

## FALL 2013 NEWSLETTER

### COMMERCIAL TRUCKING LITIGATION UPDATE

By Gerald B. Lotzer

1. ***Ramirez, Individually and as Representative of the Estate of Raymond Ramirez, et al v. Garcia, et al*, No. 07-11-00385-CV (Tex.Civ.App., 7th Dist., Amarillo) 2013 Tex. App. LEXIS 11195, 8/29/13.**

This is an appeal from the 154th Judicial District Court of Lamb County before Judges Quinn, Campbell and Hancock.

Samuel Lee Jackson, individually and as next friend of his minor son, and as personal representative of the Estate of Rexee Jo Jackson, appealed the trial court's summary judgment in favor of Defendant, Cuahutemoc "Tim" Gonzalez. Erma Ramirez, individually and as next friend of five minor children, and Janie Crosby, individually, also appeal the trial court's summary judgment in favor of Gonzalez on their claims against him. The Court addressed the number of issues relating to Gonzalez's liability for the fatal traffic collision resulting in the death of three people. The Court affirmed in part and reversed and remanded in part.

Gonzalez was the owner and sole proprietor of Gonzalez farms which was engaged in the custom harvesting business. In this particular instance, Gonzalez contracted with Chester Farms to harvest silage based on a verbal agreement. Gonzalez was to haul the harvested silage from the Chester Farms field to the Littlefield Feedyard. Mr. Gonzalez was to be paid \$6.00 for each ton harvested and delivered to the feedyard and eighteen cents per mile for the hauling.

Gonzalez then employed Robert Garcia, the owner of 3R/Garcia Trucking to perform the work. Garcia and two drivers arrived at the designated location, with a total of three seemingly well-maintained eighteen-wheeler trucks, and began hauling silage from the field to the feedyard. Garcia also brought a fourth truck which belonged to Garcia and which was driven by Raymond Ramirez.

After the silage was loaded and en route to the feedyard, a tire blew out on the tandem truck causing Ramirez to lose control and to careen headlong into oncoming traffic. His vehicle struck an SUV driven by Tammy Jackson and carrying her teenaged daughter, Rexee Jo. Tammy, Rexee Jo, and Ramirez all died as a result of the accident.

Jackson, Rexee Jo's father and former husband of Tammy, brought suit against Garcia and Gonzalez. Subsequently, Ramirez and Crosby intervened. Gonzalez moved for traditional and no-evidence summary judgments against Ramirez and Crosby and the trial court granted both motions in May 2011. In August 2011 the trial court signed a default judgment against Garcia in favor of Jackson, awarding over \$4.5 million and severing Jackson's claims against Garcia. Jackson's claims against Gonzalez remained, as did it seems Ramirez and Crosby's claims against Garcia, not having been specifically identified in the severance language. Jackson

and Gonzalez subsequently filed competing hybrid motions for summary judgment and the court granted Gonzalez's no-evidence motion, denied Jackson's, and found it unnecessary to rule on Gonzalez's traditional motion for summary judgment.

As noted, when the Court signed the default judgment against Garcia in favor of Jackson, the trial court severed Jackson's claims against Garcia, leaving Ramirez and Crosby's claims against Garcia. In its final order, the trial court specifically severed Jackson's, Ramirez and Crosby's claims against Garcia which resulted in final summary judgments in favor of Gonzalez. Since the default judgment in favor of Jackson against Garcia had already been severed, and had not been appealed, and appeared to be final as to Jackson's claims against Garcia. Ramirez and Crosby non-suited their claims against Garcia and those claims were not before the Court. Garcia was not a party to the appeal.

The issue therefore was the two summary judgments granted in favor Gonzalez against two separate sets of appellants, which the Court considered on appeal. Although some of the issues raised by the appellants were similar, the Court held that each seemed to raise significant different claims and issues on appeal. What both sets of appellants apparently did have in common is that both sets were trying to impose liability on Gonzalez.

The first issue was whether or not the trial court erred by granting Gonzalez's no-evidence motion for summary judgment on Jackson's allegations of negligent loading of the tandem truck Ramirez was driving. The Court determined that without evidence of how much silage had been loaded onto the truck that Ramirez was driving, Jackson's negligent loading cause of action cannot survive a no-evidence motion for summary judgment. Jackson failed to bring forth more than a scintilla of a challenged essential element of his cause of action and, therefore, the trial court properly granted Gonzalez' no-evidence motion for summary judgment on the issue of negligent loading of the truck that Ramirez was driving.

The second issue was whether or not Jackson could impose liability upon Gonzalez by way of the principal of "statutory employment" under the Federal Motor Carrier's Safety Regulations (FMCSR) as adopted in Texas. See, 37 TEX. ADMIN. CODE, § 4.11(a)(2012). Generally, the statutory employment is a theory of vicarious liability created by the FMCSR. The vicarious liability fiction of the statutory employ doctrine applies only to the extent necessary to ensure the carriers' responsibility for the public safety. The Court determined from the record that Gonzalez's employees loaded the trailers with silage and determined when the trailer was full. Gonzalez also made a determination of which equipment to use and coordinated the harvesting in terms of moisture and weather conditions and directing the drivers where to go and when. He retained some authority to control the transport from the farm to the feedyard; by his own testimony, he had the authority to refuse to fill a truck he considered unsafe; and per the agreement with Chester Farms, Gonzalez was "ultimately responsible" for getting the silage from the farm to the feedyard. The Court concluded that Jackson responded to Gonzalez's no-evidence motion for summary judgment with more than a scintilla of evidence that Gonzalez was a "motor carrier", "an entity that controlled, operated, or directed the operation of one of more vehicles that transported ... cargo over a road or a highway in this state," and therefore met the definition under the TEXAS TRANSPORTATION CODE.

The trial court properly granted summary judgment in favor of Gonzalez on Jackson's claims of negligent overloading and on Ramirez and Crosby's claims for negligence based on a joint enterprise. The Court overruled the corresponding points of error of the respective parties and did not reach three of Ramirez and Crosby's points of error because they were not before the trial court at the time it granted summary judgment and may not serve as a basis for reversing the judgment. The Court held that the no-evidence summary judgment in favor of Gonzalez was improper, however, on Jackson's claims of statutory employment and on Ramirez and Crosby's negligence claims based on retained control, the Court sustained those corresponding points of error of the respective parties and affirmed the trial court's no-evidence summary judgment in part, reversed in part, and remanded the cause to the trial court for further proceedings consistent with its opinion.