

# THARPE & HOWELL

## TRANSPORTATION LAW NEWSLETTER

SEPTEMBER 2009 EDITION

### EMPLOYEE'S URINE PROBLEM MAY BE A PROTECTED DISABILITY UNDER ADA

In *Melman v. Metropolitan Government of Nashville, et al.*, plaintiff Melman was a bus driver employed by a governmental agency. As part of his employment, he was required to submit to random drug testing in compliance with DOT regulations. According to both Mr. Melman and his urologist, Mr. Melman was unable to provide an adequate urine sample for testing because he suffered from Shy Bladder Syndrome. Although his physician offered to catheterize Mr. Melman to obtain a sample for testing, the employer declined.

As a result of his inability to provide an adequate sample, Mr. Melman's employer placed him on administrative leave without pay and directed him to attend a drug rehabilitation program at his own expense. Mr. Melman paid for and attended the rehab program as requested by his employer, and made continual offers to submit to alternative means of drug testing - which his employer refused. Mr. Melman appealed his employer's decision without success, and was eventually removed from his position as a bus driver and demoted to a less desirable job.

Mr. Melman filed a Complaint against his employer alleging discrimination in violation of the ADA and Rehabilitation Act. In response, his employer claimed Mr. Melman was not disabled and was not qualified for the bus driver position, with or without reasonable accommodation, because he could not comply with the mandatory DOT regulations as they relate to random drug tests. The employer filed a Motion for Summary Judgment on the issue - which the Court subsequently denied. In denying the Motion, the Court determined there were triable issues of fact for a Jury to consider as to whether the employer had violated the ADA and Rehabilitation Act. Accordingly, the case will proceed towards trial.

### BUSINESSES CAN RECOVER BOTH REPLACEMENT COSTS AND LOST PROFIT DAMAGES

In *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc.*, the Missouri Supreme Court recently determined that a business whose specially-fitted commercial vehicle was rendered useless may recover **both** the replacement cost for the vehicle **and** lost profits suffered as a result of its loss of use.

In this case, a relatively new work truck owned by plaintiff Gateway Foam Insulators was damaged when it was struck by a truck owned by defendant Jokerst. Following the accident, Gateway considered whether to purchase a new truck, but could not afford the payments. Eventually, it took out a loan to purchase a used truck and then bought additional equipment to convert it into a foam rig.

Gateway sued Jokerst in relation to the accident, and was awarded more than \$212,900 in damages broken down as \$68,500 for the foam rig truck and equipment and supplies thereon, \$11,700 in interest on the loan used to replace the truck, \$12,700 for the cost of environmental cleanup, and \$120,000 in lost profits. Jokerst appealed.

In its appeal, Jokerst argued Gateway could not recover for loss of use of the foam rig **and** lost profits because loss of use is only available for recovery for damage to personal property **if** the property is repaired. Jokerst noted that the subject work truck was replaced not repaired, and contended that the Trial Court erred in awarding Gateway \$120,000 in lost profits – in that damage for loss of use of personal property is limited to the time reasonably required to repair the property. Jokerst contended the vehicle could have been replaced in two or three weeks but that Gateway did not replace it for almost two years.

Defendant Jokerst further asserted there was no substantial evidence to support Gateway's award for lost profits, because the testimony that Gateway's revenue would increase was mere speculation and not competent as to anticipated profits. It further argued that interest on the loan encompassed replacement costs and is a double recovery in that damages on personal property are measured by diminution in value. Jokerst also contended Gateway should not be awarded interest on the loan for the replacement vehicle or for cleanup costs because these are special damages that are required to be pleaded and proven to be reasonable and necessary. Jokerst went on to argue that the invoice of environmental restoration was not a business record of Gateway and was not admissible, and no evidence of fair market value of the property prior to the accident or subsequent to the accident was introduced and, therefore, there was insufficient evidence of the diminution in value of the vehicle, equipment and supplies.

In response, Gateway argued the Trial Court properly awarded the lost profit damages. It contended it had presented overwhelming evidence of its lost profits and cited case law supporting its contention that loss of use damages can also be awarded where the defendant causes a delay in repairs. Gateway argued that defendant failed to consider the fundamental split in Missouri law regarding loss of use damages and the general trend in surrounding states' supreme court decisions, and the general public policy supporting the Trial Court's damages judgment. Gateway asserted the Trial Court has broad discretion in admitting and evaluating the evidence presented at trial and properly applied the law in awarding cleanup costs. It further responded that the evidence presented established the foam rig's diminution in value. With regard to the Trial Court's award of interest relating to the purchase of the replacement vehicle, plaintiff conceded that those particular damages were impermissible as a matter of law.

In the end, The Supreme Court of Missouri found that the Trial Court had correctly determined that the plaintiff was entitled to **both** replacement costs and lost-profit damages. However, the award was reversed as to loan interest paid.

SNAPSHOT: FAMILY AWARDED \$18 MILLION

In *Mark Tiburzi, et. al. vs. Holmes Transport, Inc.*, a Judge has awarded more than \$18 Million Dollars to Mark Tiburzi and his wife Cheryl for injuries suffered by Mark when a tractor-trailer struck a line of stopped cars as the truck driver was reaching for his cell phone. As a result of the accident, plaintiff Mark Tiburzi suffered brain damage, requires constant care, and must now live in a nursing home. The accident killed 3 and injured 14 others. The driver of the truck has been charged with manslaughter.

SNAPSHOT: TEENAGER AWARDED \$30 MILLION

In *Ethan Bryant, et al. v. APAC-Tennessee, et al.*, plaintiff Ethan Bryant suffered severe brain damage and was comatose for eight months after his pickup truck was hit by a gravel truck. At trial, plaintiffs argued that the gravel truck was more than 20,000 overweight at the time of the incident, and that the driver of the truck was inexperienced. When awarding the teenager \$30 Million in damages, the Jury found APAC-Tennessee to be negligent in the hiring of the inexperienced driver - who they determined to be 70 percent responsible for the wreck. It attributed the remaining 30% fault between the driver of the gravel truck and the company that had loaded the gravel onto the truck. The passenger in Mr. Bryant's vehicle was killed as a result of the crash.

SNAPSHOT: FAMILY AWARDED \$4.4 MILLION

In this case, the family of a deceased Utah man was awarded \$4.4 Million when a Jury found that the Utah Department of Transportation and one of its subcontractors were partially responsible for negligence leading to the man's untimely death. Plaintiffs alleged the defendant road workers failed to post appropriate warning signs about traffic delays caused by a bridge reconstruction project, forcing their family member to swerve around backed-up traffic and hit other vehicles, leading to his untimely death. The decedent was found to be 20 percent responsible for the negligence that caused his own death

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