SYLLABUS

(This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.)

Gonzalo Chirino v. Proud 2 Haul, Inc. (A-15-18) (080747)

(NOTE: The Court did not write a plenary opinion in this case. Instead, the Court affirms the judgment of the Appellate Division substantially for the reasons expressed in Judge Alvarez's majority opinion, which is published at ___ N.J. Super. ___ (App. Div. 2017).)

Argued March 12, 2019 – Decided April 25, 2019

PER CURIAM

In this appeal as of right, the Court considers whether the challenge to a fuel tax damages award by defendants Proud 2 Haul, Inc. (P2H), and its principal, Ivana Koprowski, is barred because first raised on appeal.

Plaintiffs are members of a certified class of truck owner-operators who contracted with P2H to deliver sealed containers from the Port of New Jersey to customers in the northeastern United States. P2H was the entity through which customers placed their orders. It was registered with the Federal Motor Carrier Safety Administration and subject to both the federal Motor Carrier Act (MCA) and the federal Truth in Leasing (TIL) regulations, 49 C.F.R. §§ 376.1 to .42.

P2H supplied plaintiffs with credit cards that plaintiffs used to purchase diesel fuel for their trucks and gasoline for their personal vehicles. The November 19, 2010 lease agreements between plaintiffs and P2H provided that P2H would reimburse plaintiffs for the taxes included in the price of diesel fuel they purchased for their trucks. In June 2012, P2H entered into an agreement with Trucking Support Services, doing business as Contracts Resource Solutions (CRS), under which CRS leased the trucks from the owner-operators. CRS in turn assigned the services and equipment it leased from the owner-operators to P2H.

Plaintiffs' complaint alleged in pertinent part that defendants violated the TIL regulations by virtue of their arrangement with CRS, violated New Jersey's Wage Payment Law, and engaged in acts of conversion and fraud. The trial court granted plaintiffs partial summary judgment on their claim that defendants violated the lease agreements by failing to reimburse plaintiffs' diesel fuel taxes. On November 15, 2013,

the court entered an order awarding plaintiffs $382,753.68 in damages. Defendants did not argue that the court's quantification of those damages was erroneous.

On December 20, 2013, the trial court entered an order granting plaintiffs partial summary judgment on their claim that, after May 27, 2012, defendants were in violation of the TIL regulations by failing to have written lease agreements with plaintiffs, contrary to 49 C.F.R. § 376.12(a). Defendants moved for reconsideration of that order based on a new legal theory that CRS, not plaintiffs, was the "owner" of the equipment as that term is defined in 49 C.F.R. § 376.2(d)(2) because CRS had the exclusive right to use of the equipment. The trial court denied reconsideration. It held that CRS was not the "owner" of the trucks under the TIL regulations because plaintiffs retained the ability to lease their trucks to others, including P2H. CRS thus did not have the right to exclusive use of the trucks. The trial court found that allowing a corporate intermediary like CRS to be interjected into the relationship plaintiffs and P2H would undermine the TIL regulations and the MCA. On February 28, 2014, the court awarded plaintiffs $4,481,747.37 in damages on that claim. The parties later settled the matter, preserving defendants' right to appeal some of the relief awarded by the trial court.

The Appellate Division majority affirmed. ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 17). First, recognizing that defendants failed to challenge the court's calculation of the $382,753.68 damage award at trial, the panel majority declined to consider that issue on appeal. Id. at ___ (slip op. at 12-15). The majority found that defendants' argument did not fit into any of the exceptions to the general rule that an appellate court will decline to consider issues not presented to the trial court when the opportunity for such a presentation was available. Id. at ___ (slip op. at 14). The panel majority also rejected defendants' contention that the settlement agreement preserved their right to challenge the $382,753.68 damage award, reasoning that an agreement between the parties cannot expand the universe of procedural options available on appellate review. Id. at ___ (slip op. at 13).

Second, the majority held that CRS was not the "owner" of the trucks under the TIL regulations, 49 C.F.R. § 376.2(d), because it did not have the right to exclusive use of the trucks. Id. at ___ (slip op. at 15-17). The agreements were devoid of any language that made CRS's relationship to plaintiffs exclusive because they did not prohibit plaintiffs from entering into contractual agreements with other motor carriers and, in fact, allowed for direct arrangements to be made between plaintiffs and P2H. Id. at ___ (slip op. at 15-16). The majority stressed, in reaching that holding, the purpose of the TIL regulations -- to protect individual truck drivers from large trucking concerns because the companies possess an unfair advantage. Id. at ___ (slip op. at 16-17).

Judge Accurso dissented in part. Judge Accurso agreed that CRS was not the "owner" of the trucks under 49 C.F.R. § 376.2(d) but would have vacated the November

15, 2013 order and remanded for the trial court to recalculate the $382,753.68 damage award. Id. at ___ (slip op. at 1, 8) (Accurso, J.A.D., dissenting).

Defendants appealed as of right, based on the Appellate Division dissent. See R. 2:2-1(a)(2).

HELD: The judgment of the Appellate Division is affirmed substantially for the reasons expressed in Judge Alvarez's majority opinion.

AFFIRMED.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and TIMPONE join in this opinion.

SUPREME COURT OF NEW JERSEY

A-15 September Term 2018

080747

Gonzalo Chirino, Felix D. Jay, Andrew Ankle, Gary Josephs, Rene Campbell, Aston Hemley and Maryan Vasyuta,

Plaintiffs-Respondents,

v.

Proud 2 Haul, Inc., and Ivana Koprowski,

Defendants-Appellants.

On appeal from the Superior Court, Appellate Division, whose opinion is reported at ___ N.J. Super. ___ (App. Div. 2017).

Argued	Decided
March 12, 2019	April 25, 2019

Robert J. De Groot argued the cause for appellants (Robert J. De Groot and Garrubo & Capece, attorneys; Robert J. De Groot, of counsel and on the brief, Frank Capece, of counsel, and Oleg Nekritin, on the brief).

David Tykulsker argued the cause for respondents (David Tykulsker & Associates, attorneys; David Tykulsker, of counsel and on the brief).

PER CURIAM

The judgment of the Superior Court, Appellate Division is affirmed substantially for the reasons expressed in Judge Alvarez's opinion, reported at ___ N.J. Super. ___ (App. Div. 2017).

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and TIMPONE join in this opinion.