

**IN THE SUPREME COURT OF OHIO**

**CASE NO. 2007-0281**

**Regular Calendar**

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**Appeal from Mahoning County  
Court of Common Pleas  
Case No. 02 CV 860**

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**MARK THOMPSON**

**Plaintiff-Appellant**

**v.**

**HASAN EROGLU, ET AL.**

**Defendants-Appellees**

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**DEFENDANT-APPELLEE TRINITY TRANSPORTATION CORPORATION'S  
MEMORANDUM OPPOSING JURISDICTION**

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**I. EXPLANATION OF WHY THERE IS NO PUBLIC OR GREAT GENERAL INTEREST IN ANY ISSUE RAISED BY THE APPEAL IN THIS CASE**

This is not a case of public or great general interest to the citizens of Ohio. Rather, this is a fact specific motor vehicle accident lawsuit in which appellant is attempting to pursue claims against a trucking company, Trinity Transportation Corporation ("Trinity Transportation"), because the driver who allegedly caused this accident, Hasan Eroglu, has no insurance and is otherwise apparently uncollectible. However, there has never been any evidence presented to support the allegation that Trinity Transportation should be vicariously liable for the actions of Hasan Eroglu, and Trinity Transportation was thus properly granted summary judgment. More significantly, as it pertains to this appeal, the Court of Appeals decision that appellant did not have sufficient evidence to raise a genuine issue of fact is of no public or general interest, and this Court should therefore decline to accept jurisdiction over this appeal.

This is not a case of any great legal significance. The outcome of this case hinged not on a dispute on the law or how it should be applied, but instead on the utter lack of evidence produced by appellant in the face of uncontroverted evidence from Trinity Transportation demonstrating why the claims against Trinity Transportation are without merit. Appellant failed to conduct any discovery in the underlying case, and thus failed to produce any evidence in support of his claims against Trinity Transportation. To the contrary, appellant attempted to support his position on factual and legal arguments that were wholly unsupported by the record in this case, which the trial court and the Court of Appeals properly found to be insufficient.

The Seventh District Court of Appeals decision in this case is based upon the summary judgment record, which, as it pertains to Trinity Transportation, consists only of a single affidavit. There are no legal principles either created or ignored by the Seventh District's opinion. In fact,

there really is no dispute in this case as to the state of the law or how it should be applied. Summary judgment was granted by the trial court and affirmed by the Court of Appeals not because the courts refused to adopt the appellant's interpretation of a legal principle, but instead because the appellant had presented no facts to support his case or to refute the facts set forth by Trinity Transportation.

While appellant argues that the Court of Appeals decision can be interpreted to allow transportation companies to put commercial motor vehicles on the highways without financial responsibility, this argument demonstrates a complete misunderstanding of the Court of Appeals decision and is wholly without any merit. Neither the Seventh District Court of Appeals, nor for that matter Trinity Transportation, is suggesting that commercial motor vehicles can or should operate on the highways without adequate insurance. The Court of Appeals decision simply states that there must be some facts in the record to support a finding that Trinity Transportation can be held legally responsible for the acts of Hasan Eroglu and, in the absence of any such facts, summary judgment is appropriate.

Section 2(B)(2)(e) of Article IV of the Ohio Constitution dictates that the Supreme Court of Ohio's discretionary jurisdiction is preserved for "cases of public or great general interest." Cases presenting questions and issues of public or great general interest are to be distinguished from cases where the outcome is primarily of interest to the parties in a particular case. *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254. While undoubtedly important to the parties here, this appeal falls into the latter category of cases referenced in *Williamson* and that is why the Supreme Court of Ohio should decline to accept jurisdiction.

## **II. STATEMENT OF THE FACTS**

Trinity Transportation is a New York corporation located in Islandia, New York that hauls, among other things, recyclables to and from Long Island to various recycling facilities, including BFI in Poland, Ohio. Hasan Eroglu is not currently, nor has he ever been an employee of Trinity

Transportation. Likewise, Trinity Transportation has never entered into a lease agreement with Mr. Eroglu or Mr. Eroglu's company, H&E Trucking Inc. On occasion, Trinity Transportation will be offered more loads than it is capable of hauling, in which case Trinity Transportation offers the loads to MJ Transport, a brokerage company. MJ Transport will in turn broker those loads to a different trucking companies. On March 20, 2000, Trinity Transportation made available to MJ Transport a load from Long Island to BFI in Poland, Ohio. MJ Transport, it is believed, then brokered this load to Mr. Eroglu/H&E Trucking Inc. to Ohio.

Trinity Transportation had no involvement whatsoever in the selection of Mr. Eroglu/H&E Trucking, Inc. Further and equally as important, Trinity Transportation had no involvement whatsoever in the manner in which this load was hauled since Trinity Transportation had no right of control over Mr. Eroglu/H&E Trucking, Inc.

There was no written contract entered into between Trinity Transportation and MJ Transport, nor was there a written contract entered into between Trinity Transportation and Mr. Eroglu/H&E Trucking, Inc. Neither Mr. Eroglu nor H&E Trucking Inc. were leased to Trinity Transportation when this accident happened, nor for that matter at any other time.

On March 22, 2000, Mr. Eroglu allegedly caused a head-on collision with appellant during the course of his trip from New York to Ohio. Appellant named Trinity Transportation as a defendant in this case based on the wholly unfounded belief that Hasan Eroglu and/or H&E Trucking Inc. was either an agent of Trinity Transportation or was operating under a lease agreement with Trinity Transportation that would make Trinity Transportation legally responsible for the actions Mr. Eroglu and or H&E Trucking Inc. Trinity Transportation's motion for summary judgment was properly granted by the Mahoning County Court of Common Pleas and affirmed by the Seventh District Court of Appeals.

### III. ARGUMENTS IN RESPONSE TO APPELLANT'S PROPOSITION OF LAW

#### Appellant's Proposition of Law No. 1

A motor carrier from another state which provides transportation that uses motor vehicles not owned by it to transport property under an arrangement with another party is required by federal law and regulation to have adequate liability insurance on said vehicles and to have control of and be responsible for those vehicles as if the vehicles are owned by the motor carrier pursuant to 49 USCS Section 14102.

By his Proposition of Law No. 1, appellant argues that this Court should exercise jurisdiction over the issue of whether an out of state motor carrier who enters into an arrangement with a third party to conduct interstate transportation in Ohio should be held vicariously liable for the acts of that third party. However, the issue of whether an arrangement between Trinity Transportation and Hasan Eroglu should give rise to a finding of vicarious liability on the part of Trinity Transportation was never reached by the Court of Appeals since there was no evidence to support that there even was any arrangement.

As such, what appellant is really asking this Court to review is whether the Court of Appeals properly viewed the evidence, or in this case the lack thereof, that was presented by appellant. Since the issue of whether the lower courts properly determined that there was insufficient evidence to raise an issue of fact is not of public or great general interest, this Court should not accept jurisdiction over this appeal.

Appellant failed to properly provide the trial court with any evidentiary basis to overcome Trinity Transportation's Motion for Summary Judgment. Civ.R. 56(C) provides that the trial court will review the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations" provided in the case to decide whether the movant is entitled to judgment as a matter of law. A plaintiff cannot rest upon mere allegations or denials to the contentions raised on summary judgment, but must utilize some affirmative evidence as provided by Civ.R. 56 to show that there is a genuine issue of material fact. See Civ.R. 56(C) and

(E). Those documents which are not listed in Civ.R. 56(C) cannot be utilized to overcome summary judgment. See *Dupler v. Rockwell Intl., Inc.* (March 4, 1985), Union App. No. 14-84-1, 1985 Ohio App. LEXIS 6002 at \*3 (“Whereas in a full trial there are other avenues of proof, this rule [Civ.R. 56], for this specific purpose, permits only seven modes of proof which may be considered by the trial court in the disposition of such a motion.”); see also *Canzoni v. Marymount Hosp.* (May 1, 1986), Cuyahoga App. No. 50466, 1986 Ohio App. LEXIS 6586 (“No evidence or stipulation may be considered except as stated in this rule.”).

The documents submitted by appellants are not supported by affidavits and were not properly before the trial court. As such, pursuant to Civ. R. 56(C), appellant failed to provide any evidence in support of his position. Trinity Transportation properly submitted the affidavit to establish that Trinity Transportation had no relationship whatsoever with Hasan Eroglu. Thus, the Court of Appeals properly affirmed the finding that there was no competent evidence in the record to create a genuine issue of material fact.

Notwithstanding the fact that appellant has failed to present any evidence at the trial court level to overcome Trinity Transportation’s summary judgment, Trinity Transportation has produced an unrefuted affidavit to establish that Mr. Eroglu/H&E Trucking, Inc. did not have a contractual or legal relationship with Mr. Eroglu/H&E Trucking, Inc.

Trinity Transportation did not have an agency relationship with Mr. Eroglu/H&E Trucking, Inc. because, under Ohio law “an agency relationship is a consensual relationship (between two persons) where the agent has the power to bind the principal, and the principal has the right to control the agent.” *Tiefenthaler v. Tiefenthaler*, Fairfield App. No. 02 CA 29, 2002-Ohio-6438. Therefore, the existence of an agency relationship primarily is dependent upon the right of the principal to control the agent. *Id.* An agency relationship arises *from the agreement of the parties to the existence of the relationship.* *Bradley v. Farmers New World Life Ins. Co.* (1996), 112 Ohio

App.3d 696, 709 (emphasis added). The party contending the existence of an agency relationship bears the burden of proof. *Grigsby v. O.K. Travel* (1997), 118 Ohio App.3d 671, 675. In reviewing a trial court's determination of whether an agency relationship exists, an appellate court generally does not substitute its judgment for that of the trial court. See, e.g. *Auto Owners Ins. Co. v. King* (Oct. 20, 1989), Lucas App. No. L-88-35, 1989 Ohio App. LEXIS 3957.

As an initial matter, there is no evidence that Trinity Transportation had any relationship with Mr. Eroglu/H&E Trucking, Inc. In fact, there was no written contract or lease agreement entered into between Trinity Transportation and MJ Transport, nor was there a written contract or lease agreement entered into between Trinity Transportation and Mr. Eroglu/H&E Trucking, Inc. There is no evidence to support the fact that Mr. Eroglu/H&E Trucking, Inc. had any relationship with Trinity Transportation. Rather, Mr. Eroglu/H&E Trucking, Inc. was a separately owned and operated trucking entity who simply ended up hauling a load that Trinity Transportation was unable to haul itself. Accordingly, Trinity Transportation cannot be held liable for the acts of Mr. Eroglu/H&E Trucking. Thus, the Seventh Appellate District was correct in affirming the trial court's judgment granting summary judgment in favor of Trinity Transportation.

Assuming arguendo that a independent contractor relationship had been created at the time of the March 20, 2000 accident, there still can be no liability attributable to Trinity Transportation. Under Ohio law, an employer of an independent contractor is generally not liable for the negligent acts of the contractor or of his servants. *Pusey v. Bator* (2002), 94 Ohio St.3d 275, 278-279, citing *Clark v. Southview Hosp. & Family Health Center* (1994), 68 Ohio St.3d 435, 438; see also *Knickerbocker Bldg., Inc. v. Phillips* (1984), 20 Ohio App.3d 158, 160. The key determination in regard to independent contractor status is establishing the party who retains the right to control the manner or means of performing the work. *Pusey*, 94 Ohio St.3d, at 278-279, citing *Bobik v. Indus. Comm.* (1946), 146 Ohio St. 187, paragraph one of the syllabus.

In the case sub judice, there is no evidence to support the claim that Trinity Transportation controlled the manner and means of Mr. Eroglu/H&E Trucking, Inc. Trinity Transportation had no dealings or contact whatsoever with Mr. Eroglu/H&E Trucking, Inc., and thus obviously cannot be said to have had any control over the details of this work, or the means with which the work was carried out. There is no evidence to indicate that Trinity Transportation controlled the route that Mr. Eroglu/H&E Trucking, Inc. selected or used. Trinity Transportation did not provide the truck for hauling. *Indeed, Trinity Transportation was not even aware that Mr. Eroglu/H&E Trucking, Inc. would be the entity hauling this load to Ohio!* Therefore, the undisputed facts reveal that Mr. Eroglu/H&E Trucking, Inc. was an independent contractor for one specific job hired by MJ Transport. Furthermore, if the entity did not retain control, but is merely interested *in the ultimate result to be accomplished*, the relationship is that of an employer and independent contractor. *Council v. Douglas* (1955), 163 Ohio St. 292, at paragraph one of the syllabus (emphasis added).

Finally, appellant may not impose liability on Trinity Transportation by invoking 49 U.S.C. 14102 and 49 C.F.R. 376.12 regarding motor carrier lease liability. While 49 U.S.C. 14102 does apply to an authorized carrier/lessee, appellant cannot demonstrate that Trinity Transportation was, in fact, an authorized carrier-lessee in this circumstance. In the present action no evidence has been presented to establish that Trinity Transportation did itself *provide* transportation services on March 20, 2000. Accordingly, because the *actual providing* of transportation services by a motor carrier is a necessary component of the above described definition of a "authorized carrier," it follows that 49 U.S.C. 14102 has no relevance or applicability to Trinity Transportation. Since there is no evidence here that Trinity Transportation was the motor carrier providing actual transportation services on this occasion, Trinity Transportation is not liable under federal motor carrier lease liability.

More importantly, the fact that there was no lease between Trinity Transportation further

illustrate the obvious point that the federal statutes and regulations cited by appellant are inapplicable. It would be nonsensical for the federal regulations to require Trinity Transportation to comply with 49 C.F.R. 376.12, entitled "Written Lease Requirements" when there is no lease, written or otherwise. While appellant suggests that this court should assume there was a lease, even though there was none, the law clearly does not allow courts to assume facts that are not in evidence. Clearly, Trinity Transportation is not subject to motor carrier lease liability as it pertains to Mr. Eroglu/H&E Trucking.

**IV. CONCLUSION**

Based upon the foregoing, defendant-appellee, Trinity Transportation Corporation respectfully requests that this Court decline jurisdiction in this matter as this case is not of public or great interest as required in a discretionary appeal. The issue in this case is not whether the lower Courts properly applied the law to the facts of this case, but is instead whether appellant had sufficient factual evidence and is therefore not one that should be heard by The Supreme Court.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing was mailed ordinary first-class mail, postage prepaid, on this 13<sup>th</sup> day of March, 2006 to:

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