual performances.

The case law depended on by Williams contains intervening circumstances that were entirely outside the control of the party claiming discharge. For example, Williams relies on *Western Properties v. So. Utah Aviation*, 776 P.2d 656 (1989). In that matter, the Utah Court of Appeals held that a sublessee was not responsible for payments under its lease contract because the fundamental purpose of the contract became impracticable when the City (a third unrelated party) rejected its construction plans on the leased property. *Id.* at 658. In that matter, the sublessee was excused because the impracticability of the contract was not a result of his actions or an anticipated occurrence at the formation of the contract.

Williams also refers to an earlier New Jersey Supreme Court holding that there

should be no liability where a party was prevented from performing its contractual obligations through no fault of its own. *See Directions, Inc. v. New Prince Concrete Co.*, 491 A.2d 1347, 1349 (N.J. Super. Ct. App. Div. 1985). In true cases of impracticability, a party to a contract is unable to perform its obligations because of an intervening and unforeseen circumstance, which it did not cause or expect at the commencement of the contract. This is not the present case.

Here, Williams cannot claim that an intervening circumstance out of his control prevented performance of this contract. Williams chose to entrust Mountaire's goods with Defendant Hall. The employment of drivers to carry loads to their delivery destinations was entirely within Williams' control. The fact that the successful delivery of the shipment failed due to the actions of an employee does not excuse Williams' responsibility for the goods as a carrier.

The second part of the test requires Williams to show that performance of the contract is no longer commercially practicable. It is true that Williams was no longer capable of delivering the goods to their intended destination, given that the goods were completely destroyed by Hall's treatment of the goods. However, the destruction of the goods was a result of actions taken by Williams, therefore impracticability does not apply.

Finally, to assert a defense of impracticability, the party requesting discharge must show that he did not explicitly or implicitly agree to deliver the goods despite the occurrence of the unforeseen circumstance. Williams is unable to show that he did not

have an outstanding responsibility to deliver the goods in spite of Hall's actions. This is because Williams, as a carrier, owes a certain duty to its contractor.

In this regard, the duty of care owed by a carrier depends on whether he is considered a private or common carrier. *See Tri-State Trucking Co., Inc. v. H & H Poultry Co., Inc.,* 1981 Del. Super. Ct. LEXIS 750. Nothing short of an act of God or public enemy will excuse a common carrier where goods are destroyed within its custody.

On the other hand, a "private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case, for hire or reward." *Pennewill v. Cullen*, 5 Del. (5 Harr.) 238, 242 (Del. 1849). The duty of care owed by a private carrier is "to furnish a tight good vessel, suitable to that navigation, and to provide a competent master. This results from his obligation to use ordinary care and diligence to prevent accident; such care as a prudent man would ordinarily take of his own goods." *Id.* Therefore, any losses incurred by a private carrier should be reviewed by an ordinary negligence standard, i.e., was due care exercised in the transportation of goods?

I find Williams had the status of contract carrier. He worked only for three suppliers. Further, Williams did not indiscriminately offer his service to the public at large. *See Tri-State Trucking Co.*

Also, I find Williams agreed to use due care in the selection of Hall as a driver for Mountaire. In the exercise of reasonable care, Williams would have insisted on a drug

test before entrusting Mountaire's goods to Hall. In the exercise of reasonable care, Williams would have required Hall to present proof of negative past drug tests as he represented himself as a commercial driver. Without these steps, a reasonably prudent owner would not entrust the shipment of interstate goods to a driver of a 1999 Freightline. When testifying, Hall used the expression that Williams "apparently" did not know he was using drugs. This was spoken in a disbelieving tone of voice which suggested Williams would have known if the subject was investigated. Moreover, in the exercise of reasonable care, a more thorough background check of Hall would have been made. A cursory check was made by Williams' insurer, and it was reviewed by him. It revealed problems with children, and the names and occupations of Hall's parents were known (a minister and a deacon). These problems can affect a driver's attention and use of illegal drugs. A reasonably prudent owner would have made further inquiry. When asked on February 21, 2003, his mother acknowledged Hall's drug problem.

Considering the foregoing, I conclude Williams breached his contract with Mountaire by failing to employ a reasonably competent driver who was not actively engaged in drug use. I also conclude that Williams is responsible for Hall's conduct under the doctrine of respondent superior. Therefore, judgment is entered for Mountaire against Williams in the amount of $33,375.63 together with pre and post judgment interest from February 22, 2003. Mountaire is awarded costs. Although Mountaire requests legal fees, there is no statutory or contractual basis to award them.

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary
cc: David R. Hackett, Esquire
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