

THARPE & HOWELL

TRANSPORTATION LAW NEWSLETTER

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CONTACT HOLDER NOT LIABLE FOR DEATH
CAUSED BY INDEPENDENT TRUCK DRIVER

In *Rhonda Russell v. Northeast Texas Land and Timber, et al.*, the Arkansas Court of Appeal recently held a contract holder was not liable for the death of another business' employee - caused by an independent driver who had been hired to deliver wood.

In this case, an employee of Domtar Paper Mill was killed when he was caught between a front-end loader and a logging truck owned and operated by B.J. Jetton. Mr. Jetton testified the accident occurred when the brakes on his truck failed, causing it to move and trap Mr. Russell between the truck and the front-end loader. Jetton further testified the brakes had not failed on the truck in "a good while" and he had not had any work done on the truck for a "year or better" prior to the accident.

Jetton had hauled the wood to the Domtar Mill at the request of Clemente "Speedy" Martinez. Martinez had given Jetton the access number to give to the mill when he delivered the wood. Martinez received the number via an agreement he had with Northeast Texas Land and Timber (NLT), which is owned by Perry Steitler. (NLT is a timber broker that enters into agreements with others to sell timber to mills using NLT's contract number.) Under the contract, Martinez agreed to sell and deliver materials under NLT's contract information. The agreement specified Martinez was an *independent vendor*, and required that he maintain general liability insurance. Perry Steitler testified he had previously revoked Martinez's authority to deliver timber due to lapses in Martinez's insurance and his association with an individual of whom Mr. Steitler disapproved.

Following the accident, a wrongful death action was filed against NLT and Jetton. The complaint was later amended to include Perry Steitler as a defendant, however Martinez was never joined. The complaint alleged that the NLT and others were liable for the death both directly and vicariously on theories of negligent entrustment, negligent hiring, negligent training, and/or negligent supervision. Eventually, a Motion for Summary Judgment on behalf of the defendants was granted by the Trial Court. An appeal timely followed.

The Court of Appeal found the facts surrounding the parties' relationship did not show NTLT could or did control how the timber was hauled. It also noted Martinez was allowed to perform the contracted work according to his own methods and without the control of appellees. Accordingly, it determined no evidence indicated Martinez was anything other than an independent contractor, and therefore appellees could not be subject to a claim of negligence for actions undertaken by Martinez.

**JURY AWARDS \$5.25 MILLION FOR TEENAGER'S
WRONGFUL DEATH**

In *Aichs v. Don B. Swisher Trucking Corporation, et al.*, a Jury recently awarded \$5.25 Million to the family of a 16 year old girl who was killed in an accident caused by a tractor-trailer. In this case, Sydney Aichs was killed when a truck driven by Kenneth Borbour ran a red light and slammed into a car the teenage girl was driving while on her way to school. The driver of the rig testified that although the traffic light had turned yellow, he was attempting to run the light when the truck he was driving struck the teenager's car. The girl's parents sued Mr. Barbour, Don B. Swisher Trucking Corporation, and McCann Delivery Service Inc., claiming the driver was not trained and the rig was improperly maintained.

The driver of the truck, Kenneth Borbour, accepted full responsibility for the crash, pleaded guilty to manslaughter and reckless driving, and was sentenced to a 2 year jail term. His supervisor testified Mr. Borbour was familiar with the route and should have stopped for the yellow light. The Jury found Don B. Swisher Trucking Corporation, McCann Delivery Service, and driver Kenneth Barbour were all negligent and shared responsibility for the teenager's death.

**AUTO REPAIR SHOP OWNER NOT ENTITLED
TO UNDERINSURED MOTORIST BENEFITS
UNDER BUSINESS POLICY**

In *West Bend Mutual Insurance Company v. Thomas Oczak, et al.*, the Minnesota Supreme Court recently held that when the owner of an automobile repair business is injured in a motor vehicle accident while occupying a customer's vehicle, and collects underinsured motorist benefits from the policy specifically covering his customer's vehicle, he is *not* then entitled to additional underinsured motorist benefits from his business owner's liability policy of insurance.

In this case, appellant Thomas Oczak (Oczak) was seriously injured in a car accident in which the driver of the other car was underinsured. At the time of the accident, Oczak was the owner of North End 66, Inc. (North End), and was driving a car owned by one of its customers. After settling with the negligent driver's insurer, and the insurer of the car Oczak occupied, Oczak brought an underinsured motorist (UIM) claim against West Bend Mutual Insurance Company (West Bend), the insurer of his business North End, and Allstate Insurance Company (Allstate), his personal insurer. West Bend brought a declaratory judgment action against Oczak and Allstate to determine the obligations and coverage priorities of the insurance policies. On cross-motions for summary judgment, the District Court concluded the Allstate policy provided excess UIM coverage and the West Bend policy did not. The Court of

Appeals' decision affirming the District Court's finding, was then affirmed by the Minnesota Supreme Court. After analyzing the subject West Bend policy and relevant case law, the Minnesota Supreme Court determined the West Bend policy did *not* provide excess UIM coverage as a matter of law.

**\$4.2 MILLION AWARDED BY SANTA BARBARA JURY
IN 18-WHEEL TRACTOR-TRAILER CRASH**

In *St. John-Parisian v. Foster Poultry Farms, et al.*, a Santa Barbara Jury awarded \$4.2 Million to plaintiff St. John-Parisian for injuries sustained after being hit by a tractor-trailer owned by Foster Poultry Farms.

In this action, a Foster Farms' 18 wheel tractor-trailer allegedly made an illegal lane change and struck a Ford Taurus driven by plaintiff St. John-Parisian. Upon impact, Ms. St. John-Parisian's vehicle struck a concrete center divider, causing her to suffer significant injuries including torn cartilage in her hip socket and a cut vertebrae. She also suffered nerve damage and must now take morphine for pain twice a day. Witnesses did not see the actual crash. Plaintiff recalled seeing a Foster Farms' logo on the truck which had briefly pulled onto the shoulder - before it drove away.

After the crash, the CHP contacted Foster Farms. Foster Farms advised that although several of their trucks were in the Santa Barbara area on the day of the incident - none of those drivers recalled being in an accident on that day. They explained that without a license plate or trailer number - they would be unable to assist the officer with his investigation into the subject crash.

At trial, a Foster Farms dispatcher testified *only one* truck was in the Santa Barbara area on the date of the accident - which was being driven by defendant Jesus Sepulveda. Mr. Sepulveda's driving log revealed he had, indeed, pulled over onto the highway shoulder near the accident scene just three minutes after the collision occurred. Although he initially explained he had pulled over to look at a map, Mr. Sepulveda later could not recall why he had noted that time in his driving log on that day. Mr. Sepulveda also claimed he was in another city at the time the accident occurred.

Plaintiff's counsel contended Foster Farms was aware Mr. Sepulveda had more than 5 points on his driving record and was on DMV probation at the time the crash occurred. He also argued that under Foster Farm's *own* internal policy, Mr. Sepulveda had too many points, but was allowed to drive anyway.

Although defendants contended there was no evidence establishing a Foster Farms truck had ever collided with the plaintiff's car, the Jury disagreed and returned a \$4.2 Million Dollar award.

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