INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
DOCKET NOS. 24-ICA-242; 24-ICA-243; 24-ICA-244

F&R CARGO EXPRESS, LLC
Defendant Below, Appellant

v.

AIDA BETTS, as Administratrix of the
ESTATE OF ADANELA L. SANTANA,
EBONY WHITE, and
EBONY WHITE, as Mother and
Next Friend of JAI'LIYAH BRIDDELL
Plaintiffs Below, Respondents

APPELLANT'S BRIEF

On Appeal from the Circuit Court of Ohio County

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ASSIGNMENTS OF ERROR

(1) The circuit court erred by denying F&R Cargo Express, LLC's Motion for Judgment as a Matter of Law and Renewed Motion for Judgment as a Matter of Law. The circuit court erred in denying the motion because the evidence adduced at trial did not establish an employment or agency relationship between F&R Cargo Express, LLC and Franci Colon-Fermin; therefore, no reasonable jury could have found from the evidence presented at trial that F&R is vicariously liable for the actions of Franci Colon-Fermin.

(2) The Circuit Court erred by denying the F&R Cargo Express, LLC's Motion for New Trial because the verdict is against the clear weight of the evidence and will result in a miscarriage of justice. At trial, the evidence presented clearly establishes that Franci Colon-Fermin was not an agent or employee of F&R when the subject accident occurred; therefore, F&R Cargo Express, LLC cannot be held vicariously liable for Colon-Fermin's actions.

STATEMENT OF THE CASE

This case arises out of a multi-vehicle accident that occurred on April 4, 2021, near Wheeling, West Virginia involving a Penske box truck driven by Franci Colon-Fermin ("Colon-Fermin"), a tractor trailer owned by Continental Express, and a Volkswagen Jetta driven by Adanela Santana ("Santana"). Ebony White ("White") and Jai'liyah Briddell ("Bridell") were passengers in the Jetta driven by Santana. In order to avoid two vehicles on the left shoulder that were partially obstructing the travel lane, the driver of the Continental Express tractor trailer merged across a solid white line into the right lane of travel. Santana was driving in the right lane and slowed down in response to the tractor trailer's merging in front of her. Colon-Fermin was driving behind Santana in the right lane and rear ended the Jetta. This collision pushed the Jetta into the rear of the tractor trailer, killing Santana. White and Briddell were injured in the accident.

The estate of Santana, White, and Briddell (collectively referred to as "Appellees") filed three separate lawsuits naming multiple defendants. Prior to trial, Appellees settled their claims with all named defendants except for their claims against F&R Cargo Express, LLC ("F&R"), and Colon-Fermin. Appellees brought claims against F&R for negligence, claiming that Colon-Fermin was an employee of F&R and was acting within the scope of his employment when the accident occurred; therefore, Appellees contended that F&R is vicariously liable to Appellees for the alleged negligence of Colon-Fermin.

This case was tried from March 11 through March 14, 2024. The evidence adduced at trial revealed that Colon-Fermin was not an employee of F&R, and F&R had no more of a master-servant relationship than any individual does with an Uber driver or a moving company. Indeed, as Appellees freely admitted during an on-the-record conference with the circuit court prior to commencing the second day of trial, the only witnesses who provided any evidence on the employment relationship between F&R and Colon-Fermin were Colon-Fermin and F&R principal, Francisco Rincon ("Rincon").[1] [App. 000715:3-8.] (Appellants stated that a third witness might provide relevant evidence to the topic of control, but this potential testimony was not subsequently admitted. [App. 000715:3-8; 0000778:15-000783:7.]) Both individuals testified that Colon-Fermin had previously worked for F&R but was not an employee at the time of the accident.

The evidence adduced at trial established that Colon-Fermin was paid a flat fee for this particular job, had no regularly scheduled work with F&R, had his own business in refuse pickup, was free to engage in other work, did not receive benefits from F&R, did not receive a W-2 from F&R, chose the route he was driving himself, and was not given a time frame by which to deliver

[1] During this conference, the circuit court articulated concerns that Appellees had not presented any evidence on the issue of control. [App. 000716:9-16.] After this conference, Appellees did not present any additional evidence regarding the employment relationship between F&R and Colon-Fermin.

the items. The evidence further conclusively established that F&R and Colon-Fermin did not have any employment relationship for at least 2 to 3 years prior to the subject accident, Colon-Fermin was not an employee for F&R in 2021, F&R did not train Colon-Fermin, Colon-Fermin was free to do other work, Colon-Fermin was free to refuse to drive on this particular trip, F&R did not rent the subject Penske truck, F&R did not load the subject Penske truck, and F&R did not add Colon-Fermin as a driver for the subject Penske truck.[2]

F&R is in the business of sending items such as food, clothes, and school supplies to families in the Dominican Republic. [App. 000665: 7-20.] F&R customers typically send the items to F&R's warehouse in Allentown, Pennsylvania. [App. 000665:21-24; 000666:1-6.] In April 2021, an F&R customer, Jose Hernandez ("Hernandez"), rented a truck from Penske with the intention of driving the truck himself from Indianapolis, Indiana to Allentown, Pennsylvania so that F&R could ship clothing and food from Hernandez to his family in the Dominican Republic. [App. 000674:15-24; 00675:1-6.] At some point thereafter, Hernandez contacted Rincon, the owner of F&R, and asked Rincon if he knew anybody that could bring the items from Indianapolis to Pennsylvania. [App. 000676:4-8.]. Rincon told Hernandez that he "knew a man that used to do trips for me three years ago, five years ago, and if he could, I could introduce him or connect him." [App. 000676:9-13.] After that point, F&R's only involvement in relation to Colon-Fermin's trip was that it purchased a plane ticket for Fermin to fly to Indiana. [App. 000676:11-16.] Hernandez reimbursed F&R for the plane ticket. [App. 000676:14-16.] F&R did not drive Colon-Fermin to the

[2] Nor would it have been possible for F&R to add Colon-Fermin as a driver on the subject Penske truck because F&R did not rent the truck. The evidence conclusively established that an F&R customer, Jose Hernandez, rented the subject Penske truck with the intent to drive it from Indiana to Pennsylvania to deliver items to F&R for F&R to arrange shipment to the Dominican Republic. When Hernandez became unavailable, he asked Francisco Rincon whether Rincon knew someone who could drive the truck. Rincon recommended Colon-Fermin. Per Rincon's testimony, he arranged for Colon-Fermin to "talk to the people who were sending the merchandise [Hernandez], and [F&R] couldn't control what he did then." [App. 000648:2-4.]

airport and does not know how he arrived at the airport. [App. 000676:17-21.] Hernandez rented a Penske truck for the trip but nobody from F&R was involved in renting the truck or paying Hernandez for the rental. [App. 000676:22-24; 000677:1-12.] Nobody from F&R directed Hernandez to rent the Penske truck. [App. 000677:10-12.]

Further, regarding Colon-Fermin, F&R did not give him money for food during the trip. [App. 000677:14-21.] F&R did not give him money for gas. [App. 000677:22-24.] F&R did not provide Colon-Fermin with a credit card to use during the trip. [App. 000678:1-3.] F&R did not tell Colon-Fermin how to drive from Indiana to Pennsylvania and did not have any control over the routes that he took. [App. 000678:7-12.] F&R was not involved in loading the Penske truck and was unaware of who loaded the Penske truck. [App. 000678:13-19.] F&R did not instruct Colon-Fermin that he needed to arrive in Pennsylvania by a certain date. [App. 000678:20-22.] Rincon concluded his testimony by affirming that Colon-Fermin did not work as an employee for F&R at any point in 2021. [App. 000679:3-5.]

Colon-Fermin did not appear at trial, but portions of his deposition were read into the record. [App. 000631:10-15; 000635:15-17; 000636:3-8; 000446-000472.] Colon-Fermin's testimony was in accord with Rincon's testimony in that Colon-Fermin denied that he was an employee of F&R when the subject accident occurred.

Specifically, Colon-Fermin confirmed that, on the morning of April 4, 2021, Rincon did not take him to the airport. [App. 000467:87:1-3.]. He flew through Atlanta to Indianapolis. [App. 000454:42:12-15.] Hernandez picked up Colon-Fermin at the airport in Indianapolis when he arrived and drove Colon-Fermin to a house to drop him off at the truck. [App. 000454:42: 21-24; 43:4-5.] When Colon-Fermin arrived at the house, the truck was already loaded. [App. 000454:45:11-13.] Colon-Fermin testified that he checked the tires and the load springs on the truck and then

drove it away. [App. 000455:46:12-17.] Colon-Fermin made his own decisions on how to travel from Indianapolis to Allentown, and Rincon did not direct him to take any route or even comment on the route:

> Q. … Sir, when you started your trip back from Indianapolis toward Allentown, did you make your own decisions on how to make that travel?
>
> A. Yes, sir.
>
> …
>
> Q. Did Mr. Rincon, in any way, tell you what roads to take in order to take the load from Indianapolis to Allentown?
>
> A. No, sir.
>
> Q. So you were free to make your own decisions on that route you took?
>
> A. Seventy (70) and 470.

[App. 000465:82:13-83:11.] Colon-Fermin was involved in the subject accident while driving from Indianapolis to Allentown.

Years prior to this accident, Colon-Fermin worked for F&R "for about a year"; however, it was not in 2020 or 2021. [App. 000450:29:2-14.] Colon-Fermin recognized the difference between his limited purpose task in April 2021 and when he was an F&R employee:

> Q. So do you think you worked – that you transported goods for F&R Cargo at the time of the accident and the year preceding that?
>
> A. No, it had been several years since I had not [sic] done any work for them. But since they knew me, they asked me to go and get that truck, and I went and got that truck.

[App. 000451:30:1-7.] Further, Colon-Fermin testified that he did not have a job title with F&R. [App. 000451:31:6-7.] He did not receive any training from F&R, and he was never provided training from F&R on the operation of trucks. [App. 000451:32:15-17; 33:20-22.] Colon-Fermin

never received a W-2 from F&R, and he never received benefits from F&R. [App. 000465:84:1-15.] Colon-Fermin had no regularly scheduled work with F&R. [App. 000465:85:13-15.] The only communication he had with F&R about the shipment on April 4, 2021, was simply from Rincon asking him "to go and pick up that truck. That's it."[3] [App. 000467:87:12-18.]

At the close of the Appellee's evidence, F&R made a motion for judgment as a matter of law pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure. The circuit court denied this motion.

The verdict form submitted to the jury first asked the jurors: "Do you find more likely than not that Franci J. Colon-Fermin was acting as an agent on behalf of F&R Cargo at the time of the crash with Plaintiffs?" This first question was followed by the instruction: "If your response is NO then move to Question 3. Skipping question 2." The second question it presented to the jury was: "Do you find more likely than not that Defendant F&R Cargo Express, LLC failed to use reasonable care in its hiring of Franci J. Colon-Fermin, and its negligent hiring of Franci J. Colon-Fermin was a proximate cause the injuries suffered by the Plaintiffs?" The jury answered each question in the affirmative, and a judgment consistent therewith was entered by the circuit court. [App. 000057; 000050-000052.]

On March 29, 2024, by written motion, F&R renewed its motion for Judgment as a matter of law pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure and, alternatively, made a motion for a new trial pursuant to Rule 59(a) of the West Virginia rules of Civil Procedure.

[3] There is a dispute as to whether Colon-Fermin was compensated for the subject trip. Colon-Fermin testified that he was paid $400, which he contends was a partial payment. [App. 000453:38:11-16.] F&R, through its designee, testified that it did not pay Colon-Fermin for the subject trip. This dispute is not relevant to whether an employment relationship existed as it does not go to the power of control. [*Paxton v. Crabtree*, 184 W.VA. 237, 244, 400 S.E.2d 245, 252 (1990) ("payment of compensation" and "power of control" are separate factors; ergo evidence of compensation is not, in and of itself, evidence of possessing the power to control).]

[App. 000065-000076.] F&R argued that there was no evidence presented during trial indicating that F&R had any power to control Colon-Fermin and therefore the evidence was insufficient to support the jury's verdict. The trial court denied these motions, and this appeal followed. [App. 000002-000016.]

SUMMARY OF ARGUMENT

Appellees failed to produce sufficient evidence to conclude that Colon-Fermin was an employee or agent of F&R. The evidence at trial is bereft of any indication that F&R could control how Colon-Fermin performed the task he was hired to do. Because the "power to control" is the determinative factor in analyzing whether or not one is an employee or an independent contractor and it is impossible to be an employee when the alleged employer does not have power to control, the trial court should have granted F&R's renewed motion for judgement as a matter of law. *Paxton v. Crabtree*, 184 W. Va. 237, 244, 400 S.E.2d 245, 252 (1990); *Yates v. Univ. of W. Va. Bd. Of Trs.*, 209 W.Va. 487, 493, 549 S.E.2d 681, 687 (2001). Alternately, for substantially the same reasons, because the verdict was against the weight of the evidence the trial court should have granted F&R's motion for a new trial. *In re State Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 126, 454 S.E.2d 413, 420 (1994).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate under Rule 19 of the West Virginia Rules of Appellate Procedure because this case involves an error of the application of settled law and a result against the weight of the evidence.

ARGUMENT

A. Standard

This Court "'review[s] de novo . . . the denial of the [the judgment as a matter of law]' made pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure." *Yates v. Univ. of W. Va. Bd. Of Trs.*, 209 W. Va. 487, 493, 549 S.E.2d 681, 687 (2004) (omission and second alteration in original) (quoting *Adkins v. Chevron, USA, Inc.*, 199 W. Va. 518, 522, 485 S.E,2d 687, 691 (1997)). "[A] judgment as a matter of law should be granted at the close of the evidence when, after considering the evidence in the light most favorable to the nonmovant, only one reasonable verdict is possible." *Id.* (citing *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 481 n. 6, 457 S.E.2d 152, 158 n.6 (1995)). Judgment notwithstanding the verdict is available when "with respect to an issue essential to a plaintiff's case, there exists no legally sufficient evidentiary basis for the jury to find in favor of the plaintiff." *Barefoot*, 193 W. Va. At 481, 457 S.E.2d at 158. An appellate court's task in reviewing a trial court's denial of a motion for judgment as a matter of law

> is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below . . . . If on review, the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation [an appellate court] to reverse the circuit court and to order judgment for the appellant.

*Id.*at 482, 159 (quoting Syl. Pt 1, *Mildred L.M v. John O.F.*, 192 W.Va. 345, 452 S.E.2d 436 (1994)).

This Court "reviews the ruling of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard," and this Court "review[s] the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to de novo review." *Pickens v. Tribble*, 236 W.Va. 670, 676, 783 S.E.2d 310, 316 (2016) (quoting Syl. Pt. 1 *Burke-Parson's-Bowlby Corp. v. Rice*, 230 W.Va. 105, 736 S.E.2d 338 (2012)).

B. Discussion

1. The evidence at trial did not demonstrate that Colon-Fermin was an employee of F&R.

The evidence adduced at trial failed to establish that an employer-employee relationship existed between F&R and Colon-Fermin. All of the evidence indicated that F&R did not exercise control over Colon-Fermin on or immediately prior to the April 4, 2021, motor vehicle accident. Absent control, there is not an employment relationship.

To establish vicarious liability, Appellees bore the burden of proving that Colon-Fermin was the employee of F&R. *See Roof Serv. Of Bridgeport, Inc., v. Trent*, 244 W.Va. 482, 494, 854 S.E.2d 302, 314 (2020). The question as put to the jury on the verdict form was whether "Colon-Fermin was acting as an agent on behalf of F&R Cargo at the time of the crash with Plaintiffs?"

In assessing respondeat superior liability, an independent contractor is not an agent (nor employee). *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 625-26, 225 S.E.2d 218, 221 (1976) (quoting *Carrico v. West Virginia Cent. & P. R'y Co.*, 39 W.Va. 86, 92, 19 S.E.571, 573 (1894) ("[I]s he an independent contractor, or only an agent or representative of the employer in the particular case?"); *Robertson v Morris*, 209 W.Va. 288, 290-91, 546 S.E.2d 770, 772-73 (2001) (citing *Pasquale v. Ohio Power Company*, 187 W. Va. 292, 418 S.E.2d 738 (1992) ("[W]hile one may be responsible for physical harm caused to his or her agent or employee, the Court has also recognized that, as a general proposition, one who hires an independent contractor is not responsible for injury resulting from an act or omission of the contractor or the contractor's servant."). Under West Virginia law, "one of the essential elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent." *All Med, LLC. v. Randolph Eng'g Co.*, 228 W.Va. 634, 639, 723 S.E.2d 864, 869 (2012) (quoting Syl. Pt. 3, *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994)). In *All Med LLC. V. Randloph Eng'g CO.*, the Supreme Court of Appeals cited *Paxton's* four-part test to

determine whether one is an employee or independent contractor in conjunction with this rule requiring the existence of control for a principal-agent relationship to exist. *Id.* Significantly, the fourth and "determinative" *Paxton* factor is the "power of control". *Paxton v. Crabtree*, 184 W.Va. 237, 244, 400 S.E.2d 245, 252 (1990) (quoting *Naccash v. Burger*, 223 Va. 406, 418-19, 290 S.E.2d 825, 832 (1982)). Just as one does not control the activities of an independent contractor, one does not control the actions of a non-agent, and if one controls the actions of another they are not an independent contractor, but rather an agent. Therefore, because status as an agent and status as an independent contractor are mutually exclusive, and because the jury was asked to determine whether Colon-Fermin was an agent of the F&R, any evidence that Colon-Fermin was an independent contractor does not support the verdict.

In establishing an employer-employee relationship, West Virginia law contemplates a variety of factors. Syl Pt. 5, *Cunningham v. Herbert J. Thomas Mem. Hosp. Ass'n,* 230 W. Va. 242, 737 S.E.2d 270 (2012) (internal citations omitted). The analysis required by the Supreme Court of Appeals of West Virginia considers four factors: (1) selection and engagement of the servant; (2) payment of compensation; (3) power of dismissal; and (4) power of control. *Id*. at 249, 277 (internal citation omitted). While no single factor was dispositive of the issue, the fourth factor—power of control—is determinative. *Id*. *See also*, *Paxton*, 184 W. Va. at 244, 400 S.E.2d at 252). To be clear, an employer need not have surrendered all control. *Id*. at 251, 279. For example, an owner engaging an independent contractor is permitted to retain broad general powers of supervision and control to ensure satisfactory performance of a job. Our Supreme Court has held,

> An owner who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the contract--including the right to inspect, to stop the work, to make suggestions or recommendations as to the details

> of the work, or to prescribe alterations or deviations in the work--without changing the relationship from that of owner and independent contractor, or changing the duties arising from that relationship.

Syl. Pt. 9, *id.* (quoting Syl. Pt. 4, *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 524 S.E.2d 688 (1999)).

"The fourth element of the test, power of control, is the determinative factor in a master-servant relationship analysis." *Id. at* 250, 278 (2012). "In determining whether a workman is an employee or an independent contractor, the controlling factor is whether the hiring party retains the right to control and supervise the work to be done." *Id.* at 251, 279 (quoting Syl. pt. 2, *Myers v. Workmen's Comp. Comm'r*, 150 W.Va. 563, 148 S.E.2d 664 (1966)).

The United States District Court for the Southern District of West Virginia has applied the Supreme Court's analysis in cases similar to the case at bar where the question presented was whether a driver transporting goods was an employee of a company. In *Gilley v. C.H. Robinson Worldwide, Inc.*, 2021 U.S. Dist. LEXIS 161786, (S.D.W. Va. Aug. 26, 2021), the plaintiffs, who were family members of individuals who died in a collision between a tractor-trailer and a passenger vehicle, sued the driver of the tractor-trailer, his employer, and C.H. Robinson ("Robinson"), who was the broker for the shipment. *Id*. at *3-4. Similar to the allegations in this case, the plaintiffs asserted against Robinson causes of action for vicarious liability and negligent selection. *Id*. at *5. Robinson moved for summary judgment on the grounds, inter alia, that it could not be held vicariously liable for the actions of the driver and the driver's employer, who were independent contractors. *Id*. The plaintiffs alleged that Robinson maintained a right to control because the driver's employer did not take jobs from other brokers, because the plaintiffs' expert opined that a contract suggested control, because the contract required the driver's employer to use a food-grade trailer, not mix shipments and report damages or discrepancies, because Robinson

required the driver to call Robinson before and after pickup, before and after delivery, and every morning throughout the trip, because the driver was required to call if he experienced problems along the way, because Robinson was listed on the bill of lading as the carrier, because Robinson tracked the load, and because the contract specifically warned that "failure to complete any terms and conditions on this shipment may jeopardize or result in loss of future business opportunities with C.H. Robinson and/or cancellation of the C.H. Robinson carrier contract." *Id*. at *30-31.

Despite these contractual requirements, Robinson's ability to cancel the contract, and Robinson's ability to refuse work in the future, the District Court was "convinced that, although it is close, these facts are insufficient to support a reasonable inference of Robinson's right to control the carrier or driver." *Id*. at 31. The District Court relied upon two similar cases. In *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2003), the United States District Court for the District of Maryland analyzed a case involving a collision between a tractor-trailer and a passenger vehicle, and Robinson was again the broker. *Id*. at 540. The plaintiffs argued that Robinson exerted sufficient control to be held vicariously liable because the contract discussed handling and inspection of the load and required that the carrier report problems uncovered during inspection, because Robinson dispatched the driver and directed him to pick up and deliver the load at specific times and gave him directions, and because Robinson required periodic calls from the driver and gave the driver a number to call in the event that a problem arose. *Id*. at 543-45. The District Court found these facts insufficient to support a finding that the carrier was subject to Robinson's control:

> There is no evidence that Robinson directed or authorized [the driver] to drive in excess of the maximum allowable hours or that Robinson had any control whatsoever of the manner in which [the driver] conducted his work. Robinson did not have the power to fire [the driver] 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 [the driver] on incidental details necessary to accomplish that goal is not enough to

> subject Robinson to liability for [the driver]'s negligent acts during the course of the shipment when Robinson had no control over [the driver]'s movements.

Id. at 546.

The District Court in *Gilley* also found the decision in *Jones v. C.H. Robinson Worldwide*, Inc., 558 F. Supp. 2d 630 (W.D. Va. 2008), to be persuasive. In *Jones*, the plaintiff offered the following facts to establish Robinson's control of the carrier:

> Robinson required all drivers to call in to Robinson (1) when dispatched to pick up a load; (2) when the driver arrived at the pick up address; (3) when the trailer was loaded and the freight checked by the driver; (4) during the actual transport of the load for status updates; and (5) when the driver arrived at the delivery address. Drivers also called in to report any problems or issues that arose during the transport of the load, including equipment problems, traffic or delays, or needs for advances through Robinson's T-Chek System. In addition, Robinson had the ability to terminate a carrier's right to transport a load, or "bounce" the load. Finally, Jones contends that Robinson exercised control over small carriers . . . because they were more financially dependent on Robinson through the T-Chek System, as well as its Quick Pay plan, than larger carriers would have been.

Id. at 637. Despite these facts, applying Virginia's independent contractor test,[4] the District Court found that "Robinson did not exercise a sufficient degree of control over the carrier so as to convert their contractual relationship to one of employer-employee." *Id*. at 638.

F&R's connection to Colon-Fermin is significantly more tenuous than Robinson's connection to any of the carriers in *Gilley*, *Schramm*, and *Jones*. At the time of the subject trip, Colon-Fermin had not done any work for or on behalf of F&R for several years. During the subject trip, Colon-Fermin operated the truck without any instructions, directions, directives, or mandates

[4] The Virginia independent contractor test is, for all intents and purposes, identical to West Virginia's test: "In determining whether an entity is an independent contractor or employer of another, a court must examine the following factors: (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power of control. *See Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 377 S.E.2d 589, 594-95, 5 Va. Law Rep. 1809 (Va. 1989). The fourth factor, power of control, is determinative. *Id*. However, the employer need not actually exercise this control; the test is whether the employer has the power to exercise such control. *McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 486 S.E.2d 299, 301 (Va. 1997)." *Jones*, 558 F. Supp. 2d at 638.

from F&R. Colon-Fermin chose the route, and there is no evidence that F&R controlled Colon-Fermin's stops or speed. Moreover, the evidence at trial confirmed that F&R asked Colon-Fermin if he could drive the truck back for Hernandez. Colon-Fermin was free to accept or decline the trip. At the time of the trip, Colon-Fermin worked for himself and was free to engage in other work as he saw fit. F&R had no ability to direct Colon-Fermin to drive the Penske truck, and did not control the method (or any other aspect) upon which he operated the Penske truck. F&R had no ability to prevent or rescind any permission given to Colon-Fermin to operate the Penske truck. F&R had no control over the manner in which Colon-Fermin conducted his work and did not have the power to fire Colon-Fermin. Unlike Robinson, F&R did not require Colon-Fermin to call if there were issues, to check in each morning, and F&R did not monitor his location. F&R did not even have the right to control the ultimate result. The trial transcript is replete with testimony that Colon-Fermin was free to deliver the items when Colon-Fermin saw fit.

On the date of the accident at issue, Colon-Fermin went to the airport without F&R or Rincon giving him a ride and was picked up in Indianapolis by Hernandez, who is not employed by F&R. Hernandez took Colon-Fermin to the home of Maria Santana, who is not employed by F&R. The truck rented by Hernandez was loaded by individuals unknown to F&R. F&R was not involved in selecting the truck, renting the truck, or loading the truck. Colon-Fermin chose his own route, stops, and speed. There is no evidence to suggest that he was required to check in with F&R. Simply stated, F&R had no more of a master-servant relationship than any individual does with an Uber driver or a moving company. The evidence at trial did not establish the determinative factor for an employment relationship to exist – control.

The question presented by this case is far from novel. A litany of opinions from numerous jurisdictions recognize that, when a principal does not exercise control over a driver's means and

methods, the principal is not liable for the acts of the driver. *See, e.g.*, *Constantine v. City of New York*, 188 A.D.3d 640 (N.Y. 2020) (upholding an order granting summary judgment and finding no employment relationship when the company did not own the truck alleged to have caused the plaintiff's injuries and did not exercise the requisite control over the driver); *Tate v. Progressive Sec. Ins. Co.*, 4 So. 3d 915 (La. 2009) (upholding a ruling that a truck driver was an independent contractor even though the truck driver took direction from the company as to where to deliver his loads on a daily basis but the truck driver had not worked for anyone else for several years, did not have a written contract, was paid by the load, was free to work elsewhere, did not have taxes withheld, did not receive employee benefits, and could choose not to work for the company on any particular day without having to call and report his absence); *McLaine v. McLeod*, 291 Ga. App. 335, 661 S.E.2d 695 (Ga. Ct. App. 2008) (upholding summary judgment in favor of a trucking company, concluding that the evidence of its limited involvement in directing how its goods were shipped was insufficient as a matter of law to impose vicarious liability on it for the driver's negligence); *Walker v. Martin*, 887 N.E.2d 125 (Ind. Ct. App. 2008) (affirming summary judgment in a company's favor when the company did not own the truck, the driver paid for fuel, insurance, and maintenance, and the driver determined the route and the manner in which the items were loaded); *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (Neb. 1997) (affirming an order granting summary judgment in favor of a rancher because the rancher did not control the means and methods by which the driver performed the work, including the manner in which the driver operated the tractor-trailer and the route the driver took); *Shoemaker v. Elmhurst-Chicago Stone Co.*, 273 Ill. App. 3d 916, 652 N.E.2d 1037 (Ill. Ct. App. 1994) (reversing a judgment in favor of the plaintiffs against a corporation because the corporation was not the employer of the truck driver when the corporation did not have the right to control the manner in which the truck driver

performed his job of hauling loads, did not pay the truck driver, and could not hire or fire the truck driver); *Adams v. Times-Picayune Pub. Corp.*, 418 So. 2d 685 (La. Ct. App. 1982) (upholding summary judgment when the company exercised no supervision or control over the truck driver, and the driver was responsible for the manner in which he distributed/sold the items in the truck); *Flowers v. U.S.S. Agri-Chemicals*, 139 Ga. App. 430 (Ga. Ct. App. 1976) (upholding summary judgment where the driver decided when he would work, the day and time he would make deliveries, what routes he would use, what stops, if any, he would make, and how he would mechanically operate the vehicle); *Kaniewski v. Warner*, 12 Mich. App. 355, 163 N.W.2d 34 (Mich. Ct. App. 1968) (summary judgment affirmed when the company was not the owner of the truck and did not exercise supervisory authority over the driver despite the fact that the driver hauled only the company's produce for several months prior to the accident); *Gross v. Eustis Fruit Co.*, 160 So. 2d 55 (Fla. Ct. App. 1964) (upholding summary judgment in favor of company when the driver was free to control the details of his work transporting and selling the fruit); *Smith v. Gennett*, 385 S.W.2d 957 (Ky. Ct. App. 1964) (upholding summary judgment where the company did not have control over the driver's route or manner and method of hauling); *Christensen v. Builders Sand Co.*, 180 Kan. 761, 308 P.2d 69 (Kan. 1957) (overruling a trial court's denial of a demurrer where the company did not own the trucks, the driver was hired to haul sand from the company's place of business, the driver chose whether to work, the route to take, and the company exercised no supervisory capacity over the driver); *Clarke v. Hernandez*, 79 Cal. App. 2d 414, 179 P.2d 834 (Cal. Ct. App. 1947) (reversing judgment in favor of the plaintiffs where a company who hired a truck driver to deliver onions did not control the means by which the result was accomplished, could not fire the driver, and did not exercise complete authoritative control of the mode and manner in which the work was performed); *cf.*, *Barber v. Going West Transp., Inc.*, 134

N.C. App. 428, 517 S.E.2d 914 (N.C. Ct. App. 1999) (finding a truck driver was an employee of a corporation, not an independent contractor, because she was paid according to units of time, she was classified as an employee for tax purposes, and the trucks were owned, insured, and regulated by the corporation); *Towers v.. Watson Bros. Transp. Co.*, 229 Iowa 387, 294 N.W. 594 (Ia. 1940) (where transportation company instructed truck driver what route to take, where to report, and that he would receive directions about his return load, and truck driver operated under company's permit and his truck was covered by company's insurance, driver was employee, not independent contractor, and was covered by workers' compensation insurance).

The complete absence of any evidence establishing F&R's power to control Colon-Fermin meant that "only one reasonable verdict [was] possible." *Yates*, 209 W.Va. at 493, 549 S.E.2d at 687 (citing *Barefoot*, 193 W. Va. at 481 n. 6, 457 S.E.2d at 158 n.6). Appellees presented no evidence that F&R could control Colon-Fermin's actions.[5] Thus, Appellees failed to meet their burden of proof, and the verdict delivered by the jury was not supported by the facts. As such, the trial court erred in denying F&R's renewed motion for judgment as a matter of law.

2. Because the verdict was against the weight of the evidence the trial court should have granted F&R's motion for a new trial.

For the same reason that there was no evidence F&R controlled Colon-Fermin, the trial court should have granted F&R's motion for a new trial.

[5] Furthermore, the evidence at trial was insufficient to even establish the existence of an independent contractor relationship. There was in fact insufficient evidence to show that Colon-Fermin was in any relationship with F&R Cargo whatsoever. The evidence showed that F&R Cargo simply assisted Hernandez in hiring Colon-Fermin to transport Hernandez's shipment to F&R Cargo. Nevertheless, if Colon-Fermin's testimony that Rincon was the one who spoke to him on the phone about doing the job and that F&R gave him $400 in cash is taken as evidence of some relationship existing between F&R Cargo and Colon-Fermin, that does not change the fact that no evidence indicated F&R had the power to control Colon-Fermin.

"If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial." *In re State Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 126, 454 S.E.2d 413, 420 (1994).

> In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Gillingham v. Stephenson, 209 W.Va. 741, 747, 551 S.E.2d 663, 669 (2001).

While a circuit court's decision is reviewed for abuse of discretion, and "the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight" here "it is clear that the trial court has acted under some misapprehension of the law or the evidence." *Id.* (quoting Syl. pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976)). As explained above and incorporated here by reference there simply was no evidence presented that indicated F&R controlled Colon-Fermin. There was no conflicting evidence on this point.[6] The evidence, at most, demonstrated that Colon-Fermin was an independent contractor. That F&R had the power to control Colon-Fermin is not a reasonable inference from the facts presented here. If it were, this Court would be in danger of finding that it is impossible to hire an independent contractor to transport goods on the public highways of West Virgina. Absurd results are of course disfavored in the law as evidenced by the established principles of statutory and contractual construction requiring avoidance of absurd results. *See Charter Communs. Vi v. Cmty.*

[6] Although there may be conflicting evidence about whether Hernandez or F&R engaged Colon-Fermin to drive the truck, resolving this conflict in favor of the Appellees by finding that F&R, rather than Hernandez, engaged Colon-Fermin does not affect the determination of whether F&R controlled Colon-Fermin.

Antenna Serv., 211 W.Va. 71, 77, 561 S.E.2d 793, 799 (2002); *Dunbar FOP, Lodge 119 v. City of Dunbar*, 218 W. Va. 239, 244, 624 S.E.2d 586, 591 (2005).) Taking the evidence in the light most favorable to the Appellees, F&R asked Colon-Fermin to drive a truck from Indianapolis to Allentown in exchange for a cash payment. F&R directed him when and where to go to find the truck. F&R told him where to deliver the truck. F&R also paid for his plain ticket and booked it on a particular day. It is not a reasonable inference from these facts that F&R controlled Colon-Fermin. Anyone contracted to transport goods must be told where the goods to be transported are and where they are to be transported to. Otherwise, we are faced with the absurdity of parties contracting to transport unknown goods from one unknown location to another unknown location. Simply providing this description of the work to be performed cannot constitute control. Actual evidence indicating F&R had the power to tell Colon-Fermin how to perform the work he had contracted to do, or facts allowing that inference to be drawn, were necessary and not present.

Because there was no evidence of control, the verdict is against the weight of the evidence and the circuit court abused its discretion in denying F&R's motion for a new trial.

CONCLUSION

WHEREFORE, Appellant, F&R Cargo Express LLC, respectfully requests that this Court reverse the trial court's order denying its Motion for Judgment as a Matter of Law and Renewed Motion for Judgment as a Matter of Law and remand this case to the trial court with instructions to direct a verdict in favor of F&R Cargo Express LLC because there was insufficient evidence to support a jury determination of an employment relationship between F&R Cargo Express LLC and Franci Colon-Fermin.

F&R CARGO EXPRESS LLC,
By Counsel,

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
DOCKET NOS. 24-ICA-242; 24-ICA-243; 24-ICA-244

F&R CARGO EXPRESS, LLC
Defendant Below, Appellant

v.

AIDA BETTS, as Administratrix of the
ESTATE OF ADANELA L. SANTANA,
EBONY WHITE, and
EBONY WHITE, as Mother and
Next Friend of JAI'LIYAH BRIDDELL
Plaintiffs Below, Respondents

CERTIFICATE OF SERVICE

I, Caleb B. David/Michael D. Dunham, counsel for Appellant, F&R Cargo Express LLC, do hereby certify that on this 16th day of September 2024, the foregoing ***Appellant's Brief*** was served via U.S. mail and by filing with the Court's e-filing system, File&Servexpress, to the following counsel:

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