

# **INVESTIGATION OF CATASTROPHIC TRUCK ACCIDENTS**

by

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**12<sup>TH</sup> ANNUAL CIVIL TRIAL SEMINAR**

**February 15<sup>th</sup> - 16<sup>th</sup>, 2008  
Las Vegas, Nevada**

# **INVESTIGATION OF TRUCKING ACCIDENTS**

*"Cases today are won or lost on the basis of facts, seldom issues of law. I am yet to see a case where the facts have improved because someone waited to develop them. There is no substitute for the facts and remember whether good or bad the sooner you know what the facts are the better able you are to prepare your case for handling in the future." Ronald L. Nichols, President and Chief Operator Officer, Country Wide Services Corporation, St. Louis, Missouri 1993.*

**CAVEAT:** The scope of this paper relates to catastrophic truck litigation. **In catastrophic cases, those who pinch pennies will give away dollars.**

## **Initial Case Investigation Checklist**

The first stage of investigation of a catastrophic trucking accident is information and data collection . Obtaining evidence is vital for trial preparation and case evaluation. Trucking companies and insurers will usually have a head start on the investigation. This advantage should always be exploited by the defense. Most major trucking companies have access to both in-house counsel, claims representatives and DOT experts who in turn have access to outside/national resources. The need to obtain prompt on-site investigation of the accident cannot be overemphasized. If you are waiting for the police investigation, you have waited too long.

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### **1. Investigation Check List:**

If possible, a representative of the trucking company, such as an independent adjuster, should go to the scene as soon as possible. Additionally, an accident reconstructionist should be retained and commence the investigation no later than 24 hours after the incident. What information should be collected?

#### **a. Interview with truck driver:**

This should not be recorded until an attorney is involved in the process. Even then, you may not want to record the driver.

- b. Interview independent witnesses and recordation of favorable information.
- c. Ascertain the name of the supervising person for the police authority investigating the accident.
- d. Ascertain if the truck driver, the police authority, first responders (Fire/EMT) or anyone else has obtained photographs of the scene. In many cases, the truck driver will have a camera, even a phone camera, and generally take “lousy” photographs. Those photographs should be secured and preserved, even if “lousy”.
- e. The accident reconstruction expert should take photographs of the scene and the vehicles, not the claims representative or lawyer.
- f. A complete search for and inspection of materials should be made of the vehicles involved in the incident, including the potential adverse vehicle. Look for: prescription medical containers, alcohol containers, over-the-counter medication containers, food and beverage containers, cell phones, any pertinent material relating to the drivers, condition of restraint systems, indications of driver distraction. (Televisions, laptop, cell phone, IPOD, blackberry, etc.) The persons representing the owners or drivers of the vehicles in the collision will generally be granted access to the vehicles when the police investigation is finished. However, a proper investigation of the vehicles includes visual investigation of the adverse vehicle and its contents and a prompt attempt to obtain permission for

a full inspection.

- g. **Accident Reconstruction:** The sooner an accident reconstruction expert can be at the scene the better. Sometimes the police investigation, even in fatality cases, can be hit or miss. This is especially true if local law enforcement in rural areas conducts the investigation. As a general rule, your State police, such as the Department of Public Safety in Texas, will have competent reconstruction experts at the scene in the event of catastrophic injury and fatality cases. But, mistakes can be made. The accident reconstruction expert if permitted prompt access, will be able to determine many aspects relating to the accident including point of impact, road conditions, roadway features, gouge marks, skid marks, tire marks and environmental conditions. Remember, brakes, tire type and configurations and axles are different on commercial vehicles. Roadway evidence can change quickly. Emergency responders, tow truck operators and others not charged with the preservation of roadway evidence can sometimes introduce, alter or eliminate evidence at the scene. This again emphasizes the reason a competent accident reconstruction expert should commence a prompt investigation. The accident reconstruction expert must determine whether or not the vehicles involved in the incident were moved, and how they were moved from the scene of the accident. If a vehicle is driven from the scene of the accident, this can impact the validity of electronic recording devices.
- h. **Environmental Factors:** Weather conditions at the scene of the accident must be determined as soon as possible. This is especially true in the Southwest where

conditions can include blowing dust, black ice, high winds, snow, microbursts and/or heavy rains. The investigation should include an attempt to obtain local weather data as well as data from the National Climatic Data Center (NCDC). Anecdotal evidence should also be obtained from independent witnesses and police authorities. Information as to whether or not the drivers involved in the accident are experienced in driving under certain environmental conditions that may have existed must be ascertained.

- i. **Resurfacing:** In the event your investigation is tardy, the investigation should include research as to whether or not the roadway has been resurfaced since the date of the accident. Remedial construction occurs frequently on most interstate systems and state highways. Physical evidence at a crash site changes. As a general rule, gouge marks and scratches can last for years but other tire marks can disappear quickly. If the roadway had been resurfaced, your expert will appear to be fairly stupid if he is measuring marks that were created after post-accident resurfacing of the roadway.
- j. **Roadway Environment:** The area of the accident needs to be investigated to determine whether or not the roadway itself is a factor in the incident. This is especially true if the accident occurred in mountain or hill areas where curve and grade conditions may be factors in the accident.
- k. **ECM:** Many tractor trailers are equipped with Electronic Control Modules, referred to as “black boxes” or as “ECM.” The module must be downloaded immediately after an accident. If the tractor is placed back into operation (driven)

after a crash without downloading, the data may be erased or “overwritten.” In many cases, the police authority demand that a tractor trailer, if movable, be moved. If this occurs, the data that is later downloaded may be meaningless. ECM data can include hard stop events, RPM’s, road speed and application of brakes. Remember that tractor trailer owners/carriers dictate the type of information that will be recorded. ECM’s are not foolproof. Additionally, engine manufacturers, such as Caterpillar, send engines from the factory with the recording factors set to zero. The tractor trailer owner or motor carrier programs the recording factors. Many passenger vehicles also have recording devices. The accident reconstruction expert you hire must be completely familiar with the types of recording devices that are on the tractors as well as passenger vehicles. And, you must ascertain if the device was properly downloaded by a trained person. This technology changes frequently.

- i. **GPS:** Many carriers have GPS tracking systems. In many cases, this service is provided by outside companies such as Qualcomm. These records are not retained for very long periods. The accident reconstruction expert must be totally familiar with these devices and the information that can be obtained. It is vitally important that you have a qualified person who can read and interpret Qualcomm records.
- m. **Computer/Information:** Many carriers have computers and fax capability on their tractors. Investigation should also include retrieval of this information.
- n. **Tip to Plaintiffs:** Motor carrier regulations do not require that carriers preserve

all electronic information. This includes both Qualcomm information and ECM downloads. If not preserved, there is a significant probability that such information will be deleted. Plaintiffs' counsel hired or retained shortly after an accident should forward a letter to the motor carrier and its driver demanding that such information, if in existence, be preserved. **Case authority relating to a request to preserve information:** *Dunham v. Condor Insurance Company*, 57 Cal. App. 4<sup>th</sup> 24 (Cal. App. 1997); *Anderson v. Mack Trucks, Inc.*, 793 N.E. 2<sup>nd</sup> 962 (Ill. App. 2003).

- o. **Investigation of adverse vehicle:** As soon as possible, obtain permission for your accident reconstruction expert to fully inspect the adverse vehicle.
- p. **Identify all potential Plaintiffs and Responsible Defendants:** In accidents that occur in construction zones, identify the general contractor and subcontractors. Identify the State or local authority involved in the construction project.

2. **Documentary Information:**

The Federal Motor Carrier Regulations mandate the creation and preservation of certain types of documentary information. Additionally, documentary information created by police and other governmental authorities will provide additional information relating to the investigation of a catastrophic accident. The following checklist is not exhaustive:

- a. **Police Accident Report and Supplemental Reports of Investigation.** In catastrophic/fatality cases, there usually is at least one supplementation of the police report. In the event that numerous witnesses are involved, the police

authority may obtain signed statements even months after the accident. The careful practitioner will obtain the initial police accident report and all supplementation. As a general rule, this information is readily available or it may be secured through a public information request. If criminal charges are filed, obtain all criminal investigation materials.

- b. **All Electronic Data:** ECM/Qualcomm, fax, e-mail, records from on board computers, tire pressure monitoring to include deflation detection systems (DDS) and tire pressure monitoring system (TPMS); anti-brake systems, anti-lock brake systems (ABS). For an excellent discussion of onboard electronic safety systems and devices see, Ruhl, On Board Electronics Safety Systems and Devices, Truck Accident Litigation, Second Edition, 2006 American Bar Association.
- c. **Cargo Records:** Bills of lading and information relating to cargo contents. This will provide you the load weight.
- d. Autopsy report, coroners report/medical examination investigation/death certificates. The medical examiner's office may have investigators who actually conduct investigations and take photographs other than just autopsy photographs.

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Additionally, blood samples and tissue samples are generally taken by medical examiners and preserved. Do not think that you have all of the information just because an autopsy report is produced.

- e. Media Reports/Video and Newspaper.
- f. Driver logs.
- g. Maintenance, mechanical and repair records, pre and post-accident for all



vehicles.

- h. Driver qualification file.
  - i. Dispatch records.
  - j. Cell phone records/all drivers and passengers.
  - k. Wrecker or tow company records including receipts, invoices and/or storage records. Ascertain if the tow company has photographs.
  - l. Truck and trailer licenses and all involved vehicle licenses.
  - m. Debit card records-credit card records of all drivers.
  - n. Fuel receipts.
  - o. Administration and title information for truck trailer and passenger vehicles involved in incident.
  - p. Pre-trip inspection records.
  - q. Worker's compensation information on any potential party to case including tractor trailer driver.
  - r. Current motor vehicle record on all drivers involved including tractor trailer records.
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- s. If the tractor or trailer is leased, all lease records and contracts. Keep in mind that companies lease vehicles to both owner operators and motor carriers. Also, obtain any contract or agreements between owner-operators and the carrier.
  - t. Ambulance records, fire medical service records, paramedic records. In some cases, fire personnel and paramedic personnel maintain logs or diaries of call responses. Ascertain if such information exists. Also, ascertain if the

responders have photographs.

- u. Both Plaintiffs and Defendants should request information regarding the truck driver's previous employment and obtain employment records from those employers.
  - v. Personnel file of the truck driver and any other drivers involved in the incident. Keep in mind that some motor carriers maintain personnel files separate and apart from the driver qualification file.
  - w. All reports on testing for drug and alcohol abuse. Remember that the Federal Motor Carrier Safety Regulations mandate drug/alcohol testing after certain accidents. Additionally, some motor carriers have policies that exceed requirements of the Federal Motor Carrier Safety Regulations relating to drug testing.
  - x. The random drug/alcohol testing results involving the motor carrier driver and any other driver that may be subject to such testing.
  - y. Information relating to any prescription or non-prescription medication taken by the drivers involved in the incident.
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- z. Obtain the Federal Motor Carrier Safety Regulation records. The Federal Motor Carrier Safety Act and its regulations mandate the retention of certain records and provide minimum retention periods:
    - 1. 49 C.F.R. Section 379 (basic business records, dispatch sheets, bills of lading contracts);
    - 2. 49 C.F.R. Section 382 (drug use and alcohol misuse);

3. 49 C.F.R. Section 387 (financial responsibility, insurance);
4. 49 C.F.R. Section 390 (Accident register);
5. 49 C.F.R. Section 399 (driver records, basic file, specific items on active);
6. 49 C.F.R. Section 391 (driver records, past employment verifications);
7. 49 C.F.R. Section 395 (hours of service records);
8. 49 C.F.R. Section 396 (maintenance records).

- aa. **Insurance Information:** You cannot be satisfied with just having insurance information from the police reporting. See 49 C.F.R. 387 for insurance and safety records that must be retained for certain periods. To the extent possible, also ascertain the names of the insurance brokers who are potential parties to the litigation. In many cases, the brokers may also have information relating to other available insurance and possibly other potential Defendants.
- bb. In accidents occurring in construction zones, obtain all documentary information, including photographs relating to the construction and all pertinent information from the General Contractor, subcontractors, and governmental authority involved in the construction.

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3. **Carrier Driver Information:** Counsel for both Plaintiff and the Defendant need to ascertain as much information relating to the motor carrier driver in order to properly investigate the claim. Some of these materials have been discussed. Unfortunately, in a number of cases, especially those involving motor carriers, disqualified drivers are permitted to drive. For example, if a driver has been convicted of a crime involving the use of a commercial motor vehicle in interstate commerce involving manufacturing,

distributing or dispensing of controlled substances, lifetime disqualification is mandated. For a listing of conduct that mandates disqualification for a period of one year up to lifetime, see 49 C.F.R. 383.51.

4. **Post Accident Discipline:**

Both the Plaintiff and the defense must ascertain information on the post-accident review of the driver by the motor carrier and any driver reviewed by an employer. This includes information relating to whether or not the driver was disciplined and whether or not the motor carrier/employer declared the accident preventable or non-preventable. This generally will result in a dispute as to whether or not such information is admissible.

The defense will assert the privileges of critical analysis and subsequent remedial measures. Notwithstanding the outcome of the evidentiary issue, both sides in catastrophic truck accidents need to know the post-accident history of the motor carrier driver and any disciplinary action by the motor carrier. The diligent defense practitioner will also attempt to ascertain the post-accident history of the adverse driver, especially if the driver was in the course and scope of his employment for another motor carrier or employer that requires its employees to drive.

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5. **What Type of Truck?**

Commercial vehicles are complex and complicated. The careful practitioner will ascertain what type of truck or trucks were involved in the collision. There are several different types of over-the-road trucks and commercial trucks used locally that have different configurations and technologies. This is also true of the type of trailer or configuration of trailers involved in the incident. Emphasis is placed on the necessity of

a competent accident reconstruction expert who is totally familiar with the type of tractors, trucks, trailers, axles and tires that are involved in the incident. Categories include:

- a. Van Body-Straight Truck.
  - b. Flat bed straight truck.
  - c. Three axle heavy tow truck.
  - d. Dump truck with auxiliary axle.
  - e. Concrete mixer truck.
  - f. Tractor and Semitrailer.
  - g. Three axle tractor with a day cab.
  - h. Two axle tractor with a day cab.
  - i. Cab over engine.
  - h. Van Semitrailer.
  - j. Semitrailer with landing gear.
  - k. Two axle tractor hauling doubles.
  - l. Refrigerated Semitrailer.
- 
- m. Flatbed.
  - n. Step deck Semitrailer.
  - o. Double drop bed Semitrailer.
  - p. Livestock Semitrailer.
  - q. Tanker Semitrailer.
  - r. Dry bulk Semitrailer.

- s. Hopper Semitrailer.
- t. Frame dump Semitrailer.
- u. Frameless dump Semitrailer.
- v. Converter Dolly - converts Semitrailer to Full Trailer.

The accident reconstruction expert must be familiar with the unit dimensions including width, length, configuration, weight, height and operation and safety features of both the tractor and the trailer. Additionally, the technology of the component parts and design of the units, both for tractor and the trailers, change periodically. And, you need to ascertain the type of tires used on the tractor and trailer: dual or super single.

6. **Other Experts:** Counsel should, at an early stage, ascertain if other experts are needed.

Visibility and conspicuity can be an issue. The Federal Motor Carrier Safety Regulations mandate the requirements for lamps and reflectors on vehicles. See, 49 C.F.R. 393.9 - 393.30.

A load expert may also need to determine whether or not loading of the cargo is appropriate and whether or not the securement of loads, especially with regard to flatbed trailers was compliant.

Did the “load” contribute to the accident? You may need an expert relating to lighting requirements for different types of loads. The Federal Motor Carrier Safety Regulations also

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have requirements for the lighting of loads overhanging the rear of the vehicle. See, 49 C.F.R. 393.11. Your expert must be familiar with these regulations.

The science of sleep is also an area of expertise. If fatigue is involved a careful practitioner will ascertain whether or not a “sleep expert” is necessary. The science of sleep is developing and a tremendous amount of contradictory information exists in this field. The fatigue factor analysis is not just reserved for the motor carrier operators. The National Sleep

Foundation computed that “37% of Americans adults are so sleepy during the day that it interferes with daytime activities”. Burns, Truck Driver Fatigue - A Primer, Truck Accident Litigation-Second Edition (American Bar Association-2006). In fatigue cases and other cases, consideration also must be given to retaining a human factors expert. For example, in cases involving multiple driver distractions, peculiar environmental or weather conditions, or visibility issues, a human factors expert may lend assistance.

### CONCLUSION

The careful practitioner will tailor the investigation to the specific physical, environmental, mechanical and human conditions involved in the accident. Adherence to a “formula” for investigation may produce incomplete information and create rather than eliminate problems in the case. An excellent source for investigation resources and trial preparation is contained in Truck Accident Litigation - Second Edition, American Bar Association 2006, edited by Laura Ruhl Genson and Anita M. Kerezman.

# **ADDENDUM “A”**

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## Title 49--Transportation

(This index contains parts 300 to 399)

### Subtitle B--Other Regulations Relating to Transportation (Continued)

#### CHAPTER III--FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

<i>Part</i>	
301	<u>[Reserved]</u>
303	<u>Civil Rights</u>
325	<u>Compliance with interstate motor carrier noise emission standards</u>
350	<u>Commercial motor carrier safety assistance program</u>
355	<u>Compatibility of State laws and regulations affecting interstate motor carrier operations</u>
356	<u>Motor carrier routing regulations</u>
360	<u>Fees for motor carrier registration and insurance</u>
365	<u>Rules governing applications for operating authority</u>
366	<u>Designation of process agent</u>
367	<u>Standards for registration with States</u>
368	<u>Application for a certificate of registration to operate in municipalities in the United States on the United States-Mexico international border or within the commercial zones of such municipalities</u>
369	<u>Reports of motor carriers</u>
370	<u>Principles and practices for the investigation and voluntary disposition of loss and damage claims and processing salvage</u>
371	<u>Brokers of property</u>
372	<u>Exemptions, commercial zones, and terminal areas</u>
373	<u>Receipts and bills</u>
374	<u>Passenger carrier regulations</u>
375	<u>Transportation of household goods in interstate commerce; consumer protection regulations</u>
376	<u>Lease and interchange of vehicles</u>
377	<u>Payment of transportation charges</u>
378	<u>Procedures governing the processing, investigation, and disposition of overcharge, duplicate payment, or overcollection claims</u>
379	<u>Preservation of records</u>
380	<u>Special training requirements</u>
381	<u>Waivers, exemptions, and pilot programs</u>
382	<u>Controlled substances and alcohol use and testing</u>
383	<u>Commercial driver's license standards; requirements and penalties</u>
384	<u>State compliance with commercial driver's license program</u>

- 385 Safety fitness procedures
  - 386 Rules of practice for motor carrier, broker, freight forwarder, and hazardous materials proceedings
  - 387 Minimum levels of financial responsibility for motor carriers
  - 388 Cooperative agreements with States
  - 389 Rulemaking procedures--Federal motor carrier safety regulations
  - 390 Federal motor carrier safety regulations; general
  - 391 Qualifications of drivers and longer combination vehicle (LCV) driver instructors
  - 392 Driving of commercial motor vehicles
  - 393 Parts and accessories necessary for safe operation
  - 394 **[Reserved]**
  - 395 Hours of service of drivers
  - 396 Inspection, repair, and maintenance
  - 397 Transportation of hazardous materials; driving and parking rules
  - 398 Transportation of migrant workers
  - 399 Employee safety and health standards
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# **ADDENDUM “B”**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
PECOS DIVISION

FILED

RECEIVED NOV 20 1989

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U. S. DISTRICT COURT  
CLERK'S OFFICE  
DEPT.

"SONNY" HILLIN )

v. )

P-89-CA-004

BY                      DEPT.

DENVER G. BURRELL, and )  
EDMONDSON SWIFT MEAT TRANSPORT, )  
INC., d/b/a FREEDOM FREIGHT, )  
and JOHN DOE, M.D. )

and )

FRANK W. AGUTTER, Individually )  
and LYNDA COLLEEN MAYES on )  
behalf of the Estate of SHARON )  
MARIE AGUTTER, Deceased )

MEMORANDUM OPINION

ON THE THIRD DAY OF OCTOBER, 1989, at a regular term of this Court, there came on to be heard the above-styled and numbered cause in a trial to the Court. Having considered the evidence and the pleadings in this case, this Court, for reasons set forth below, is of the opinion that Plaintiff and Intervenors have failed to meet their burden on one or more essential elements of ~~the causes of action asserted and therefore should take nothing~~ by their suit.

FINDINGS OF FACT

On October 30, 1988, Denver G. Burrell, driving an 18-wheel tractor-trailer west on Interstate 10 near Sierra Blanca, Texas, struck the vehicle of Sharon Marie Agutter of El Paso, Texas, thereby causing the death of Miss Agutter. When stopped shortly thereafter by Constable "Sonny" Hillin of Hudspeth County, Texas,

Denver G. Burrell shot Constable Hillin, causing him severe injury. This lawsuit arises from those October 30, 1988, events.

Denver Burrell started work for Freedom Freight, a North Carolina corporation doing business in Texas, late in September of 1988. He was 31 years of age at that time. When he began work for Freedom Freight he had a Class I standard automobile operator's license, which did not license him to operate an 18-wheel tractor-trailer rig.

Shortly after he joined Freedom Freight, Burrell went with W. O. Jackson of Freedom Freight on a six-day trip to New York and Florida. Burrell believed he was to learn the operation of an 18-wheel rig during that trip. Jackson entrusted Burrell with the driving of an 18-wheel rig for an unspecified amount of the distance on that trip.

Burrell carried a .357 magnum revolver in his travel bag during the trip with Jackson. However Burrell did not specifically tell Jackson that he was carrying a revolver on that trip, and did not recall whether Jackson was ever in a position to actually see the revolver. No one at Freedom Freight ever asked Burrell if he carried a gun while driving, nor told him that he was prohibited from doing so.

On the morning of Wednesday, October 26, 1988, Burrell went to the truck terminal of Freedom Freight to see if he would be assigned a load. While waiting for an assignment, he went to the Highway Department and obtained his Class 3 license for operating an 18-wheel tractor-trailer. This was the first time he had held such a license.

Burrell returned to Freedom Freight headquarters and was assigned a load at around 4:30 or 5:00 p.m. At that time he also found out that the individual designated as his partner for this trip had his operator's license suspended. Burrell testified that Mr. Hunsinger, the Vice President of Freedom Freight, gave Burrell the option of doing the trip alone. Burrell accepted the assignment.

Burrell left Anderson around midnight without having rested, and drove approximately 350 miles to Mullins, South Carolina to pick up his load. He arrived in Mullins at approximately 5:00 a.m. on Thursday, October 27, 1988. His assistance was required to load his truck, therefore was unable to rest in Mullins. He left at approximately 2:30 p.m. and arrived back in Anderson at approximately 8:00 p.m. Before beginning his cross-country haul, Burrell took a one-hour and 45 minute side-trip to pick up a citizen's band radio. Burrell returned to Anderson to commence his Nevada haul.

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~~Mr. Hunsinger of Freedom Freight told Burrell that Burrell~~  
had to be in Sparks, Nevada by 7:00 a.m. the following Monday, so Burrell began his journey on the morning of Friday, October 28, 1988. He drove through Mississippi, Alabama and Louisiana without resting, and reached the Texas border before daylight on Saturday, October 29th. About sunrise on Saturday, Burrell stopped and slept for approximately two hours. About noon Saturday, near Dallas, Burrell encountered rain and mechanical problems, which slowed his progress somewhat. He telephoned Freedom Freight regarding his progress. He had been given no

fuel permits before departing, but learned from Hunsinger on reporting in to Freedom Freight from Cisco, Texas around noon that he would be able to pick up permits in El Paso.

Burrell reached Wickett, Texas around 10:00 p.m. Saturday, where he stopped for food. He left the Wickett area around midnight without having slept. At some point he checked his bill of lading and learned that his load was not expected in Sparks, Nevada until Wednesday morning. However, he assumed that he was still needed there on Monday morning to pick up a back-haul.

Burrell stopped to rest somewhere between Wickett and Van Horn, Texas, at 2:00 or 2:30 a.m. Sunday morning, October 30, 1988. He sat in his cab attempting to relax for 30 to 45 minutes. He recalled hearing voices on the citizen's band radio which he interpreted as voices of law enforcement officials plotting to stop him and give him a ticket. He fell asleep and woke intermittently, until the sensation of air blowing in through his partly opened cab door woke him fully. It was then ~~daylight on Sunday morning, and Burrell thought he slept~~ approximately 4 to 6 hours.

Burrell continued his journey "in the direction the truck was pointed," that is, toward El Paso, Texas, and Sparks, Nevada beyond. At some point, he developed the belief that he was back in South Carolina, and thought he actually "saw" his wife in the cab with him. Expert testimony of Dr. Ben Passmore, a psychiatrist, indicated that Burrell's experience was more likely a misperception than a hallucination.

Burrell became preoccupied with the idea that his wife was lost somewhere in the vicinity. As he drove, he believed that he had to search for her. He recalled hitting or side-swiping one or more trucks before hitting Agutter's car. He believed other vehicles were implicated in his wife's disappearance. The parties do not dispute that Burrell struck or sideswiped eight vehicles, and the record shows Burrell in fact hit or forced off the road eight vehicles that Sunday morning.

Burrell noticed Sharon Agutter's car appear suddenly in the right lane of the interstate. He approached Agutter's car in the left lane at a high rate of speed, and swerved his truck into Agutter's car, knocking it off the road.

According to expert medical testimony, Burrell was for some time during his trip under the influence of an apparent delusion that other drivers were involved in his wife's disappearance. Other evidence, however, clearly shows that such delusion could not possibly have impaired Burrell's ability to appreciate ~~important details of his situation, coordinate his activities~~ with reference to the outside world, and carry out planned acts in reference to other vehicles and persons, at least until some point after his encounter with Constable Hillin. Burrell's own testimony regarding his intent in striking Agutter's vehicle is dubious because of his interest in avoiding criminal liability. This Court is convinced by a preponderance of the evidence that Burrell's actions toward the vehicle of Agutter were intentional.

Burrell grew increasingly worried about his wife being in danger. He attempted to force a motor home to stop by ramming it



with his truck, believing the driver had some connection with his missing wife. He recalled that he noticed the flashing lights of a patrol car behind him. He believed that the car belonged to a law enforcement officer back in South Carolina who was out to get him or interfere with his attempt to find his missing wife.

Burrell stopped his truck and waited for the officer to exit the patrol vehicle, then purposefully backed his truck into the patrol vehicle in an effort to disable it. He drove off in pursuit of the motor home once again, but stopped shortly thereafter when the patrol vehicle resumed pursuit. The patrol vehicle pulled up approximately 30 to 40 yards in front of Burrell's truck and Constable Hillin got out.

Burrell fired a shot in Hillin's direction. Burrell testified that he aimed over Hillin's head because he meant only to scare away the South Carolina officer he believed Hillin to be. However it appears to this Court that Burrell's actions in regard to Hillin were also intentional, and that he intended to shoot to kill or seriously injure Hillin or some other person he believed Hillin to be.

Burrell drove away and continued for several miles, but slowed his truck to a crawl and eventually stopped once again. He testified that he saw more flashing lights and believed the South Carolina officer was still after him. He threw his billfold and permits out the window of his cab. He was pulled down from the cab by a law enforcement agent, and was handcuffed. Officers on the scene testified that Burrell appeared "wild

looking," was talking to himself, and appeared intoxicated or dazed though he evidenced no odor of alcohol.

Burrell had never worked as a truck driver before the day Freedom Freight entrusted their tractor-trailer rig to him. His only experience with such vehicles was as a child riding with his father, who was a truck driver. Burrell obtained his GED and trained as a mechanic. He worked previously as a mechanic, as a convenience-store operator, and running his own scrap-metal business.

Burrell was licensed to operate passenger cars in South Carolina for approximately 15 or 16 years. During that time his license was never suspended or revoked, and he received only one citation, that being for speeding.

Burrell applied for employment at Freedom Freight at a time when he was experiencing financial difficulties. He filled out Freedom Freight's "standard" application form without assistance. He was not directed to obtain a physical examination and does not recall what he put on the application regarding his health history. Freedom Freight did not tell him he was required to carry a health certificate and did not tell him that he could not drive without one. They did say he would be required to obtain a physical but did not say when he would have to do so. He testified that, in response to a question about mental problems or disability, he answered "none."

The truck Burrell drove was owned by Freedom Freight and registered for operation in interstate commerce. Freedom Freight's records contained a certificate evidencing Burrell's

driving test, but it was signed by Hunsinger and not by W.O. Jackson. It was not signed by Burrell in the place designated for the examinee to sign. The record also did not contain a certificate of medical examination. The record contained a written driving examination taken by Burrell, however Burrell's incorrect responses were not marked. Burrell answered incorrectly the question dealing with DOT regulations governing the number of hours a driver may drive between rest periods. The written examination was not signed by Burrell in the place designated for the examinee to sign. Burrell's record contained no employment recommendations, but DOT regulations do not require Freedom Freight to have recommendations on file until 30 days after Burrell began work.

Burrell was paid for this trip by Freedom Freight based on a percentage of the load. Under the terms of their agreement, Burrell was responsible for paying his own federal income taxes and social security, as well as his own food and lodging expenses unless such expenses were occasioned by a breakdown of Freedom Freight's truck. Freedom Freight was responsible for all expenses of operating and repairing the truck. Freedom Freight was responsible for shipping arrangements including providing the load and arranging the pick-up point and destination.

Freedom Freight designated two alternative routes from Alabama to Nevada, between which Burrell could choose. Freedom Freight told Burrell when he was required to arrive at his destination, but did not tell him what schedule of driving and rest to follow. Burrell determined for himself the hours that he

would drive and when he would rest. Burrell was responsible for reporting in to Freedom Freight daily around noon with information about his whereabouts and progress.

Burrell did not recall discussing with Freedom Freight whether Freedom Freight considered him to be an employee or an independent contractor. Burrell was not aware of any contract with Freedom Freight making him an "independent contractor," and no such contract was in evidence. Burrell did not doubt that Freedom Freight could control his activities in driving their truck, or take the truck away from him if he did not comply with orders.

Burrell had been under the care of Dr. E. P. Battle since 1982 or 1983. Burrell began using the drug Fastin in 1985, and the drug Valium in 1986 or 1987, under a doctor's prescription. He took these medications because of a back injury. He took one dose of Fastin daily, as prescribed, continuously since 1985 and up to the day of the events of October 30, 1989. He took Valium ~~off and on until March of 1989. He also took Percoset in the~~ past for back pain. Burrell testified, and Dr. Briones confirmed that Burrell told him, that Burrell did not take Valium on this trip.

Burrell was given Fastin initially to lose weight as a way of managing his back problem. He continued taking Fastin, however, as prescribed by Dr. Battle, despite the fact that his weight remained stable with only temporary variations for several years. Neither Dr. Battle nor any other physician treating Burrell warned him of possible side-effects of Fastin, or that

Fastin could cause hallucinations or violent behavior, or that Fastin should not be taken while operating machinery, or that Fastin should not be taken for extended periods of time. The undisputed medical testimony was that Fastin should not be prescribed as an aid for weight reduction for anywhere near the length of time that Dr. Battle prescribed it for him.

During the trip in question Burrell believes that he took the Fastin as prescribed, one dosage daily, but does not recall for sure. Dr. Briones testified that Burrell had reported taking two additional doses of Fastin on that trip. At the same time, the Fastin bottle found in Burrell's truck after the incidents contained only one pill, which would be consistent with his having taken the prescribed dose of one tablet daily. Medical testimony of Dr. Briones indicated that reports from law enforcement officials regarding Burrell's urinalysis and blood test results did not indicate his having taken an excess dose of Fastin. In addition to taking Fastin, Burrell drank one 16 ounce Dr. Pepper approximately every hour.

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Burrell has a history of depression. He became "stressed out" in January of 1987 because of job and marital problems, and attempted suicide. He was hospitalized involuntarily in a psychiatric treatment facility for six days. He was not assaultive during that period. Furthermore, the evidence failed to turn up any incidents in which Burrell ever assaulted anyone, became paranoid, hallucinated, or was affected by delusions. That hospitalization was Burrell's only psychiatric episode. There was no testimony that Burrell told anyone at Freedom

Freight about this hospitalization, or that any representative of Freedom Freight ever asked him about any psychiatric problems.

No evidence was introduced to show that Burrell was psychotic, delusional or disturbed at the time he left Anderson to begin his trip. No evidence contradicted Burrell's testimony that, when he reached the Dallas area, he was able to transact business with sufficient competency to have mechanical problems repaired on the tractor trailer, and to call Freedom Freight to report his progress. No testimony questions that, when Burrell stopped in Wickett for food his conduct was apparently normal enough to pass without incident. In the early hours of October 30, 1988, however, Burrell evidently became preoccupied by paranoid thoughts, and later delusions accompanied by mental agitation. His abnormal state of mind apparently developed primarily from the effects of long-term Fastin abuse, amplified to an undetermined extent by lack of sleep and high caffeine intake.

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This Court is convinced, however, that up to and beyond the point that he shot Constable Hillin, Burrell, though deluded, was sufficiently in control of his faculties to operate and control his vehicle at a high rate of speed, systematically hit and/or run off the road eight other vehicles, and trick Constable Hillin into the situation where Burrell could attempt to disable his patrol car by backing the truck into it. Some time near or just after shooting Constable Hillin, Burrell's condition apparently deteriorated rapidly. When finally apprehended by law enforcement agents, <sup>Burrell</sup> Hillin appeared dazed, incoherent, and

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disoriented if not delirious--obviously not a condition in which he could operate his vehicle normally, much less run another truck off the road or trick Constable Hillin. By the time he was apprehended, Burrell was driving his truck at a slow rate of speed. He apparently stopped the truck voluntarily and/or because he was no longer able to control it.

#### CONCLUSIONS OF LAW

##### NEGLIGENCE OF DENVER G. BURRELL AND VICARIOUS LIABILITY OF FREEDOM FREIGHT

Plaintiffs assert a claim against Freedom Freight for vicarious liability premised on the negligence of Denver G. Burrell. A cause of action for negligence arises when someone breaches a duty of care to another, to avoid conduct which poses an unreasonable risk of foreseeable injury. Plaintiffs do not point convincingly to conduct of Burrell on which this Court might rest a finding of negligence upon which Burrell's liability, and Freedom Freight's vicarious liability, might rest. ~~Indeed, the preponderance of the evidence in this case~~ establishes that Burrell's conduct in reference to the Plaintiff and Sharon Marie Agutter, though probably deluded, was intentional.

The Court, upon consideration of the evidence and the pre-trial and post-trial Briefs of the Parties, has strained to find some merit to the arguments of the Plaintiff and Intervenor that Burrell breached a duty of care and caused foreseeable injury thereby. However the Court remains convinced that Denver G. Burrell was not negligent in taking the prescription drug Fastin

because the preponderance of credible evidence establishes that Burrell took Fastin in the manner prescribed by his doctor and had not been warned of any side effects that might affect his driving.

Burrell's conduct in driving with little rest while taking Fastin and consuming substantial amounts of caffeine may have reflected poor judgment. However, nothing in the record establishes that Burrell could have foreseen any risk of the kind of result that appears to have occurred from a combination of forces operating in the context of his vulnerable personality organization. If his conduct would not have been foreseeable to trained medical experts, as Dr. Passmore testified, it is impossible for this Court to imagine how it could have been foreseeable to Burrell, or for that matter, to Freedom Freight.

There is not substantial contradiction of the testimony of credible physicians and fact witnesses in the case, that Burrell was in an altered, psychotic-like state of consciousness when many of the events of October 30, 1988 transpired. However this Court finds it unnecessary to engage in metaphysical speculation regarding whether, under the circumstances, Burrell was capable of conforming his conduct to a reasonable standard under negligence law.

While there is evidence that Burrell's beliefs were deluded, it is clearly established that he was oriented to many relevant details of his situation. Burrell apparently knew that he was driving a truck, knew that other vehicles including Agutter's car were on the road nearby, knew that he had a gun and that a gun



was a dangerous weapon, and knew that he could employ his tractor trailer as an instrumentality to disable other vehicles.

This Court is convinced that Burrell's state of mind was sufficiently organized to have formulated the intent to do precisely what he did, that is, to shoot another person and to systematically hit or run off the road several vehicles including the one driven by Sharon Marie Agutter. In other words, Burrell had the "conscious objective or desire to engage in the conduct or cause the result" that occurred. See Holmes v. Holmes, 588 S.W.2d 674, 676 (Tex. Civ. App.--Beaumont 1979, no writ). Even granting Burrell his claim of mental incapacity, the fact that Burrell may have been paranoid and deluded about the identities of his victims, and inadvertently injured the wrong people, at the time that the injuries to Hillin and Agutter occurred, would not appear to change the intentional character of his conduct toward Constable Hillin and Sharon Marie Agutter under Texas law. See Morrow v. Flores, 225 S.W.2d 621 (Tex. Civ. App.--Fort Worth 1949, writ ref'd n.r.e.).

Accordingly, while Defendant Denver G. Burrell might be liable to Constable Hillin and the estate of Sharon Marie Agutter for the intentional torts of assault and battery, this Court can find no basis for holding him liable for the torts of negligence or gross negligence. Causes of action for assault and battery were not pleaded, and therefore consideration of same lies beyond the scope of this Opinion.

The Plaintiff and Intervenors contend that Freedom Freight should be vicariously liable to them for Burrell's conduct.

Ordinarily, vicarious liability is predicated on the negligent conduct of a servant. To establish liability of a principal or master for the negligent conduct of a servant, the injured party must show that the actor was an employee, that the employee's act was negligent, and that the negligent act was within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired. See Wilson v. H.E. Butt Grocery Co., 758 S.W.2d 904 (Tex. App.--Corpus Christi 1988, no writ); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972); Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 357 (Tex. 1971). A crucial test in establishing a master's liability for the negligent acts of his servant is whether at the time of the negligent act the master had the right and power to direct and control the servant in the performance of the act or omission, at the very instance of its occurrence. Wilson, supra, at 907, citing Parmlee v. Texas & New Orleans Railroad Co., 381 S.W.2d 90 (Tex. Civ. App.--Tyler 1964, writ ref'd n.r.e.).

This Court does not doubt that Burrell was under the general direction and control of Freedom Freight at the time he injured the Plaintiffs, in his capacity as employee of Freedom Freight. Whatever Burrell might have believed, Freedom Freight's truck was proceeding in the direction of its ultimate intended destination in Sparks, Nevada with the load of light bulbs that Freedom Freight contracted to ship. However, vicarious liability ordinarily requires an act of negligence by the employee, and

this Court finds that the injuries to Plaintiffs did not arise from Burrell's negligence.

Texas Courts have imposed vicarious liability on an employer for the intentional torts of an employee, but under fairly narrow circumstances that do not appear analogous to those presently confronting this Court. See, e.g., Houston Transit Co. v. Felder, 208 S.W.2d 880 (Tex. 1948); Texas & P. R. Co. v. Hagenloh, 247 S.W.2d 236 (Tex. 1952). Ordinarily, an assault based primarily on a confrontation or ill will between an employee and a third person is considered to be outside the course and scope of employment. Kendall v. Whataburger, Inc., 759 S.W.2d 751 (Tex. App.--Houston 1988, no writ). This Court finds the conduct of Burrell in the case at bar to be outside the course and scope of his employment by Freedom Freight.

NEGLIGENT ENTRUSTMENT AND PER SE NEGLIGENCE  
OF FREEDOM FREIGHT

Both the Plaintiff and the Intervenor in this case assert a ~~claim against Freedom Freight for the tort of negligent~~ entrustment. A plaintiff under Texas law faces a five-pronged burden in advancing a claim of negligent entrustment against a vehicle owner for the conduct of a driver. To establish an owner's liability, a plaintiff must show the following: (1) entrustment of a vehicle by the owner, (2) to an unlicensed, reckless, or incompetent driver, (3) who the owner knew or should have known to be unlicensed, reckless, or incompetent; (4) negligence of the driver on the occasion in question; (5) and proximate cause between the driver's negligence and the injury.

Williams v. Steves Industries, Inc., 699 S.W.2d 570, 571 (Tex. 1985).

If the vehicle entrustor is the driver's employer, no "scope of employment" element is required to make out a claim of negligent entrustment against the entrustor. See Drooker v. Saeilo Motors, 756 S.W.2d 394, 399 (Tex. App.--Houston 1988, writ denied). The incompetence of a driver need not necessarily be reflected in a bad driving record or history, in order to create an issue of negligent entrustment. Drooker, supra, at 399.

Texas courts impose a proximate-cause requirement on the scope of the risk occasioned by negligent entrustment of a vehicle. For entrustment to be a proximate cause of injury, the entrustor must reasonably be able to anticipate that some injury would result as a natural and probable consequence of the entrustment. Schneider v. Esperanza Transmission Co., 744 S.W.2d 595, 596 (Tex. 1987), citing Sturtevant v. Pagel, 134 Tex. 46, 130 S.W.2d 1017 (1939). Furthermore, the general nature of the ~~risk must also be apparent to the entrustor.~~ "The risk that caused the entrustment to be negligent" must cause the injury. Schneider, supra, at 597. Causation-in-fact is also a necessary element of proximate cause.

Texas law also recognizes a cause of action for gross negligence if the entrustor of a vehicle knows or should have known that the person to whom he entrusted the vehicle was incompetent or habitually reckless and if the entrustor exhibited such an entire want of care as to raise the belief that the entrustment complained of was the result of conscious

indifference to the rights or welfare of persons to be affected by it. Williams, supra, at 699 S.W.2d 572. An employer may be held liable for exemplary damages if he is grossly negligent in entrusting a vehicle to an employee who is an incompetent driver, even when mere ordinary negligence of the driver causes injury. Go International, Inc. v. Lewis, 601 S.W.2d 495 (Tex. Civ. App.--El Paso, 1980, writ ref'd n.r.e.); Montgomery Ward and Co. v. Marvin Riggs Co., 584 S.W.2d 863, 867 (Tex. Civ. App.--Austin 1979, writ ref'd n.r.e.).

Texas Courts have found gross negligence when an owner had knowledge of a driver's past bad record, and entrusted him with the vehicle despite that record and knowledge of the attendant risk to the public. See Go Intern., supra (record revealed six speeding tickets and two wrecks); Lorillard, supra (record revealed two speeding tickets, one ticket for improper turn, and two wrecks); McAllister, supra (record revealed five speeding tickets in past year and one-half); Montgomery Ward and Co. v. Marvin Riggs Co., 584 S.W.2d 863 (Tex. Civ. App.--Austin 1979, writ ref'd n.r.e.). (Owner knew driver was nervous with slow reactions and impaired hearing, and had four moving violations).

The claims of Plaintiff and Intervenors for negligent entrustment and gross negligence falter on several obstacles. The most prominent of these obstacles is the requirement that negligent entrustment be predicated on negligence of the person to whom the vehicle is entrusted. As indicated, supra, this Court has found that Burrell's acts were intentional. As with many other negligence claims, an intentional injurious act by the

person entrusted ordinarily is not within the risk occasioned by the entrustment, at least not in the case where the instrumentality is a motor vehicle. The foreseeability requirement of negligent entrustment, and the "superseding cause" doctrine, present related obstacles which the Plaintiff and Interveners cannot surmount.

Even if Freedom Freight had conducted additional investigation of Burrell's background and medical history, it would have discovered only that he had one speeding ticket and had a bout with depression. Freedom Freight would have discovered no assaultive conduct, no paranoid delusions, and no incidents of negligent motor-vehicle operation. While a background check might well have resulted in Freedom Freight deciding not to entrust Burrell with its truck, such a decision would have been motivated by risks other than the risk of Burrell's committing assault and battery. Freedom Freight could not reasonably be held responsible for the type of risk that ~~matured, which risk this Court finds would have been nearly impossible to imagine, let alone foresee.~~

Plaintiff asserts a claim of negligence per se against Freedom Freight for entrusting its vehicle to Burrell before requiring Burrell to comply, or verifying his compliance if any, with the DOT regulation requiring that medical examination with certificate verifying same be obtained before a driver may operate a truck. Undoubtedly Burrell was not in compliance with the medical examination and certificate requirement when he drove Freedom Freight's tractor-trailer. This Court does not question

Plaintiff's assertion that the statute was intended to protect persons in the position of the Plaintiff. However, Plaintiff still must surmount the requirement of proximate cause, which feat this Court believes impossible under the facts of the case.

#### NEGLIGENT HIRING BY FREEDOM FREIGHT

Plaintiff and intervenors have asserted a claim of negligent hiring against Freedom Freight. Texas law provides that, if an employer hired an incompetent or reckless employee without a proper investigation of that employee's past, and negligence of the employee causes injury to another in furtherance of the employee's duties to the employer, then the employer can be found negligent in hiring the employee. Parker v. Fox Vacuum, Inc., 732 S.W.2d 722, 723 (Tex. App.--Beaumont 1987, writ ref'd n.r.e.); Wilson N. Jones Memorial Hospital v. Davis, 553 S.W.2d 180 (Tex. Civ. App.--Waco 1977, writ ref'd n.r.e.). Unlike the claims of negligence and negligent entrustment, the incompetence or recklessness of the employee need not necessarily be the proximate cause of the event causing the injury. However the negligence of the employer in hiring must. Id. Punitive damages can be awarded against a master or other principal because of an act by an employee or agent, but only if the agent was unfit and the master was reckless in employing him. Jones Memorial, supra, at 183.

To assert a negligent hiring claim, a plaintiff carries the burden of establishing that the act of the employee that caused injury was within the course and scope of the employer's

business. In analyzing a claim against an employer for an employee's assault, one Texas appellate court has applied the rule enunciated in Houston Transit Co. v. Felder, 146 Tex. 428, 208 S.W.2d 880 (1948). The Felder Court held that the master is liable "for ... any act of the servant which, if isolated, would not be imputable to the master, but which is so connected with and immediately grows out of another act of the servant imputable to the master, that both acts are treated as being one indivisible tort, which, for the purposes of the master's liability, takes its color and quality from the earlier act." Kendall v. Whataburger, Inc., 759 S.W.2d 751 (Tex. App.--Houston 1988, no writ), quoting Felder, supra, at 881.

Even with a liberal construction of the rule, an assault by the employee on a third person ordinarily remains outside the scope of employment unless the employment necessarily involves some use of force against other persons. Texas Pac. Ry. Co. v. Hagenloh, 151 Tex. 191, 247 S.W.2d 236, 239-40 (1952). Under the ~~facts of the case at bar, assaultive conduct or use of force were~~ not within the scope of reasonably foreseeable employment-related conduct of Denver G. Burrell.

There remains one point which, though unnecessary to a determination of the merits of the claims in this suit, this Court wishes to make clear. The point is simply that, in this Court's opinion, the conduct of Freedom Freight's officers in entrusting a tractor-trailer to Burrell is exceedingly troubling. The failure to obtain medical examination of Burrell, the failure to document adequately his training if any, and the failure to



secure additional background references before entrusting to him a 12-ton tractor-trailer likely constitute negligence and per se negligence, if not willful disregard for public safety. A simple and inexpensive step involving minimal delay would have prevented the injury to Constable Hillin and the death of Sharon Marie Agutter on October 30, 1988. Though the bizarre circumstances of this case regrettably shield the officers of Freedom Freight from legal liability, this Court states for the record its belief their omissions are reprehensible.

Because Plaintiff and Intervenors have failed to assert claims for the intentional torts of assault and battery against Denver G. Burrell, and because, inter alia, they have failed to set forth facts to meet the showing of proximate cause required by their negligence claims, this Court finds that Plaintiffs should have and recover nothing on their claims from either Denver G. Burrell or Freedom Freight. Accordingly,

IT IS ORDERED that Judgment be entered for the Defendants and that Plaintiff and Intervenors take nothing by their suit.

SIGNED AND ENTERED this 13<sup>th</sup> day of November, 1989.

  
LUCIUS D. BUNTON  
CHIEF JUDGE