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**Establishing An Ever-Widening Toehold \To Overcome Placard/Statutory Employee Liability**

*by Chris Kelly*

**Saullo v. Douglas, 957 So. 2d 80 (Fla. Ct. App. 2007)**

[Steele Holman](#)

A recent Florida case has added a new arrow to the motor carrier's quiver of defenses against presumptive liability when a placarded vehicle wrecks while not operating "in the business of the carrier." *Saullo v. Douglas*, 957 So. 2d 80 (Fla. Dist. Ct. 2007).

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Most jurisdictions considering the issue have held that a leased truck displaying a carrier's placard is presumptively under the control of that carrier due to the federal regulation lease language in 49 C.F.R § 376.12[1], making the carrier vicariously liable for the wrongful acts of the driver even if the driver is not operating "in the business of the carrier." These courts have found motor carriers liable for a driver's negligence based solely upon the driver's use of the equipment, even if the driver is an independent contractor and not acting in furtherance of the carrier's business.[2]

However, small steps have been made to transform what has been held an irrebuttable presumption into a rebuttable presumption that allows a defense based upon a "course and scope" or "in the business of the carrier" argument. This new *Saullo* case provides defense counsel more ammunition to throw against that presumption and restore traditional agency analysis to this important issue of trucking law.

First, here is some background. The reasoning for placing responsibility upon the lessee has been explained as follows:

Absent such a policy, when innocent people are hurt or killed, there will be, as here, a round robin of finger pointing by carriers, lessors, owners and drivers, cargo owners, and insurers raising issues of independent contractor, frolic and detour, whose cargo was being carried, what instructions the driver had, agency and the like in their attempt to evade responsibility for the carnage wrecked [sic] upon innocent motorists. The plaintiff encounters much difficulty in fixing responsibility, for only the carrier and his lessor really know their arrangements. A plaintiff should not be required to bear this burden nor should he be required to settle for a financially irresponsible defendant fathered by the carrier.

... The carrier must, at his peril, exert care in his leasing arrangements and avoid leasing from "gypsies" or fly-by-night, irresponsible truckers. The regulations and cases make the carrier police its lessors as it is policed by the I.C.C.

*Rediehs Express, Inc. v. Maple*, 491 N.E.2d 1006, 1012 (Ind. Ct. App. 1986)

(emphasis added).[3] Accordingly, courts have reasoned that to allow a “within the course and scope argument,” coupled with the industry’s use of independent contractors, would defeat the purpose of the regulations, which is to protect the public by ensuring sufficient financial responsibility in serious casualty cases. In addition, the policy considerations provide justification, whether rational or not, for holding a carrier responsible for unauthorized conduct that does not benefit it by asserting that the carrier has the burden and duty to supervise and police the conduct of its lessors/owner-operators to ensure they are operating in a safe and responsible manner.

C. 1992 Amendment to Section 376.12 adding subsection (c)(4) and subsequent caselaw and analysis

In 1992 the Interstate Commerce Commission added subsection (c)(4) to Section 376.12, which provides that “[n]othing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.” The Commission has stated that the language in subsection (c)(4) was intended to confirm the I.C.C.’s view that the type of control required by the regulation does not affect “employment” status and that it is not the intention of the regulation to affect the relationship between a motor carrier lessee and the independent owner-operator lessor. See Patrick Phillips, Note, Common Law Respondeat Superior Versus Federal Regulation of Motor Carrier Leases: Court Interpretation of the Interstate Commerce Commission Regulations of Motor Carrier Lease Requirements, 24 Okla. City U.L. Rev. 383, 407-409 (1999) (citing Petition to Amend Lease and Interchange of Vehicles Regulations, 57 Fed. Reg. 32905 (1992)). For years, however, carriers have argued that the 1992 language helped their position that agency principles should apply.

***Parker v. Erixon—A Toehold for a Good Faith Argument***

North Carolina is one jurisdiction that has held that a scope of employment analysis is now appropriate under the 1992 addition to Section 376.12 and that the presumption of agency is rebuttable by a showing that the driver was not operating to further the business of the carrier. Parker v. Erixon, 473 S.E.2d 421, 426 (N.C. Ct. App. 1996). In Erixon, the North Carolina Court of Appeals held that although a rebuttable presumption of agency exists between a carrier and an independent contractor, a carrier is only liable under vicarious liability principles if the driver’s negligence occurred while the driver was acting in the course and scope of his services.

In Erixon, a carrier entered into a lease relationship with a driver. The carrier’s logo

and I.C.C. identification code were on the driver's tractor. The driver was involved in an accident after he temporarily unhooked his loaded trailer for the purpose of taking a side trip to visit his son. *Id.* at 422-23. The trial court denied the carrier's motion for summary judgment on the grounds that the federal regulations created an irrebutable presumption of agency between the parties. The North Carolina Court of Appeals, reversing, held that any presumption of agency was rebuttable and depended on whether the driver was in the business of the motor carrier at the time of the accident. The court noted that the I.C.C. had stated that it "did not intend that its leasing regulations would supersede otherwise applicable principals [sic] of State tort, contract, and agency law and create carrier liability where none would otherwise exist." *Id.* at 425. (quoting *Lease and Interchange of Vehicles (Identification Devices)*, 31 I.C.C. 2d 92, 93 (1986)). Indeed, the court noted that the I.C.C. stated in a 1992 opinion that its "regulations are silent on the agency status of lessors, and our decisions are clear that the Commission has taken no position on the issue of independence of lessors. ... [A]dopting the proposed amendment [Section 376.12(c)(4)] will reinforce our view of the neutral effect of the control regulation and place our stated view squarely before any court or agency asked to interpret the regulation's impact." *Id.* at 424-25 (quoting *Ex Parte No. MC-203*, 8 I.C.C. 2d at 671).

The *Erixon* Court thus held that since the driver had deviated from the lease agreement with the carrier, he was acting outside the scope of his authority when the accident occurred, and the carrier was not liable for his conduct. *Id.* at 426-27.

The comments of the I.C.C. outlined above are, as emphasized by the Commission, neutral. The Commission stated that the regulations are silent on the agency status of lessors and that the Commission has taken no position on the issue of independence of lessors by adopting Section 376.12(c)(4). The Commission clearly states that the adoption of the 1992 amendment was meant to emphasize the neutral effect of the control regulation and place the decision squarely on any court or agency asked to interpret the regulation's impact

Although the language of the 1992 amendment and Commission comments may be

helpful to carriers, they have not been persuasive enough for a majority of Courts to believe that they provide a justification for overturning 25 years of case law. The comments by the I.C.C. are reasonably interpreted by plaintiffs to indicate that the commission took no position on whether the 1992 amendment affected the case law concerning statutory employment under the federally mandated lease language. It is also reasonable to argue that the clarification was added due to workers' compensation claims by owner-operators.

***Saullo v. Douglas, 957 So. 2d 80 (Fla. Dist. Ct. 2007)—Widening the Toehold***

In *Saullo* the personal representative of the Estate of James J. Saullo brought suit against Jessie J. Douglas (hereinafter "Douglas") and Dart Transit Company (hereinafter "Dart"). Douglas was an owner-operator permanently leased to Dart with language that reflected the federal lease requirements. While Douglas was at a Florida rest area, his brother called and asked Douglas to help him get unstuck from a nearby muddy area. Douglas traveled to his brother's location, dropped the trailer in the outer lane of a four-lane highway, and drove the tractor to the brother's vehicle. The plaintiff's decedent wrecked when he swerved to avoid the trailer and a car parked behind it. *Saullo*, 957 So. 2d at 82.

During the ensuing wrongful death action against Douglas and Dart, Dart won summary judgment on the ground that it was not liable because Douglas was not acting in Dart's business interest. The trial court held that Douglas, "in leaving the trailer on the roadway and driving the tractor to extricate his brother's car, was clearly not within the course and scope of his employment or relationship with Dart." *Id.* at 86. The trial court also held that the trailer was not a dangerous instrumentality such that the employer was subject to vicarious liability under Florida law. *Id.*

The District Court of Appeal of Florida for the Fifth District reversed and remanded to the trial court, but only on the ground that Florida's dangerous instrumentality doctrine required a finding of vicarious liability if Douglas was negligent in causing the accident. *Id.* at 88. The appellate court in addressing the course and scope argument discussed in detail the requirements of the federal regulations with regard to lease language, subsequent ICC amendments, and the case law that evolved from the federal regulation. The Court, noting that this was an issue of first impression in Florida and held that a rebuttable presumption was created held:

Thus, we are faced with two competing views of the regulations and their effect on state tort law in negligence actions. One view focuses on the specific language of the lease regulations and applies a "strict agency" or "lease liability" paradigm. The other focuses on the enabling statute and the administrative directives and compels a state law respondeat superior and "scope of employment" analysis. [ ... ]. If the former is adopted, the motor carrier is liable as a matter of law for the negligence of its hired driver regardless of whether the driver was under the control of the motor carrier at the time the tort was committed. If the latter is adopted, then liability attaches to the carrier only if the driver was acting within the scope of his employment at the time of the accident. It appears that this issue is one of first impression in Florida.

We think the better view is the one that begins with the enabling statute, as amplified by the ICC directives, adopted and applied by the Parker [v. Erixon, 123 N.C. App. 383, 473 S.E.2d 421 (1996)] court. It is clear from the repeated comments of the administrative body itself that the ICC regulations were never intended to impose greater liability on carriers using either leased equipment or an independent contractor than that imposed when a carrier uses its own equipment or employees.

Saullo, 957 So. 2d at 85-86. Accordingly, although the Court in Saullo ultimately reversed the trial court based on Florida's dangerous instrumentality doctrine, it first addressed the nature of the presumption of the federal lease regulations Dart's potential vicarious liability for any negligence of Douglas. The court held that the presumption was rebuttable and that any liability that attached to Dart through Douglas's actions would not do so as a result of the federally mandated lease language.

The Erixon case established a toehold and the Saullo case has widened that toehold, providing those who represent and defend motor carriers that engage owner-operators one more case to cite in support of the rebuttable nature of the presumption.

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[1] The written lease requirements of the federal regulations can be found at 49 C.F.R. § 376.12. Section 376.12 provides in pertinent part as follows:

The required lease provisions shall be adhered to and performed by the authorized carrier.

\* \* \*

(c) Exclusive possession and responsibilities.

(1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

\* \* \*

(4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a

carrier lessee complies with 49 U.S.C. 14102[1]  
and attendant administrative requirements.

49 C.F.R. § 376.12 (emphasis and footnote added). The “exclusive possession and responsibilities” section wrought a sea change with regard to vicarious liability for carriers for the acts of their leased owner/operators.

[2] See *Mellon Nat. Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473, 477-78 (3rd Cir. 1961); *Price v. Westmoreland*, 727 F.2d 494, 497 (5th Cir. 1984); *Johnson v. S.O.S. Transp., Inc.*, 926 F.2d 516, 522 (6th Cir. 1991); *Wellman v. Liberty Mut. Ins. Co.*, 496 F.2d 131, 139 (8th Cir. 1974); *Planet Ins. Co. v. Transp. Indem. Co.*, 823 F.2d 285, 286-87 (9th Cir. 1987); *Rodriguez v. Ager*, 705 F.2d 1229, 1231, 1236 (10th Cir. 1983); *Cox v. Bond Transp., Inc.*, 249 A.2d 579, 590 (N.J. 1969); *Phillips v. J.H. Transp., Inc.*, 565 So. 2d 66, 69-70 (Ala. 1990); *Turnbow v. Hays Freight Line, Inc.*, 145 N.E.2d 377, 380 (Ill. App. Ct. 1957)(*abrogated on other grounds in Lange v. Freund*, 855 N.E. 2d. 162, 171 (Ill. App. Ct. 2006); *Empire Fire and Marine Ins. Co. v. Truck Ins. Exch.*, 462 So. 2d 76, 78, 80 (Fla. Dist. Ct. App. 1985); *Cosmopolitan Mut. Ins. Co. v. White*, 336 F. Supp. 92 (D. Del. 1972); *Hot Shot Express, Inc. v. Assicurazioni Generali, S.P.A.*, 556 S.E.2d 475, 477 (Ga. Ct. App. 2001).

[3] It is worth noting that some courts have declined to extend this line of reasoning to the intentional torts of drivers. See *C.C. v. Roadrunner Trucking, Inc.*, 823 F. Supp. 913, 920-21 (D. Utah 1993).

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