

TRANSPORT COMPANIES MAY BE LIABLE FOR "INCOMPETENT" INDEPENDENT HAULERS

By John J. Abromitis, Esq.

When utilizing independent contractors for transportation services, trucking companies must be aware of their legal duties with regard to the hiring of "competent" independent contractors, and the scope of investigation that the law requires be undertaken to determine the competency of such contractors. The ramifications of the failure to do so can be significant, and may result in liability to a company who hires an incompetent independent contractor. The duties, responsibilities, and legal ramifications of a company's failure to perform a reasonable investigation concerning an independent contractor's competency was recently the subject of a New Jersey Supreme Court decision entitled *Puckrein v. ATI Transport, Inc., et al.*

In the *Puckrein* matter, BFI-NY was one of Browning-Ferris Industries 200 American wholly owned subsidiaries. BFI-NY used a facility in Brooklyn as a central hub for the five boroughs of New York City. Pursuant to contracts with the City, BFI-NY collected and hauled the City residents' waste and recyclable materials to Brooklyn. BFI-NY used independent carriers to transport recyclables and solid waste from Brooklyn to sites in other states and around the world.

In 1997, BFI-NY contracted with World Carting to haul glass residue and solid waste to American Ref-Fuel and other sites. Pursuant to the contract, World Carting was to provide all necessary equipment complying with all federal, state and local laws, rules, regulations, permits and licenses. With regard to this

agreement, World Carting assigned its responsibilities to ATI Transport, Inc. World Carting and ATI were both owned by the same individual (Stangle), and had the same address. Witnesses testified that despite BFI-NY's contract with World Carting, ATI trucks "showed up for World Carting" to pick up the materials to be hauled to Newark.

In 1998, while an ATI truck was transporting materials for BFI-NY in accordance with the

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above-referenced contract, it collided with a vehicle operated and occupied by the Puckrein family. Certain members of the family were killed and others were seriously injured. It was thereafter determined that ATI, as owner of the tractor-trailer involved in the accident, received summonses for operating a vehicle with a suspended registration, operating an unsafe vehicle, and operating an uninsured vehicle. Both the owner of ATI and the operator of the vehicle were thereafter charged with

manslaughter and other miscellaneous criminal offenses.

Thereafter, the Puckrein family filed suit against BFI-NY, World Carting, ATI Transport, and others. The Puckrein family sought to hold BFI-NY legally responsible for the negligence of ATI Transport. Included in the causes of action was the Puckreins' claim that BFI-NY was liable for hiring an "incompetent contractor." In short, the Puckreins alleged that BFI-NY failed to ensure that the ATI truck involved in the accident was registered and insured.

In determining whether BFI-NY was liable for the actions of ATI (an independent contractor), the New Jersey Supreme Court recognized that in general, a company is not liable for the negligence of an independent contractor that it hires. The Court nonetheless recognized that there are several exceptions to this general rule; (1) where the principal retains control of the manner and means of doing the work subject to the contract; (2) where the principal engages an incompetent contractor; or (3) where the activity constitutes a nuisance *per se*.

The second exception — the incompetent contractor exception — was the exception cited by the Puckreins, who alleged that BFI-NY hired an incompetent contractor (ATI Transport). The Court determined that to prevail against BFI-NY for hiring an incompetent contractor, the Puckreins were required to show that the contractor was, in fact, incompetent or unskilled to perform the job for which he/she was hired,

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CKC "IN THE COURTS"

CKC Attorneys Obtain "No Cause" Jury Verdict

In the case of *Forder v. The Town of Phillipsburg, et al.*, Attorneys John J. Abromitis and James F. Moscagiuri successfully defended the Town of Phillipsburg and its Police Department in a jury trial before the Warren County Superior Court. The Plaintiff alleged that an Officer operated his squad car in a reckless manner and, as a result, the Plaintiff allegedly sustained severe spinal injuries, which required multiple surgeries. The Plaintiff also alleged a Police Department cover-up and other wrong doing in connection with the incident. Notwithstanding those significant allegations, the jury returned a verdict of "No Cause" in favor of the Town after deliberating for less than fifteen minutes. They concluded that the Officer did not operate his squad car in a reckless manner, and that the Police Department was not involved in any wrongdoing whatsoever. The Firm congratulates Attorneys Abromitis and Moscagiuri on a job well done!

CKC Attorney Obtains Affirmation from Appellate Division in Major Land Use Case

Joel Kobert, our Managing Partner, successfully argued before the Appellate Division that the Trial Court's reversal of local action taken against Toll Brothers, Inc. by the Mount Olive Planning Board should be affirmed. Mr. Kobert, on behalf of Toll Brothers, initially challenged the Planning Board's decision to deny it an extension of certain zoning approvals, related to a 418 unit subdivision, before the Trial Court in Morris County, New Jersey. That Court agreed with Toll Brothers, reversed the Board's denial and the Board filed an appeal of that decision to the Appellate Division. Notwithstanding the fact that planning boards must be afforded a high degree of deference by New Jersey Courts, Mr. Kobert convinced both the Trial Court and the Appellate Division that the Board acted in an

unreasonable and arbitrary manner in denying Toll's request for an extension of its zoning approvals. The Board then sought Certification from the State Supreme Court, which was denied. The Appellate Division decision can be found at *Toll Bros., Inc. v. Bd. of the Township of Mt. Olive*, 2006 WL 1085771. The Firm offers its congratulations to Mr. Kobert on his efforts.

CKC Attorneys Set Precedent in New Jersey Courts

In *Random House, Inc. v. Director, New Jersey Division of Taxation*, Attorneys Lawrence P. Cohen and James F. Moscagiuri, along with co-counsel from the Maine law firm of Brann & Isaacson, successfully represented Random House in an important, precedent setting case before the New Jersey Tax Court. The case, which is reported at 22 *N.J. Tax* 485, involved years of alleged unpaid taxes under New Jersey's Litter Control Tax, *N.J.S.A. 13:1E-99.1(a)*. The State attempted to assess Random House back taxes and fines claiming that the packaging in which Random House's books were shipped constituted paper products that generated litter along New Jersey's landscape, subject to taxation under the Litter Control Tax. Of course, this tax would in the future be assessed against all prospective products Random House delivered in New Jersey. In response, Cohen, Moscagiuri and Maine Counsel argued that the tax could not possibly have been intended to apply to Random House's books and related products. The Judge ultimately agreed, looking beyond the literal wording of the applicable statute in order to avoid an unreasonable result. Consequently, Random House will not be liable for any of the assessed taxes or penalties sought by the State. This case, which has been appealed by the State, will likely emerge as the seminal case in future tax matters involving the Litter Control Tax in the State of New Jersey, and the Firm commends all coun-

sel involved for their successful efforts on this important issue.

In *Town of Phillipsburg v. Community Prop. Resources Corp.*, the Appellate Division of the Superior Court of New Jersey upheld a Warren County Trial Court decision in favor of the Town of Phillipsburg by allowing a judgment of tax foreclosure held by the Town to remain. The decision — found at 380 *N.J. Super.* 159 — endorsed a major victory for the Town of Phillipsburg, which was represented by Lawrence P. Cohen and James F. Moscagiuri. The decision allowed the Town to sell a commercial building at public auction thereby permitting the Town to realize an enormous financial benefit. The complex issues involved in this matter were worthy of publication in order to guide litigants and attorneys who are confronted with similar issues in future tax foreclosure matters.

CKC Attorney Obtains Dismissal of Employment Lawsuit and Wins Rare Reimbursement of Attorneys Fees for Defendant

In *Sternadori v. Healthstar Marketing, Inc., et al.*, Attorney Howard Vex successfully moved the U.S. District Court for summary judgment, obtaining a decisive dismissal with prejudice of the former employee's claims against our corporate client. In that case, Judge Norma Shapiro rejected the Plaintiff's claims and monetary demand of \$382,700 and fully concurred with Mr. Vex that all but one of Ms. Sternadori's wrongful discharge claims should be dismissed as a matter of law. Moreover, because the remaining claim, for contractual severance pay, resulted in an award of less than Defendant's \$30,000 Offer of Judgment, the Defendants are now entitled to reimbursement of their attorneys fees incurred from the date of the Offer of Judgment. The Firm commends Mr. Vex and the Labor and Employment Law Department on their most recent victory! ♦

THE DANGERS OF EMPLOYEE INTERNET USE

By Kevin M. Hahn, Esq.

By some accounts, a large majority of employees access the Internet on company computers for personal reasons while at work. The obvious adverse effects of this on productivity are only the tip of the iceberg with regard to the potential headaches that such activities can cause for employers. Personal Internet activity by employees can pose security risks to the company's computer network itself, such as by exposing a network to a computer virus.

Less immediate but just as serious is the threat of legal liability of the employer to injured third parties. Some scenarios are not difficult to imagine. An employee uses his computer as a tool for sexually harassing fellow workers by visiting pornographic websites. Or, an employee embroiled in a bitter domestic dispute uses his office computer to communicate threats to his spouse, and the employer fails to take action.

In a recent case, one such nightmare scenario was all too real for an employer that had to defend itself against the alleged victims of an employee who used a workplace comput-

er for conduct that was criminal, not just indicative of poor judgment. This case may be the first reported decision on the matter of an employer's liability to a third party for having failed to take action to stop an employee from using a company computer in a manner that harmed the third party. It most certainly will not be the last such case.

The case involved an employee who used his company's computer at work to visit pornographic sites, including some relating to child pornography. Over a period of time, a supervisor and some coemployees became aware of this activity and complained to management. Eventually, the offending employee was confronted and was told to stop such use of the computer, but, a few months later, he was again discovered to have accessed pornographic sites.

Eventually, the employee was arrested on child pornography charges, including allegations that he had transmitted nude pictures of his 10-year-old stepdaughter over his office computer to a child pornography site. The

employee's wife, who divorced him, sued the employer for failing to investigate and for failing to report the employee's viewing of child pornography. The case was settled, but not until a precedent was set when the lawsuit survived attempts to have it dismissed before trial.

There are limits to what companies can or should do to prevent improper use of company computers, but it is only prudent to take at least some basic measures. It makes sense to have a written e-mail and Internet use policy that clearly informs employees of what, perhaps, they should already know ó that the employer has and reserves the right to monitor employees' use of the company's computers and to discipline violators. In addition, there needs to be even-handed enforcement of the policy. Even the best written policy will do little to convince a jury, if it comes to that, that a company has done all it reasonably could have done, if the evidence is that the policy was toothless or rarely enforced. ❖

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that the harm resulted out of that incompetence, and that the principal (BFI-NY) knew or should have known of the incompetence.

As to ATI Transport, the Court determined that a hauler's basic competency includes, at a minimum, a valid driver's license, a valid registration certificate, and a valid liability insurance identification card. The Court determined that a company like BFI-NY, whose core purpose is the collection and transportation of materials on the highways, has a duty to use reasonable care in the hiring of an independent carrier, including the duty to make an inquiry into the carrier's ability to travel legally on the highways. The question of whether BFI-NY violated its duty to use "reasonable care," *i.e.*, whether it "knew or

should have known" of World Carting/ATI's incompetence would be determined by the jury. The Court determined that the apparent lack of evidence to establish that BFI-NY made any inquiry with regard to the licensing, registration, and insurance of the vehicle in question precluded BFI-NY from being dismissed from the case, and the jury would ultimately determine whether BFI-NY's actions/inactions were unreasonable so as to subject it to civil liability, with regard to the "incompetent contractor" claim alleged by the plaintiff.

It is clear from the *Puckrein* holding that a company who hires independent contractors for transportation services is wise to conduct a reasonable investigation as to the "competency"

of the hauler, including, but not limited to, making sure that the hauler holds all required licenses, registration and insurance. One should also be aware that such a duty to investigate may require additional steps over and above such a basic investigation. The nature and extent of the inquiry required is not specifically defined, and will presumably be determined by courts on a case-by-case basis. Nonetheless, a company hiring an independent hauler is best served to perform as thorough an investigation as possible so as to limit potential liability in the event that the independent contractor causes injury to person or property. ❖

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PEOPLE IN THE NEWS

JOHN J. ABROMITIS was appointed to the networking committee of the Transportation Lawyers Association.

MICHAEL S. SELVAGGI received a Special Recognition Award from The Arc — Warren County Chapter, Inc. for providing pro bono legal services to assist the Arc in building a group home in Knowlton, New Jersey. Mr. Selvaggi has been a member of the Arc's Board of Directors since 1992.

KEVIN M. HAHN was recently selected to join the Board of Directors of the Warren County Chapter of Habitat for Humanity, and will be one of the coaches of this year's Mock Trial Team for Pope John XXIII High School in Sparta, New Jersey.

ANTHONY J. ZARILLO, JR., and associates Jason Gratt, Alex Castle and Marysol Rosado Thomas during the week of October 2, 2006, provided daily summaries on "hot cases" throughout the country for the Federation of Defense & Corporate Counsel's (FDCC) website. The topics summarized included Statutes of Limitation Defenses to Title VII Discrimination Claims and the unavailability of emotional stress damages resulting from a real estate purchase agreement. Mr. Zarillo is a member of the FDCC, an international association made up of outside defense counsel, insurance company and large corporation in-house counsel and insurance claims executives.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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