IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
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

RESPONDENTS' JOINT BRIEF

On Appeal from the Circuit Court of Ohio County

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STATEMENT OF THE CASE

Defendant F&R Cargo is a cargo shipment company whose business model is to ship goods primarily from its warehouse in Allentown, Pennsylvania to the Dominican Republic.[1] At the time of the accident in 2021, F&R Cargo had clients in Indiana, New Jersey, and Pennsylvania who would pay F&R Cargo to ship goods to family and friends back home in the Dominican Republic.[2] To facilitate this, F&R Cargo, through its owner Francisco Rincon, would oftentimes send someone on its behalf to the client's location to transport the goods in a rental truck back to F&R Cargo's warehouse in Allentown, Pennsylvania.[3]

Prior to the events giving rise to this cause of action, F&R Cargo engaged and selected Franci J. Colon-Fermin to transport goods to F&R Cargo's facility as an agent and employee of F&R Cargo.[4] During this selection process, F&R Cargo checked Franci J. Colon Fermin's driver's license, ran his driver's history, administered a drug test, and trained him.[5] For each occasion that Franci J. Colon-Fermin transported goods on F&R Cargo's behalf prior to 2021, F&R Cargo would pay Mr. Fermin $700 in cash, pay for his plane ticket, pay for his food, and pay for his gas.[6] After each payment, F&R Cargo prepared a 1099 reflecting the cash it paid to Franci J. Colon-Fermin and documented the cash it paid on its tax records.[7]

On or about April 3, 2021, F&R Cargo called Franci J. Colon-Fermin and selected and/or engaged him to fly to Indianapolis, Indiana, be added as an additional driver to a rental agreement with Penske, then transport goods via interstate commerce back to Allentown, Pennsylvania to F&R Cargo's warehouse, where it would then be packaged from the Penske truck into a cargo

[1] [App. 000639:11-19]
[2] [App. 000641:10-000643:4]
[3] [App. 000644:19-000645:5]
[4] [App. 000452:35:1-37:3]
[5] [App. 000644:5-14; 000647:16-22]
[6] [App. 000646:17-24]
[7] [App. 000647:1-3]

container for sea transport.[8] F&R Cargo, through Mr. Rincon, directed Franci J. Colon-Fermin to provide his driver's license so he could facilitate the addition of Mr. Fermin to the existing rental agreement with Penske.[9]

On April 3, 2021, F&R Cargo paid $201.70 for Franci J. Colon-Fermin's flight to Indianapolis, and Jose Hernandez picked him up from the airport.[10] F&R Cargo directed Franci J. Colom-Fermin to pick up the truck.[11] F&R Cargo controlled Franci J. Colon-Fermin compensation and agreed to pay him $700 for his trip, but only provided him partial compensation of $400 in cash.[12]

On April 4, 2021, Franci J. Colon-Fermin began his trip from Indianapolis, Indiana to Allentown, Pennsylvania to deliver the goods to F&R Cargo's warehouse, per F&R Cargo's directives and with F&R Cargo's permission.[13] At all relevant times, Franci J. Colon-Fermin acted in furtherance of F&R Cargo's business.[14] Had Franci J. Colon-Fermin taken F&R Cargo's goods somewhere he was not instructed by F&R Cargo, F&R Cargo would have called the police.[15] The merchandise Franci J. Colon-Fermin was transporting on April 4, 2021 belonged to F&R Cargo.[16]

During Franci J. Colon-Fermin's trip from Indianapolis to F&R Cargo's warehouse, at the Interstate 470-Interstate 70 split in Elm Grove, West Virginia, Franci J. Colon-Fermin rear-ended a Volkswagen Jetta being driven by Adanela Santana. The collision caused the Jetta to be pushed forward into the rear bumper of a trailer owned and operated by Defendant Continental Express, Inc., causing the corner of the bumper to go through the Jetta's windshield and impact Adanela's

[8] [App. 000450:29:2-000451:31:1; 000453:40:12-17]
[9] [App. 000671:11-13; *see also* Household Rental Agreement [App. 000443-000445]; [App. 000453:40:12-17]
[10][App. 000452:35:1-37:3; 000467:87:1-11]
[11][App. 000467:87:12-16]
[12][App. 000466:84:5-7]
[13][App. 000453:39:9-11; 000644:23-000646:21]
[14][App. 000452:35:5-9]
[15][App. 000644:22-000645:24]
[16][App. 000450:29:15-21]

skull, killing her in the process.[17] In addition, Ebony White and her daughter Jai'Liyah Briddell both suffered traumatic brain injuries and subsequent Post Traumatic Stress Disorder. Both experience long term sequela related to the event that include headaches, nightmares and continued flashbacks.

This case was tried to a jury from March 11, 2024 to March 14, 2024. At the close of Plaintiffs' case, F&R Cargo motioned the Court for a directed verdict pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure on the issue of respondeat superior, i.e. whether a master-servant relationship existed. After hearing arguments from Plaintiffs and Defendant F&R Cargo, the Court denied F&R Cargo's motion, finding that the evidence in the case was conflicting and/or susceptible to one or more inference, such that the issue of respondeat superior was a question for the jury.

On March 14, 2024, after deliberations, the jury returned a verdict in favor of Plaintiffs Aida Betts, as Administratrix of the Estate of Adanela Santana, Ebony White, and Ebony White, as mother and next friend of Jai'Liyah Briddell with respect to their claim of negligence against Defendant Franci J. Colon-Fermin, and their claims of vicarious liability and negligent hiring, selection, and retention against Defendant F&R Cargo Express, LLC. The jury awarded economic damages in the amount of $4,209,256 and non-economic damages in the amount of $3,000,000, totaling $7,029,256 in compensatory damages. The Plaintiffs withdrew their claim for punitive damages prior to jury deliberations. The jury found Defendant Franci J. Colon-Fermin to be 80% at fault and Defendant F&R Cargo Express, LLC to be 20% at fault, and found Mr. Colon-Fermin to be an agent of F&R Cargo Express, LLC.

On March 20, 2024, the Court entered its Judgment on Jury Verdict. On March 29, 2024,

[17][App. 000457:56:1-60:5]

Defendant F&R Cargo filed a *Renewed Motion for Judgment as a Matter of Law and Motion for New Trial*, arguing that the Court should direct entry as a matter of law in favor of F&R Cargo because there is no evidence of control to convert its relationship with Mr. Fermin into an employment relationship. In the alternative, F&R Cargo requested a new trial.

On April 4, 2024, Plaintiffs filed their *Response in Opposition to F&R Cargo Express LLC's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial*, arguing that the evidence in this case, when applied to West Virginia law, demonstrates that no error occurred at trial, and that, when (1) considering the evidence most favorable to Plaintiffs; (2) assuming that all conflicts in the evidence were resolved by the jury in favor of Plaintiffs; (3) assuming as proved all facts which Plaintiffs' evidence tends to prove; and (4) giving to Plaintiffs the benefit of all favorable inferences which reasonably may be drawn from the evidence, it is clear that a reasonable trier of fact could, and did, find that a master-servant relationship existed between F&R Cargo and Mr. Fermin.

On May 15, 2024, the Circuit Court of Ohio County entered its *Order Denying Defendant F&R Cargo Express, LLC's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial*. [App. 000002 -000016]. In doing so, the Court held as follows:

> This Court FINDS that the evidence in this case demonstrates F&R Cargo had the authority to rescind Mr. Fermin's permission to drive on its behalf and transport its goods to its warehouse. Mr. Fermin only drove on April 4, 2021, because F&R Cargo directed him to do so. F&R Cargo had the right to rescind Mr. Fermin's ability to get to Indianapolis to pick up the truck and to be added as an additional driver, as F&R Cargo facilitated and purchased Mr. Fermin's plane ticket and provided Mr. Fermin's identification to be added to the Penske rental agreement. But for F&R Cargo's directions to go to Indianapolis, payment of $400, instructions on where to transport the goods, facilitation and payment of Mr. Fermin's flight, the facilitation of the rental agreement, the introduction of Mr. Fermin to F&R Cargo's customer, and permission to drive on F&R Cargo's behalf, Mr. Fermin would not have flown to Indianapolis, been added as an additional driver, transported F&R Cargo's goods, or driven through Wheeling, West Virginia where he ultimately killed Adanela Santana and injured Ebony White and Jai'Liyah

Briddell.

> The evidence in the present case demonstrates far more control and authority to control than in *Roof Service*. In *Roof Service,* Mr. Wilfong was not compensated to retrieve scrap metal, acted without Roof Service's consent, did not act in accordance with Roof Service's instructions, acted after work hours, and drove his own truck, yet the West Virginia Supreme Court of Appeals still found the existence of a master-servant relationship. In the present case, Mr. Fermin was compensated $400 by F&R Cargo, acted per F&R Cargo's directives, drove with F&R Cargo's permission and consent, his destination was F&R Cargo's warehouse, he transported F&R Cargo's goods, he traveled the same route he drove on previous occasions when he admittedly acted on F&R Cargo's behalf, and he drove a Penske box truck that F&R Cargo helped facilitate his addition to the existing rental agreement.
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> Accordingly, this Court FINDS that in light of the evidence, the Court correctly found that during trial that because the evidence of master-servant relationship is conflicting, more than one inference can be drawn therefrom, and the question is ultimately one of fact for jury determination. When (1) considering the evidence most favorable to Plaintiffs, (2) assuming that all conflicts in the evidence were resolved by the jury in favor of Plaintiffs; (3) assuming as proved all facts which Plaintiffs' evidence tends to prove; and (4) giving to Plaintiffs the benefit of all favorable inferences which reasonably may be drawn from the evidence, it is clear that a reasonable trier of fact could, and did, find that a master-servant relationship existed between F&R Cargo and Mr. Fermin.

[App. 000015 -000016].

SUMMARY OF ARGUMENT

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 evidence." Syl. pt. 3, *Gillingham v. Stephenson*, 209 W. Va. 741, 744, 551 S.E.2d 663, 666 (2001). The Respondents provided sufficient evidence at trial, that when resolved in their favor, is clear that a reasonable trier of fact could, and did, find that a master-servant relationship existed between F&R

Cargo and Mr. Fermin due to F&R Cargo's right to control Mr. Fermin's actions. For those reasons, the trial court did not abuse its discretion in denying F&R Cargo's Motin for a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

LEGAL STANDARD

Rule 50(b) of the West Virginia Rules of Civil Procedure states as follows:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: (1) if a verdict was returned: (a) allow the judgment to stand, (b) order a new trial, or (c) direct entry of judgment as a matter of law.

W. Va. R. Civ. P. 50(b); *see also Morrison v. Sharma*, 200 W. Va. 192, 194, 488 S.E.2d 467, 469 (1997) (recognizing that "a trial judge should rarely grant a new trial … Indeed, a new trial should not be granted 'unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done.' ")

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 evidence." Syl. pt. 3, *Gillingham*, 209 W. Va. at 744, 551 S.E.2d at 666. "In determining whether the verdict

of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." *Fredeking v. Tyler,* 224 W. Va. 1, 2, 680 S.E.2d 16, 21 (2009) (citations omitted). Accord, *Gillingham*, at 747, 551 S.E.2d at 669; *Wager v. Sine*, 157 W. Va. 391, 400 201 S.E.2d 260. 266 (1973).

In reviewing a trial court's granting of or denial of a judgment notwithstanding the verdict, it is not the task of the appellate court to determine how it would have ruled on the evidence presented, but rather, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. *Alkire v. First Nat'l Bank*, 197 W. Va. 122, 475 S.E.2d 122 (1996); *Ingram v. City of Princeton*, 208 W. Va. 352, 540 S.E.2d 569 (2000) (applying de novo standard of review). The ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, and reversal of that ruling is appropriate only when it is clear that the trial court has acted under some misapprehension of the law or the evidence. *Gillingham*, at 747, 551 S.E.2d at 669.

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 B*urke-Parson's-Bowlby Corp. v. Rice*, 230 W.Va. 105, 736 S.E.2d 338 (2012)).

ARGUMENT

A. The Evidence at Trial Concerning Master-Servant Relationship Was Conflicting, Such That the Question Was Ultimately One of Fact for a Jury's determination.

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 evidence." Syl. pt. 3, *Gillingham*, 209 W. Va. at 744, 551 S.E.2d at 666. "In determining whether the verdict of a jury is supported by the evidence, ***every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true***." *Fredeking,* 224 W. Va. at 2, 680 S.E.2d at 21. Accord, *Gillingham*, at 747, 551 S.E.2d at 669; *Wager v. Sine*, 157 W. Va. 391 (1973).

There are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of respondent superior: (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative. Syl. pt. 10, *Roof Serv. of Bridgeport, Inc. v. Trent*, 244 W. Va. 482, 486, 854 S.E.2d 306, (2020). "In addition to control being the definitive factor in determining whether a master-servant relationship exists for purposes of the doctrine of respondeat superior, it is also *the right of control* that matters, and not the exercise or use of the right of control. *Id.* (holding master-servant relationship existed because the jobsite was controlled by Roof Service and, at any time, it could have exercised control by rescinding the permission to access it and collect the debris.); *see also Zirkle v. Winkler*, 214 W. Va. 19, 585 S.E.2d 19 (2003) (holding that, "[i]n these circumstances, when an entity engaged in a commercial activity on its own initiative places a fleet

of drivers and automobiles on the public roads to accomplish a part of its core business activity, it is at the least a reasonable inference that accountability and responsibility for the injurious results of negligence in the operation of those automobiles should be borne by the entity engaging in the commercial activity"). The issue is driven by the facts and circumstances. In those instances, wherein the evidence is conflicting, or wherein more than one inference can be drawn therefrom, the question is one of fact for jury determination." *Id.*

1. The Circuit Court of Ohio County Correctly Followed the West Virginia Supreme Court of Appeals' Holdings in *Roof Service of Bridgeport, Inc.* and *Zirkle* in Allowing the Jury to Determine Whether a Master-Servant Relationship Existed

In *Roof Service of Bridgeport, Inc.* the Plaintiff was severely injured on a sidewalk in front of his home after he was struck and run over by a truck owned and operated by Bruce Wilfong. The Plaintiff sued Roof Service and alleged that Mr. Wilfong was acting as an agent on behalf of Roof Service at all relevant times. At trial, Defendant Roof Doctor filed a Motion for Directed Verdict under rule 50(a), arguing that Mr. Wilfong was an independent contractor because at the time of the collision:

> Mr. Wilfong was in his own vehicle, his workday had concluded, he was not being compensated by Roof Service at the time of the incident, he was engaged in a personal effort at gathering scrap metal to later sell for his personal benefit, Roof Service did not financially benefit from the salvage activities, and Mr. Wilfong was beyond the supervision, direction, or control of Roof Service.
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> Mr. Wilfong was in his own vehicle after the conclusion of the work day, his activities had nothing to do with his roofing work for Roof Service, he conducted no business for Roof Service after retrieving his personal vehicle, and he received no compensation for his personal activities. Rather, it is contended that Mr. Wilfong was on his own adventure for his own financial purposes.

Id. at 495-496, 854 S.E.2d at 315-316. The Honorable Christopher McCarthy from the Circuit

Court of Harrison County denied Roof Service's Motion. Following deliberation, the jury returned a verdict finding that Mr. Wilfong was an agent of Roof Service, apportioning one hundred percent of the fault for the incident to Mr. Wilfong. Following trial, Judge McCarthy denied Roof Service's motion for judgment as a matter of law under Rule 50(b), or, in the alternative, a new trial under Rule 59. On appeal, Roof Service contended that the circuit court erred in failing to award judgment on a matter of law to it because there was no master-servant relationship between Roof Service and Mr. Wilfong. The West Virginia Supreme Court of Appeals sustained the circuit court's ruling denying Roof Service's judgment as a matter of law, holding that "It is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party" *Id.* at 493. Ultimately, the Court found that Roof Service had the right to control Mr. Wilfong because the jobsite was controlled by Roof Service and, at any time, it could have exercised control by rescinding the permission to access it and collect the debris. *Id.* at 495. The Court also considered that Mr. Wilfong does not engage in the activity for or with anybody in the community other than Roof Service. *Id.*. Accordingly, viewing the evidence in the light most favorable to Mr. and Mrs. Trent as the nonmoving party, the Court found that the evidence is capable of more than one interpretation and did not indisputably show that there was no master-servant relationship between Roof Service and Mr. Wilfong at the time he returned to the jobsite. *Id.* at 495.

In *Zirkle*, 214 W. Va. 19, 585 S.E.2d 19, the West Virginia Supreme Court of Appeals distinguished the *Shaffer v. Acme Limestone., Inc.* 206 W. Va. 333, 524 S.E.2d 688 (1999) decision

which involved a third-party manufacturer, and held that a newspaper delivery driver was an agent, not an independent contractor, of a newspaper company, because the driver was recruited by the company, and "[***i]n these circumstances, when an entity engaged in a commercial activity on its own initiative places a fleet of drivers and automobiles on the public roads to accomplish a part of its core business activity, it is at the least a reasonable inference that accountability and responsibility for the injurious results of negligence in the operation of those automobiles should be borne by the entity engaging in the commercial activity***. *Zirkle*, at 28, 585 S.E.2d at 28. In making this ruling, the Court distinguished a previous 1999 ruling made in *Shaffer v. Acme Limestone., Inc.* 206 W. Va. 333, 524 S.E.2d 688 (1999), where a quarry contracted with a trucking company, whose employees operated that company's trucks, to haul stone to the quarry's customers. In *Zirkle*, however, Mr. Winkler worked directly for the appellee, not for a delivery company that contracted with the appellee. *Zirkle,* at 27, 585 S.E.2d at 27. The Court found that, "[h]ad the facts in *Shaffer* been that the *trucking company* (not the quarry) had tried to avoid accountability for the results of a truck driver's negligence by attempting to make all of its truck drivers "independent contractors, then the *Shaffer* case would have been more like the instant case, and the independent contractor issue would be clearly, at the least, a jury issue." *Id*. at 28, 585 S.E.2d at 28.

2. <u>The Cases Cited by F&R Cargo Are Not Analogous to the Facts of this Case</u>

The cases cited by F&R Cargo, including *Gilley v. C.H. Robinson Worldwide, Inc.,* No. 1:18-00536, 2021 U.S. Dist LEXIS 161786 (S.D. W. Va. Aug 26, 2021),[18] *Jones v. C.H. Robinson*

[18] In *Gilley v. C.H. Robinson Worldwide, Inc.,* No. 1:18-00536, 2021 U.S. Dist LEXIS 161786 (S.D. W. Va. Aug 26, 2021), the federal court did not find agency because Robinson was a broker rather than a carrier, and as such, it could not terminate the trucking company's driver or control compensation plans. The court specifically held that "while it is true that the line between broker

Worldwide Inc., 558 F. Supp. 2d 630 (W.D. Va. 2008),[19] and *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2003),[20] are neither applicable nor persuasive to the Court's consideration of this appeal. None of these cases were decided by the West Virginia Supreme Court of Appeals, and each involved a third-party broker asserting the independent contractor defense because of a contract with a trucking company that labeled it as an independent contractor. In each case, the trucking company that contracted with the broker was not challenging that its drivers were independent contractors. Had it done so, the West Virginia Supreme Court of Appeals in *Zirkle* has already held that it would arise to a jury question. *Id.* (holding had the facts in *Shaffer* been that the trucking company (not the quarry) had tried to avoid accountability for the results of a truck driver's negligence by attempting to make all of its truck drivers "independent contractors, then the Shaffer case would have been a jury question.). In the instant case, there is no third-party broker asserting an independent contractor defense, nor is there a contract listing Mr. Fermin as an independent contractor.

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and carrier is somewhat blurred here . . . slightly different facts may blur the line enough to create a jury question." *Id.* Here, F&R Cargo was not a broker. It was the trucking company that had a direct relationship with Mr. Fermin, selected Mr. Fermin, controlled Mr. Fermin's compensation by reducing his pay from $700 to $400, directed Mr. Fermin where to go and where to transport the goods, and at any time could have rescinded Mr. Fermin's ability to drive on its behalf.

[19] In *Gilley v. C.H. Robinson Worldwide Inc.*, 558 F. Supp. 2d 630 (W.D. Va. 2008), Defendant Robinson was once again a broker, not the trucking company that selected the driver. The Virginia federal court also considered that there was a contract labeling the broker as an independent contractor and that Robinson could not control compensation or fire any of AKJ's drivers. Here, Mr. Fermin was selected and paid directly by F&R Cargo, and there was no contract that listed Mr. Fermin as an independent contractor.

[20] In *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2003), the facts involved a contract between a broker and a trucking company that expressly provided for an independent contractor relationship. The Court found that the broker was not vicariously liable for the trucking company's driver's negligence based upon the language of the contract and that because the employer maintained the right to control, not the broker. Here, there is no broker involved, nor is there a contract listing Mr. Fermin as an independent contractor.

In citing these foreign cases, F&R Cargo ignores established West Virginia law. See e.g., *Roof Service* (supra); *Zirkle* (supra); and, *Williams v. Werner Interprises, Inc.* No. 12-0847, 2013 WL 3184545 (W. Va. June 24, 2013), all of which involved motor vehicles collisions with an analysis of agency directly between the driver and the entity that selected him, without a third-party broker. F&R Cargo has selectively cited and relied upon foreign decisions because West Virginia law does not support a finding of an independent contractor defense under the established facts of this case.

F&R Cargo cites to only two West Virginia cases, neither of which provides support to grant the relief sought by F&R Cargo in its Motion. *Cunningham v. Herbert J. Thomas Mem'l Hosp. Ass'n*, 230 W. Va. 242, 737 S.E.2d 270 (2012), involved an analysis of the statutory definition of an employee under the MPLA, W. Va. Code § 55-7B-9(g), in which the Court held that doctors were employees of their own employer per their employment contracts rather than with the hospital itself. In *Shaffer v. Acme Limestone., Inc.* 206 W. Va. 333 (1999), the Court held that 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. Four years later, in *Zirkle*, the West Virginia Supreme Court of Appeals pointedly distinguished its holding in *Shaffer*, finding in *Zirkle* that, "[h]ad the facts in *Shaffer* been that the *trucking company* (not the quarry) had tried to avoid accountability for the results of a truck driver's negligence by attempting to make all of its truck drivers 'independent contractors,' then the *Shaffer* case would have been more like the instant case, and the independent contractor issue would be clearly, at the least, a jury issue." *Id.* at 27, 585 S.E.2d at 27.

3. <u>The Circuit Court of Ohio County Correctly Found that, When Giving Plaintiffs the Benefit of All Favorable Inferences Which May Reasonably Be Drawn From the</u>

Evidence, It is Clear That a Reasonable Trier of Fact Could, and Did, Find That Mr. Fermin Was Acting as an Agent of F&R Cargo at the Time of the Subject Collision Insofar as F&R Cargo had the *Right* to Control Him.

Similar to the authority and right to exercise control sufficient to demonstrate a master-servant relationship in *Roof Service*, here, F&R Cargo had the authority to control Mr. Fermin and rescind its permission to drive on its behalf and transport its goods to its warehouse. The evidence establishes that: Mr. Fermin drove only on April 4, 2021, because F&R Cargo directed him to do so; F&R Cargo directed Mr. Fermin to travel to Indianapolis to pick up the truck; F&R Cargo provided Mr. Fermin's identification to be added to the Penske rental agreement and added Mr. Fermin as an additional driver to the truck rental agreement; F&R Cargo purchased Mr. Fermin's plane ticket; F&R Cargo paid Mr. Fermin $400 to transport the goods; and, F&R Cargo directed Mr. Fermin where to transport the goods.[21] But for the acts and authority of F&R Cargo to direct Mr. Fermin where, how, and when to travel and transport the goods being carried on April 4, 2021, Mr. Fermin would not have flown to Indianapolis, been added as an additional driver to the truck rental agreement, transported F&R Cargo's goods, or driven through Wheeling, West Virginia, where he ultimately killed Adanela Santana and injured Ebony White and Jai'Liyah Briddell.

The evidence in the present case demonstrates far more control and authority to control than in *Roof Service*. In *Roof Service,* Mr. Wilfong was not compensated to retrieve scrap metal, acted without Roof Service's consent, did not act in accordance with Roof Service's instructions, acted after work hours, and drove his own truck, yet the West Virginia Supreme Court of Appeals still found the existence of a master-servant relationship. In the present case, Mr. Fermin was compensated $400 by F&R Cargo, acted per F&R Cargo's directives, drove with F&R Cargo's permission and consent, his destination was F&R Cargo's warehouse, he transported F&R Cargo's

[21] [App. 000644:23-000646:21; 000671:11-13; 000672:23-673:19; 000450:29:2-30:24; 000452:35:5-9; 000453:38:3-23; 000453:39:9–11; 000453:40:12-17; and 000467:87:1-16.

goods, he traveled the same route he drove on previous occasions when he admittedly acted on F&R Cargo's behalf, and he drove a Penske box truck that F&R Cargo helped facilitate his addition to the existing rental agreement.

Specifically, Mr. Fermin testified at trial to the following:

> Q. At the time of this accident, you were hauling a load for F&R Cargo. Is that right?
> A. Yes, sir.
> Q. And that would have been 2021. Correct?
> A. Yes, sir

[App. 000450:29:15-21]

> Q. Each of your trips for F&R Cargo, were you transporting goods from Indianapolis to Allentown?
> A. Yes, sir.
> Q. So it was the same trip each time you worked for F&R Cargo?
> A. Yes, sir

[App. 000451:31:17-22]

> Q. And for each of those trips, F&R Cargo paid you a flat fee of $700. Correct?
> A. Yes, sir

[App. 000451:31:23-32:2]

> Q. On each of those trips, did you drive a Penske truck similar to the one involved in the accident?
> A. The same truck.

[App. 000451:32:7-9]

> Q. And when you were making these trips from Indianapolis to Allentown, you were furthering that business. Correct?
> A. Yes, sir.

[App. 000452:35:5-9]

> Q. Did F&R Cargo pay for those flights?
> A. Yes, sir.

[App. 000452:35:14-15].[22]

> Q. And F&R compensated you for this job. Correct?
> A. The last trip I did, because of the accident, they didn't compensate me fully.
> Q. Did they compensate you partially?
> A. No. They gave me $400.

[App. 000453:38:11-16]

> Q. What was your involvement of being added as an additional driver on the Penske rental form?
> A. Francisco called me to go pick up the truck. It was Indiana. They asked me for my driver's license so they can put it in there so I can drive the truck, and I went and picked up the truck

[App. 000453:40:12-17]

> Q. And you had told, in previous testimony, that you had taken that route on at least multiple occasions?
> A. Of course, yes.

[App. 000465:83:12-14]

> Q. Okay. That's what I thought. Other than --- what other conversations did you have with F&R regarding the transport of this particular shipment, sir?
> A. Nothing. He just said to go and pick up that truck. That's it.

[App. 000467:87:11-16]

Mr. Rincon's testimony at trial further establishes the existence of a master-servant relationship between F&R Cargo Express and Mr. Fermin:

> Q. If he would have taken F&R Cargo's goods and instead of giving it to you, like you instructed him, and took it somewhere else, you would have called the police, wouldn't
> you?
> A. If he was locally, because he was working locally with me.

[App. 000645:11-16]

> Q. On each occasion when he was hired by you, on each occasion that he drove a rental truck he did so with F&R Cargo's permission?
> A. Yes

[22] [App. 000467:87:1-11]

[App. 000645:21-24]

> Q. You had the authority with Mr. Fermin to administer a drug test, didn't you?
> A. When he worked for me five years ago that's the way we did it.

[App. 000647:16-19]

> Q. When Mr. Fermin would drive from Indiana to Pennsylvania on the four or so occasions before April 2021, did F&R Cargo tell him what route to take?
> A. Yes, yes. We will always take the best roads, the best routes, there was no issues or danger.
> Q. Did F&R Cargo tell him what roads to drive on?
> A. Yes, on that occasion, yes.

[App. 000673:9-15]

In light of the evidence, the Circuit Court Ohio County correctly ruled that the question of whether a master-servant relationship existed was one of fact for jury determination. When (1) considering the evidence most favorable to Plaintiffs, (2) considering the evidence most favorable to Plaintiffs; (3) assuming that all conflicts in the evidence were resolved by the jury in favor of Plaintiffs; and (4) assuming as proved all facts which Plaintiffs' evidence tends to prove; and (5) giving to Plaintiffs the benefit of all favorable inferences which reasonably may be drawn from the evidence, it is clear that a reasonable trier of fact could, and did, find that a master-servant relationship existed between F&R Cargo and Mr. Fermin.

B. The Circuit Court of Ohio County did Not Commit Abuse of Discretion in Denying F&R Cargo's Motion for a New Trial Under Rule 59.

"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. Syl. pt. 3, *Gillingham*, 209 W. Va. at 744, 551 S.E.2d at 666.

This Court "reviews the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard…" Syl. pt. 1, *AIG Domestic Claims, Inc. v. Hess Oil Company, Inc.*, 232 W. Va. 145, 751 S.E.2d 31 (2013). The ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect, and a trial court's ruling should be reversed on appeal only when it is clear that the trial court has acted under some misapprehension of the law or the evidence. *Gillingham*, at 747, 551 S.E.2d at 669. This Court "reviews the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard…" *Pickens,* at 676, 783 S.E.2d at 316.

For the reasons set forth herein, and stated in the Circuit Court of Ohio's *Order Denying F&R Cargo's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial*, Judge there was sufficient evidence of a master-servant relationship when considering the evidence most favorable to the Plaintiffs, such that Judge Cuomo did not abuse his discretion in allowing the issue of master-servant relationship to be decided by the jury and denying F&R Cargo's Rule 50 Motion.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Respondents move this Honorable Court to affirm the Circuit Court of Ohio County's Order Denying F&R Cargo's Motion for Judgment as a Matter of Law and Renewed Motion for Judgment as a Matter of Law.

Respectfully submitted:

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
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, the undersigned counsel for Plaintiff/Respondent *AIDA BETTS, as Administratrix of the ESTATE OF ADANELA L. SANTANA*, do hereby certify that, on October 30, 2024, the foregoing "RESPONDENTS' JOINT BRIEF" was filed and serviced via File&ServeExpress on all counsel of record.

/s/ *Taylor M. Norman*
Taylor M. Norman (WV State Bar No. 13026)

I, the undersigned counsel for Plaintiffs/Respondents, *JAI'LIYAH BRIDELL and EBONY WHITE, as Mother and Next Friend of JAI'LIYAH BRIDDELL* do hereby certify that, on October 30, 2024, the foregoing "RESPONDENTS' JOINT BRIEF" was filed and serviced via File&ServeExpress on all counsel of record.

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