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Court of Appeals of Ohio, Twelfth District, Warren County.
WYCKOFF TRUCKING, INC., et al., Plaintiffs-Appellees,
v.
MARSH BROTHERS TRUCKING, et al., Defendants-Appellees,
and
C.J. Rogers Trucking, et al., Defendants-Appellants.
No. CA88-05-041.

Aug. 14, 1989.

Bieser, Greer & Landis, Michael W. Krumholtz and Geoffrey P. Walker, Dayton, for plaintiffs-appellees, Wyckoff Trucking, Inc. and Clinton E. Bell.

Young & Alexander Co., L.P.A., Mark R. Chilson and Barbara Lehman, Dayton, for defendant-appellees, Marsh Brothers Trucking Service, Inc. and Miller's National Insurance Company.

Freund, Freeze & Arnold, Gordon D. Arnold, Dayton, for defendant-appellee, United States Fidelity and Guaranty Company.

Kuczak, Stukey & Associates, Konrad Kuczak, Dayton, for defendant-appellee, Thomas Howard.

Pickrel, Schaeffer & Ebeling Co., L.P.A., Andrew C. Storer and William L. Havemann, Dayton, for defendant-appellant, C.J. Rogers Trucking Company.

Lyons & Fries Co., L.P.A., William J. Mulvey, Cincinnati, for defendant-appellant, Michigan Mutual Insurance Company.

OPINION

YOUNG, Judge.

*I This is an appeal from the judgment of the Warren County Court of Common Pleas in a declaratory judgment action to determine the rights and obligations of all parties involved in a personal injury suit which arose from a traffic accident on January 10, 1985.

Plaintiff-appellee, Clinton Bell (Bell), was the operator of a tractor-trailer rig owned by plaintiff-appellee, Wyckoff Trucking, Inc. (Wyckoff). At the time of the events in question, the rig was subject to a twenty-nine day master lease between Wyckoff and defendant-appellant, C.J. Rogers Trucking Company (Rogers). Under the terms of this lease, Rogers had exclusive possession and control of the rig. The parties orally agreed, however, that the rig could be trip-leased to other companies when it was not needed by Rogers.

On January 10, 1985, Bell delivered a load from Michigan to the Warren County area for a company not involved in this litigation. After making the delivery, Bell went to a brokerage office at the Cavalier Inn in Franklin, Ohio and telephoned defendant-appellee, Marsh Brothers Trucking Company (Marsh), about a trip lease back to Michigan. A dispatcher for Marsh gave Bell a load number and instructed him to pick up the load at Armco Steel in Middletown, Ohio, then to stop at Marsh's office in Dayton, Ohio to complete the necessary paperwork. On the way to Armco Steel, Bell collided with a vehicle driven by defendant-appellee, Thomas Howard. At the time of the accident, Bell's rig displayed the insignia, I.C.C. and P.U.C.O. authority of Rogers.

On August 18, 1986, Howard filed an action for personal injuries and property damage against Bell, Rogers, and Wyckoff. Howard subsequently amended his complaint to include Marsh as a fourth defendant. Bell and Wyckoff then filed the instant declaratory judgment action against Rogers, Marsh, their respective insurance carriers, defendant-appellant, Michigan Mutual Insurance Company (Michigan Mutual), and defendant-appellee, Miller's National Insurance Company (Miller's National) and Howard. The complaint for declaratory relief was subsequently amended to include defendant-appellee, United States Fidelity and Guaranty Company (USF & G), which insured Bell and Wyckoff.

The Warren County Court of Common Pleas proceeded to judgment upon stipulated facts presented through briefs and memoranda of counsel without an evidentiary hearing and ruled as follows:

"1. There was no lease existing between the plaintiff, Clinton Bell and the defendant, Marsh Brothers Trucking Service. Therefore neither Marsh Brothers Trucking Service nor its carrier defendant, Millers [sic] National Insurance Co. is obligated to either defend or indemnify Bell as a result of the January 10, 1985 accident.

"2. The master trip lease existing between the defendant, C.J. Rogers Trucking Co. and the defendant [sic], Wyckoff

Trucking Inc. was in full force in [sic] effect at the time of the accident. There was no breach; or termination of that agreement by Wyckoff Trucking Inc. The plaintiff, Clinton Bell, was either 'deadheading' or 'bobtailing' on behalf of C.J. Rogers Trucking Co. at the time of the accident.

*2 "3. The provisions of the defendant, Michigan Mutual's Insurance coverage of the defendant, C.J. Rogers Trucking Co. was in full force and effect. Said carrier is obligated to provide a defense and indemnify plaintiffs herein in Warren Co. Case 45878.

"(4) [sic] The Defendant United States Fidelity [sic] Guarantee [sic] is not obligated to either defend or indemnify any party."

The matter is now before this court pursuant to notices of appeal filed by Rogers and Michigan Mutual. Both appellants have each set forth four assignments of error which challenge specific findings made by the trial court. [FN1] Upon reviewing the arguments under each assignment, however, it is clear that the central focus of this appeal is the liability or potential liability of the various parties, particularly Rogers, Marsh, Wyckoff and their respective insurers. Therefore, instead of addressing the assignments of error seriatim, we will, for purposes of clarity, discuss the liability of each party separately. The specific factual findings assigned as error will be addressed within the context of this discussion.

I.

Rogers

The trial court concluded that Rogers was solely liable under the terms of the master lease, which placed "exclusive possession, control, use and responsibility" with the lessee Rogers. [FN2] Rogers argues, however, that Wyckoff breached the master lease, and thereby nullified its responsibility provisions, by entering into a trip-lease arrangement with Marsh. In support of this argument, Rogers relies on paragraph four of the master lease, which provides:

"4. DURATION OF LEASE--THIS LEASE SHALL COMMENCE ON THE EFFECTIVE DATE SPECIFIED BELOW AND SHALL CONTINUE IN EFFECT UNTIL BREACHED BY EITHER PARTY OR UNTIL TERMINATED IN ACCORDANCE WITH THE PROVISIONS OF THIS PARAGRAPH. EITHER PARTY SHALL HAVE THE RIGHT TO TERMINATE THIS LEASE AT ANY TIME BEFORE THIRTY DAYS FROM THE EFFECTIVE DATE HEREOF BY MAILING OR DELIVERING TO THE OTHER PARTY AT THE ADDRESS LISTED BELOW TWO COPIES OF A WRITTEN NOTICE OF TERMINATION. TERMINATION SHALL BE EFFECTIVE EITHER UPON RECEIPT OF THE NOTICE OF TERMINATION FROM THE OTHER PARTY OR UPON SUCH LATER DATE AS MAY BE SPECIFIED IN THE NOTICE. THE PARTY RECEIVING NOTICE OF TERMINATION SHALL RECEIPT THE COPY OF SUCH NOTICE AND RETURN SUCH RECEIPTED COPY TO THE OTHER PARTY. WITHOUT EXCLUDING OTHER BREACHES, ANY FAILURE TO FURNISH EQUIPMENT OR ANY USE OF EQUIPMENT BY OWNER OR BY ANY OTHER PERSON OTHER THAN THE CARRIER, PRIOR TO WRITTEN TERMINATION OF THIS LEASE IS SPECIFICALLY DESIGNATED A BREACH OF THIS LEASE WHICH PREVENTS AND THEREFORE TERMINATES CARRIERS EXCLUSIVE POSSESSION, CONTROL AND USE OF SAID EQUIPMENT AND IN SUCH EVENT CARRIERS RESPONSIBILITY FOR OR RELATIONSHIP TO SAID EQUIPMENT INITIATED BY WRITTEN NOTICE AS ABOVE PROVIDED."

In response, Wyckoff asserts that its arrangement with Marsh did not constitute a breach because the foregoing contractual language was modified through a verbal agreement with Rogers which allowed Wyckoff to trip lease with other companies when Rogers was not using the equipment.

*3 "A written contract may be modified or amended, after it is made, by the parties' express agreement or by their acts which evince a meeting of the minds in agreement to modify its terms upon a particular point." Hill v. Langley (Oct. 31, 1988), Fayette App. No. CA88-01-001, unreported. Thus, a written contract may be orally modified. Sur-Gro Plant Food, Inc. v. Morgan (June 24, 1985), Butler App. No. CA84-02-017, unreported. Whether a written contract has been orally modified is generally a question for the trier of fact. Morrison v. Devore Trucking, Inc. (1980), 68 Ohio App.2d 140. Therefore, where the record supports a trial court's determination that a contractual term has been modified, a reviewing court will not disturb that determination. Id.; Sur-Gro, supra.

In the case at bar, Rogers' safety and personnel director, Harold Levack, testified by deposition that Rogers and Wyckoff had a verbal agreement whereby Wyckoff could trip lease the equipment subject to the master lease when Rogers was not using it. According to Levack, the only stipulation was that the master lease be given priority and the equipment be available to Rogers when needed. Levack's testimony was corroborated by the deposition of Wyckoff's operations manager, Jimmie Newsome. Newsome acknowledged the verbal agreement with Rogers and indicated that such agreements were common in the trucking industry because they maximized productivity and kept the equipment from sitting idle.

The testimony of Levack and Newsome clearly demonstrates that the parties orally modified paragraph four of the master lease and agreed that individual trip

leases with other companies would not constitute a breach as long as the equipment was available to Rogers upon request. The record demonstrates that Wyckoff always had equipment available when Rogers needed it. Therefore, Rogers cannot rely upon paragraph four to establish a breach. As no other conduct constituting a breach was alleged, and no written notice of termination was provided by either party (see paragraph four of master lease, supra), we agree with the trial court's finding that no breach had occurred and that the master lease was in effect at the time of the accident.

As the master lease between Rogers and Wyckoff was in effect at the time of the accident, we must look to the language of the lease and the law applicable to such leases to determine the nature and extent of Rogers' liability.

Motor carrier leasing arrangements are generally controlled by Section 11107, Title 49, U.S.Code, and the regulations promulgated thereunder. According to these regulations, the lessee must identify itself as the operating carrier by displaying its insignia and I.C.C. authority on the equipment. Section 1057.22(a), Title 49, C.F.R. The regulations also require that the lessee accept "control and responsibility" for the equipment. Specifically, Section 1057.22(c), Title 49, C.F.R. provides:

*4 "(2) [The lease] must provide that control and responsibility for the operation of the equipment shall be that of the lessee from the time possession is taken by the lessee and the receipt required under § 1057.11(b) is given to the lessor until: (i) Possession of the equipment is returned to the lessor and the receipt required under § 1057.11(b) is received by the authorized carrier; or (ii) in the event that the agreement is between authorized carriers, possession of the equipment is returned to the lessor or given to another authorized carrier in an interchange of equipment."

The foregoing regulations create what has been termed a "statutory employment" relationship between the driver and the lessee. See Empire Indemn. Ins. Co. v. Carolina Cas. Ins. Co. (C.A. 5, 1988), 838 F.2d 1428; John B. Barbour Trucking Co. v. Texas (Tex.App.1988), 758 S.W.2d 684. Under the statutory employment doctrine, the driver of a vehicle displaying the insignia and I.C.C. authority of the lessee is presumed to be an employee of the lessee and subject to its control and responsibility. There is a split of authority, however, as to the nature and effect of this presumption.

The majority of jurisdictions hold that when a carrier lessee such as Rogers allows a driver to operate under its I.C.C. authority by placing its insignia and permit number on the vehicle, the lessee is irrebuttably presumed to be acting within the scope of his employment with the lessee and the lessee is held vicariously liable as a matter of law. Empire Indemn. Ins. Co., supra; Grinnell Mut. Reinsurance Co. v. Empire Fire & Marine Ins. Co. (C.A. 8, 1983), 722 F.2d 1400, certiorari denied (1984), 466 U.S. 951, 104 S.Ct. 2155; Rodriguez v. Ager (C.A. 10, 1983), 705 F.2d 1229; Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc. (C.A. 3, 1961), 289 F.2d 473; Kreider Truck Service, Inc. v. Augustine (1979), 76 Ill.2d 535, 394 N.E.2d 1179; Cox v. Bond Transportation, Inc. (1969), 53 N.J. 186, 249 A.2d 579. Under this view, Rogers would be strictly liable, regardless of whether Bell was actually operating on its behalf, merely because Rogers' insignia and permit numbers adorned the vehicle at the time of the collision. Empire Indemn. Ins. Co., supra; Rodriguez, supra; Mellon, supra.

The minority view rejects the imposition of strict liability on the lessee and holds that the presumption created by the I.C.C. regulations may be rebutted by applying traditional respondeat superior concepts and showing that the driver was not acting within the scope of his employment with the lessee at the time of the accident. Wilcox v. Transamerican Freight Lines (C.A. 6, 1967), 371 F.2d 403, certiorari denied, (1967) 387 U.S. 931, 87 S.Ct. 2053; Gudgel v. Southern Shippers, Inc. (C.A. 7, 1967), 387 F.2d 723; John B. Barbour Trucking Co., supra; Thornberry v. Oyler Bros. Inc. (1955), 164 Ohio St. 395. Under this view, "the I.C.C. regulations do not impose a liability on a carrier using leased equipment greater than that when operating its own equipment." Wilcox, supra, at 404.

*5 Wyckoff relies upon Jerina v. Schrock (1987), 37 Ohio App.3d 171, and asserts that the majority view outlined above is controlling in Ohio. In Jerina, a Paul Schrock owned and operated a tractor which was subject to a long-term lease with Special Service Transportation, Inc. (SST). Under the terms of the lease, Schrock was to haul exclusively for SST, but, as here, the parties had an agreement whereby Schrock could trip lease with others when he was not hauling for SST. During one of those trip leases, Schrock negligently collided with another vehicle, injuring the driver and killing a passenger. At the time of the collision, SST's insignia and I.C.C. permit numbers adorned Schrock's rig. The Geauga County Court of Appeals adopted the majority view, found SST to be liable and held:

"Where the leased vehicle is involved in an accident during the terms of the lease while carrying on the decal the name and the ICC number of the carrier with operating authorities, and while carrying a copy of the lease in the equipment with no release having been executed for the termination of the lease, the carrier is liable as a matter of law even though the owner-driver lessor was involved in a project of his own without the knowledge and consent of the carrier-lessee."

Id. at 172.

Other courts in Ohio have also indicated in dicta that liability in such situations rests with the lessee as a matter of law. Laux v. Juillerat (S.D. Ohio, 1987), 680 F.Supp. 1131, affirmed without published opinion (C.A. 6, 1988),

No. 87-3849 [FN3]; Teledyne Osco Steel v. Woods (1987), 39 Ohio App.3d 145. [FN4] In none of these cases, however, did the court discuss the contrary holding of the Ohio Supreme Court in Thornberry, supra, or that of the Sixth Circuit in Wilcox, supra.

In Thornberry, supra, the driver had completed a delivery for the lessee and was instructed to return to the lessee's place of business. After unloading the freight, however, the driver contracted with a third party and hauled an unauthorized load for his own benefit without the knowledge or consent of the lessee. During the course of the unauthorized trip, the driver negligently caused an accident. In addressing the liability of the lessee, the Ohio Supreme Court held:

"Where a common carrier of freight by motor vehicle possesses Public Utilities Commission and Interstate Commerce Commission permits, leases in its operations, from an independent contractor, a vehicle, including the services of a driver, and such vehicle is operated under the carrier's permits, such driver is deemed to be under the direction and control of the carrier, and, under the doctrine of respondeat superior, the latter is fully responsible for the actions and conduct of the driver within the scope of the carrier's business."

Id. at paragraph one of the syllabus.

The court concluded that the lessee was not liable for the negligence of the driver because the unauthorized trip constituted a complete deviation and departure from the scope of lessee's business. Id. at paragraph three of the syllabus.

*6 In Wilcox, supra, the Sixth Circuit applied Thornberry and ruled that the lessee could not be found liable for the actions of the driver who negligently caused an accident while driving the leased truck to his home after completion of his work with the lessee. The court expressly rejected the argument that the I.C.C. regulations fixed absolute liability on the lessee and held that the lessee could not be held responsible when the driver was not engaged in the lessee's business or doing anything for the benefit of the lessee at the time of the accident. Wilcox, supra, at 405.

The holdings in Thornberry and Wilcox make it clear that the minority interpretation of the I.C.C. regulations outlined above is controlling in Ohio. See also Midwestern Indemn. Co. v. Reliance Ins. Co. (1988), 44 Ohio App.3d 83; Dazell v. Sheets (Feb. 4, 1983), Lucas App. No. L-82-249, unreported; Smith v. Massachusetts Bonding and Ins. Co. (C.P.1957), 75 Ohio Law Abs. 108. As Thornberry emanates from the Ohio Supreme Court, we are bound by its precedent. Thacker v. Bd. of Trustees of Ohio State Univ. (1971), 31 Ohio App.2d 17, 23, affirmed (1973), 35 Ohio St.2d 49; Hogan v. Hogan (1972), 29 Ohio App.2d 69, 77. Accordingly, we reject Jerina, supra, and hold that where a carrier leases a vehicle and allows the driver to operate under its I.C.C. authority by placing its insignia and permit number on the vehicle, a statutory employment relationship is created and under the I.C.C. regulations, the driver is rebuttably presumed to be acting within the scope of the lessee's business, thereby subjecting the lessee to vicarious liability under the doctrine of respondeat superior. The lessee may rebut this presumption, however, and avoid liability by demonstrating that the driver was not acting within the scope of the lessee's business at the time of the incident in question.

Whether an employee's conduct is within the scope of his employment or within the scope of the employer's business is generally a question of fact to be determined under the peculiar facts of each case. Rogers v. Allis-Chalmers Mfg. Co. (1950), 153 Ohio St. 513, 526. It has been held, however, that "[t]he servant's conduct is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master." (Emphasis in original.) Calhoun v. Middletown Coca-Cola Bottling (1974), 43 Ohio App.2d 10, 13.

At the time of the accident in question, Bell was under dispatch pursuant to the oral trip lease with Marsh. See part II, infra. Although Rogers was generally aware that Bell was trip leasing, it did not have specific knowledge of this particular trip lease and did not receive any compensation or benefit therefrom. All revenues from the individual trip leases went to Wyckoff, who paid Bell's salary and maintained the equipment. Rogers did not possess control over any particular aspect of the individual trip leases. Such matters were entirely between Wyckoff and the trip lessee. Under such circumstances, it cannot be said that Bell's conduct was actuated, even in part, by a purpose to serve Rogers.

*7 The trial court found that Bell was "deadheading" or "bobtailing" [FN5] on behalf of Rogers because the master lease was in effect and Rogers' decals adorned the vehicle at the time of the accident. Thus, the trial court held Rogers liable simply because the collision occurred during Bell's employment with Rogers under the master lease. We find this holding to be erroneous. "Under the doctrine of respondeat superior, the test of a principal's liability is not whether a given act was performed during the existence of an agent's employment, but whether such act was done by the agent while engaged in the service of and while acting for the principal, in the prosecution of the latter's business." Senn v. Lackner (1952), 157 Ohio St. 206, paragraph one of the syllabus. In the case sub judice, the collision did occur during the period Bell was statutorily employed by Rogers, i.e., during the term of the master lease. However, as indicated above, the collision did not occur while Bell was acting for Rogers or within the scope of Rogers' business. Therefore, Rogers cannot be held vicariously liable for the conduct of Bell at the time of the collision. Thornberry, supra.

II.

Michigan Mutual

At the time of the collision, Michigan Mutual had issued three policies which listed Rogers as the named insured. One was an automobile policy which was not involved in this case. A second was a "truckers policy," number SRF46-0- 752102, which covered trucks, tractors and trailers owned by Rogers. Since Rogers did not own the vehicle Bell was driving, this policy is also inapplicable. A third policy, however, a "business auto" policy, number SR43- 0-752109, specifically listed Bell's vehicle as a covered auto. Under the liability provisions of this policy, Michigan Mutual agreed to defend and indemnify the insured in any suit asking for "damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto." Anyone using a covered auto with Rogers' permission was deemed an insured.

Bell and Wyckoff contend that Michigan Mutual is obligated to defend and indemnify Bell because Rogers acquiesced in Bell's trip leasing arrangements, thereby making Bell a permissive user. Michigan Mutual, on the other hand, argues that even if Bell is a permissive user, coverage is still excluded under paragraph A of endorsement number CA2310, which reads:

"LIABILITY INSURANCE does not apply while the covered auto is used in the business of anyone to whom it is leased or rented if the lessee has liability insurance sufficient to pay for damages in accordance with Chapter 31 of the Michigan Code."

We agree with Bell and Wyckoff that Bell should be considered a permissive user under the Michigan Mutual policy. However, we also agree with Michigan Mutual that coverage would be excluded if the foregoing endorsement is applicable. In order to determine whether the foregoing exclusion applies, three questions must be answered: (1) was there a lease between Bell or Wyckoff and Marsh at the time of the collision?; (2) was Bell using the vehicle "in the business of" Marsh at the time of the collision?; and (3) did Marsh have liability insurance sufficient to pay for damages in accordance with Chapter 31 of the Michigan Code? A negative answer to any one of these three questions precludes application of the exclusion and obligates Michigan Mutual to defend and indemnify Bell.

*8 Was there a lease between Wyckoff or Bell and Marsh? Section 1057.2(e), Title 49 C.F.R., defines "lease" as "[a] contract or arrangement in which the owner grants the use of equipment, with or without driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation." Therefore, the existence of a lease is determined by principles of contract law.

"To constitute a valid contract, there must be parties capable to contract, a lawful subject matter, a sufficient consideration, and an actual agreement to do or forbear from doing some particular thing." Local Telephone Co. v. Cranberry Mut. Telephone Co. (1921), 102 Ohio St. 524, 530. In the case at bar, Bell, who was authorized by Wyckoff to enter into individual trip leases, contacted Marsh and inquired about a load to Michigan. Bell indicated in his deposition that he had previously trip leased with Marsh and preferred to do so because Marsh paid well. A dispatcher authorized to assign loads offered Bell a load of steel to be hauled from Armco in Middletown, Ohio, to the Fisher Body Plant in Grand Blanc, Michigan. Bell accepted, obtained a specific load number and departed for Armco pursuant to the dispatcher's instructions. Under these circumstances, it is clear that a valid contractual agreement existed whereby Wyckoff, through Bell, granted the use of its equipment to Marsh for the purpose of hauling a load of steel from Ohio to Michigan in exchange for compensation. Accordingly, we find that the trial court erred in determining that no lease existed between Wyckoff or Bell and Marsh.

Marsh argues, and the trial court apparently agreed, that a valid contract was not created because there was no mutuality of obligation and therefore a lack of sufficient consideration. Marsh argues that Bell could have blown his engine before picking up the load or Armco could have refused to load the steel if Bell's truck was in poor condition. Similarly, Marsh contends that Bell could have rejected the load after he arrived at Armco if the load was too heavy or otherwise not suited for his truck.

The hypothetical scenarios proposed by Marsh do not represent a lack of consideration which would prevent the formation of a contract. The exchange of Bell's promise to pick up and deliver the load and Marsh's promise to compensate Bell was sufficient consideration to form the contract. The hypotheticals advanced by Marsh would merely represent a failure of consideration which would relieve a party of its obligation under the contract. For example, if Bell had blown his engine and could not perform his promise to pick up and deliver the load, Marsh would not be obligated to fulfill its promise to compensate Bell. Such a failure of consideration merely affects the enforceability of the agreement upon the nonperformance of the agreed upon exchange. It does not affect the validity of the underlying contract. See 1 Corbin on Contacts § 133. Accordingly, we find Marsh's argument to be misplaced and hold that a trip lease between Wyckoff through Bell and Marsh was in effect at the time of the collision.

*9 Having concluded that Bell's vehicle was under lease to Marsh at the time of the collision, we must next determine whether the vehicle was being used "in the business" of Marsh. Generally, a vehicle is used "in the business" of another if it is utilized or employed as an incident of the driver's service or as a means, tool or adjunct for or on behalf of that business. Trolio v. McLendon (1967), 9

Ohio St.2d 103; Hartford Acc. & Indemn. Co. v. Allstate Ins. Co. (1966), 5 Ohio App.2d 287. In the case at bar, it is undisputed that Bell proceeded from Franklin to Middletown at the direction of Marsh. Bell's sole purpose in doing so was to pick up a load of steel at Armco and transport it to Michigan on behalf of Marsh. Thus, the entire trip was actuated by Marsh in furtherance of its business of hauling cargo in interstate commerce. The trial court even concluded that upon dispatch, Bell's vehicle became "Marsh's truck." Under the circumstances, therefore, we conclude that Bell was operating his vehicle in the business of Marsh at the time of the collision. Johnson v. Angerer (1968), 16 Ohio App.2d 16.

The final determination we must make with respect to Michigan Mutual's obligation under the policy is whether Marsh had "liability insurance sufficient to pay for damages in accordance with Chapter 31 of the Michigan Code."

The relevant portion of Chapter 31 of the Michigan Insurance Code, Mich. Comp. Laws Ann. § 500.3101, provides:

"Sec. 3101. (1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall be in effect continuously during the period of registration of the motor vehicle.

" * * *

"(3) Security may be provided under a policy issued by an insurer duly authorized to transact business in this state which affords insurance for the payment of benefits described in subsection (1). A policy of insurance represented or sold as providing security shall be deemed to provide insurance for the payment of the benefits.

"(4) Security required by subsection (1) may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the registration period. The person filing the security has all the obligations and rights of an insurer under this chapter. When the context permits, 'insurer' as used in this chapter, includes any person filing the security as provided in this section."

According to the deposition testimony of Marsh's general manager, Anthony W. Marsh, Marsh had filed certificates of insurance with the I.C.C., the P.U.C.O. and similar regulatory agencies in Michigan and other states. Each of these filings indicated that Miller's National had issued a policy of bodily injury liability and property damage liability insurance which provided coverage or security for the protection of the public. In light of these filings, it is evident that Marsh complied with Chapter 31 of the Michigan Insurance Code.

*10 Whereas the record demonstrates that Bell's vehicle was operated pursuant to a trip lease with and in the business of Marsh at the time of the collision and that Marsh maintained the requisite liability insurance, we conclude that the exclusion contained in endorsement number CA2310 to Michigan Mutual's truckers policy was effective. Accordingly, coverage under the policy was precluded and Michigan Mutual owed no duty to defend or indemnify Bell or Wyckoff.

III.

Marsh

The trial court concluded that Marsh was not liable because no trip lease existed between Marsh and Bell. We have already concluded, however, that a trip lease was in effect and that Bell was acting in the business of Marsh at the time of the collision. Therefore, under the principles of respondeat suprerior, Marsh is liable for the alleged negligence of Bell.

IV.

Wyckoff

The trial court implicitly found that Wyckoff was not responsible for the alleged negligence of Bell. Wyckoff asserts that such a holding is proper because Bell was operating under a lease with and in the business of Marsh at the time of the collision. While we agree with the premise that Marsh is responsible, we further find that the trip lease does not preclude the imposition of liability upon Wyckoff as well.

Under the loaned or borrowed servant doctrine, it is possible for an individual to be considered an employee for respondeat superior purposes of two employers at once:

"A person may be the servant of two masters, not joint employers, at one time as to one act, if this service to one does not involve abandonment of the service to the other."

Laux, supra, at 1138 (quoting Restatement of the Law of Agency, 2d, § 226).

As noted above, the relationship of principal and agent or master and servant in Ohio is dependent on the master's right of control over the servant and whether the servant is acting within the scope of the master's business. Hanson v. Kynast (1986), 24 Ohio St.3d 171. In circumstances involving the lease of a tractor trailer rig and driver, it is common to find "mixed control" over the driver by both the lessor and lessee. Johnson v. Motors Dispatch, Inc. (1977), 172 Ind.App. 285, 360 N.E.2d 224. It is thus possible for the driver to be acting within the scope of business and to the benefit of two "employers" simultaneously. Id.; Laux, supra; see also, Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., supra, at 35, 96 S.Ct. at 233.

In the case at bar, Wyckoff paid the wages of Bell and authorized the individual trip leases with various companies,

including Marsh, which made payments directly to Wyckoff. Wyckoff was generally responsible for the costs of such trip leases, including fuel, tolls and maintenance. Marsh, on the other hand, in addition to the indicia of control outlined in part II, supra, maintained the right of control over the time and place of loading and unloading and the right to specify the freight to be carried. Under such circumstances, we conclude that Bell was a servant for respondeat superior purposes of both Wyckoff and Marsh at the time of the collision. Therefore, Wyckoff and Marsh may be held jointly and severally liable. Laux, supra.

V.

U.S.F. & G.

*11 The trial court concluded that U.S.F. & G. was not obligated to defend or indemnify any party. We disagree.

At the time of the collision, U.S.F. & G. insured Wyckoff under a "truckers policy," number TP026009423, part IV(A) of which provided:

"A. We will pay.

"1. We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto.

"2. We have the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for bodily injury or property damage not covered by this policy. We may investigate and settle any claim or suit as we consider appropriate. Our payment of the LIABILITY INSURANCE limit ends our duty to defend or settle." (Emphasis in original.)

Part IV(D) of the policy stated that Wyckoff was an "insured" for any covered auto, as well as any person using, with Wyckoff's permission, a covered auto owned, hired, or borrowed by Wyckoff. The covered autos were specifically listed on a separate schedule. Bell's vehicle was not on this schedule. Therefore, although Bell was clearly operating with Wyckoff's permission a vehicle owned by Wyckoff, Bell was not operating a "covered auto." Accordingly, neither Bell nor Wyckoff was covered under the language of parts IV(A) and (D).

Attached to the policy, however, was an I.C.C. form BMC-90 endorsement, which provides in part:

" * * *

"In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay, within the limits of liability prescribed herein, any final judgment recovered against the insured for bodily injury to or death of any person, or loss of or damage to property of others (excluding injury to or death of the insured's employees while engaged in the course of their employment, and property transported by the insured, designated as cargo), resulting from negligence in the operation, maintenance, or use of motor vehicles regardless of whether or not such motor vehicles are specifically prescribed in the policy and whether or not such negligence occurs on any route or in any territory authorized by the Interstate Commerce Commission to be served by the insured or elsewhere.

"It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, shall relieve the Company from liability or from the payment of any final judgment, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured.

" * * * "

Under the terms of the I.C.C. endorsement, U.S.F. & G. would be obligated to pay any final judgment rendered against Wyckoff, even though the vehicle involved was not specifically listed as a covered auto. [FN6] Such a result is consistent with the public policy behind the I.C.C. endorsement, that is, to assure financial responsibility and to provide security for the protection of the public from injuries arising from the operations of a certificated carrier. Carolina Cas. Ins. Co. v. Underwriters Ins. Co. (C.A. 5 1978), 569 F.2d 304. According to the language of the I.C.C. endorsement, therefore, Wyckoff is an insured under the policy and U.S.F. & G. is obligated to defend and indemnify Wyckoff. Furthermore, since Wyckoff's liability, if any, rests on its status as the general employer of Bell, we conclude that U.S.F. & G. is also obligated to defend Bell. U.S.F. & G. would not, however, be responsible to Bell for any judgment rendered against Bell because the I.C.C. endorsement only obligates U.S.F. & G. to pay for judgments rendered against the carrier. See American Gen. Fire & Cas. Co. v. Truck Ins. Exchange (D.Kans.1987), 660 F.Supp. 557, 567.

VI.

Miller's National

*12 Miller's National concedes in its brief that it owes a duty to defend and indemnify Marsh and has apparently done so throughout these proceedings. Miller's National argues, however, that it owes no such duty to Wyckoff or Bell. This argument is based on the erroneous contention that Bell was not acting under a lease with or in the business of Marsh at the time of the collision. Since Marsh is at least partially responsible for Bell's actions, Miller's National, as Marsh's insurer, also faces potential liability. Any such liability, however, must be determined from the language of the insurance policy issued to Marsh or the declarations and endorsements attached thereto. The record before us does not include a copy of such policy. The only item in the record in this regard is a copy of the certificate filed with the I.C.C. on behalf of Marsh which indicates that Miller's National has issued a policy of insurance providing the requisite coverage under the I.C.C.

regulations. Accordingly, this matter must be remanded to the trial court for a determination of the nature and extent of coverage, if any, provided to Wyckoff and/or Bell under the policy or policies issued to Marsh by Miller's National.

VII.

Summary

I. Although the master lease between Wyckoff and Rogers was in effect, Rogers is not responsible for the alleged negligence of Bell because Bell was not acting in the business of Rogers at the time of the collision with Howard.

2. Rogers' acquiescence in Bell's trip leasing arrangements made Bell a permissive user under Rogers' policy with Michigan Mutual. Coverage was excluded, however, under endorsement number CA2310 which precludes liability when the vehicle is operated in the business of one to whom it is leased and the lessee maintains the requisite insurance coverage.

3. Marsh is jointly and severally liable with Wyckoff for the alleged negligence of Bell because Bell was operating under a valid trip lease and in the business of Marsh at the time of the collision.

4. Wyckoff is jointly and severally liable with Marsh for the alleged negligence of Bell because Wyckoff and Marsh exercised mixed control over the actions of Bell, who was acting in the business of both Wyckoff and Marsh at the time of the collision.

5. Under the terms of the I.C.C. BMC-90 endorsement U.S.F. & G. is obligated to defend and indemnity Wyckoff. Since Wyckoff's liability rests on its status as the general employer of Bell, U.S.F. & G. is also obligated to defend Bell. The I.C.C. BMC-90 endorsement, however, does not obligate U.S.F. & G. to indemnity Bell for any judgment obtained against Bell personally.

6. The liability of Miller's National must be determined on remand by examining the language of any policy it issued to Marsh and the law relative thereto.

Therefore, in accordance with the foregoing, Michigan Mutual's first, second and third assignments of error are sustained. Michigan Mutual's fourth assignment of error is sustained as it relates to the duty of Miller's National to defend and indemnify Marsh. The duty of Miller's National with respect to Bell and/or Wyckoff, however, must be determined on remand. Rogers' first assignment of error is overruled and its second, third and fourth assignments of error are sustained.

JONES, P.J., and HENDRICKSON, J., concur.

FN1. Michigan Mutual's assignments of error are as follows:
ASSIGNMENT OF ERROR NO. I:
"THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN DETERMINING THAT CLINTON BELL WAS NOT ON THE BUSINESS OF MARSH BROTHER'S TRUCKING AT THE TIME OF THE ACCIDENT WITH THOMAS HOWARD ON JANUARY I0, I985."
ASSIGNMENT OF ERROR NO. 2:
"THE TRIAL COURT ERRED WHEN IT DETERMINED THAT DEFENDANT UNITED STATES FIDELITY & GUARANTY IS NOT OBLIGATED TO DEFEND OR INDEMNIFY ANY PARTY."
ASSIGNMENT OF ERROR NO. 3:
"THE TRIAL COURT ERRED IN DETERMINING THAT WYCKOFF TRUCKING INC. WAS NOT RESPONSIBLE FOR THE NEGLIGENCE OF CLINTON BELL."
ASSIGNMENT OF ERROR NO. 4:
"WHERE AN INSURANCE COMPANY HAS FILED A CERTIFICATE OF INSURANCE WITH THE ICC ENABLING A TRUCKING CONCERN TO OPERATE AS A COMMON CARRIER, THAT INSURANCE COMPANY IS LIABLE FOR THE DEFENSE AND INDEMNIFICATION OF THAT TRUCKING CONCERN."
C.J. Rogers' assignments of error are as follows:
ASSIGNMENT OF ERROR NO. I:
"THE LOWER COURT ERRED IN ITS FINDING THAT AT THE TIME OF THE ACCIDENT C.J. ROGERS WAS A CARRIER LESSEE OF THE WYCKOFF VEHICLE WHICH COLLIDED WITH HOWARD."
ASSIGNMENT OF ERROR NO. 2:
"THE LOWER COURT ERRED IN ITS FINDING THAT AT THE TIME OF THE ACCIDENT CLINTON BELL WAS EITHER 'DEADHEADING' OR BOBTAILING' ON BEHALF OF C. J. ROGERS."
ASSIGNMENT OF ERROR NO. 3:
"THE LOWER COURT ERRED IN CONCLUDING THAT AT THE TIME OF THE ACCIDENT THERE WAS NO TRIP LEASE IN EXISTENCE BETWEEN BELL AND MARSH BROTHERS."
ASSIGNMENT OF ERROR NO. 4:
"THE LOWER COURT ERRED IN ITS FINDING THAT BECAUSE C. J. ROGERS PLACARDS, I.C.C. AND PUCO AUTHORITY ADORNED THE WYCKOFF VEHICLE AT THE TIME OF THE ACCIDENT, C.J. ROGERS IS SOLELY AND STRICTLY LIABLE IN THIS CASE."

FN2. Paragraph two of the master lease provides in part: "For the duration of this lease owner

[Wyckoff] leases equipment unto carrier [Rogers] for the carriers [sic] exclusive possession, control, use and responsibility."

FN3. In Laux, supra, the defendant-lessee, Transamerican Freight Lines, Inc., conceded that it was liable for the negligence of the driver under Section 1057.22, Title 49 C.F.R. The sole issue tried in the district court, therefore, was Transamerican's claim that the defendant-lessor, Juillerat, was jointly and severally liable. In addressing this claim, the district court noted that "[t]he fact that ICC regulations impose liability on the lessee under a trip lease agreement, however, does not prevent joint and several liability for the same negligence from being imposed upon the owner-lessor of the truck under the applicable state law of respondeat superior." Id. at 1137.

FN4. In Teledyne, supra, the Lorain County Court of Appeals stated that under the control and responsibility provisions of the I.C.C. regulations "responsibility for any loss would necessarily rest with [the lessee]." Id. at 146. In that case, however, the parties had specifically allocated the risk of loss to the lessor pursuant to an indemnification clause in the lease agreement. The court found such a clause permissible under Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc. (1975), 423 U.S. 28, 96 S.Ct. 229.

FN5. The term "deadheading" is generally used within the trucking industry to refer to a tractor that has made a delivery and is returning with an empty trailer. The term "bobtailing" generally refers to a tractor that is running without a trailer.

FN6. Although the I.C.C. form BMC-90 endorsement provides that under no circumstances will the insurer of a certificated motor carrier be relieved of liability to any person injured or damaged as a result of the carrier's operations, the insurer still maintains a right of contribution or indemnity from another insurer of the same risk. Transport Indemn. Co. v. Rollins Leasing Corp. (1975), 14 Wash.App. 360, 541 P.2d 1226.

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