[Cite as *United Fin. Cas. Co. v. Abe Hershberger & Sons Trucking Ltd.*, 2012-Ohio-561.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

United Financial Casualty Company,	:	
Plaintiff-Appellee,	:	
v.	:	
Abe Hershberger & Sons Trucking Ltd.,	:	
Defendant-Appellee,	:	No. 11AP-629 (C.P.C. No. 08CVH-09-13286)
and	:	(ACCELERATED CALENDAR)
Raymond B. Miller,	:	
Defendant-Appellee,	:	
Barbara June Anderson, Executrix of the Estate of Robert Lynn Anderson, deceased,	:	
Defendant-Third-Party Plaintiff-Appellant.	:	

D E C I S I O N

Rendered on February 14, 2012

Crabbe Brown & James LLP, and *Daniel J. Hurley*, for plaintiff-appellee.

Lowe Eklund Wakefield & Mulvihill Co., L.P.A., *James A. Lowe*, and *Michelle L. Holiday*, for defendant-third-party-plaintiff-appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Barbara June Anderson, Executrix of the Estate of Robert Lynn Anderson ("appellant"), appeals the Franklin County Court of Common Pleas' entry of summary judgment in favor of plaintiff-appellee, United Financial Casualty Company ("UFC"). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} UFC filed this action for a declaratory judgment against defendants Abe Hershberger & Sons Trucking Ltd. ("Hershberger"), Raymond B. Miller ("Miller"), and Robert L. Anderson ("Anderson"), deceased. An amended complaint named appellant as a defendant, in lieu of Anderson himself. UFC requested a declaration that it had no duty to defend or indemnify any claims asserted against Hershberger or Miller on behalf of Anderson, as a result of the automobile accident that resulted in Anderson's death. Appellant responded by filing an answer, a counterclaim and third-party claim for a declaratory judgment regarding insurance coverage, and crossclaims against Miller and Hershberger for injuries, damages, and losses suffered by Anderson and for wrongful death.

{¶ 3} Hershberger, a sole proprietorship owned by Abraham Hershberger, was an interstate motor carrier in the business of hauling logs, timber, and general freight. Hershberger employed, at most, two drivers at any given time. In May 2008, Hershberger hired Miller as a part-time driver-in-training, with the intention of hiring Miller full-time after he was trained as a driver. Because Miller lacked a commercial driver's license ("CDL"), he was not authorized by federal law to operate a commercial vehicle without a licensed driver in the vehicle with him. On May 6, 2008, Mr. Hershberger telephoned Anderson, a licensed commercial truck driver, and asked Anderson to train Miller and oversee Miller's driving until Miller obtained a CDL. Anderson agreed. Hershberger and Anderson had no prior relationship, and Mr. Hershberger assumed the relationship would terminate at the end of Miller's training. Mr. Hershberger testified in his deposition that Anderson was essentially training Miller from the passenger seat. Hershberger agreed to pay Anderson biweekly at the rate of

$100 per day that he rode with Miller. Anderson accompanied Miller on seven trips on behalf of Hershberger between May 7 and 22, 2008.

{¶ 4} On May 22, 2008, while in the course and scope of his employment, Miller was operating a tractor-trailer, owned by Hershberger, westbound on U.S. Route 50 in West Virginia, with Anderson as a passenger. Miller lost control of the truck, which flipped onto its side and top. The parties have stipulated that Anderson died as a result of Miller's negligent operation of the tractor-trailer.

{¶ 5} At the time of the accident, Hershberger was the named insured under a commercial auto insurance policy (the "policy"), issued by UFC, in compliance with all applicable federal and state motor carrier insurance regulations. The policy contained the following relevant exclusions:

> PART I – LIABILITY TO OTHERS
>
> * * *
>
> Coverage under this Part I, including **our** duty to defend, does not apply to:
>
> * * *
>
> 5. **Bodily injury** to:
>
> a. An employee of any **insured** arising out of or within the course of:
>
> (i) That employee's employment by any **insured**; or
>
> (ii) Performing duties related to the conduct of any **insured's** business; * * *
>
> * * *
>
> This exclusion applies:
>
> a. Whether the **insured** may be liable as an employer or in any other capacity; * * *
>
> * * *

> 6. **Bodily injury** to a fellow employee of an **insured** injured while within the course of their employment or while performing duties related to the conduct of **your** business.

(Emphasis sic.)

{¶ 6} The policy also contained the federally-mandated MCS-90 Endorsement for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980 (the "MCS-90 endorsement"). The MCS-90 endorsement states, in pertinent part, as follows:

> The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with Sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Highway Administration (FHWA) and the Interstate Commerce Commission (ICC).
>
> In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. *Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment* * * *.

(Emphasis added.)

{¶ 7} On June 17, 2009, UFC moved for summary judgment on the ground that Miller and Anderson were statutory employees of Hershberger under controlling federal law and that the policy exclusions precluded coverage. Appellant filed a cross-motion for summary judgment, arguing that Anderson was not an employee of Hershberger and that he was entitled to coverage as a matter of law. On December 7, 2009, the parties stipulated, in part, as follows:

> If the Court ultimately determines that Robert Anderson was a statutory employee of [Hershberger], then [Hershberger] is not liable to the estate of Robert Anderson. Conversely, if the Court ultimately determines that Robert Anderson was not a statutory employee of [Hershberger] at the time of his death, then [Hershberger] is liable to Anderson's estate for his wrongful death in the amount of $600,000.00, as the parties have agreed by separate written agreement.

{¶ 8} On June 23, 2011, the trial court granted UFC's motion for summary judgment and denied appellant's cross-motion. The trial court concluded that Anderson was a statutory employee of Hershberger and that his status as an employee precluded coverage. Appellant dismissed the third-party claims and cross-claims and filed a timely notice of appeal.

II. ASSIGNMENTS OF ERROR

{¶ 9} Appellant now raises the following assignments of error:

> I. THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLANT WAS AN EMPLOYEE PURSUANT TO 49 CFR § 390.5 AND AS A RESULT ERRO[N]EOUSLY GRANTED [UFC'S] MOTION FOR SUMMARY JUDGMENT.
>
> II. THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLANT DIRECTLY AFFECTED COMMERCIAL MOTOR VEHICLE SAFETY PURSUANT TO 49 CFR § 390.5 AND AS A RESULT ERRO[N]EOUSLY GRANTED [UFC'S] MOTION FOR SUMMARY JUDGMENT.

Because appellant's assignments of error are interrelated, we address them together.

III. DISCUSSION

{¶ 10} We review a summary judgment de novo by independently reviewing the judgment, without deference to the trial court's determination. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993). We apply the same standard as the trial court and must affirm the judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 11} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992), quoting *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2 (1982).

{¶ 12} Federal law requires motor carriers to procure at least a minimum level of public liability insurance to ensure that a financially responsible party will be available to compensate members of the public injured in a collision with a commercial motor vehicle. *See Consumers Cty. Mut. Ins. Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362, 365-66 (5th Cir.2002), citing 49 U.S.C. 13906 and 49 C.F.R. 387.1 et seq. 49 C.F.R. 387.15, promulgated pursuant to authority granted by 49 U.S.C. 31139(b), requires the inclusion of an MCS-90 endorsement in an insurance policy intended to satisfy minimum financial responsibility requirements for motor carriers, and the UFC policy includes an MCS-90 endorsement, as quoted above. As set forth in the MCS-90 endorsement, motor carriers are not required by federal law to obtain coverage for injury to or death of their employees while engaged in the course of their employment. *See P.W. & Sons* at 366, citing 49 C.F.R. 387.15. Courts construe the operation and effect of an MCS-90 endorsement as a matter of federal law. *Lynch v. Yob*, 95 Ohio St.3d 441, 445, 2002-Ohio-2485. Therefore, the federal requirements inform our interpretation of the policy's terms. *See P.W. & Sons* at 366.

{¶ 13} The only definition of the term "employee" in the federal motor carrier safety regulations is found in 49 C.F.R. 390.5 ("section 390.5"). That regulation provides the relevant definition for determining employee status under a policy that includes an MCS-90 endorsement. *See P.W. & Sons* at 366 (stating, where parties intend to comply with federal regulations under the Motor Carrier Safety Act, it is reasonable to conclude that the parties intend for section 390.5 to supply the definition of "employee" in the policy). Section 390.5 defines "employee," in pertinent part, as follows:

> Employee means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler.

See also 49 U.S.C. 31132(2). The first quoted sentence defines the term "employee," and the second quoted sentence provides illustrative examples of individuals who may satisfy that definition. To satisfy the conjunctive, regulatory definition of "employee," an individual must be "employed by an employer" and must "directly [affect] commercial motor vehicle safety" in the course of his or her employment. Appellant argues that Anderson did not fall within that definition because he did not satisfy either requirement.

{¶ 14} The question of whether Anderson was "employed by an employer" resolves to whether Anderson qualified as an employee, as there is no dispute that Hershberger qualified as an employer under section 390.5.[1] Appellant summarily contends that Anderson was not an employee of Hershberger, but was, instead, an independent contractor under Ohio common law. We disagree with appellant's position that the first requirement under section 390.5 contemplates or requires a common-law analysis of an individual's status as an independent contractor or an employee.

[1] Section 390.5 defines an employer as "any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it"; *see also* 49 U.S.C. 31132(3)(A).

{¶ 15} Several federal courts have held that section 390.5 eliminated the common law distinction between employees and independent contractors "to discourage motor carriers from using the independent contractor relationship to avoid liability exposure at the expense of the public." *P.W. & Sons* at 366; *Perry v. Harco Natl. Ins. Co.*, 129 F.3d 1072, 1075 (9th Cir.1997) (affirming a summary judgment based on the district court's determination that independent contractors are included within the regulatory definition of employee; "The plain language of the Regulations is clear: independent contractors are considered employees."); *see also Basha v. Ghalib*, 10th Dist. No. 07AP-963, 2008-Ohio-3999, ¶ 15, citing *P.W. & Sons*.

{¶ 16} As appellant notes, however, at least one federal court has rejected the suggestion that section 390.5 eliminated the distinction between employees and independent contractors, stating that "the plain language of the regulation preserves this distinction." *See Pouliot v. Paul Arpin Van Lines, Inc.*, 292 F.Supp.2d 374, 378 (D.Conn.2003). In *Pouliot*, where a truck driver was injured while unloading freight at his delivery destination, the court held that an independent contractor is treated as an employee under section 390.5 only where the independent contractor is in the course of operating a commercial motor vehicle, which the court interpreted as synonymous with "driving a motor vehicle." The court relied on the example in the second quoted sentence of section 390.5 to conclude that acts of an independent contractor not involving the driving of a commercial motor vehicle were beyond the scope of section 390.5.

{¶ 17} We disagree with the *Pouliot* court's narrow reading of section 390.5. To the extent *Pouliot* recognized that an individual's status as a common-law independent contractor is not fatal to qualifying as an "employee" under the regulatory definition, we agree. The regulation expressly states that "a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle)" is an "employee." Thus, in that context, the independent contractor is necessarily "employed by an employer" and "directly affect[ing] commercial motor vehicle safety" in the course of his or her "employment." Because an employee under section 390.5 must be "employed by an employer," the term "employed" cannot be read

to exclude independent contractors. Were an individual's status as a common-law independent contractor determinative, an independent-contractor driver could never satisfy the definition of "employee" in section 390.5, despite the express inclusion of such a driver within that section. As used in section 390.5, "employed" must be given a broader reading that encompasses independent contractors working for the employer. This reading is not only consistent with the plain language of the regulation, but also consistent with the purpose of discouraging carriers from using the independent contractor relationship to avoid liability at the public's expense. *See P.W. & Sons* at 366.

{¶ 18} Nothing in section 390.5 limits an independent contractor's status as a statutory employee to times when the individual is actually operating a commercial motor vehicle. The regulatory language referring to an independent contractor "in the course of operating a commercial motor vehicle" must relate to the second requirement under that section—that the employee directly affects commercial motor vehicle safety. The plain language of the regulation requires only that the individual directly affects commercial motor vehicle safety while in the course of his or her employment, a requirement that may be satisfied by operation of a commercial motor vehicle. Satisfaction of that requirement, however, is not limited to actually driving a commercial motor vehicle. In fact, a myriad of courts have held that a passenger in a commercial vehicle may qualify as an employee under section 390.5. For example, in *Basha*, 2008-Ohio-3999, this court applied the section 390.5 definition and held that a passenger in a tractor-trailer was an employee for purposes of an MCS-90 endorsement. In that case, Farah Basha, a commercial truck driver, was injured while riding in a tractor-trailer operated by Abdi Jama Ghalib when the tractor-trailer was involved in an accident. *Basha* involved coverage under an insurance policy issued to Daryel Express Trucking, LLC ("Daryel") by Canal Insurance Company ("Canal"). The policy contained an MCS-90 endorsement and the same exclusions as the UFC policy here. Consistent with Canal's position, we held that Basha was a statutory employee under section 390.5 and that his injuries were, therefore, not covered. We stated, "our research has revealed that those seeking coverage and benefits under the MCS-90 have indeed been denied

such by virtue of the employee exclusion contained in the MCS-90 regardless of whether or not they were a passenger or the driver at the time of the accident." *Id.* at ¶ 15.

{¶ 19} In *P.W. & Sons*, which this court relied on in *Basha*, the Fifth Circuit rejected a trucking company's argument that one of its drivers was not an employee under section 390.5 because he was an independent contractor under Texas common law. P.W. & Sons Trucking, Inc. ("PWS") hired two drivers to assist in hauling four loads of plastic resin, and PWS paid the drivers, who both held other jobs, on a load-by-load basis. The drivers successfully delivered the loads, but were involved in a one-vehicle accident on their return trip to Texas. At the time of the accident, Fred Paillet, one of the drivers, was asleep in the truck's sleeper bunk. Paillet filed suit against PWS to recover for his injuries. PWS notified its insurer, which filed an action for declaratory judgment, arguing that Paillet was an employee of PWS and that his injuries were, therefore, excluded from coverage by policy exclusions similar to those in this case. The district court concluded that section 390.5 "eliminates the traditional common law distinction between employees and independent contractors for drivers" and that Paillet was a "statutory employee" of PWS. *Id.* at 365. The Fifth Circuit agreed and stated that, "[b]y eliminating the common law employee/independent contractor distinction, the definition [of employee in section 390.5] serves to discourage motor carriers from using the independent contractor relationship to avoid liability exposure at the expense of the public." *Id.* at 366. The court held that, "[b]ecause Paillet is an employee under § 390.5 *regardless of whether he would have been considered an employee or an independent contractor at common law*, the policy's employee exclusions apply to preclude coverage in this case." (Emphasis added.) *Id.* at 367.

{¶ 20} Appellant maintains that *Basha*, *P.W. & Sons*, and other factually similar cases are distinguishable because, unlike Anderson, the passengers in those cases were co-drivers of the commercial vehicle involved in the accident. Appellant argues that an individual, like Anderson, who never drove the motor vehicle, but was only a passenger, is not an employee under section 390.5. In this respect, appellant relies on *Pouliot*, 292 F.Supp.2d 374, but we are again unpersuaded by that decision. First, *Pouliot* did not involve injuries to an individual who had not driven the vehicle in question, but, instead,

arose from injuries sustained by the driver while unloading freight at his destination. Second, while the court read section 390.5 to provide that independent contractors are deemed "employees" only while in the course of driving a commercial motor vehicle, it distinguished that case from a lengthy list of cases in which statutory employee relationships were found to exist, stating that the majority of those cases involved injuries sustained in a motor vehicle accident. The court stated, "*any* situation involving a motor vehicle accident on a public highway is probably covered by § 390.5." (Emphasis added.) *Id.* at 381. Here, because this case arises out of a motor vehicle accident on a public highway, we find *Pouliot* readily distinguishable.

{¶ 21} Hershberger engaged Anderson to train Miller as a driver and to ride with Miller, who was not legally permitted to drive without a licensed driver in the vehicle. Hershberger paid Anderson a daily rate while he was riding with Miller. Even if Anderson were an independent contractor under Ohio common law as appellant argues, we conclude that, for purposes of section 390.5, he was employed by Hershberger.

{¶ 22} We now turn to the question of whether Anderson, in the course of his employment, directly affected commercial motor vehicle safety. Appellant cites *Jensen v. Dept. of Revenue*, 13 Or.Tax 296 (1995), in support of the contention that Anderson did not directly affect commercial motor vehicle safety. *Jensen* involved a tax appeal, in which taxpayers, who were residents of Washington, argued that certain income was exempt from Oregon income tax. The relevant federal statute in that case subjected compensation paid by a motor carrier to an employee who performs regularly assigned duties in two or more states with respect to a motor vehicle to taxation only in the employee's state of residence. *See* former 49 U.S.C. 11504(b)(1). That statute incorporated the definition of employee set forth in 49 U.S.C. 31132, which is substantively the same as the definition in section 390.5. The question in *Jensen* was whether the taxpayer directly affected commercial motor vehicle safety in the course of his employment as an upper-level manager of an operating group for an interstate trucking firm. The *Jensen* court distinguished between positions that require hands-on work with commercial motor vehicles and positions that involve delegation, like managers, supervisors, and consultants. The court concluded that the taxpayer did not

directly affect commercial motor vehicle safety in the course of his employment and reasoned that, if any manager or supervisor whose decisions affected safety was deemed to be an employee who "directly affects" safety, that phrase would be virtually meaningless. *Id.* at 302. Appellant likens Anderson's role to the upper-level manager's role in *Jensen* to argue that Anderson did not directly affect commercial motor vehicle safety.

{¶ 23} Contrary to appellant's suggestion, the *Jensen* court did not purport to exclude all supervisory personnel from the applicable definition of "employee." Rather, *Jensen* involved a specific, upper-level manager, who was primarily responsible for the operation of a freight consolidation center. He was not a driver, mechanic or freight handler, and, in his position, he was removed from the actual operation of commercial motor vehicles. The court explained its rationale as follows:

> The statute limits "directly affects" to employees whose daily routine and duty has them moving, touching, or affecting a commercial motor vehicle or its contents. It is these employees who are at risk of injury if the commercial motor vehicle is improperly operated, loaded, repaired or maintained. If brakes fail, a tire explodes, or a driver loses control because the load shifts, it is the hands-on employees who are at risk. Supervisors, managers and other employees are less likely to be injured or have their health impaired by failure to comply with the safety regulations.

Id. at 301. Thus, the court distinguished between hands-off, supervisory personnel and hands-on personnel with a direct, one-on-one relationship with a commercial motor vehicle, who are at risk of injury from a failure to comply with federal safety regulations.

{¶ 24} *Jensen* is readily distinguishable from this case, based on the unique characteristics of Anderson's job. Unlike the taxpayer in *Jensen*, Anderson was not a hands-off manager, distanced from the actual operation of the commercial motor vehicle. Anderson's responsibility was to ride in the commercial motor vehicle with Miller and to directly oversee Miller's operation of the vehicle. Mr. Hershberger's stated purpose for hiring Anderson was to ensure Miller's ability to safely operate Hershberger's vehicle. Although Anderson did not drive the vehicle himself, his presence was essential to its operation. Anderson's duties clearly involved touching and

affecting the commercial motor vehicle and put him at risk of harm from improper operation of the vehicle. Moreover, Anderson's required physical presence in the vehicle establishes the hands-on, one-on-one relationship missing in *Jensen*.

{¶ 25} In *White v. Excalibur Ins. Co.*, 599 F.2d 50 (5th Cir.1979), the court determined that one member of a two-driver team, who was asleep in the truck cab at the time of an accident, was as much a statutory employee as the driver. The court stated that the two-driver team "[was] indispensable to continual vehicle operation for federal law generally permits each driver to work only ten hours at a time and then to obtain at least eight hours of rest. The activities of each of the pair during a single driving stint, including his rest period, are clearly within the course of his employment." (Citation omitted.) *Id.* at 53. Just as in *White*, both Miller and Anderson were indispensable to the operation of the vehicle in question, not because of statutorily-required rest periods, but because of Miller's lack of a CDL and the federal law prohibiting Miller from operating the vehicle without a licensed driver with him. We conclude that Anderson had at least as much direct effect on commercial motor vehicle safety as would a sleeping co-driver. We therefore conclude that Anderson qualified as a statutory employee under section 390.5.

IV. CONCLUSION

{¶ 26} Because Anderson was a statutory employee under section 390.5, the MCS-90 endorsement and the exclusions in the UFC policy preclude coverage for Anderson's injuries and appellant's claim of wrongful death. Therefore, the trial court did not err in granting UFC's motion for summary judgment and denying appellant's cross-motion. Accordingly, we overrule appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and TYACK, JJ., concur.