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

PETITIONER'S REPLY BRIEF

On Appeal from the Circuit Court of Ohio County

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INTRODUCTION

Franci Colon-Fermin ("Colon-Fermin") was not an employee of F&R Cargo Express LLC ("F&R") at the time of the accident on April 4, 2021, and F&R should not be held vicariously liable for his actions under the doctrine of respondeat superior. The evidence presented at trial, including testimony from both F&R's principal and Colon-Fermin, clearly establishes that F&R exercised no control over Colon-Fermin's work, and the minimal involvement it had in this transaction does not support an employer-employee relationship. In contrast to Respondents' claims, the legal principles set forth in *Zirkle v. Clarksburg Publishing Co.*, 214 W. Va. 19, 585 S.E.2d 19 (2003), and *Roof Services of Bridgeport, Inc. v. Trent*, 244 W. Va. 482, 854 S.E.2d 302 (2020), affirm that Colon-Fermin was an independent contractor. Therefore, F&R cannot be held vicariously liable for Colon-Fermin's actions in this case.

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. The evidence in the record clearly establishes that the relationship between F&R and Franci Colon-Fermin was that of an independent contractor, not an employee.

In this case, the facts clearly establish that Colon-Fermin was an independent contractor, not an employee of F&R, and therefore F&R should not be held vicariously liable for his actions under the doctrine of respondeat superior. The record evidence supports this conclusion. First, Colon-Fermin was paid a flat fee for the specific job of driving a Penske truck from Indianapolis to Allentown, Pennsylvania, without any regular work schedule or ongoing relationship with F&R. [App. 000677-79; 001131] Unlike an employee, Colon-Fermin was free to work for other

businesses, as evidenced by his own refuse pickup business, and he had no ongoing contractual obligation to F&R. [App. 000120; 675]

Additionally, Colon-Fermin exercised complete control over the manner in which the job was performed. F&R did not direct him on how to drive, what routes to take, or when to complete the delivery. [App. 000677-79] In fact, Colon-Fermin testified that he made his own decisions regarding his route from Indianapolis to Allentown, specifically choosing to travel on highways such as Route 70 and 470. [App. 000465-66] F&R did not instruct him on these decisions, and Rincon, the owner of F&R, confirmed that he had no control over the specifics of the trip. [App. 000677-79] Furthermore, F&R did not provide Colon-Fermin with any transportation, food, or gas money, nor did it supply a credit card or other typical employee benefits. [App. 000677-679]

Colon-Fermin's lack of integration into F&R's regular operations further underscores his independent contractor status. F&R did not train him, did not assign him any specific job duties beyond the single trip in question, and did not provide him with any formal job title or benefits such as health insurance or a W-2. [App. 000451; 000465] His previous work with F&R, which had occurred several years prior to the 2021 incident, was sporadic and limited in scope. He was never a full-time or regular employee of F&R, but rather, he was brought in for this isolated task based on his prior working relationship with Rincon. [App. 000450-451]

The nature of the relationship between F&R and Colon-Fermin, as established by the evidence, is more akin to that of a contractor hired for a specific purpose, rather than an employer-employee relationship. The absence of control, the lack of integration into F&R's regular business, and Colon-Fermin's independence in performing the task all point to his status as an independent contractor rather than an employee. Therefore, the legal principles in this case, supported by the facts, confirm that F&R cannot be held vicariously liable for Colon-Fermin's actions.

B. The principles articulated in *Zirkle* and *Roof Service* establish that Colon-Fermin was an independent contractor, not an employee of F&R.

Respondents contend that the outcome of this case is governed by the Supreme Court of West Virginia's decisions in *Zirkle v. Clarksburg Publishing Co.*, 214 W. Va. 19, 585 S.E.2d 19 (2003), and *Roof Serv. of Bridgeport, Inc. v. Trent*, 244 W. Va. 482, 854 S.E.2d 302 (2020). However, a careful examination of the facts in those cases reveals significant differences when compared to the circumstances here. The factual distinctions between those cases and the present matter are critical, as they involve different types of employer-employee relationships and varying degrees of control over the employee's actions. While the legal principles set forth in these cases are important, they do not support the argument for vicarious liability in this case. In fact, when applying the relevant law, it is evident that Colon-Fermin was not an employee of F&R at the time of the accident, and therefore, F&R cannot be held vicariously liable under the doctrine of respondeat superior.

First, Respondents contend that the West Virginia Supreme Court's decision in *Zirkle* mandates that F&R should be held liable for the actions of Colon-Fermin as an employee under the doctrine of respondeat superior. In *Zirkle*, the West Virginia Supreme Court ruled that a newspaper delivery driver was an agent of the newspaper company because the company recruited and managed a fleet of drivers who operated on public roads each day to deliver the company's newspapers to its subscribers. 214 W. Va. at 28. The company did not contract with independent delivery services like the U.S. Mail, FedEx, or UPS, but instead undertook the task of delivery itself, directly employing and deploying drivers. *Id.* The Court went on to find that

> 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.

Id.

This case is distinguishable from *Zirkle* because F&R did not recruit or manage a "fleet of drivers" to perform ongoing, controlled delivery services for its business. Instead, F&R's involvement with Colon-Fermin was limited to assisting a customer in transporting a truck from one location to another. F&R did not control how or when Colon-Fermin performed his work, nor did it provide any ongoing direction or supervision over his activities. Unlike the newspaper company in *Zirkle*, which managed a fleet of drivers to carry out its delivery operations, F&R did not organize or manage a workforce of drivers and did not undertake the delivery task itself.

As the evidence clearly establishes, Colon-Fermin was not an employee of F&R at the time of the accident. Rather, he was an independent contractor who was hired for a single, specific task. Colon-Fermin was paid a flat fee for this particular job and had no ongoing work relationship with F&R. He was free to engage in other work, and F&R did not provide him with benefits, a W-2, or any other indicia of an employer-employee relationship. [App. 000465] Colon-Fermin also had complete control over how and when he performed the job. [App. 000465; 000677-79] He chose the route he would take from Indianapolis to Allentown, and F&R did not direct or control his travel, the truck's operation, or the timing of the trip. [App. 000465] This level of independence is typical of an independent contractor arrangement.

The facts surrounding the accident on April 4, 2021, further highlight the lack of control F&R had over Colon-Fermin's actions. On the morning of the accident, F&R did not dictate to Colon-Fermin how to drive, what routes to take, or when to make deliveries. [App. 000465] Colon-Fermin was free to make decisions on his own regarding the travel route, as confirmed by his testimony. He specifically testified that F&R, and Rincon, did not direct him on the routes to take from Indiana to Pennsylvania. [App. 000465] Colon-Fermin was also not provided with a company

vehicle, nor was he given any funding for the trip, such as money for food, gas, or a company credit card. [App. 000677-79] These are all critical facts that demonstrate the lack of an employer-employee relationship, and thus, F&R did not have the type of control over Colon-Fermin's work that the Court found in *Zirkle*.

Additionally, Colon-Fermin's own testimony and the testimony of F&R's principal, Francisco Rincon, both clearly established that Colon-Fermin had not worked for F&R in any capacity for at least two to three years prior to the accident. [App. 000450; 000679] His previous work with F&R was limited to a few trips years earlier, and there was no ongoing or regular relationship between F&R and Colon-Fermin. [App. 000450; 000678-79] Indeed, the only reason F&R was involved in this trip was because the customer, Jose Hernandez, reached out to Rincon to inquire about a driver, and Rincon referred Colon-Fermin to Hernandez. [App. 000676] This is a far cry from the ongoing control that would be necessary to create an employer-employee relationship.

The fact that F&R's involvement was limited to merely purchasing a plane ticket for Colon-Fermin (which cost was reimbursed by Hernandez) and facilitating the connection between him and Hernandez underscores that F&R did not exercise any control over Colon-Fermin's work. F&R did not instruct Colon-Fermin on how to operate the truck, when to leave, or how to conduct his business. In fact, Rincon's involvement was limited to a one-time connection with the customer, and F&R did not supervise or oversee the details of Colon-Fermin's work in any meaningful way. As such, the facts of this case are far more consistent with an independent contractor relationship than the agency relationship found in *Zirkle*.

F&R did not manage or oversee Colon-Fermin's business activities in any way, and there is no evidence that F&R attempted to avoid responsibility for Colon-Fermin's actions by

misclassifying him as an independent contractor. Instead, the evidence shows that F&R had no more control over Colon-Fermin than a company hiring FedEx, or UPS for a one-time delivery service. In light of these facts, the principles set forth in *Zirkle* do not support Respondents' argument. Unlike the newspaper company in *Zirkle*, which exercised substantial control over the delivery drivers, F&R did not manage Colon-Fermin's work or control the manner in which he performed his job. The relationship between F&R and Colon-Fermin was one of independent contracting, not employment. Consequently, the doctrine of respondeat superior does not apply, and F&R should not be held vicariously liable for the actions of Colon-Fermin. Thus, *Zirkle* does not dictate the outcome in this case; rather, it reinforces that independent contractors, such as Colon-Fermin, who are free from the control and direction of a company, are not subject to respondeat superior liability. The facts of this case establish that Colon-Fermin was an independent contractor, and therefore, F&R is not liable for the accident under the doctrine of respondeat superior.

Next, Respondents rely upon *Roof Service* to support their arguments. In that case, the Court found that the employer, Roof Service, had a long-standing practice of allowing its employee, Mr. Wilfong, to engage in activities such as removing scrap metal from job sites, which the employer benefitted from. 244 W. Va. at 489. This created a reasonable inference that Mr. Wilfong's actions were within the scope of his employment when the accident occurred, as his activities were directly tied to Roof Service's business interests. *Id.* at 495-96.

The Court emphasized that while the "going and coming" rule typically precludes employer liability for accidents occurring while an employee is traveling to or from work, the specific facts in *Roof Service* altered the application of this rule. *Id.* at 497. The employer's tacit approval of the employee's conduct—specifically, allowing him to engage in activities like scrap metal collection,

which benefited Roof Service—made the actions reasonably attributable to the employer's business interests, even if the employee was not physically working at the time of the accident. *Id.*

In contrast, the facts in this case present a vastly different scenario. Here, the evidence showed that Colon-Fermin was not an employee of F&R at the time of the accident. F&R's involvement in Colon-Fermin's trip was limited to facilitating a one-time job by purchasing a plane ticket for him, which was reimbursed by the customer, Hernandez. [App. 000676] Colon-Fermin had no ongoing employment relationship with F&R and was free to take other work. [App. 000465] He was not directed by F&R in his travel route, nor did the company provide any guidance, equipment, or compensation during the trip. F&R had no control over the details of Colon-Fermin's work. [App. 000465] The factual disparity between *Roof Service* and this case lies in the level of control and the nature of the relationship between the employer and the worker.

Unlike in *Roof Service*, where the employee's actions (scrap removal) were deemed to be part of the job duties and reasonably tied to the employer's business, Colon-Fermin was merely completing a one-off task for a customer. Colon-Fermin was also free to choose his route, determine his schedule, and decide whether or not to accept the work. This level of independence further distances his actions from the employer's control, reinforcing that F&R should not be held vicariously liable under the principles of respondeat superior.

Simply stated, the facts in *Roof Services* are distinguishable from those in this case because F&R did not have an ongoing employment relationship with Colon-Fermin, did not exert control over his actions during the trip, and did not derive any advantage from his conduct at the time of the accident. Accordingly, the law established in *Roof Service* should not be applied to impose vicarious liability on F&R in this case.

C. The Trial Court Abused Its Discretion in Denying F&R's Motion for a New Trial

The trial court committed a clear error in denying F&R's motion for a new trial. Respondents contend that the trial judge acted within his discretion by upholding the jury verdict, but they overlook the fact that the trial court must not simply defer to the jury's conclusion where the evidence clearly fails to support the verdict. Here, the jury's finding that Colon-Fermin was an employee of F&R is not supported by the weight of the evidence, and the trial court should have granted a new trial because it is apparent that the verdict was based on a misapprehension of both the law and the evidence.

The standard for granting a new trial, as articulated in *Gillingham v. Stephenson*, 209 W.Va. 741, 551 S.E.2d 663 (2001), is whether the verdict is against the clear weight of the evidence or based on false evidence. In this case, no reasonable jury could have found that F&R exercised sufficient control over Colon-Fermin to establish an employer-employee relationship. The evidence presented at trial overwhelmingly supports the conclusion that Colon-Fermin was an independent contractor. His relationship with F&R was limited, transactional, and entirely consistent with independent contractor status. F&R did not provide any ongoing supervision or control over the manner or method of his work. At bottom, it simply contracted with him to perform a specific task—transporting goods—under mutually agreed-upon terms. This lack of control or supervision should have led the trial court to recognize that the jury's verdict was not only unsupported by the facts, but also represented a miscarriage of justice.

Moreover, Respondents' argument that the trial court should be afforded great respect and that the decision to deny a new trial is entitled to deference, while true, mischaracterizes the nature of the trial court's role in this instance. Trial court decisions are reviewed under an abuse of discretion standard, but this Court must still ensure that the trial judge's actions are grounded in a

proper understanding of the law and the evidence. In this case, the trial court's refusal to grant a new trial effectively endorsed an erroneous legal conclusion—that F&R had an employer-employee relationship with Colon-Fermin. As a result, the trial court's decision to allow the verdict to stand constitutes a clear misapprehension of the evidence and the applicable legal principles governing independent contractor relationships.

It is well-established that the jury's role is to resolve factual disputes, but where there is no factual dispute—as is the case here regarding the lack of control by F&R over Colon-Fermin—no reasonable jury could have found an employment relationship. The trial court failed to correct this error when it denied F&R's motion for a new trial. The verdict was clearly against the weight of the evidence, and the trial court should have set it aside to prevent a miscarriage of justice. The jury's finding that Colon-Fermin was an employee of F&R was not merely a different interpretation of the facts—it was a result wholly unsupported by the actual evidence presented. Given this, the trial court's decision to uphold the verdict constitutes an abuse of discretion that warrants reversal.

CONCLUSION

WHEREFORE, Petitioner, 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,

/s/ Michael D. Dunham

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CERTIFICATE OF SERVICE

I, Caleb B. David/Michael D. Dunham, counsel for Appellant, F&R Cargo Express LLC, do hereby certify that on this 20th day of November 2024, the foregoing ***Petitioner's Reply 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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