

TRUCKING LITIGATION AND D.O.T. REGULATIONS IN GEORGIA

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I. OVERVIEW OF TRUCKING LITIGATION: PLAINTIFFS' PERSPECTIVE

This presentation is intended as an overview of trucking litigation to give the practitioner an understanding of issues peculiar to trucking cases and how to approach the handling of these claims. The proper investigation, planning, and execution of trucking case litigation demands that the practitioner understand the unique factual, legal, regulatory and commercial aspects of the trucking industry. Fundamental changes in technology, the Georgia regulatory scheme and “Tort Reform” legislation have created significant recent changes in the field.

A. Initial Considerations In Case Management and Organization

1. **Conducting Factual and Legal Investigations**. The pre-suit investigation is intended to *identify and preserve facts and evidence and to develop legal theories*. There are unique aspects to the trucking case initial investigation.

Initial Client Contact. Getting and keeping the client and the case. Everyone wants the opportunity to handle a catastrophic truck collision case. Why should the client employ you and stay with you when problems arise?

Police Reports. The uniform police report is the place to begin the investigation. Understand every entry on the report. Immediately obtain all police photographs. Specialized Collision Reconstruction Team (SCRT) reports can include witness statements, cargo and weight information, logs, photos, measurements, and reconstruction analysis. SCRT reports are made in cases involving potential criminal prosecution. Police video is often automatically engaged when the officers respond a call.

Scene investigation. The scene of any event should be viewed as early as possible. It is often important to conduct the view under similar circumstances of light, weather, seasonal changes, time of day and traffic or use. Documenting conditions through photographs and/or videotape should be conducted in a manner consistent

with the significance of the case. (Aerial views and professional forensic photographs are not justified in every case). Take more rather than fewer photographs. Document the areas of interest, all approaches, signs, traffic control devices, road markings, views and positions of known witnesses and any visible markings or debris. It is a good idea to carry a ruler to place along any subject where size or scale may be significant.

Physical Evidence. Vehicles and their components. Documenting, Securing and Chain of Custody. The vehicles, component parts and stored data may be necessary evidence. Preservation of this evidence and the chain of custody requires that you know what may be available and how to control preservation of the evidence. The purchase and storage of any automobile may require the cooperation of the owner or the insurance company. Access to and preservation of the tractor, trailer, tires, parts, computer and other vehicle data should be established by notice to the custodians and potential defendants [**Appendix 1**].

Technology and Data Recorders. You will require access for examination and investigation or notice to the truck company and its insurance carrier forcing preservation of the evidence. The vehicles will probably have event data recorders (“Black Box”) which record various data before and during the collision. Mobile and Satellite Communication Systems such as OmniTRACS® is an interactive information management system that includes two-way mobile communications, satellite tracking and fleet management software. The OmniTRACS system also includes automatic vehicle tracking with the use of a global positioning satellite (GPS). TrailerTRACS, which attaches to trailers so that their location can be constantly monitored as well. Fleet management communication systems such as

OmniEXPRESS® (a digital wireless mobile communication system similar to OmniTRACS but more affordable), TruckMAIL™ (a web-based mobile communication system), OmniOne™ (essentially a customized cellular phone with two-way data communication between dispatch and drivers), and FleetAdvisor® (a fleet management system which can support the use of electronic DOT time logs, tracking functions, including when a truck crosses a state line, and can generate over 30 standard reports related to any particular delivery). Vehicle and Performance Monitoring Systems may also exist such as JTRACS Pro® as well as FleetAdvisor® which are vehicle computer systems that allow the trucking company monitor vehicle systems while the truck is in operation. JTRACS Pro has over-the-air reporting and control features that monitor such characteristics as engine oil pressure, engine coolant temperature, transmission oil pressure, injector cylinders, alternator current, gas supply pressure, refrigerant pressure, and glow plug relay. SensorTRACS® is a performance monitoring system which interfaces directly with the truck's sensor inputs to provide RPM, speed and idle summaries. All of this can be displayed in real time or at customer-defined intervals. The company can monitor a driver's speed and evaluate average speeds over any period of time the company wants to use. A driver can modify his driving habits immediately with messaging from the company. Many performance aspects can be monitored including fuel mileage, driving time, "over speed percent," "over RPM percent," "and excess speed time." This system can provide performance summaries for each driver's speed, RPM, MPG and idle times so that the company can determine which drivers are meeting or violating fleet standards.

Witness Statements : Cast a Wide Net. Interview everyone at the scene. Police,

state patrol and deputy sheriffs investigating or just directing traffic at the scene. ALL witnesses and passengers identified through the police reports. Fireman and EMT's, who are frequently the best witnesses regarding initial medical evaluations and extraction of trapped vehicle occupants. Wrecker drivers may have had direct contact with potential parties at the scene. Completely canvass the neighborhood, including businesses and the residences. The importance of positive and negative statements will only be appreciated when a witness appears at deposition or trial with a different story. The signed statement serves to both restrict and refresh the witness recollection. Have the witness date and sign each page of the statement and initial any corrections or changes. Consider informal video statements of particularly important or powerful witnesses to use in mediation presentations.

News media. Visit the local newspaper and obtain all photographs (not just the ones that appear in the newspaper). Obtain all video shot by local television news organizations (not just the ones that appear on TV).

Internet Searches. Motor Carrier's own website is a great place to begin to understand their business structure, locations, and people. www.Safersys.org The Federal Motor Carrier Safety Administration's database of motor carrier profiles, violations, accidents, and insurance information (Company Snapshot, Company Safety Profile, SafeStat Online); www.fmcsa.dot.gov; www.ai.volpe.dot.gov/mcspa.asp; www.trucking.org The American Trucking Associations; www.truckinginfo Industry News; www.tth.net/truckingcom.htm Trucking Carrier and industry Links;

(www.jjkeller.com) J.J Keller & Associates; (www.truckline.com) American

Trucking Association; www.truck.com - Comprehensive trucking site with links to several trucking databases and similar information; www.transportlink.com - home pages of motor carrier, third-party logistics and industry provider organizations; (www.transportnews.com) Daily guide to news and topics of interest in the transportation industry; (www.greentruck.com)Green Truck environmental compliance requirements; (www.truckinginfo.com) Newport's Trucking info.com-
“If it happens in trucking, we've got it covered.

Insurance Coverages: Federal law requires commercial vehicles traveling in interstate commerce to carry \$750,000.00 of insurance for bodily injury and property damage. (49 U.S.C. 31139 (b)(2)) Proof of financial responsibility shall be filed with the Secretary of Transportation (Form MCS-90, 49 C.F.R.387.7 (d)). If the carrier is transporting hazardous material in excess of 3,500 water gallons \$5,000,000 in coverage is required. Transporters of oil and hazardous materials not covered elsewhere are required to have \$1,000,000 in coverage. Most State laws also impose minimum insurance requirements on trucks not covered under Federal law.

Government information sources: Investigative Agency records (Police, Fire, EMT, 911 records, Government Regulatory Agencies, Criminal Investigations) and regulatory filings (DOT, PSC, SEC and the rest of the regulatory alphabet). The Georgia Open Records Act and the Freedom of Information Act (governing federal information) are extremely important tools that should be used in every tractor/trailer investigation. Georgia Open Records Act (O.C.G.A. § 50-18-70; *Napper v. Georgia Television Company, et al.*, 257 Ga. 156, 356 SE 2d 640, “if closed investigatory files in criminal cases are held not to be open to public inspection because of the possibility of post-conviction relief, the Public Records Act ... will be completely eviscerated.”).

[Appendix 2]. Records which can be obtained from state sources include: (1) Public Service Commission (Files on the Motor Carrier); (2) Department of Transportation (DOT Audit and Exit Reports, records for any construction or work zone related accident; fatality reports and photographs generally available on any fatal incident on Georgia highways; aerial surveys DOT Office of Environmental Matters 3993 Aviation Circle, Atlanta, Georgia (404) 699-4401; (3) accident statistics for a particular location; (4) traffic signal information from the engineering department of the responsible governing authority i.e. city, county or state; (5) 911 records and audio tapes. The Freedom of Information Act, 5 U.S.C., Section 552, may be used to obtain records about a trucking company from the U.S. Department of Transportation. A request may be addressed to FOIA Program Officer, U.S. Department of Transportation, Federal Highway Administration, Washington, D.C. 20590. **[Appendix 3]**. The FOIA request should refer to the date and place of the crash from which the representation arises, and specify the categories of documents requested. Those may include: (1) The office of Motor Carrier Safety accident report submitted by the carrier regarding the specific accident, specifying the time, date, place and truck driver. (2) Copies of the initial notice of applicable DOT-OMCS rules sent to the motor carrier by the FOMCS, DOT. (3) Copies of all correspondence of records received from or sent to the carrier. (4) All "driver equipment and compliance checks" completed on standard DOT - OMCS equipment and roadside check forms along with copies of any such reports returned to the DOT. (5) All case reports prepared by any DOT - OMCS agent on this carrier.(6) All safety compliance surveys conducted by any DOT - OMCS agent on the carrier.(7) All notices of Civil Forfeiture Claims or Federal Court action documents sent to the above-mentioned companies, by DOT along with any enclosures attached thereto and answers received from the carrier.(8) All memoranda and/or reviews maintained in the carrier's files created by any state or federal agent, Regional Director, OMCS National Director or Counsel for the U.S. Department of Transportation.(9) All

settlement agreements, consent orders, or federal court action documents in reference to actions taken against the above-listed company, and any related news releases.(10) The safety rating as maintained by the DOT - OMCS on the company on the date of the accident, and the carrier's present safety rating.

2. Determining Legally Viable Causes of Action, Potential Defendants, and Venue.

The Regulatory Scheme. We care about the state and federal regulation of commercial trucking because they establish **standards of conduct, legal relationships** and **financial responsibility**. It is critical to be familiar with the application of FMCSR's with the facts presented by your case. The regulations are broad and are intended to assure the safe operation of motor carriers. The FMCSR's are found at 49 C.F.R. Parts 350 through 399. Copies of the regulations is American Trucking Association, 2200 Mill Road, Alexandria, Virginia 22314. and Official Trucking Safety Guide, J.J. Keller & Associates, Inc., 3003 W. Breezewood Lane, P.O. Box 369, Neenah, Wisconsin 54957-0368. This is a particularly good compilation of all information relating to trucking safety rules in all 50 states. These regulations apply to common carriers, contract carriers and private carriers of property subject to 49 U.S.C. § 1651 *et seq.* Generally, interstate trucking firms are subject to these regulations. However, there are many exemptions from interstate commerce commission to economic regulations. Exempt activities are include the operation of school buses, taxi cabs, hotel buses, certain types of farm equipment and agricultural vehicles.

The State of Georgia Public Service Commission. The State of Georgia Public Service Commission ("PSC") is authorized by law to regulate motor carriers. O.C.G.A. § 46-7-1 *et seq.* The PSC acts as a quasi legislative body, and its rules

and regulations have the force and effect of law. O.C.G.A. §§ 46-7-26 and 46-7-27. *Georgia Public Service v. Smith Transfer Company*, 207 Ga. 658 (1951); *Georgia Public Service Commission v. Jones Transportation, Inc.*, 213 Ga. 514 (1957). In general, the PSC had adopted the FMCSR's as its own rules governing the safe operation of motor carriers. See "Adoption of Motor Carriers Safety Regulations issued by the Department of Transportation, Federal Highway Administration, Office of Motor Carrier Safety, Title 49 C.F.R., Parts 390 - 397," Georgia Public Service Commission, order dated April 2, 1991

Independent cause of action for FMCSR . Negligence per se. Under Georgia law, the negligence per se doctrine applies where there is a violation of a statute, ordinance, rule, or regulation promulgated by a lawmaking or regulatory body that can establish as a matter of law the standard of ordinary care for the circumstances. When a statute provides a rule of conduct, "negligence per se" is established by proof of a violation of that law. The party asserting negligence per se must show that the statute was designed to guard against the particular danger involved in the occurrence, and that he comes within the class of persons that the legislature intended to protect from the particular danger. Negligence per se can only be based on a statute which imposes a specific duty to act or not to act. The violation of federal regulations, may constitute negligence per se. A party relying on federal laws or regulations is not required to give notice of intent to do so. While there are valid arguments for treating FMCSR violations as negligence per se, there are few reported decisions that do so. In Georgia, recent decisions have declined to require even instructing juries on the FMCSR due to lack of proof of proximate cause, but an earlier decision combines a state statute and federal

regulations to support the doctrine of negligence *per se*. **Evidence of Negligence.** Admission of FMCSR violations as evidence of the applicable standard of care under a theory of ordinary negligence. Comment g to the Restatement (Second) of Torts §286 states: “The fact that a legislative enactment requires a particular act to be done for the protection of the interests of a particular class of individuals does not preclude the possibility that the failure to do such an act may be negligence at common law toward other classes of persons. It also does not preclude the possibility that, in a proper case, the requirements of the statute may be considered *as evidence* bearing on the reasonableness of the actors conduct.

Proximate Cause. Some courts have taken an extremely narrow and restrictive view of the role of FMCSR violations in causation of truck wrecks, injuries and deaths. In a Georgia case, *Parker v. R & L Carriers, Inc.*, 253 Ga. App. 628, 560 S.E.2d 114 (2002) where a trucker ran a red light the court held that the proximate cause of the collision was the failure to yield the right of way, not the failure to follow federal regulations FMCSR hours of service rule and fatigue.

Company Rules and Policies. The violation of a private company rule is not negligence *per se*. *Southern Railway v. Allen*, 88 Ga. App. 435 (1953). However, the rules of a private company are admissible into evidence and negligence actions as illustrative of negligence. *Luckie v. Piggly Wiggly Southern, Inc.*, 173 Ga. App. 177 (1985).

Venue. The normal rules of venue apply to motor carrier cases, with some exceptions (i.e. residence county of the defendant driver, for non-resident drivers where the collision occurred or the plaintiff resides, where the defendant motor

carrier resides or has a designated corporate agent). First, a motor common or contract carrier can be sued in the county where the cause of action arose. O.C.G.A. §§ 46-7-17(b). The carrier can also be sued in the county in which it has designated an agent for service of process pursuant to O.C.G.A. §§ 46-7-17(a). The insurance carrier in a direct action case can be sued in the county where (1) the insurer's principal office is located; (2) any county where the insurer has an agent, or (3) the county of the registered agent. The motor carrier and the insurer are not joint tortfeasors, so where the carrier and the insurer are sued jointly, venue must be proper as to both. *Thomas v. Bobby Stevens Hauling Contractors, supra*; *Bolin v. Pennsylvania Threshermen & Farmers' Mutual Casualty Company*, 92 Ga. App. 726 (1955).

3. Establishing Which Parties Will Be Involved .

The driver. State common law agency principles will control. A leased driver is the "statutory employee" of the motor carrier making the carrier vicariously liable for the driver's negligence. CFR 376.12 and 376.31. See, *Judy v. Tri State Motor Transit Co.*, 844 F. 2d 1496, 1501 (11th Cir. 1988).

The direct employer (motor carrier). In motor carrier cases, complicated questions relating to agency often arise. See, *Chrostowski v. G & M.S.S. Trucking, Inc.*, 198 Ga. App. 140 (1990); *Cf. Spell v. Port City Adhesives, Inc.*, 183 Ga. App. 816 (1987). Ordinarily, a person cannot be the servant of two masters, but the Georgia courts have recognized the principle that one may be the servant of two masters and subject to the demands of both or either. *Hotel Equipment Company v. Liddell*, 32 Ga. App. 590 (1924); *Allen v. Landers*, 39 Ga. App. 264, 265 (1929). In *Reliance Insurance Company v. Bridges, supra*, the

Court of Appeals approved the trial court's charge to the jury on dual agency.

Parent and subsidiary corporations. Consider the theories of principle and agent, joint venture, and instrumentality or alter ego and apparent agency.

Conduct in Joint Violation of the Law. A common understanding among two or more drivers to reach a common destination driving their vehicles together in a group, i.e., a "convoy," at excessive speeds, in a reckless manner, is an unlawful joint enterprise to violate the traffic laws of this State. *Bellamy v. Edwards*, 181 Ga. App. 887, 888 (1987); *Kilpatrick v. Foster*, 185 Ga. App. 453, 454 (1988).

Vehicle Identification. "Logo Liability" The driver is the statutory employee of the carrier who's logo is displayed on the truck. *Empire Indem. Ins. Co. v. Carolina Ins. Co.*, 833 F. 2d 1428 (5th Cir. 1988)

Brokers. A broker may incur liability for failure to review and evaluate a carrier's safety record under a negligent hiring theory. *Schramm v. Foster*, 341 F. Supp 2d. 536 (Md. 2004).

Shippers. A shipper may have responsibility if the incident is related to the condition of the load. A load shift, improper weight or weight distribution can be a common law negligence or FMCSR violation. There can be a presumption the shipper participated in loading where it is sealed before the motor carrier picks up the load. *Miller v. Rollins Leasing Corp.*, 1999 WL 739539 (Ohio 1999).

Logistics Company. For a hours of service violation, check who designed the route the trucker was driving. It may be that it was impossible to drive the route as designed without an hours of service violation which might impose

liability on the company designing the route.

Trip Leasing. It is not at all unusual for the owner of a tractor to lease his tractor and his driver to the owner of a trailer. Freight moves by an independent tractor hooking up to the trailer, carrying it from various points, and then the tractor returns to its home terminal. It is not economically practical for the tractor to return without pulling a trailer, so the tractor and driver are frequently “trip leased” to a common carrier who has a return load. The licensed motor carrier has a certification of public convenience and necessity, usually owns its own trailers and some tractors. Motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation of them in accordance with the applicable law and regulations as if they were the owners of the vehicles. Under the provisions of 49 U.S.C. § 304(a)(3), the common carrier bears full responsibility for the control of the driver of the leased equipment. To constitute a dual agency under a trip lease, all that is ordinarily required is some retention of control over the person by both the lessor and the lessee. *Merry Brothers Brick and Company v. Jackson*, 120 Ga. App. 716 (1969). See also, *Nationwide Mutual Insurance Company v. Holbrooks*, 187 Ga. App. 706 (1988). There the court held that under federal and state laws and regulations, the driver was a statutory employee of the lessee in recognition of Georgia’s public policy that the insurance carrier bear full responsibility to the public for the operation of the truck. This case should be reviewed for its analysis of statutory obligations, both federal and state, arising in a motor carrier trip lease situation r place of doing business; (3) the insurer had an agent or place of business at the time the cause of action accrued or the policy was issued; and (4) the victim resides.

O.C.G.A. § 33-4-1. *Thomas v. Bobby Stevens Hauling Contractors supra.*

Joinder of Insurer. Direct Action Statutes . A “direct action statute” allows a Plaintiff to join a trucking company’s insurance carrier as a named party in the same lawsuit. Effective July 1, 2005, however, the Department of Motor Vehicle Safety was disbanded by the legislature. There are now three distinct levels of trucking regulation in Georgia. The functions it formerly performed were delegated to three other state agencies: the Public Service Commission took over regulation of the transportation of household goods and passengers; the Department of Revenue took over regulation of the transportation of property; and The Department of Public Safety took over regulation of the transportation of hazardous materials and certain licensing and safety functions. These regulatory changes necessitated the amendment of the Direct Action Statute. The direct action statute set forth in O.C.G.A. § 46-7-12(c) now only applies to motor carriers of household goods and passengers. A new direct action statute, codified at O.C.G.A. § 46-7-12.1, provides that before obtaining a permit authorizing carriage of property. A third category of motor carriers is regulated only minimally, by virtue O.C.G.A. § 46-7-16. This statute applies to motor carriers who act solely in interstate commerce. These motor carriers must file proof of insurance in their home states but do not have to file separate certificates of insurance in Georgia. In addition, they do not receive “certificates” (from the PSC) or “permits” (from the Revenue Department) from the state of Georgia. Instead, they receive a “registration receipt” issued pursuant to federal law. O.C.G.A. § 46-7-16(a). The Georgia statute specifically indicates that: It shall not be necessary for any motor carrier to obtain a permit from the State revenue

commissioner when such motor carrier is engaged solely in interstate commerce over the public highways of this state. O.G.G.A. § 46-7-16(f). Thus, purely interstate motor carriers regulated by federal law are exempt from Georgia regulation and are not covered by either of the two Georgia direct action statutes. This is because an interstate motor carrier holds neither a “certificate” from the PSC (which would have made its insurer subject to direct action under O.C.G.A. § 46-7-12) nor a permit from the Revenue Department (which would have made its insurer subject to direct action under O.C.G.A. § 46-7-12.1). Unless the motor carrier is a certificate holder or a permit holder, there will be no direct action statute applicable to that carrier. To summarize, under the new regulatory scheme:

- motor carriers of property engaged solely in interstate commerce are not required to obtain an operating permit or certificate from the state;
- motor carriers of property engaged solely in interstate commerce are not required to file a certificate of insurance with the state; and
- motor carriers of property engaged solely in interstate commerce do not subject their insurers to direct action under either of the two direct action statutes.

The cause of action is not in tort, but in contract based on the motor carrier’s tort. The plaintiff is a third party beneficiary of the indemnity contract given by the insurer for the protection of the public against wrongful acts or omissions by motor carriers. *Grissom v. Gleason, supra*; *Glenn McLendon Trucking Company, Inc. v. William*, 183 Ga. App. 508 (1987), cert. denied. An action may be maintained against the insurer without joining the carrier as a party. *Griffin v. Johnson*, 157 Ga, App. 657 (1981); *Thomas v. Bobby Stevens Hauling Contractors*, 165 Ga. App. 710 (1983).

To maintain a direct action against a motor carrier's insurer, the plaintiff must show that the insurance policy was issued, filed, and approved by the Georgia PSC at the time of the incident. *Glenn McLendon Trucking Company, Inc. v. William, supra*. There is no direct action available against an insurer of a motor carrier engaged solely in interstate commerce who has not been issued a certificate of convenience by the Georgia PSC. *Commercial Union Insurance Company v. Bradley Company*, 186 Ga. App. 610 (1988). There is no direct action against insurers who insure motor carriers which are exempt under applicable statutes. *National Indemnity Company v. Tatum*, 193 Ga. App. 698 (1989); *Bailey v. Occidental Fire & Casualty Company*, 193 Ga. App. 710 (1989). But to avoid direct liability on the policy, the insurer must show that the equipment was used exclusively for an exempt purpose. *Progressive Casualty Insurance Company v. Scott*, 188 Ga. App. 75 (1988). The amount of coverage provided by the insurance policy is not admissible at trial. *Carolina Casualty Insurance Company v. Davalos*, 246 Ga. App. 746 (1980). It is questionable whether liability of the insurer extends to punitive damages, although there is no binding authority that it does not. See *Spicer v. American Home Assurance Company*, 292 F. Supp. 27 (N.D. Ga. 1967, aff'd, 402 F.2d 988 (5th Cir. 1968), cert. denied, 89 S.Ct. 1275 (1969)).

Drafting the Initial Pleadings. [Appendix 4] Notice Pleading does not mean "No Rules". Pitfalls remain for the inexperienced practitioner even in the age of notice pleading. The drafting of initial pleadings is an excellent opportunity to either anticipate and avoid problems or create a set of new ones. **Conditions precedent** : Notice (County, Municipality, GTCA); Contractual; Administrative

(FTCA); **Foreign law**: The laws of other States and Foreign jurisdictions must be plead to give the other party notice O.C.G.A. § 9-11-43; **Choice of forum** : State Court/ Superior Court; Federal Court/State Courts. Considerations: Jury Pool, judges, procedural requirements, length of discovery, time to trial, expense, bill of costs, appellate costs; **Parties** . Qualification of Party. Representative capacity: Parent/Child, Guardian /Ward, Executor/Administrator; **Jurisdiction and Venue**; **Factual Allegations** ; **Causes of Action**; **Damage allegations** . [Attachment 4].

B. Working With Expert Witnesses. Deciding who, how, and if expert witnesses are engaged are some of the most expensive and consequential decisions in the case. *Daubert* (making the trial judge the “gatekeeper” who decides the admissibility of expert testimony) has only made the choice more critical. Accident reconstruction, biomechanics, human factors, conspicuity, tires, brakes, component parts, trucking safety and management are all experts you may need to consider inn a tractor trailer case..

Do You Need an Expert ? Trucking cases will generally require the employment of some experts. At the very least the scene and vehicle conditions should be inspected and documented in any significant claim. If the scene is stale or the police have made an accident reconstruction investigation it may not be necessary to have the same work repeated. Ask yourself: 1) Could I lose some evidence that could have been preserved?, and 2) Could I lose a party or theory that should have been pursued? If the trucking company claims representative is in your office with a blank check an expert may be an unnecessary expense. ***Daubert and Expert Selection.*** Selection and preparation of any expert witness should be made with the requirements of *Daubert* in mind, remembering that the trial judge has broad

discretion to admit or exclude expert testimony. There are only a small number of reported decisions apply *Daubert* standard to trucking safety experts. In order to assure admissibility of an expert to explain the standard of care with references to FMCSR, counsel may consider use of a trucking safety consultant who has advised trucking companies about safety issues, who has some academic background, who has taught and/or advised companies or trained drivers specifically on safety standards and the FMCSR, and who is able to clearly articulate a rational methodology and specific standards of care based on his knowledge and experience rather than just from reading the FMCSR. Counsel should work to educate the expert about *Daubert* / *Kumho* requirements and insist on preparation sufficient to pass close scrutiny regarding methodology and reliability of the experts.

Locating the Right Expert to Support Your Case. The expert search should begin with a broad search for qualified experts close to home: GTLA, ATLA, other lawyers, other cases, internet. Soon a reasonable list of qualified names will be generated. Contact the expert and request their resume (CV), fee schedule, experience with *Daubert* challenges and a list of cases where they have given depositions or trial testimony. Speak to other lawyers who have retained them and seen them in depositions or court. Meet the expert - if you don't like them why will a jury? Take time to discuss how they like to work, fees and expenses and their experience with issues raised by your case.

Guidelines for Retaining an Expert. Establish if the expert is a consulting or testifying

expert; discuss and document fee and expense arrangements, the handling and

consequences of *Daubert* motions, and the management of reports and communications.

Are Your Communications with the Expert Privileged? An expert hired in anticipation of litigation under Rule 26 can not be discovered unless the inquiring party shows “substantial need”. With respect to a testifying expert “correspondence from an attorney to an expert is protected from disclosure to the extent that the correspondence contains the opinion work product of the attorney. Should a dispute arise over whether a particular document does contain protected work product material, the trial court must conduct an in camera review to ensure that mental impressions, conclusions, opinions, or legal theories of a party's attorney or representative are not disclosed. *McKinnon v. Smock*, 264 Ga. 375, 377 (Ga. 1994).

Deposing the Expert Witness. Always depose the expert with “informed humility”. They are the expert and you are not likely to know more than they do. Question them thoroughly, carefully and using common sense. Obtain their entire file and review each entry. Make them explain their actions, methods, procedures and opinions until you understand._____

C. Discovery Techniques and Strategy. Because of the extensive documentation generated in many trucking cases comprehensive requests to produce [Appendix 5] and interrogatories [Appendix 6] are essential discovery. After the written discovery is obtained then depositions should be carefully planned. Consider taking: The Truck Driver; 30(b) (6) depositions concerning motor carrier regulatory compliance, insurance, and other general issues; Scene Witnesses; Motor Carrier Employee collision witnesses; Driver's Supervisor; Director of

Operations; Safety Director; dispatchers, auditors, and the doctor that conducted the DOT physical exam; defense experts.

D. Settlement, Negotiations and Mediation. While lawyers refer to commercial trucks as “piggy banks” on wheels, the defense bar, insurance and trucking industry are sophisticated and talented advocates. They are not often stampeded by bad facts, bad injuries or death. Even in the worst cases they will not hesitate to litigate aggressively. The best settlements generally require preparation and a demonstrated ability to take the case to trial.

The Role of ADR or Mediation in Settlement Proceedings. The purpose is to save time, money and energy in reaching a “fair settlement”. What’s “Fair”? More than the defendant wants to pay and less than the plaintiff wants to accept. The value of any claim is ultimately what a jury will award (and that will be upheld on appeal) for a unique and specific case. ADR can focus everyone’s attention on the case, make an unreasonable client listen to reason (plaintiff or defense), and create another opportunity to persuade your opposition.

Effective Ways to Negotiate During Settlement Proceedings. **High expectations**. Studies have demonstrated that attorneys with high expectations achieve higher negotiated settlements. **Be prepared to go to trial**. Studies have demonstrated that attorneys prepared to go to trial achieve higher negotiated settlements. **Prepare for Negotiations**. Other Verdicts; Mock trials, focus groups, juror surveys, Ejury; Mediation Video or Disk; Day in the life Video or Disk; Medical illustrations. **Good manners, businesslike and professional**. We are all professionals here.

The goal is to demonstrate in a convincing manner that it is in the other party's interest to settle the case based upon your evaluation. **Choosing a Mediator** . Mediators' have different styles just like everyone else. Some are only messengers going back and forth urging "good faith" and the uncertainties of a trial. Others are more aggressive and willing to push parties to achieve an agreement. Some mediators have a particularly good reputation with certain insurance carriers or companies and may wield greater influence than others. Fit the mediator to the case. **Who will attend mediation** ? Do they have the authority to commit the company or insurer? Are they a phone call away from that authority? **Prepare the Client for failure** . The clients expectations are often biased towards settlement once mediation is scheduled. They must be prepared to accept that the mediation may be unsuccessful and trial may be the preferred path to recovery.

Structuring the Settlement . A structured settlement is simply an agreement to enter into a present settlement which usually provides for a present lump sum payment and future periodic payments. The future payments are often funded through the purchase of an annuity or life insurance contract. The advantage to the plaintiff is that the future periodic payments remain tax free to the extent they are compensation for personal injury resulting from a physical injury [IRC Sec.104(a)(2)]. A structured settlement can also avoid the danger of mismanagement or fraud which may deplete a settlement fund, particularly where the recipient is a minor, incompetent or financially unsophisticated. The advantage to the defendant is that a smaller present lump sum will generate greater total future

payments which may lower the actual cost of the settlement. Considerations when structuring settlements: Present value; Financial strength of the guarantor; Tax issues; Probate and/or Trial Court approval; Contingent Beneficiaries and Special Needs Trusts. A qualified Special Needs Trust [42 U.S.C. § 1396p(d)(4)(A)] can preserve the clients right to recover governmental and charitable benefits.

Strategies for Drafting Settlement Documents . Releases: The main areas of concern for a plaintiff in the release documentation are the parties being released and any indemnification language. A Limited Release is effective under Georgia law but must be clear. Indemnification language should always be reviewed carefully and negotiated aggressively. **Tax considerations** . IRS Code §104(a)(2) provides that gross income does not include: the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness. Confidentiality clauses. The value of a confidentiality agreement is taxable. If you do not assign a value to the clause the IRS will. T.C. Memo.2003-329; *UNITED STATES TAX COURT; EUGENE AMOS, JR., Petitioner v. COMMISSIONER OF INTERNAL REVENUE* Respondent Docket No. 13391-01. Filed December 1, 2003. **Third party claims:** Subrogation, reimbursement, and liens. Med Pay, Health Insurance, Workers Comp, Social Security, Medicare, Medicaid, Hospital Liens, ERISA Plans, Government Employees, Military Personnel and Dependents.

E. Planning and Preparation for Trial .

1. Distinguishing Between the Various Types of Damages

Pre-Impact Pain and Suffering. In a trucking case do not overlook pre-impact pain and suffering. For pre-impact pain and suffering to be awarded, the jury must have some evidence that the deceased at some point in time was conscious of her imminent death; the jury may infer such consciousness from evidence immediately prior to impact or following her injury. *Monk v. Dial*, 212 Ga. App. 362 (441 S.E.2d 857) (1994). *DOT v. Dupree*, 256 Ga. App. 668, 680 (Ga. Ct. App. 2002). **Emotional Distress**. Georgia law permits recovery of damages for emotional distress arising from viewing injury to another person under limited circumstances. When, as here, a parent and child sustain a direct physical impact and physical injuries through the negligence of another, and the child dies as the result of such negligence, the parent may attempt to recover for serious emotional distress from witnessing the child's suffering and death without regard to whether the emotional trauma arises out of the physical injury to the parent. *Lee v. State Farm Mut. Auto. Ins. Co.*, 272 Ga. 583, 588 (Ga. 2000). **Wrongful death**:" full value of the life of the deceased"; economic value and intangible loss. The full value of the life of the deceased, as shown by the evidence, is the full value of the life of the deceased without deduction for necessary or other personal expenses of the deceased if that person had lived. You should consider the gross sum deceased would have earned to the end of life, had deceased not been killed, reduced to its present cash value in determining the amount of the full value of the life of the deceased. The full value of the life of the deceased is not limited to the

amount of money that could have or would have been earned had deceased not been killed. O.C.G.A. §51-4-1; *Pollard v. Boatright*, 57 Ga. App. 565 (1938). **Punitive (Aggravated or Exemplary) Damages**. In Georgia, O.C.G.A. § 51-12-5.1 allows an award of punitive damages based upon “clear and convincing evidence” that the defendants actions showed willful misconduct, wantonness, or “that entire want of care which would raise the presumption of conscious indifference to consequences.” Punitive damages are limited to \$250,000 except for intent to cause harm, or intoxication, or the first award regarding a defective product. Proof of knowing violations of FMCSRs may aid in satisfying that standard. Three Georgia cases illustrate how, even under a more demanding legal standard, a “pattern or policy of dangerous driving” in might be proven to support an award of punitive damages. In *Smith v. TommyRoberts Trucking Co.*, 209 Ga.App. 826, 828(2), 435 S.E.2d 54 (1993), a claim for punitive damages against a truck driver was supported by evidence that his truck struck another vehicle twice and kept pushing that vehicle down the road the second time, that truck driver had indicated that he was in a hurry to deliver his load, and that he was rewarded for fast driving and quick deliveries. In *J.B. Hunt Transport v. Bentley*, 207 Ga. App. 250, 255(2), 427 S.E.2d 499 (1992), the mode of operation of a trucking company authorized a jury to find conscious indifference to consequences. The largest trucking company in the country was a habitual violator of hours of service regulations, operated on a “forced dispatch” system, under which a driver could not refuse a load without losing his job. In *Fowler v. Smith*, 237 Ga. App. 841, 516 S.E.2d 845 (1999), evidence was sufficient to overcome a motion for

partial summary judgment on a punitive damages claim where there was some evidence that Fowler may have violated federal safety law by being stopped in the interstates center lane for approximately 35 minutes before the collision without placing triangular warning devices on the highway, in violation of 49 CFR § 392.22(b), and that the truck driver did not turn on his tractor-trailer lights after it became dark and his main truck lights were not on at the time of the collision.

Pre-Judgment Interest . O.C.G.A. 51-12-14(a) provides that where a claimant has given written notice by registered or certified mail to a person against whom claim is made of a demand for an amount of unliquidated damages in a tort action and the person against whom such claim is made fails to pay such amount within 30 days from the mailing of the notice, the claimant shall be entitled to receive interest on the amount demanded if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the amount demanded.

2. **Creating an Effective Trial Notebook**: A trial notebook should be considered in any case involving complex litigation such as trucking injury or death cases. A trial notebook which is developed as the case is prepared will assist in organization, case analysis and preparation, discovery and presentation at trial. [Attachment 6] is an article describing the authors trial notebook preparation system.

3. **Composing Motions in Limine and Memoranda to Address In-Trial Issues.**

Motions in Limine. The evidentiary SWORD AND SHIELD. **Trial Memoranda** . Think economically; both for your costs and the courts time. The

court will appreciate your directness. If there is a single controlling authority consider providing a copy of the case to the court and opposing counsel. If the issue warrants further detail keep the brief BRIEF. If there is a life or death issue controlling the case take what time and space is necessary to brief the issue thoroughly.

4. **Making a Preliminary Decision as to the Order of Witnesses.** Why chronological facts are seldom the best presentation and how juries make decisions.

Principles of primacy, simplicity, hindsight, prototypes, issue framing, and mutating facts.

5. **Preparing Witnesses for Examination and Cross-Examination . Direct Examination :** “Introductions”, “Tell their stories”, “Describe and Explain”; “Use your head, but speak from the heart.” **Cross Examination :** “Don’t take it personally”. A visit may help familiarize the witness with the courtroom and calm them before testifying.

6. **Planning for Opening Statements and Closing Arguments . Opening Statement .** Studies have demonstrated that 85% of jurors make a decision by the end of opening statements. The interaction of jurors CORE BELIEFS with the persuasive principles of primacy, simplicity, hindsight, prototypes, issue framing, and mutating facts drive those decisions. The trucking case is almost always about the defendants conduct. Exploit it. **Closing Argument .** Closing the deal.

7. **Practical Tips for Voir Dire Question Construction .** [Appendix 7] The dual purpose of voir dire is to identify jurors core beliefs (bias and prejudice); and, to educate and sensitize the jury to the issues in your case. In a trucking case the main areas of concern are the jurors attitudes towards trucking companies, the civil

justice system, and money damages. You are seeking the jurors CORE BELIEFS. These are opinions, attitudes and perspectives that are deeply held and form a central part of their identity. They are the lense through which the juror will receive all the information communicated during the case. You can not alter a jurors core beliefs. They will alter the facts in order to conform to their core beliefs. You want to understand their beliefs and experience about trucks, driving, safety, injury, death, loss, business, rules, money damages, and the jury system. Voir Dire is also the first opportunity to educate the jury and sensitize them to issues in the case. The panel will take the process more seriously after hearing that the case is about a 80,000 pound vehicle that ran over your clients car at 65 miles an hour.

8. **Choosing and Developing a Case Theme**. The case theme is shorthand to identify to the jury the essence of your client's case. An effective theme aids in framing the issues for the jury. It acts as an organizing principal for them to receive and process facts and evidence. The theme may be a word or phrase but should be no longer. Often, the theme will be used in the opening statement, "This case is about, i.e. GREED/ RESPONSIBILITY/ SELFISHNESS"; and, returned to in the closing argument. As the military says, the use of a proper theme is a "force multiplier". Principles for developing a case theme: the case THEME grows from your clients unique experience; the case THEME must have integrity; the case THEME should fit the case like a glove. Generally, in a trucking case, the theme remains the defendant's conduct. Consider if there is a theme to your case such as: A chain is only as strong as its weakest link; A small hole can sink a big ship; Its better to be safe than sorry; Actions speak louder than words; Profits over people; For want of a horse a kingdom was lost; The straw that broke the camels back.

II. A LOOK AT FEDERAL RULE CHANGES TO ELECTRONIC DISCOVERY AND DOCUMENT STORAGE.

Pending amendments to the Federal Rules of Civil Procedure [**Appendix 8**] will take effect on December 1, 2006, absent congressional action to the contrary. The amendments will affect Rules 16(b), 26(a), 26(b)(2), 26(b)(5), 26(f), 33, 34(a), 34(b), 37(f) and 45, as well as Form 35. The proposed rules introduce a new term, “electronically stored information” (or “ESI”), which is defined as “including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium....”

A. Mandated Early Planning. Changes to Rules 16 and 26(f) mean parties will need to be familiar with their clients’ information and prepared to address steps to preserve and produce information. Rule 26(f) provides that parties must confer “to discuss any issues relating to preserving discoverable information” prior to the Rule 16 scheduling conference. Further, parties are required to discuss “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced” pursuant to proposed Rule 26(f).

Revised Rule 33 incorporates electronically stored information as a possible source to cite in response to an interrogatory request. Further, Rule 34 provides expressly that the scope of production of documents will include electronically stored information. Form 35 memorializes some of these changes by identifying electronic-discovery-related topics as subparagraphs in the form discovery plan.

B. Privilege. The sheer size and scope of electronic discovery has led to the problem of inadvertent production of privileged materials and trade secrets. The Rule 16 amendment allows agreements between the parties to be incorporated in the Rule 16 Scheduling Order and approved by the Court (“clawback” arrangements and sneak peek/quick peek provisions); Rule 26 amendments 26(b)(5)(B) sets forth a specific procedure to be

followed in the event of inadvertent production.

C. Accessibility. The new Rule 26(b)(2)(B) requires the producing party to identify the sources it claims to be inaccessible because of undue burden or cost and which therefore will not be searched. On a motion to compel it is the producing party's burden to demonstrate "reasonable inaccessibility" due to burden or cost. If that burden is met then the party moving to compel must show good cause to obtain the information.

D. Specified Formats. Amendments to Rule 34 set forth procedures governing the format of production of electronically stored information. These rules establish as a default standard production in "a form or forms in which [electronically stored information] is ordinarily maintained or in a form or forms that are reasonably usable." This is the standard unless the Court orders otherwise or the parties agree to other formats in the scheduling plan and order.

E. Safe Harbor. There is a qualified "safe harbor" provided under Rule 37. Protection from (at least certain) sanctions for spoliation where electronically stored information is lost through "routine, good-faith operation" of computer systems (at least where "exceptional circumstances" are absent).

Appendix 1 - Sample Notice and Spoliation Letter

This letter is notification that certain records, documents, data and things be must be retained and maintained in their current condition as potential evidence in this claim and anticipated litigation. We hereby request reasonable access to the vehicle at issue in the same state it was on the day of the collision for the purposes of inspection and the preservation of evidence.

We request that you maintain the following records pertaining to the driver and the vehicle being operated on the date at issue and that none of the materials listed should be destroyed or compromised in any manner.

- (1) Copy of all tachometer records;
- (2) Copy of all on board computer records;
- (3) Copy of all dispatch records;
- (4) Copy of all fax transmissions;
- (5) Copy of all telephone records;
- (6) Copy of all mobile radio records;
- (7) Copy of all pre-rate records;
- (8) Copy of all wrecker or tow truck records;
- (9) Copy of all truck licenses;
- (10) Copy of all pick up and delivery records;
- (11) Copy of all trip summaries;
- (12) Copy of all delivery manifests;
- (13) Credit card receipts for the driver and motor carrier;
- (14) Copy of all toll tickets;
- (15) Copy of all fuel receipts;

- (16) Copy of all weight tickets;
- (17) Copy of all fuel tax records;
- (18) Copy of all state entry and departure records;
- (19) Copy of registration and title to truck;
- (20) Copy of all expense sheets;
- (21) Copy of all manifest and weigh bills;
- (22) Copy of all rental contracts involving the truck;
- (23) Copy of the written response from each state agency contacted with reference to the truck driver's riding record pursuant to 49 CFR § 391.23.
- (24) Copy of all written records with respect to each past employer who was contacted about the driver's qualifications;
- (25) Copy of the photos of the accident scene and truck, and any investigative reports;
- (26) Copy of the truck driver's list of violations of motor vehicle traffic laws pursuant to 49 CFR § 391.27;
- (27) Copy of the driver's personnel file;
- (28) Copy of all National Transportation Safety Board investigative reports;
- (29) Copy of all insurance policies covering the truck and trailer involved in the incident;
- (30) Copy of all photographs of the accident scene, the truck and/or trailer involved in the collision;
- (31) the driver qualification file pursuant to 49 CFR § 391.51, including the application, list of his previous employers for the ten (10) years preceding the date of the application, the reasons for leaving said employments, medical examiner's certificate, a note showing when and who reviewed the driver's record with him for each year of employment, pursuant to 49 CFR §

391.25, a list of certificates showing all violations of motor vehicle laws and ordinances pursuant to 49 CFR § 391.27, responses from state agencies and employers to your inquiries about the truck driver's employment and driving records, certificate of road test pursuant to 49 CFR § 391.31(e), records of drug and alcohol tests, and an accident register listing all DOT recordable, preventable accidents (note here that the carrier is required to keep the driver's file at its principal place of business as long as the driver is employed and for three years thereafter).

(32) Copies of all the driver's logs (i.e. record of duty status) for the six months immediately preceding the collision at issue herein pursuant to 49 CFR § 395;

(33) Copy of the vehicle maintenance records for the commercial motor vehicle involved in the accident for the six months immediately preceding this collision pursuant to 49 CFR §396.3;

(34) Copy of the accident register pursuant to 49 CFR § 390.35;

(35) Copy of the accident report;

(36) Copy of all invoices for repair during the period that the truck has been operated in your behalf;

(37) Copy of all lease and trip lease contracts between you and the truck/trailer owner and operator;

(38) Copy of all trip reports;

(39) Copy of all commercial driver's licenses for Joshua Griffin Jr.;

(40) All writings giving notification to you of the truck driver's convictions or suspensions for violating a state or local law relating to motor vehicle traffic control pursuant to 49 CFR § 383.31;

(41) All writings containing the results of any drug or alcohol tests that were

administered to the truck driver immediately after this collision;

(42) All records of driver alcohol tests with the confirmed reading of .02 or greater confirmed positive test results, documentation of refusal to take alcohol and/or drug tests, instrument calibration documentation, driver evaluation by a substance abuse professional and calendar year summaries for the past five years;

(43) All records related to the alcohol and drug testing collection process and records for the last two years;

(44) All records of alcohol tests with less than .02 alcohol reading and negative drug tests;

(45) All copies of alcohol test forms, controlled substance chain or custody forms, documents relating to the refusal of any driver to submit to testing, documents supplied by the driver to dispute test results and signed acknowledgments of required training documents;

(46) Copies of educational materials explaining drug and alcohol testing regulations submitted to drivers.

(47) Copies of employer's own policies and procedures relating to alcohol and drug testing;

(48) Copies of the driver's signed receipt for the above materials;

(49) Copy of all company manuals covering truck safety, maintenance, fleet safety, and driver standards;

(50) Copy of all records generated by on board recording devices with which the truck was equipped at the time of the collision at issue herein;

(51) Copy of all records generated through the use of QualCom Omni-Track System with which the truck was equipped at the time of the collision; and

(52) Copy of records generated by the Eaton Vorad Collision Avoidance System with which the truck was equipped at the time of the collision;

The destruction of any of these items at this time would constitute spoliation of evidence for which the Court may issue sanctions available to it pursuant to the Georgia Civil Practice Act.

Appendix 2 - Open Records Request Letter

Ms. Sandra Burgess
Custodian of Records
Georgia Department of Transportation
2 Capital Square
Atlanta, Georgia 30334

Dear Ms. Burgess:

Pursuant to the Open Records Act O.C.G.A. § 50-18-70, et seq. and the Freedom of Information Act, 5 U.S.C. § 552, et seq., this is our written request for the following information:

- (1) All information, data, reports and documents regarding collisions occurring at the intersection of _____ and _____.
- (2) All information, data, reports and documents concerning the construction, maintenance, minoring, testing, or studies of the location.
- (3) All information, data, reports and documents concerning analysis of traffic volume.
- (4) All information, data, reports and documents concerning speed of vehicle.
- (5) All information, data, reports and documents concerning maintenance of the intersection.
- (6) All information, data, reports and documents concerning placement and maintenance of signage relating to the intersection.

Should there be any charges for your services, please forward a statement, together with the above-requested information.

Thank you for your prompt assistance in this matter.

Appendix 3 - FOIA Request Letter

Mr. _____
FOIA Program Officer
U.S. Department of Transportation
Federal Highway Administration
Washington, D.C. 20590

Re: FOIA Request to DOT-OMCS and
MTB for Production of Documents

Dear Mr. _____:

Under the Freedom of Information Act, 5 U.S.C., Section 552, I request the documents described below as maintained by Federal Office of Motor Carrier Safety at its Washington, D.C., office, regional offices or local offices concerning the following carrier:

This office represents _____ in litigation as a result of an accident involving the above-referenced motor carrier. The accident occurred on _____, at approximately ____ p.m., in _____, _____ County, _____.

We specifically request the following documents be completely and clearly reproduced and forwarded to us:

1. The office of Motor Carrier Safety accident report submitted by _____ in reference to the accident in question which occurred on _____, at approximately ____ p.m. on _____ in _____, _____ County, _____, involving _____ as the driver of the _____.
2. Copies of the initial notice of applicable DOT-OMCS rules sent to the motor carrier by the FOMCS, DOT.
3. Copies of all correspondence of records received from or sent to the above-mentioned carrier.
4. All "driver equipment and compliance checks" completed on standard DOT - OMCS equipment and roadside check forms along with copies of any such reports returned to the DOT on _____.
5. All case reports prepared by any DOT - OMCS agent on this carrier.
6. All safety compliance surveys conducted by any DOT - OMCS agent on _____.
7. All notices of Civil Forfeiture Claims or Federal Court action documents sent to the above-mentioned companies, by DOT along with any enclosures attached thereto and answers received from _____.

8. All memoranda and/or reviews maintained in the carrier's files created by any state or federal agent, Regional Director, OMCS National Director or Counsel for the U.S. Department of Transportation.

9. All settlement agreements, consent orders, or federal court action documents in reference to actions taken against the above-listed company. If your files also contain any news releases, we request copies.

10. The safety rating as maintained by the DOT - OMCS on the above-listed company on the date of the accident, _____. We further request the present safety rating.

11. All vehicular accident reports as submitted by the above-listed company for STATE THE YEARS, and up until the date of the accident, _____.

12. And other related documents concerning the above-listed company's past and present state of compliance with the motor carrier safety regulations and/or hazardous materials regulations.

13. Any available printout or reports available for "Safety Net" as reported into by state and federal inspection officials.

14. The insurance filings (MCS 90 forms) on file for the above-listed company.

I appreciate your immediate attention to this request. We are presently scheduling depositions, and we need this information in sufficient time to prepare for these depositions. You may also bill this office directly, if there are any charges for this information. PLEASE LET US KNOW IN ADVANCE IF FEES EXCEED \$_____

Thank you for your attention to this request.

3.

Defendant Bundy does business within the State of Georgia as Pan-Glo Atlanta and maintains an office and place of business at 3316-B Hamilton Boulevard, S.E., Atlanta, Fulton County, Georgia.

4.

Defendant Kenneth Walter Pelech is a resident of Clayton County, Georgia and may be served with process of this Court at his residence address of 8833 Highway 54 West, Jonesboro, Clayton County, Georgia 30238.

5.

Defendant Pelech is subject to the jurisdiction and venue of this Court.

CAUSE OF ACTION

6.

That on Sunday, May 12, 2002, on Interstate Highway I-75 in Bartow County, Georgia at approximately 4:24 p.m., approximately one half mile north of Georgia State Route 92, Barbara Gail Nester was lawfully operating a 2000 Toyota Corolla in a southerly direction in the farthest left lane of through traffic. It was Mothers Day.

7.

At that time and location, Defendant Pelech was operating a 1999 Freightliner tractor pulling a trailer in a northerly direction on Interstate 75.

8.

That at that time and location, the weather was clear and the roadway was dry.

9.

That at all times relevant to this action, Defendant Pelech was an employee of Russell T. Bundy Associates, Inc. and was operating a commercial vehicle in the course and scope of his employment for Russell T. Bundy Associates, Inc.

10.

That the tractor trailer operated by Defendant Pelech on behalf of Defendant Bundy veered from the northbound lanes of travel on Interstate 75, crossed through the median, and entered the southbound lanes of traffic violently colliding with the vehicle operated and occupied by Barbara Nester in the southbound lanes of travel.

11.

That as a direct and proximate result of the negligence of the Defendants, Barbara Nester was mortally injured, suffered horrifically, and then died the same day, May 12, 2002, from the multiple trauma she suffered.

12.

That on that date, Barbara Nester was 49 years of age.

13.

That her natural parents are Beecher and Evelyn Dyke, and she was born on October 8, 1952.

14.

That the Administrator of the Estate of Barbara Nester sues for damages for medical, hospital, and surgical expenses, multiple trauma, disfigurement, pain and suffering, mental, emotional, and physical, and funeral and burial expenses in a sum not less than Ten Million Dollars (\$10,000,000.00).

That Beecher and Evelyn Dyke sue for the wrongful death of their daughter, Barbara Nester, in the full value of the life of the deceased in a sum not less than Twenty-Five Million Dollars (\$25,000,000.00).

WHEREFORE, Plaintiffs demand judgment in an amount not less than Thirty-Five Million Dollars (\$35,000,000.00) against the Defendants, jointly and severally, such further relief as the Court deems necessary, plus costs of this action.

IN THE STATE COURT OF CLAYTON COUNTY
STATE OF GEORGIA

BEECHER and EVELYN DYKE,)
as parents of Barbara Nester, deceased, and)
JACK DYKE, as Administrator of the)
Estate of Barbara Nester,)
Plaintiffs,)
) CIVIL ACTION

Vs.)

) FILE NUMBER: 2004-CV-01211-B
RUSSELL T. BUNDY ASSOCIATES, INC.,)
a foreign for profit corporation, d/b/a)
PAN-GLO ATLANTA, and)
KENNETH WALTER PELECH,)
Defendants.)

FIRST AMENDED COMPLAINT FOR DAMAGES

COME NOW the Plaintiffs, Beecher and Evelyn Dyke, as parents of Barbara Nester, deceased, and Jack Dyke, as Administrator of the Estate of Barbara Nester, and file the FIRST AMENDED COMPLAINT FOR DAMAGES and show to the Court the following case:

PARTIES

1.

Defendant Russell T. Bundy Associates, Inc. (hereinafter "Bundy") is a foreign corporation and may be served with process at its corporate offices at 417 East Water Street, Urbana County of Champaign, State of Ohio, by second original.

2.

Defendant Bundy is subject to the jurisdiction and venue of this Court.

3.

Defendant Bundy does business within the State of Georgia as Pan-Glo Atlanta and maintains an office and place of business at 3316-B Hamilton Boulevard, S.E., Atlanta, Fulton County, Georgia.

4.

Defendant Kenneth Walter Pelech, alias John Klaus and Robert Raguso, is a resident of Clayton County, Georgia and may be served with process of this Court at his residence address of 8833 Highway 54 West, Jonesboro, Clayton County, Georgia 30238.

5.

Defendant Pelech is subject to the jurisdiction and venue of this Court.

CAUSES OF ACTION

6.

That on Sunday, May 12, 2002, on Interstate Highway I-75 in Bartow County, Georgia at approximately 4:24 p.m., approximately one half mile north of Georgia State Route 92, Barbara Gail Nester was lawfully operating a 2000 Toyota Corolla in a southerly direction in the farthest left lane of through traffic. It was Mothers Day.

7.

At that time and location, Defendant Pelech was operating a 1999 Freightliner tractor pulling a trailer in a northerly direction on Interstate 75.

8.

That at that time and location, the weather was clear and the roadway was dry.

9.

That at all times relevant to this action, Defendant Pelech was an employee of Russell T. Bundy Associates, Inc. and was operating a commercial vehicle in the course and scope of his employment for Russell T. Bundy Associates, Inc.

10.

That the tractor trailer operated by Defendant Pelech on behalf of Defendant Bundy veered from the northbound lanes of travel on Interstate 75, crossed through the median, and entered the southbound lanes of traffic violently colliding with the vehicle operated and occupied by Barbara Nester in the southbound lanes of travel.

COUNT ONE

NEGLIGENT HIRING AND RETENTION

11.

That Russell T. Bundy Associates, Inc. was negligent in the hiring and retention of Kenneth Walter Pelech as a commercial truck operator, including but not limited to, the following:

- (a) Unlawfully delegating to its' insurance broker the duty to investigate the background and character of trucking applicants in an inherently dangerous activity;
- (b) Failure to obtain and investigate accurate employment application;
- (c) Failure to investigate character and background;
- (d) Failure to investigate prior employment;

- (e) Failure to conduct criminal background inquiry;
- (f) Failure to investigate annual driving violations;
- (g) Failure to investigate prior substance abuse history;
- (h) Negligent failure to audit fraudulent driver logs;
- (i) Negligently placing an unqualified driver on the public highway;
- (j) Negligent policy, practices and procedures for hiring and retention.

COUNT TWO

NEGLIGENCE AND *RESPONDEAT SUPERIOR*

12.

That Russell T. Bundy Associates, Inc. is liable for all acts of negligence of the employee and agent Pelech under the doctrine of *Respondeat Superior*.

13.

That the Defendant Kenneth Walter Pelech was negligent, including but not limited to, the following:

- (a) Failure to maintain control of a commercial tractor trailer;
- (b) Operating a commercial tractor trailer too fast for conditions;
- (c) Engaging the cruise control at 70 miles per hour;
- (d) Operating a commercial tractor trailer in an unsafe manner;
- (e) Failure to submit a complete and accurate application for employment in compliance with minimum federal requirements;
- (f) Failure to submit and document annual driving violations in compliance with minimum federal requirements;
- (g) Filing false federal Drivers Logs.

COUNT THREE

STUBBORN LITIGIOUSNESS

14.

The Defendant Russell T. Bundy Associates, Inc. and its officers, directors, agents and employees have caused the Plaintiffs unnecessary trouble and expense including attorneys' fees and expenses of litigation.

15.

These Defendants have denied responsibility in this egregious and clear liability matter, forcing the Plaintiffs to file suit for the damages and injuries suffered, despite the violation of state law and federal and state trucking regulations constituting negligence per se; lied to investigating officers at the scene and in continuing investigations and formal statements concerning the incident; lied concerning the driver's hours of work, hours of rest and medical history; lied in depositions taken under oath in these proceedings; and filed false federal and state driver's logs for the date of the collision.

16.

These actions constitute bad faith and a calculated economic decision to force unnecessary trouble and expense and intimidate and frustrate justice. The conduct of the Defendants and their agents evidence stubborn litigiousness authorizing the award of expenses of litigation and attorneys' fees pursuant to O.C.G.A. § 13-6-11 and as otherwise authorized by law.

COUNT FOUR

EXEMPLARY DAMAGES

17.

The conduct and actions of the Defendants, Kenneth Walter Pelech and Russell T. Bundy Associates, Inc., evidenced a conscious indifference to the consequences authorizing the imposition of exemplary or punitive damages to deter the wrongdoers.

GENERAL AND SPECIAL DAMAGES

19.

That as a direct and proximate result of the negligence of the Defendants, Barbara Nester was mortally injured, suffered horrifically, and then died the same day, May 12, 2002, from the multiple trauma she suffered.

20.

That on that date, Barbara Nester was 49 years of age.

21.

That her natural parents are Beecher and Evelyn Dyke, and she was born on October 8, 1952.

22.

That the Administrator of the Estate of Barbara Nester sues for damages for medical, hospital, and surgical expenses, multiple trauma, disfigurement, pain and suffering, mental, emotional, and physical, and funeral and burial expenses in a sum not less than Ten Million Dollars (\$10,000,000.00).

23.

That Beecher and Evelyn Dyke sue for the wrongful death of their daughter, Barbara Nester, in the full value of the life of the deceased in a sum not less than Twenty-Five Million Dollars (\$25,000,000.00).

WHEREFORE, Plaintiffs demand judgment in an amount not less than Thirty-Five

Million Dollars (\$35,000,000.00) against the Defendants, jointly and severally; reasonable and necessary expenses of litigation to be proven at trial including attorneys fees and expenses as an element of damages; exemplary damages to deter the wrongdoers from future similar conduct and such further relief as the Court and jury deems necessary, plus costs of this action.

Appendix 5 - Requests for Production of Documents

- (1) Copy of all tachometer records.
- (2) Copy of all on-board computer records.
- (3) Copy of all dispatch records.
- (4) Copies of all fax transmissions.
- (5) Copy of all telephone records.
- (6) Copy of all mobile radio records.
- (7) Copy of all pre-rate records.
- (8) Copy of all wrecker or tow truck records.
- (9) Copy of truck and trailer license.
- (10) Copy of all pick-up and delivery records.
- (11) Copy of all trip summaries.
- (12) Copy of all delivery manifests.
- (13) Credit card receipts.
- (14) Copy of all toll tickets.
- (15) Copy of all fuel receipts.
- (16) Copy of all weight tickets.
- (17) Copy of all fuel tax records.
- (18) Copy of all state entry and departure records.
- (19) Copy of registration and title to the truck.
- (20) Copy of all expense sheets.
- (21) Copy of all trailer interchange records.
- (22) Copy of all bills of lading (both sides).
- (23) Copy of all manifests and waybills.
- (24) Copy of all rental contracts involving the truck.
- (25) Copy of the written response from each private company or state agency contacted with reference to truck driver's driving record. 49 CFR 391.23.

- (26) Copy of all written records with respect to each past employer who was contacted about the truck driver's qualifications.
- (27) Copy of driver's qualifications file. 46 CFR 391.51.
- (28) Copy of the truck driver's list of violations of motor vehicle traffic laws. 49 CFR 391.27.
- (29) Copy of driver's personnel files.
- (30) Copy of all National Transportation Safety Board investigative reports.
- (31) Copy of all insurance policies covering the truck and trailer involved in the accident even if the vehicles are not specifically designated therein. This includes primary coverage, excess insurance coverage, or any other type of liability insurance coverage.
- (32) Copy of all photographs, still or motion pictures, plans, drawings, blueprints, sketches, diagrams, computer simulations, or other photographic and demonstrative evidence concerning the subject collision, the accident scene, the truck and/or trailer involved in the accident, or any issue relevant to this lawsuit.
- (33) Truck driver's driver qualification file, 49 CFR 391.51, including employee's application, list of truck driver's previous employers for the 10 years preceding the date of application, the reasons for leaving said employments, medical examiner's certificate, a note showing when and who reviewed the driver's record with him or her for each year of employment, 49 CFR 391.25, a list of certificates showing all violations of motor vehicle laws and ordinances, 49 CFR 391.27, responses from state agencies, private companies, and employers to your inquiries about the truck driver's employment and driving records, certificate of road test, 49 CFR 391.31(e), records of drug and alcohol tests, and an accident register listing all DOT recordable preventable accidents. (Note: Employers are required to keep the driver's file at its principal place of business as long as the driver is employed and for three years thereafter.)
- (34) Copies of all out of service orders.
- (35) Copies of all the driver's logs (i.e record of duty status) for the past 6 months. 49 CFR 395.
- (36) Copies of the vehicle maintenance records for the commercial motor vehicle involved in the accident for the past 6 months. 49 CFR 396.3.
- (37) Copy of the accident register. 49 CFR 390.35.
- (38) Copy of the accident report.
- (39) Copy of repair invoices during the period that the truck has been operated in your behalf.
- (40) Copy of all lease and trip lease contracts between you and the truck/trailer owner and operator.
- (41) Copy of all trip reports.
- (42) Copy of Commercial Driver's License of Truck Driver.
- (43) All writings giving notification to you of the truck driver's convictions or suspensions for violating a state or local law relating to motor vehicle traffic control. 49 CFR 383.31.

- (44) All writings containing the results of any drug and alcohol test that was administered to the truck driver after the accident.
- (45) All records of driver alcohol tests with a confirmed reading of 0.02% or greater, confirmed positive test results, documentation of refusals to take alcohol and/or drug tests, instrument calibration documentation, driver evaluation by a substance abuse professional and calendar year summaries for the last 5 years.
- (46) All records relating to the alcohol and drug testing collection processes and records of training for the last 2 years.
47. All records of alcohol tests with less than 0.02 blood alcohol reading and negative drug tests.
48. All copies of alcohol test forms, controlled substance chain or custody forms, documents related to the refusal of any driver to submit to testing, documents supplied by the driver to dispute test results and signed acknowledgments of required training documents.
49. Copies of educational materials explaining drug and alcohol testing regulations submitted to drivers.
50. Copies of employer's own policies and procedures relating to alcohol and drug testing.
51. Copies of the drivers signed receipt for the above materials.
52. Copy of all company manuals covering truck safety, maintenance, fleet safety, programs, and driver's standards effective as of the date of the collision.
53. Copy of all records generated by on-board recording devices with which the truck was equipped with at the time of the accident.
54. Copy of all records generated through the use of the QUALCOMM OMNITRAX system with which the truck was equipped at the time of the accident.
55. Copy of all records generated by the EATON VORAD collision avoidance system with which the truck was equipped at the time of the accident.
56. Copy of all witness statements obtained from any person about any information relevant to any issue in this lawsuit, including, but not limited to, the issue of liability or damages.
57. Copy of all reports received from any expert.
58. Copy of all materials provided to any expert
59. Copy of the payroll information concerning said driver for the six (6) months prior and the two months subsequent to said collision and his pay check for the time period covering the date of the collision. (Plaintiff's counsel is not requesting copies of pay checks unless otherwise specified, but requests the individualized payroll record ledger sheet indicating the amount of pay, miles driven for the time period, etc...)
60. Copies of all documents or materials of any kind received from any person or company, or generated by you or your agents, relative to the performance, appraisals, criticisms, reprimands, or infractions or driving offenses committed by the driver operating the truck at the time of the collision, and from any time subsequent to the time the driver became employed by the defendant

up to and through the date of trial.

61. Copy of each certificate of membership in every organization, association, counsel, or group involved in the trucking or transportation industry to which you belong or pay a membership dues, or has paid dues in the last five (5) years.
62. Copies of all documents sent to or received from the any department of the Office of Federal Highway Administration, or other government agency, regarding this collision, the driver involved in the collision, or any subject that is part of the basis of this lawsuit.
63. Copies of any employee handbooks, safety manuals, or instructional materials of any kind whatsoever which were distributed to the driver of the truck involved in the collision or utilized in the training or monitoring of said driver while employed by the Defendant.
64. A copy of the Drivers Handbook in effect at the time of the collision.
65. Copy of the index of the policies and procedure manual, internal operating procedures, or other compilation of corporate policies and procedures to specifically include the safety director, safety committee, risk manager, and risk management committee, effective of the date of the subject collision.
66. Copy of the defendant's Safety Handbook or documentation and compilation of policies and procedures in the area of loss control and safety, effective of the date of the subject collision.
67. Copy of any and all materials which support any contention that this collision was the fault of anyone other than the defendants.
68. Copies of all emails or electronic correspondence between any of the defendants and the driver.
69. If not previously produced, all documents required by Federal Motor Carrier Safety Regulation 395.8, specifically those items identified in the Department of Transportation's interpretation of the regulation in its Answer to Question 10.

RTP

Driver's Complete Qualifications File

- Preemployment questionnaire
- Application for employment
- All medical examination records and DOT exam cards
- Driving History from State DMVs
- Driver's Road Tests
- Driver's Written Tests
- Driver's violation statements for each 12 months of employment
- All past employment inquiries and responses
- Annual Review of Driving Record

Driver's Logs for 6 months preceding the accident

- Complete Driver Personnel File including, hiring, termination and disciplinary notices; accident and loss reports; roadside inspections and traffic citations; and all other documents
- Lease Agreement (for independent contractors on leased trucks)
- Inspection, Repair and Maintenance Files for one year preceding the collision and 6 months after the accident

- Driver Training Records (Attendance, Lesson Plans and Tests)
- Accident Register for the year preceding the collision
- Post Accident Drug and Alcohol Testing
- Dispatch Records for all drivers for 6 months preceding the collision
- Former Employee Lists for previous 3 years
- Policy and Procedure Manuals
- Printouts and data from online recording devices
- Downloadable data from the ECM
- Bills of Lading, manifests, fuel purchase receipts, weight tickets, hotel receipts, restaurant receipts, and Trip records for 8 days preceding collision
- Cargo pickup and delivery orders
- All equipment or cargo loading, unloading or detention records
- Freight bills, including cargo pickup and delivery copies
- Dispatch & Assignment Records
- Expense Vouchers
- Written or Electronic Orders for travel routes, pickup or delivery times, cargo transport, etc.
- Fuel purchase or mileage reports
- “Trip Related Documents”
- Computer Printouts such as Com Check or Cash Control Corp. showing driver name, truck number, location and time of fuel purchases, and mileage for dates
- Any and all special or oversize permits and related documents issued by any government agency
- Accident & Incident Reports
- Photographs
- Witness Statements
- Driver Statements
- Repair Orders and Bills
- Statements of Adjusters/Investigators
- DOT audits and exit reports
- Document retention/destruction program or policy.
- A blank form of each and every operational document supposed to be utilized
- Internal rules and policies governing the conduct of your drivers.
- Internal rules and policies governing the maintenance of your vehicles.
- Driver training programs
- Carrier’s Driver’s Manual
- safety manuals, and other relevant directives, memoranda, bulletins, rules, regulations and materials which applied to the driver and his conduct on the date of the collision.
- written reports or statements taken from any experts or witnesses that in any way relate to the collision

- manuals, procedural information, employee handbooks, or any other documentation given to driver upon being hired
- electronic control module (ECM)/black box data and copies of all printouts for the vehicle involved in the collision to include the time period of twenty-four (24) hours prior to the collision and twenty-four (24) hours following the collision, including but not limited to diagnostic records, trip activity, overspeed/over rev data; hard brake events; engine calibration data; ECM clock; and ECM audit trail
- GPS data
- onboard recording devices, ECM, black box, onboard computers, tachographs, trip monitors, trip recorders, trip master, QualComm devices
- copy of the “accord” statement you filed with any insurance carrier to advise them of the collision
- documents showing your authority to operate your trucks through the State of Georgia (such as an I.C.C. permit or Certificate of Public Necessity and Convenience)
- Communication devices and systems, including cellular telephones, pagers, email, laptop computers, CB, OmniExpress Fleet Management, Terion Fleetview, Qualcomm OmniTRACS Satellite Mobile Communication Systems, untethered systems, transponders (SpeedPass System), Roll Advisor and Control, Eaton Vorad EVT 300.

Appendix 6 - Interrogatories

INTERROGATORY NO. 1: What is the full name of your company?

INTERROGATORY NO. 2: Is your company owned by another company or a subsidiary of another company? If so, state the full name of the other company.

INTERROGATORY NO. 3: Is your company a common carrier, a contract carrier, or a private carrier?

INTERROGATORY NO. 4: Does your company hold a certificate of authority, a license or a permit issued by the Interstate Commerce Commission? If so, state which and provide explicable number.

INTERROGATORY NO. 5: Does your company hold any state authority to engage in intrastate commerce? If so, state what that authority is.

INTERROGATORY NO. 6 :Identify the owner of the tractor involved in the accident at issue in this lawsuit.

INTERROGATORY NO. 7: Describe the tractor by stating the year of manufacture, manufacturer, model and configuration.

INTERROGATORY NO. 8: Identify the owner and the trailer involved in the accident at issue in this lawsuit.

INTERROGATORY NO. 9 :Describe the trailer by stating the year of manufacture, manufacturer, model and configuration.

INTERROGATORY NO. 10: If you were not the owner of the tractor and/or trailer involved in the accident, state whether these vehicles were being operated by your company under lease and if so, whether the lease was a permanent lease or a trip lease.

INTERROGATORY NO. 11 : If the answer to Interrogatory No. 10 is in the affirmative, state the name and address and telephone number of the person who was the lessor of the tractor and/or trailer.

INTERROGATORY NO. 12: State the name, address and telephone number of the driver of the rig involved in the accident.

INTERROGATORY NO. 13: Is the driver of the rig involved in the accident at issue in this lawsuit your regular employee? If so, state the date that employment began and whether he/she is still in your employee.

INTERROGATORY NO. 14: State whether you have retained a driver qualification file in your company offices for the driver of the vehicle. If so, list each of the

documents in that file.

INTERROGATORY NO. 15: State whether you have knowledge of any traffic violations committed by the driver either while in your employ or in previous employment. If so, state what information you have in that regard.

INTERROGATORY NO. 16: State whether you have knowledge of any hours of service violations committed by the driver either while in your employ or in previous employment. If so, state what information you have in that regard

INTERROGATORY NO. 17: State whether any disciplinary action was taken either by your company or a company union against the driver as a result of his or her driving that resulted in the accident at issue in this lawsuit.

INTERROGATORY NO. 18: If the answer to Interrogatory 18 is “no”, state whether any was considered? Were his/her actions reviewed by any person(s)? State the details.

INTERROGATORY NO. 19: State whether your company has a safety director. If so, state his or her name and full title.

INTERROGATORY NO. 20 : State whether your company has written driving standards and/or instructions for its drivers

INTERROGATORY NO. 21: State the method by which compensation was determined for the payment of the driver and/or lessor for the trip during which the accident occurred.

INTERROGATORY NO. 22: State the place of origin and the place of destination of the truck involved in the accident indicating the exact time when the truck left its place of origin and what the scheduled arrival time was at the place of destination

INTERROGATORY NO. 23 : State whether your company is in possession of the driver’s logs for the trip.

INTERROGATORY NO. 24: State whether your company is in possession of the bill of lading, freight bill and expense invoices generated during the course of the trip.

INTERROGATORY NO. 25: State whether the truck/trailer was transporting a load of cargo at the time of the accident. If so, describe the load, state the names, addresses and telephone numbers of the shipper(s) and the names, addresses and telephone numbers of the consignee(s).

INTERROGATORY NO. 26: State whether the truck/trailer underwent any repairs during the trip. If so, state the nature of the repairs and the names, addresses and telephone numbers of the repair facilities.

INTERROGATORY NO. 27: Does your company retain possession of repair and warranty invoices and bills covering the history of the truck/trailer? If not, who does?

INTERROGATORY NO. 28: Does the truck involved in the accident have an on-board computer? If so, identify all disks, computer tapes and other written materials generated by the use of the on-board computer during the trip. Are these items in your company's possession?

INTERROGATORY NO. 29: Have you ever been notified by the truck driver of a conviction(s) or suspension(s) for violating a state or local law relating to motor vehicle traffic control?

INTERROGATORY NO. 30: If the accident resulted in the loss of life or if the truck driver was cited for a moving violation:

- a) Was a drug test administered to the truck driver within 32 hours of the accident?
- b) Who administered the test?
- c) What was the result?
- d) Was an alcohol test administered to the truck driver after the accident?
- e) How long after?
- f) If not done within 2 hours, what was the reason for the delay?

INTERROGATORY NO. 31: Do you know whether the truck driver ever reported for duty while having an alcohol concentration 0.04 percent or greater?

INTERROGATORY NO. 32: Has the truck driver ever refused to submit to a post-accident alcohol or controlled substance test required under 49 CFR 382.303, a random alcohol or controlled substance test required under 49 CFR 382.305, a reasonable suspicion alcohol or controlled substance test required under 49 CFR 382.307, or a follow-up alcohol or controlled substance test required under 49 CFR 382.311?

INTERROGATORY NO. 33: Has the truck driver ever been disqualified from driving a truck when in your employ? If so, when and under what circumstances?

INTERROGATORY NO. 34: Has your company ever undergone a FHWA compliance review? If so what was your rating? (Either satisfactory, conditional or unsatisfactory).

INTERROGATORY NO. 35: If you contend that your company is not liable for this accident, state in exact detail the reasons for that contention.

INTERROGATORY NO. 36: If you or anyone acting on your behalf obtained statements **in any form** from any person regarding the present collision, the Plaintiff and/or her past medical care, including statements by the Plaintiff, state with respect to each such statement:

- a. the name and address of the person(s) to whom such statement was made;
- b. the date the statement was made;
- c. the form of the statement;
- d. if the statement was written, whether it was signed; and
- e. the names and addresses of all persons presently having custody of the statement.

INTERROGATORY NO. 37: Do you, your attorneys, your insurance carriers or anyone acting on your or their behalf have or know of any photographs, motion pictures, maps, plats, drawings, diagrams, videotapes, or other tangible or documentary evidence concerning any of the events, happenings, scene of the wreck, or the condition of any vehicle (or any part thereof)

involved in the wreck either before or after the event alleged in this action? If so, please identify:

- a. each tangible item's specific subject matter;
- b. the date it was made or taken;
- c. the name and address of the person making or taking it;
- d. what each item purports to show, illustrate or represent; and
- e. the name and address of each person having custody of such item or items.

INTERROGATORY NO. 38: State the name, address, occupational title, and present whereabouts of each person whom you expect to call as an expert witness at the trial of this case, and with respect thereto, state the following:

- a. The subject matter on which the expert is expected to testify;
- b. The substance of the facts and opinions to which the expert is expected to testify;
- c. A summary of the grounds for each opinion to which the expert is expected to testify; and
- d. Whether any reports or other written materials or letters have been generated by such expert for this case.

INTERROGATORY NO. 39: Only if you allege any defense to this action based on jurisdiction, venue, issuance of process, process itself, or service of process, as to each such defense, please state:

- a. each and every fact upon which you rely in asserting such defense;
- b. provide a complete description of all documents which you contend support the assertions of the said defense;
- c. the name and address of all persons having custody and control of the documents described in (b) above; and
- d. please provide the full and complete legal addresses of this Defendant's registered office and agent.

INTERROGATORY NO. 40: If you contend that any person, firm, or entity caused or contributed to the injuries to the Plaintiff, identify by name, address, job title, and employer all such persons, firms or entities and state the reasons for your contentions.

INTERROGATORY NO. 41: Please explain the nature of the employment relationship between you and your driver on the day of the wreck (lease operator, company driver, temporary driver, owner-operator, etc.) and include the date the relationship began, the date it terminated, and, if applicable, the person from your company involved in any such termination.

INTERROGATORY NO. 42: State the name, and address for the Safety Director, Federal Safety Regulation Compliance Officer, driver's Terminal Manager, and the driver's Dispatcher, for your organization, who were in the positions named above during any portion of your driver's trip which ultimately involved the wreck referenced in the Complaint.

INTERROGATORY NO. 43: State the name, address, home phone number, office phone number, and address of employment for each and every person, firm, or entity who:

- a. witnessed the wreck described in the Complaint;
- b. arrived at the scene of the wreck within two (2) hours after it occurred;
- c. has or who claims to have knowledge of liability in this action.
- d. has or who claims to have knowledge of damages in this action.

INTERROGATORY NO. 44: As to the driver (your driver) of your tractor-trailer being operated at the time of the wreck, please state:

- a. the driver's complete name;
- b. the driver's present home address;
- c. the driver's social security number, date of birth, driver's license numbers, the names of the states issuing said licenses;
- d. and such driver's mode of compensation.

INTERROGATORY NO. 45: As to both the tractor and trailer involved in the wreck which your driver was operating, please state:

- a. each's manufacturer, make, model number, and year;
- b. the trailer's length and width thereof at the longest and widest portions, respectively;
- c. the weight of the trailer empty, its carrying capacity, and the gross vehicular weight;
- d. the name of the entity to whom the tractor and the trailer were titled;
- e. the total gross weight of the tractor-trailer at the time of the wreck.

INTERROGATORY NO. 46: In reference to the load being transported at the time of the wreck, please identify:

- a. where the load originated;
- b. the contents and weight of the load;
- c. the final destination for the load;
- d. any contracts signed or entered into pertaining to the transportation of said load;
- e. the name, address, and phone number of the person or persons employed by the contractor and shipper who was in charge of the load at the place where said load originated; and
- f. the name, address and phone number of each broker in any way involved with the load.

INTERROGATORY NO. 47: State whether your tractor-trailer contained or utilized an on-board recording device, an on-board computer, tachograph, trip monitor, trip recorder, trip master, or device known by any other name which records and/or transmits information concerning the operation of the truck? If so, please state the name and address of the person having custody of the graphs, printouts, raw data, and/or other documentary evidence produced or capable of being produced by said machine regarding any data for any and all parts of the trip which ultimately was involved in the wreck which forms the basis of Plaintiff's Complaint.

INTERROGATORY NO. 48: Were any tests (blood, urine, or other) performed on your driver by you, pursuant to state or federal regulation or your own safety policies, at any time during the period commencing 45 days prior to the wreck through and including 45 days after the wreck? If so, please state the results of all such tests and the name, address, and phone number of the persons, firms, or entities who administered said test and all such persons, firms, or entities who are in possession of a copy of the results of said tests.

INTERROGATORY NO. 49: At the time of the wreck, did you have any policy or procedure manuals pertaining to the operation of a tractor-trailer such as driver's manuals, company rules, or other tangible materials by whatever name? If so, provide the name of each such manual.

INTERROGATORY NO. 50: State the name, address and telephone number of each person who has a copy of any of your driver's Daily Driver Logs for the period commencing 6 months prior to the present collision, up to and including the day of the collision.

INTERROGATORY NO. 51: Describe any and all mirrors and other devices, together with their location, placed to assist your driver in viewing and lane changes to the passenger side of the vehicle involved in the present collision on the date thereof.

INTERROGATORY NO. 52: Describe in detail the initial and continuing training requirements for your drivers as of the date of the present collision.

INTERROGATORY NO. 53: Describe in detail your drug and alcohol programs including, without limitation, your random drug testing program.

INTERROGATORY NO. 54: State the date of each and every review by federal, state and/or other entities during the last 10 years, and state the results of each such review.

INTERROGATORY NO. 55: State the manner in your driver, her dispatcher and her terminal manager were compensated as of the date of the present collision, including without limitation any pay or bonus was based on miles driven or other productivity indices.

Appendix 7 - Voir Dire

This case is about a corporation whose tractor trailer caused the NEGLIGENT HOMICIDE of Barbara Nester on Mother's Day May 12, 2002.

BIAS/PREJUDICE/INSURANCE

Is there anyone on this jury or in your family who ever made a claim for injuries or damages against a company or an insurance carrier where it was obvious that they were at fault and were told "so sue us".

Is there anyone on this jury who feels that once a company has been sued, it is fair for them to use any means whatsoever to avoid responsibility regardless of the truth?

Has anyone had responsibility for safety in their work life? Hiring? Background checks or investigation?

Did the company have any procedures or other ways to follow-up to ensure that the driver's background, qualifications and driving history did not impair their ability to safely operate the vehicle?

Has anyone here had any training or experience as a professional driver?

Familiar with federal reporting requirements

Familiar with Federal qualification requirements

Familiar with Federal record keeping requirements

Does anyone in your family have such training or experience?

Anyone with any experience in trucking regulation or safety practices?

Does anyone do business with trucking concerns?

Experience or knowledge of law, medicine, trucking, safety issues

CLAIMS/LAWSUITS/INSURANCE

Have you or a family member ever been in a car or truck wreck?

Have any of you ever had occasion to consult an attorney about the possibility of filing a lawsuit for damages?

Have you or a family member ever made a claim for damages or filed a lawsuit for damages?

Is there anyone who has ever considered talking to an attorney about a potential lawsuit on behalf of themselves or an injured family member and then decided against it for some reason?

Is there anyone here who would never bring a lawsuit for damages on their own behalf or on behalf of an injured family member regardless of the facts?

VERDICTS/DAMAGES/ATTITUDES

Is there anyone who believes that if a trucking company is negligent or careless and injures or kills someone that they should still not be sued?

That they should not be held responsible in damages according to the law?

Is there anyone who does not believe that the jury system is a fair method of resolving disputes and claims for damages? Is there anyone who knows of a better system?

Is there anyone who has formed the opinion that suits to recover damages for injuries suffered due to someone else's negligence should not be brought?

Is there anyone who cannot assure us that they will consider each item of damages the court tells you are proper for your consideration under evidence?

Questions re: pain and suffering damages

Questions re: wrongful death damages

Is there anyone who has a figure in mind, any figure, where they say they would never award an amount above that figure, regardless of what the law and evidence show concerning damages?

Would it embarrass or intimidate any of you to enter a substantial verdict in this case if you felt the evidence supported the award?

Does the fact that Russell T. Bundy and Associates, Inc. An Ohio for Profit Corporation and Kenneth Walter Pelech will be held liable in damages effect your opinion?

Is there anyone who cannot try this case based on testimony from the witness stand and

let the chips fall where they may?

Appendix 8 - Federal E-Discovery Rule Changes

Selected Portions of Proposed Federal Rules Changes effective December 1, 2006

Rule 16. Pretrial Conferences; Scheduling; Management(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

- (1) to join other parties and to amend the pleadings;
- (2) to file motions; and
- (3) to complete discovery.

The scheduling order may also include

- (4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
- (5) provisions for disclosure or discovery of electronically stored information;
- (6) any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production;
- (7) the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (8) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as possible but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

* * *

Rule 26. General Provisions Governing Discovery; Duty of Disclosure.

(a) Required Disclosures; Methods to Discover Additional Matter

(1) Initial disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

- (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;
- (B) a copy of, or description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

* * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(2) Limitations

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

* * *

(5) Claims of Privilege or Protection of Trial Preparation Materials.

(A) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information produced. If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

* * *

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

* * *

Rule 33. Interrogatories to Parties

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

* * *

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information \ including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium – from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the party shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part

thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders, (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request; and (ii) if a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and (iii) a party need not produce the same electronically stored information in more than one form.

* * *

Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions

(f) Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

* * *

Form 35. Report of Parties' Planning Meeting

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed)

Disclosure or discovery of electronically stored information should be handled as follows: (brief description of parties' proposals)

The parties have agreed to an order regarding claims of privilege or protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order)

All discovery commenced in time to be completed by (date). [Discovery on (issue for early discovery) to be completed by (date).]