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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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DIVISION I
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Negusie T. Birru, et ux., Appellant

v.

Pacific Rail Services, LLC., et. ano., Respondents

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. Assignments of Error.....	1
Assignments of Error	
No. 1.....	1
No. 2.....	1
No. 3.....	1
No. 4.....	1
No. 5.....	2
Issues Pertaining to Assignments of Error	
No. 1.....	2
No. 2.....	2
No. 3.....	2
No. 4.....	3
No. 5.....	3
B. Statement of the Case.....	3
Procedural History.....	3
Statement of Facts.....	4
C. Summary of Argument.....	10
D. Argument.....	12
I. UNDER THE CURRENT WASHINGTON COURT RULE 32 (a) (2), AND CASE LAW, A PARTY MAY USE A DEPOSITION OF AN ADVERSE PARTY FOR ANY PURPOSE. A DEPOSITION OF A KEY WITNESS AND AN ADMISSION OF A PARTY AGAINST OWN INTEREST SHOULD BE ADMITTED AND GIVEN WEIGHT IN THE INTEREST OF JUSTICE.....	12
II. DEFENDANTS BREACHED THE DUTY OF CARE THEY OWED TO BUINESS INVITEE BY CREATING	

A DANGEROUS CONDITION OF BACKING A TOP PICK FROM STACK OF CONTAINERS, AND BY NOT HAVING A SPOTTER OR FLAGGER. THE DUTY OWED TO PLAINTIFF IS NOT ONLY LIMITED TO DUTIES DEFINED BY THE FACILITY (TERMINAL).....32

PRS Has A Duty Beyond that were Defined by the Facility To Ensure The Safe Exit of A Loaded Truck That Was There Solely For Business Purposes.....32

- III. THE COURT ERRED ADMITTING AND GIVING WEIGHT TO ERIC STRANDBERG’S INCOMPLETE DEPOSITION WHEN MR. STRANDBERG REFUSED TO TESTIFY IN TRIAL IN DEFIANCE OF SUPOENA.37
- IV. UNDER COURT RULE 50, PLAINTIFF WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF DEFENDANT’S LIABILITY.....39
- V. THE TRIAL COURT SHOULD HAVE DECLARED A MIS-TRIAL BECAUSE THE DEFENDANTS’ COUNSEL MENTIONED, ARGUED, AND REFERRED TO PLAINTIFF’S LIABILITY INSURANCE.....46
- VI. CONCLUSION.....47

TABLE OF AUTHORITIES

A. Table of Cases

Young v. Liddington, 50 Wn.2d 78,12
309 P.2d 761 (1957)

Belli v. Shaw, 98 Wn.2d 569,39
657 P.2d 315 (1983).

Blackburn v. Evergreen Chrysler-Plymouth, 53 Wn. App. 146,.....39
765 P.2d 922 (1989).

Regulations and Rules

A. Court Rules

CR 32 (a)(1).....12

CR 50 (b).....39

ER 411.....46

B. Other Authorities

WPI 120.05.....33

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial Court erred when the Court failed to consider the terminal manager's deposition and testimony as a statement against party interest by failing to admit and consider a crucial and key evidence regarding liability when it excluded a sworn in deposition of Defendant's manager or agent pursuant to CR 32 (a) (1). RP 686-688.

2. The trial Court erred when the Court found that there is no duty owed to the Plaintiff other than the duty defined by the rules of the facility, and there is no breach of that duty on the part of the Defendants when the Plaintiff is a business invitee who was at PRS to conduct business. RP 700.

3. The trial Court erred when it failed to compel the presence of a witness Mr. Eric Strangberg, who was under subpoena and refused to show up for trial when he was available instead of substantially relying on Mr. Strandberg's incomplete deposition in making its ruling. RP 694-695.

4. The trial Court erred when it denied Plaintiff's CR 50(b) motion for Judgment as a Matter of Law after Trial and Entry of Judgment against Defendant, and Request for a New Trial on October 13, 2009. (CP 460).

5. The trial Court erred when it failed to declare a mistrial when Defendants' counsel repeatedly made references and discussed that the Plaintiff had liability insurance in violation of the pre-trial ruling. RP 110-118.

Issues Pertaining to Assignments of Error

(1) Whether the trial Court erred when the Court failed to consider the terminal manager's deposition, and testimony as a statement against party interest by failing to admit and consider a crucial and key evidence regarding liability when it excluded a sworn in deposition of Defendant's manager or agent pursuant to CR 32 (a) (1)? (Assignments of Error 1).

(2) Whether the trial Court erred when the Court the Court found that there is no duty owed to the Plaintiff other than the duty defined by the rules of the facility, and there is no breach of that duty on the part of the Defendants when the Plaintiff is a business invitee who was at PRS to conduct business? (Assignments of Error 2).

(3) Whether the trial Court erred when it failed to compel the presence of a witness Mr. Eric Strangberg, who was under subpoena and refused to show up for trial when he was available instead of substantially relying on Mr. Strandberg's incomplete deposition in making its ruling? (Assignments of Error 3).

(4) Whether the trial Court erred when it denied Plaintiff's CR 50(b) motion for Judgment as a Matter of Law after Trial and Entry of Judgment against Defendant, and Request for a New Trial on October 13, 2009? (Assignments of Error 4).

(5) Whether the trial Court should have declared a mistrial when the Defendants' counsel repeatedly made references and discussed that the Plaintiff had liability insurance in violation of the pre-trial ruling? (Assignments of Error 5).

B. Statement of the Case

Procedural History

On March 7, 2007, Plaintiff, Negusie T. Birru ("Negusie"), brought a personal injury claim against the Defendant Pacific Rail Services, LLC ("PRS") and the machine, or top pick operator Patrick E. O'Shields arising out of a personal injury Negusie sustained when his truck was struck by a backing top pick machine at the PRS Seattle terminal on December 18, 2006. CP 3.

On August 24, 2009, the case went to a bench or a trial by judge before the honorable Michael J. Trickey. On August 28, 2009, the judge entered Defense verdict as to both Defendants. CP 331. On September 8, 2009, the Plaintiffs brought a motion as a matter of law to set aside the verdict and/or to grant a new trial. CP 346. On October 13, 2009, the

Court denied Plaintiffs' motion for new trial. CP 460. The same day, on October 13, 2009, the Court entered a Finding of Fact and Conclusion of Law. CP 453. In its Finding of Fact and Conclusion of Law, the Court concluded that as a matter of law "Plaintiff Birru failed to yield right of way to Defendant O'shields as required by the rules of the yard." CP 458. On October 27, 2009, the Court entered Judgment for Defendants. CP 463. On November 13, 2009, Plaintiffs filed a Notice to appeal to this Court and paid filing fee. CP 486.

Statement of Facts

On December 18, 2006, on or about 10:45 a.m., Plaintiff Negusie T. Birru ("Negusie"), a licensed and well-experienced truck Driver, arrived at the Pacific Rail Services ("PRS") or also sometimes referred to as Seattle International Gateway ("SIG") to pick up a container. At the time of the accident herein and at all times relevant, Negusie is a truck driver working for Lion Trucking Inc. Negusie has been in the same terminal many times prior to the incident of December 18, 2006, and testified that he knows the terminal like he knows "his house".

In fact, the same day, on December 18, 2006, Negusie has picked up a container at the SIG terminal prior to the incident. Negusie's experience as a truck driver, knowledge of the terminal, and the yard rules are undisputed. The accident, which is a subject of this appeal, occurred when

Negusie went to the terminal for the second time to pick up a container. Negusie's truck arrived at the terminal at approximately 10:45 a.m. to pick. As Negusie or other truck drivers enter the PRS terminal, there is a loud speaker instructing them where to go, or directing them to a particular stall to pick up a container. Then, the trucks proceed to the place or stall PRS directs them to have a container loaded on them by a Top Pick, machine, or cranes.

Accordingly, on December 18, 2006, Negusie's truck was directed to be loaded by a Top Pick, a Taylor 950 crane operated by an employee of PRS one Eric Strandberg. The Defendant PRS uses alphabetically enumerated poles and dividers to stack containers in the terminal. Negusie's truck was loaded at pole 9G and the accident occurred at pole 9B. Negusie followed the instruction and direction of PRS to pick up his container. His truck was loaded. He went toward the exit in prudent and reasonable manner, the only exit out of PRS or SIG, the exit on the south side of the terminal. In order to exit the terminal, a truck must make a right turn to the gate. Making the right turn is the way Trucks have been exiting the terminal, and that is the only way to exit the terminal. The fact that Negusie has to make a turn to exit the terminal is undisputed because that is the proper, safe, and correct procedure to exit the terminal.

Right before the impact at pole 9B, according to Negusie, he was probably not moving at all, and he is attempting to make the right turn and exit the terminal. Not far from where his truck was loaded, Negusie proceeded to turn right and exit the terminal.

A top pick operated by the Defendant Patrick O'shields backing up and coming out of a stack of containers crashed into Negusie's truck. The top pick was backing out from an alley of a stack of containers. The containers were as high as three racks on the left side where the impact occurred. The top pick was heading to a maintenance shop and did not have a load (container). The top pick was heading to a maintenance shop in a particularly busy a day and a time at the terminal. At the time of the crash, Negusie was a restrained driver and undistracted by anything. The top pick, however, was backing out from an alley of containers.

The impact or crash was so severe that it violently threw Negusie from his driver's seat to the passenger seat. Negusie was bleeding and blood covered one of his eyes. The Defendant Patrick O'shield, at his deposition and at trial, testified that after the impact when he looked at the truck, he did not see the driver on his seat. This fully confirms Negusie's testimony that the severity of the impact thrown him from driver's seat laterally toward the passenger seat. Before the impact, Negusie was looking directly where he was going, as he did hundreds of times, and

testified that he did not see the top pick that was backing out from a stack of containers prior to the impact. Negusie also testified that he is well aware and obeyed all the yard rules, specifically the rule that states “Yield to trains, Yard Equipment and Pedestrian.”

The terminal manager, Charles Reed, a well-experienced investigator (according to himself), Defendant’s liability expert, safety supervisor, who investigated the accident has repeatedly and unequivocally stated that Negusie DID NOT VIOLATE or broke any yard rules, including but not limited to, the “Yield to trains, Yard equipment and Pedestrian.” Patrick O’shiled’s the Defendant in this case did not say that the Plaintiff violated the yard rule. The only yard rule presented and the Court relied on to reach its decision was the yard rule posted at the gate as trucks enter, and states among other: “Yield to trains, Yard equipment and Pedestrian.” That is the only rule presented at trial.

Immediately after the accident, Negusie was hurt, confused, could not move and was taken to a hospital, Harborview, by ambulance. He complained of low back pain, left shoulder, right forehead and leg. At Harborview emergency room, Negusie was treated for hours before he was released with instruction and recommendation for further treatment and follow up. He had stitches put for his left eye injury.

In this case, the following facts are established and are undisputed: that the top pick was heading to the Maintenance shop, or, also known as the birdcage or the shack prior to hitting Negusie; the top pick was backing out of a stack of containers; and, most importantly, Negusie did not violate any yard rules. Negusie testified, at his deposition, the top pick was backing up with a speed for the attending circumstances. After the crash occurred and before Negusie was taken to a hospital, the terminal manager, Charles Reed, led the investigation of the accident. The yard manager was also present and participated in the investigation. The investigating officer Mr. Reed took statements from other alleged eyewitnesses except the Plaintiff Negusie.

The terminal manager who was also the investigating officer, Mr. Reed, only interviewed and took statement from his employees, not from any independent witnesses. Mr. Reed admitted that he did not make any attempt to obtain a statement from Negusie. He fully relied on the statement and conversation he had with his employees to determine fault and liability in this case. Still, the terminal manager and the investigating officer of PRS reached the following finding or conclusion as to liability: neither the Plaintiff, nor the top pick operator is at fault for this accident.

The terminal manager repeatedly claims that what happened on December 18, 2006 was just an “accident” and there was NO ONE at

fault. Although Mr. Reed admitted the top pick driver was suspended for about four days without pay (later changed his deposition testimony at trial and stated that the driver was paid) until his drug and alcohol test came back, his investigation revealed NO LIABLE party and this incident was merely an “accident.”

Contrary to Defendants’ answer to the complaint filed by the Plaintiff and still claiming that the Plaintiff violated yard rules, Mr. Reed testified at his deposition and in Court, on behalf of the Defendant, that no one is at fault for the accident. Interestingly, the Court refused to read or admit into evidence Mr. Reed’s deposition. Had the trial Court read Mr. Reed’s testimony along with the deposition of Mr. Strandberg, then the Court would have readily seen that liability is easily established. Again, the Defendants, over and over again, in all of their disclosure of witnesses and response to discovery stated that Mr. Reed is their liability expert. However, the Court did not admit or considered Mr. Reed’s deposition in making its findings in favor of the Defendants.

Clearly, the terminal manager’s deposition was important to show that the terminal manager, Mr. Reed, has a vast experience in investigating accidents and he considers himself an expert. The Court stated, in its finding and ruling, that the manager Mr. Reed did not have experience or qualified to investigate accidents that occurred in the yard. Mr. Reed

disagrees with the Court's findings and considers himself to be as an expert and well-experienced in investigating yard accidents. Mr. Charles Reed who was also the investigating officer initially erroneously claimed that the Plaintiff was driving his truck on the other side of the safety line.

For instance, Mr. Reed testified that the truck made contact with the top pick inside the safety line when in fact Plaintiff's truck was not over the safety yellow line, not even near it. Mr. Reed admitted that he erroneously testified when he was shown pictures of the scene and the locations of the top pick and the truck right after the crash. The trial Court, however, admitted and considered a witness's deposition who was available and was under subpoena but did not show for trial, Mr. Stradnberg, (which the Court stated that it found his deposition helpful) in finding that the Defendant did not owe any duty to the Plaintiff.

The trial Court entered an oral finding and a defense verdict on August 28, 2009. The Plaintiffs offered the deposition of the terminal manager Charles Reed as an offer of proof prior to the Court's verdict.

C. Summary of Argument

Negusie Birru sustained severe injuries when a backing top pick crashed his truck on December 18, 2006 at the PRS terminal. According to all the evidence and testimonies presented at trial, Negusie did not violate any yard or terminal rules on the date in question to cause or

contribute to the accident. In fact, all the evidence and testimony showed that Negusie obeyed all the yard rules for PRS. Contrary to the Evidence the trial judge held that Negusie violated the yard rule, did not pay attention, and found him to be liable.

The Court excluded a deposition of Defendants manager from evidence who testified at trial. The deposition contains the findings of the manager, his qualification, and expertise as to determining liability. On the other hand, the Court admitted deposition of a witness, who was in town but refused to come to trial to testify. Had the Court admitted and considered the sworn in deposition of Defendants' investigating manager, the Court would not have reached the finding it did as to fault. The Court could not have ruled that the Plaintiff was negligent and violated "...yard rules" in its verdict for the Defendants. The judge made an error rendering a defense by excluding a crucial deposition.

The Court erred in finding that there is no duty owed to the Plaintiff by PRS or its top pick operator. The Court finds in the absence of any evidence that there is no duty and in turn a violation of that duty by the Defendant. The Court failed to consider the fact that the Plaintiff was a business invitee and there is a duty of care owed to him.

Furthermore, the trial Court erred in allowing the trial to continue when counsel for the Defendants' made several reference to insurance.

The trial Court also erred by not considering the testimony of the terminal manager's admittance that the Plaintiff did not commit fault, or did not violate any yard rules as statement against party interest. The trial Court denied Plaintiffs' post verdict motions and Plaintiffs filed this appeal.

D. Argument

- I. UNDER THE CURRENT WASHINGTON COURT RULE 32 (a) (2), AND CASE LAW, A PARTY MAY USE A DEPOSITION OF AN ADVERSE PARTY FOR ANY PURPOSE. A DEPOSITION OF A KEY WITNESS AND AN ADMISSION OF A PARTY AGAINST OWN INTEREST SHOULD BE ADMITTED AND GIVEN WEIGHT IN THE INTEREST OF JUSTICE.

CR 32 (a) (2) the deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under rule 30 (b) (6) or 31 (a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

Also, the Washington Supreme Court, in Young v. Liddington, 50 wn.2d 78, 309 P2.d 761 (1957) found concerning deposition testimonies at trial "the rule is plain and unambiguous. A majority of Federal and State Courts hold that, under this rule, the deposition of a party may be used by an adverse party for any purpose. We are in accord with the views expressed in these opinions" *See Id. at 80*.

The case at bar is even stronger than *Liddington*. Under the facts of this case, the deposition offered by Plaintiffs was that of a manager and

an officer of the Defendant Company, not of an ordinary witness. Thus, the deposition testimony of Mr. Reed along with Mr. Strandberg could have provided the Court a clear ability to make the right liability decision. By excluding the deposition of a manager who testified against his own interest, the Court was deprived of the whole and major facts of the case to reach the decision.

The fact that the Court greatly undermined the ability, experience, and expertise of Mr. Reed shows that the Court did not have sufficient facts about the investigation and Mr. Reed's findings. For instance, Mr. Strandberg (the top pick operator who loaded the Plaintiff's truck) repeatedly testified in his deposition that the top pick was moving. Mr. Reed said if he knew or find evidence the top pick was moving, then he would have found liability against the Defendant.

In this case, the trial Court made an error of excluding the Deposition of a Manager, Charles Reed, who repeatedly stated that there were no violations of the Yard Rule by the Plaintiff. And, the manager, Mr. Reed, who unequivocally claimed that he is a well-experienced in investigator of accidents in the Yard or terminal. RP 481 and RP 686-688.

The Plaintiffs offered the deposition of Mr. Charles Reed into evidence at least in three occasions, and finally offered it as offer of proof. The Court ruled against admitting the deposition of Mr. Reed over the

objection of the Plaintiffs reasoning: "...The Court has to apply the rules. The rules don't permit the deposition to be admitted. The objection is sustained." RP 482.

Again, the Court, in denying the offer of Mr. Reed's deposition, before the Plaintiffs rested, into evidence by stating, in relevant part: "...I think that if there's a problem with being unable to procure the attendance or unable to attend, or the witness is dead, or resides out of the county. ... So, I---I—I think he testified thoroughly....So, I--I'm going to deny the motion." RP 687.

Mr. Reed testified at trial, but Mr. Reed changed some of his testimony, amended some of his testimony, and denied some claims he made at his deposition. To impeach Mr. Reed on all of his inconsistency could have taken as much time as it took to depose him. His deposition took over two hours and forty minutes (2:40).

Additionally, the trial was in tight schedule. For instance, on August 26, 2009, the cross-examination of Mr. Reed was briefly interrupted when the next witness, the Physical Therapist Ms. Izette Swan, arrived or walked in (see RP 488), the treating doctor was also scheduled to testify that afternoon and Plaintiff had hard time scheduling the family doctor to attend trial, and the trial judge will not be available and be on leave after Thursday, August 27, 2009. RP 14. Thus, Plaintiff pleaded

with the Court to read the deposition of Mr. Reed for efficiency and evidence, but the Court persisted in excluding the crucial evidence key to determining liability of this case.

Interestingly, the trial Court included Mr. Reed's investigation results in its final ruling or verdict, and found that Mr. Reed did not do a thorough investigation of the accident. RP 701. The Court also found, contrary to the evidence and the testimony of Mr. Reed, that he was not "He seems like a good manager, but he's not trained as an investigator" of accidents. RP 700 at 20-21. Mr. Reed, at his deposition vehemently disagrees with the Court. Mr. Reed stated that he was well-experienced and even considered himself as a trained expert in investigating accident at the terminal. In fact, defendants have listed him as their liability expert at every stage of the litigation.

As stated above, the Court initially did not admit the deposition of stating that Mr. Reed is not an officer of PRS in accordance with the Court Rule. However, Mr. Reed is an officer and manager of PRS/SIG. In his deposition and at his trial Mr. Reed stated:

On Pg. 21 of Mr. Reed's Deposition conducted on June 18, 2009, CP 236.

19 Q. What is your current position?

20 A. I'm the terminal manager of the
21 Seattle International Gateway.

22 Q. Is that where the accident of December 18,
23 2006 happened?

24 A. Yes, sir.

There should not be any question as to the position of Mr. Reed and that he is the manager, officer and representative of PRS/SIG currently and at the time of the accident. Mr. Reed says the following about his experience and knowledge of accident investigation:

Pg. 26 of deposition, CP 241.

6 As part of your job you have to investigate
7 accidents that happen in the terminal?

8 A. Yes.

9 Q. But this job is also left for the yard
10 managers, correct?

11 A. Yes -- excuse me, I'm sorry. The job of
12 investigating accidents?

13 Q. Yes.

Pg. 27 of deposition CP 242.

8 You are also investigating manager, right?

9 A. Yes.

10 Q. You investigate?

11 A. Absolutely.

Mr. Reed continues and goes on to state his vast experience, training, and knowledge of investigating accidents at the terminal.

Pg. 50 of deposition CP 265.

25 Q. Would you say your experience or your

Pg. 51 of deposition CP 266.

1 training or your education qualifies you to be -- to
2 determine who's at fault in certain accidents?

3 A. I think the experience that I have doing
4 this, the very fact that I do involve multiple people
5 in the decision process and I don't solely make it by
6 myself, I understand that there are limitations to
7 people, including myself, I don't pretend like I know
8 everything. I try to get other people's opinions. I

9 ask outside parties to look at this incident. We even
10 present these things during safety meetings and talk
11 about them and discuss, discuss what could have
12 happened or what we could do to not make these things
13 happen anymore, that kind of stuff. I try to make it
14 broad based, let's try to stop this now so we're not

Again, Mr. Reed states that he even has a formal training:

Pg. 52 of deposition CP 267

1 You don't have any formal training let's say
2 in how to determine accident and fault and
3 liabilities? Did you take classes, for instance?
4 A. SSA provides a safety class we take every
5 year.

Mr. Reed responded in affirmatively whether or not he considers
himself as an expert in investigating accidents and liability.

Pg. 70 of deposition CP 286.

23 Do you consider yourself as an expert in
24 determining accidents that happen in terminal?
25 A. Determining what?

Pg. 71 of deposition CP 287

1 Q. Accident liabilities, who's at fault and
2 who's not at fault.
3 A. Boy, expert is just a -- I don't know about
4 that word. I can tell you that I have investigated
5 numerous accidents and have implemented discipline
6 based on my investigation. A lot of times when we
7 have incidents at a yard, I don't -- for example,
8 didn't call Lyon Trucking and say you got to
9 discipline this driver because he did this, this,
10 this. I don't do that. I leave Lyon Trucking to
11 discipline their employees as they see fit.
12 I'm more on my side of the fence where if I
13 find liability that my guy did something wrong or my
14 guy broke a rule, I involve myself in that process.
15 99 percent of the time any company that runs in to and

16 out of that yard is going to take those things
17 seriously and investigate it themselves, too. I don't
18 go outside the reach, per se, of my facility. I try
19 to let the trucking companies be responsible for their
20 drivers if they did something wrong.

21 Q. If you are called in front of the jury to
22 testify as an expert regarding who's at fault in this
23 case, do you believe you're qualified to give
24 testimony as an expert?

25 A. I think based on my past experience that I

Pg. 72 of deposition CP 288.

1 could, yes, I could, I think I could.

Mr. Reed was persistent in considering himself knowledgeable,
trained and well-experienced in investigating accident at rail-road
terminal. Moreover, Mr. Reed defends his lack of college degree in
investigating accidents, or formal education by stating his experience is
sufficient.

Pg. 52 of deposition CP 267

19 Q. But you don't have any formal training, for
20 example, degree?

21 A. No. Just on-the-job training. I've been
22 doing it for a long time, that's all.

When Mr. Reed it was suggested that he may not be qualified to
investigate accidents, as the Court found in its finding and defense verdict
after trial, Mr. Reed strongly disagrees with the Court's finding and states
as follows about his qualification on pg. 68 of his deposition by saying
"No, I think I am qualified to investigate. I think I am." CP at 15-16.

It should not be disputed or contended that Mr. Reed is well trained, qualified and experienced investigator of accidents at the terminal. Here, when he was asked by the Defendants attorney at trial, on direct examination, he sated the following: RP 381 at 4-5.

[By Mr. Waller] Q. Okay, So, accidents do happen. Are you charged with any sort of investigative authority when these accidents occur?

A. Yes.

RP 381 at 23-24; RP 382

Q. Are you in charge of conducting the investigation at the SIG yard?

A. Yes.

Q. How did you learn the procedure - - before we talk about the procedure, how did you learn what the procedure was to investigate an accident?

A. Just years of doing it. I did it on – it's pretty much on-the-job stuff. I - - when you first, uh, come into the railroad, you know, there is – you're taught this is what you're supposed to do if you have an accident, and then you progress from these as your authority, you know, increases. I became a supervisor so I became more involved. Internal in a couple different places so, you know, it's just on the-the-job training and - and being able to see the things that I've seen in the past 14 or 15 years.

Mr. Reed's qualification and expertise should have been apparent from his deposition and trial testimony. His finding that the Plaintiff did not do anything wrong, including breaking any yard rules, should have been given weight by the Court in the absence of any evidence to suggest otherwise. For example, Mr. Reed states he has even written articles in investigating terminal truck and equipment accidents.

Pg. 69 of deposition CP 285.

3 Have you ever written any documentation or

4 any articles regarding safety procedures at a
5 terminal?

6 A. That were presented in Court or just for my
7 terminal?

8 Q. Presented in Court or to outside party.

9 A. We've -- I developed over time some
10 procedures within the yards that I've worked in, you
11 know, some safer procedures and we've implemented
12 those things, yeah.

13 Q. Does that include regarding accidents that
14 happened in the terminal?

15 A. Absolutely, we take those as lessons and try
16 to apply them to our work.

17 Q. So you have authored articles regarding
18 trucks and, you know, trucks in the terminal?

19 A. Not like altering any existing rules.

20 Q. No. Authoring, writing.

21 A. Oh, yes, yes.

22 Q. You have done that?

23 A. Yes.

24 Q. Could you tell me one of those articles?

25 A. Well, to be -- you know, I guess there -- we

Pg. 70 of deposition CP 286.

1 just opened a brand-new yard, the north yard,
2 brand-new crane, these cranes don't exist in this
3 country, they don't exist in the western hemisphere, I
4 was very much involved in writing the facility
5 operations plan and the rules specific to that yard
6 when it was built, which was only about a year and a
7 half ago. So I spent a lot of time with a lot of
8 people discussing, you know, if there should be any
9 changes to rules based on the operation of the
10 facility and what the facility looks like
11 geographically.

12 Q. How trucks are supposed to be operating in
13 the terminal, have you ever written anything about
14 that?

15 A. Yes, it very much involved that, how the
16 trucks should come in to and out of the yard, yes.

17 Q. These articles contained your name?

18 A. I'm not sure. I don't know. I didn't
19 actually -- I participated in the panel that made
20 these rules, but I'm not sure if my name is on it.
21 Q. You participated in a panel?
22 A. Yeah, with a bunch of people, yeah.

Still, the Court found Mr. Reed not to be a “trained” investigator of accidents and determining liability. Similarly, the Court did not admit Mr. Reed’s deposition, and had the deposition admitted, the Court’s finding that the Plaintiff was “not paying attention” and looking elsewhere to make a turn could have been clarified.

In sum, there are numerous instances to show Mr. Reed is well qualified, trained, and experienced investigator from his deposition and trial testimony. The Court dismissed the qualification of Mr. Reed because the Court did not admit the deposition of Mr. Reed. With all his expertise, knowledge, training, and experience Mr. Reed found no rules were broken by the Plaintiff and the Plaintiff was not at fault in this accident.

Still, the Court based its decision solely and primarily on speculation by guessing the Plaintiff failed to pay attention when there is absolutely no evidence to support that assertion. The Court speculated by saying “...I think that because of the pressure of schedule, Mr. Birru was simply not paying attention at that point in time, and that he was looking

over to his right as he made that right turn..." the accident could have been prevented. CP 699.

First, there is no testimony to presented to show that Plaintiff was under any time or schedule pressure, no evidence whatsoever, that is a pure and clear speculation and guessing by the Court. Second, there is no evidence or testimony regarding the Plaintiff was looking over his right. Third, there is no evidence or testimony presented, other than the Court's conjecture, that Plaintiff was not paying attention.

The Court ignored, along with Mr. Reed's testimony and deposition, the fact that the Plaintiff was outside the yellow line (a line the trucks are not suppose to cross) by ruling: "...even though there - - he was outside that yellow line, the boundary line,...". All in all, the Court had no supporting evidence to sustain or justify its verdict for the Defendants.

As it will be seen below from Mr. Reed's deposition, the Plaintiff did nothing wrong whatsoever to cause this accident. The Plaintiff did not violate any yard rules as the Court seemed to suggest in its oral ruling and finding for the Defendant.

Pg. 72 of deposition CP 288.

- 2 Q. What would be your testimony in front of the
3 jury in this case?
4 A. That, once again, I don't believe that

5 either of these guys broke any rules within the
6 facility and that, you know, it was an accident in the
7 true sense of the word.

8 Q. You base that on?

9 A. What I see as far as what I came on the
10 scene and saw. Neither of them were doing anything
11 wrong.

Mr. Reed goes further and states that no one is at fault for the accident, and broke any yard rules. He states that the Plaintiff was not barred from coming to the yard and the top pick driver, the Defendant Mr. O'Shields, lost 4 days of work (later he changed his testimony at trial).

Pg. 39 of deposition CP 254.

1 there now. He's had no issues whatsoever. You know,
2 I know he's still driving in there. He's not -- the
3 railroad hasn't deemed him responsible for it and said
4 he's not allowed back in.

5 Q. So in your opinion my client is not at fault
6 for this accident?

7 A. I'm saying that neither party I don't think
8 had any negligence or purposefully did anything to
9 cause this.

10 Q. So your conclusion of the investigation of
11 this accident, what is the outcome of your
12 investigation?

13 A. The outcome was really only detrimental -- I
14 shouldn't say that. The driver was injured, that's
15 detrimental. But the operator ended up having, I'm
16 not sure, three or four days off unpaid while the drug
17 screen came back. He lost pay, he lost time as a
18 result of this incident.

At trial, Mr. Reed completely changes his testimony and stated that the Defendant Mr. Reed was paid, at cross-examination he states as follows: CP 467-468.

Q. -- "he lost time as a result of this incident." But today under oath you said he got paid for the time he lost; isn't that correct?

A. I believe he did, yes.

Q. so -

A. uh, there was a rule - - there was a change in rule from the union. I'm not exactly sure when that happened. We didn't used to pay people for going out [sic] on accident but - -

Q. Okay. The point is, Mr. Reed, what you told me on your deposition under oath was not true, correct?

A. Right, but it's - -

Q. Right.

A. I'm not - - I'm - - okay.

It is also imperative to note that Mr. Reed found no fault on the part of the Plaintiff even without talking to the Plaintiff or any independent witnesses. It is reasonable to assume that had Mr. Reed talked to the Plaintiff and got the Plaintiff's side of how the incident happened, he may could have very well found that the Defendants are at fault. Here is the testimony by Mr. Reed regarding his lack of through investigation.

Pg. 37 of deposition CP 252.

2 Q. Again, you did not take any witness
3 statement or independent witnesses, correct?

4 A. I did try to see if there was any other
5 truck drivers in the area. That's something I've done
6 to kind of back up accident investigations, you were
7 here, Trucker A, what did you see, did you see
8 anything. Not in this incident, but others.

9 At this specific incident, they were pretty
10 much by themselves without any other trucks anywhere
11 near the incident, as far as I could tell. I usually
12 try to, if I'm at an incident scene, try to ask some
13 of the trucks if there are any in the vicinity if they

including the yard equipments, to picks, or trucks alike. He even stated that the accident happened because the truck driver, he found not to be at fault, crossed the yellow safety line. Here is what he said prior to seeing the photos clearly and unambiguously showing that the Plaintiff was far from the yellow line.

Pg. 56 of deposition CP 271.

21 Q. By the way, you draw a great chart, better
22 ones than I've seen in this case so far.

23 The truck, how far was it from the stack of
24 containers?

25 A. You know, it was pretty close.

Pg. 57 of deposition CP 272

1 Can I see your pen real quick? There's like
2 a safety line. There's a grade area that's painted
3 out. Then there's another line that runs along the
4 entirety of the facility. That's kind of like a
5 safety line. That's trucks and yard vehicles and
6 stuff like that, they're supposed to stay out of this
7 area here.

8 What I got out of this incident is he was
9 pretty much on the other side of this line. As he
10 came to this area --

11 Q. He was on the other side of the safety line?

12 A. Right, initially. Where he ended up is they
13 actually kind of made contact like right inside the
14 line. So I think, I'm not sure because I haven't
15 talked to the guy, that he made contact because he was
16 about to make a U-turn and leave the facility. I'm
17 not sure if he was -- I don't think he was going to go
18 this way.

19 Trucks are also allowed to take this route
20 through the stacks. They are. So I don't know if he
21 was going to take a right and make a U-turn and leave
22 or he could have taken a left. Typically in this area
23 they will make the U-turn here.

24 Q. Why?

25 A. Because it's the end of the yard and the
Pg. 58 of deposition CP 273.
1 yard tapers. There's not a whole lot of room over
2 here. If there's any trucks or machines, it's going
3 to be a pain in the butt to have him maneuver through
4 that.

5 The scene of the incident, this whole entire
6 area here was pretty clear. There wasn't much going
7 on at this end. I think he was -- he crossed this
8 line and he was going to make his U-turn.

9 Q. Did he cross the line fully? Just barely?

10 A. I think he was probably splitting his truck
11 in half. I think he was coming in here and go out the
12 yard the other direction.

13 Q. We established that he was -- trucks are
14 allowed to make a U-turn?

15 A. Yes. But they're not allowed to go -- not
16 even yard vehicles are allowed in this area, just
17 because of this incident where you have stacked
18 containers here and there's cross traffic.

19 Q. Obviously the picker was in that line,
20 right?

21 A. Yes, that is true. But once again, this
22 truck is also allowed -- it's kind of like a double
23 yellow line when you're driving. You can make a
24 left-hand turn to get into a driveway, but you can't
25 cross a double yellow line to pass somebody. You can

Pg. 59 of deposition CP 274.

1 break that line and make a turn. That's the danger of
2 it. We have had a lot of trouble with trucks being in
3 this lane.

Here is what Mr. Reed said after he was shown the picture he
himself took showing that the truck was nowhere near the yellow safety
line as he previously alleged.

Pg. 63 of deposition CP 279.

5 Q. Do you have any recollection that my client
6 crossed the safety line?

7 A. I didn't see -- well, I think he was
8 slightly inside the safety line, yes.
9 Q. Okay.
10 A. I do believe I remember that.
11 Q. But you're not certain?
12 A. Not completely certain, no.
13 Q. If I show you some picture, would that
14 refresh your memory?
15 A. It might, yes, since I took the pictures.
16 Q. This is the safety line we're talking about?
17 A. He's outside of it.
18 Q. He's outside of it according to this
19 picture?
20 A. Right.
21 Q. Did you take this picture?
22 A. I did.
23 Q. My client is a little further than the
24 safety line, correct?
25 A. Right. It also means this man was exposed

Pg. 64 of deposition CP 280.

1 for a longer period of time before the impact took
2 place.

Mr. Reed admits that he was not truthful when he was asked about

the yellow safety line and states as follows.

Pg. 66 of deposition CP 282.

14 Q. Earlier before I showed you the pictures,
15 you testified that the truck may have crossed the
16 safety line, is that correct?
17 A. Yes, I did say that.
18 Q. Why did you make that mistake?
19 A. I thought he was. I was proven incorrect.

In direct opposition of the Court's finding without any evidence or
any testimony or inference that the Plaintiff was not "paying attention"
was in rush, Mr. Reed states as follows: on page. 73 of deposition CP 289.

2 At the same time, the driver I don't believe

3 was speeding. I don't think he was driving
4 recklessly, you know, driving through the yard fast or
5 swerving or anything like that.

Mr. Reed again stating that the Plaintiff did not violate any yard rules:

Pg. 68 of deposition CP 284.

10 Also the same, my client, the Lyon Trucking
11 driver, Mr. Negusie, did not break any rules, correct?
12 A. I don't think he did, no.

Most importantly, Mr. Reed said had he known or found any evidence that the top pick was moving, then he would have found liability on the part of the Defendant. Still, he was not even certain whether or not the top pick was moving or not.

Pg. 73 of deposition CP 289.

11 Q. He was backing out. Was his car moving or
12 not?
13 A. The machine?
14 Q. Yes.
15 A. I'm sure -- I'm not exactly sure at the
16 point of impact if he was moving. It didn't look like
17 it, because there was no movement within the accident
18 scene. There was no pushing of the truck. I didn't
19 see any evidence of that on the ground.

Here, Mr. Reed states in his deposition that had he known, or could prove that the top pick was moving at the time of impact, he would have found liability against the Defendant. He contends that he could not prove whether the top pick was moving or not.

Pg. 77 of Deposition, CP 294.

4 Q. It's your testimony today that the picker

5 was standing still when it came in contact with my
6 client's vehicle?

7 A. It's my testimony that I could not find any
8 evidence that he was moving. I could not find any.

9 Q. If he was moving would your opinion about
10 liability or fault would have changed either way?

11 A. **If he had moved into the stacks without**
12 **stopping, and I could verify that, then he would have**
13 **been breaking a facility rule. Then he would have**
14 **been at fault.**

15 Q. Okay.

16 A. But I couldn't find any evidence to back
17 that up.

Again, when asked in different way, Mr. Reed says as follows:

Pg. 83 of deposition, CP 299.

12 Q. Do you have any evidence that he was not
13 moving?

14 A. I don't have evidence -- no, I don't.

15 Q. You don't, correct?

16 A. No.

The Plaintiff did not violate any yard rule, any rule that states the yard equipment has the right of way, and that is proven by the manager Mr. Reed himself. Mr. Reed responded as follows asked about the same rule that he later tried to change his testimony at trial.

Pg. 88 of deposition, CP 304.

24 Q. Earlier you testified that you didn't find
25 on both parties, either the plaintiff or defendant,

Pg. 89 of deposition, CP 305.

1 doing anything out of the rule or in violation of the
2 rules. If that is your testimony, did anybody violate
3 the equipment have a right-of-way rule in this case?

4 A. No, I didn't really -- like I said before, I
5 didn't see it that way. Two guys were in the exact
6 same spot at the exact same time. I really didn't see

7 personally that.

8 Q. So the right-of-way rule does not -- is not
9 applicable in this case, correct?

10 A. You could make that argument. I don't think
11 that either of them did anything negligent to get
12 themselves in the position they were.

13 Q. You said "you could make that argument."
14 Which argument are you referring to?

15 A. That the driver himself didn't violate the
16 right-of-way rules. At the same time the picker
17 didn't violate any rules by being where he was either.

In conclusion as to the issue of excluding Mr. Reed's deposition, the Plaintiffs were highly prejudiced and the outcome of the trial would have been altered had the Court read or considered the sworn in deposition of Mr. Reed. Defendants would have been found liable for damages to the Plaintiff. The trial Court made a grave error that could only be remedied by reversing and remanding this case for new trial. Clearly, the error of the trial Court is not a harmless error that could of left the finding and conclusion of the trial Court intact.

II. DEFENDANTS BREACHED THE DUTY OF CARE THEY OWED TO BUINESS INVITEE BY CREATING A DANGEROUS CONDITION OF BACKING A TOP PICK FROM STACK OF CONTAINERS, AND BY NOT HAVING A SPOTTER OR FLAGGER. THE DUTY OWED TO PLAINTIFF IS NOT ONLY LIMITED TO DUTIES DEFINED BY THE FACILITY (TERMINAL).

PRS Has A Duty Beyond that were Defined by the Facility To Ensure The Safe Exit of A Loaded Truck That Was There Solely For Business Purposes.

In this case, Negusie is a truck driver who was at PRS for business purposes, namely to pick up a container. PRS manages the yard and is responsible for activities in the terminal. A business invitee is a person who is either expressly or impliedly invited onto the premises of another for some purpose connected with a business interest or business benefit to the owner. WPI 120.05 (Washington Pattern Instruction). This definition by the Washington Pattern Jury Instruction perfectly applies to Negusie who was at PRS for the business benefit of the terminal, which has to move, distribute, or deliver the containers.

Accordingly, there is a duty owed to a business invitee beyond that was “...defined by the rules of the facility” RP 700 at 12. An owner or occupier of premises owes to a business invitee a duty to exercise ordinary care for his or her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use. WPI 120.6.

In this case, there is only one exit, there is only one way to leave the PRS/SIG and Negusie was operating his truck in reasonable and prudent manner. Thus, PRS/SIG breached a duty it owed to the truck driver, the Plaintiff, who was there for business purposes and was loaded with a container. The act of backing up from a stack of containers in a

busy yard rail is a dangerous move. As testimonies established in this case, the top pick was only suppose to pick up containers and load them to truck. The top pick is not designed to drive from one end of the yard to another end, as it did here and caused the accident.

Furthermore, the top pick driver did not exercise “ordinary care” when he failed to have a spotter, proper lookout, or a flag or any warning as he backs up his unloaded machine. As the top pick driver backs up out of alley like stack of containers, up to three stacks, to travel to a maintenance shop caused the accident.

At trial, the Defendant slightly implied that the Burlington Northern Santa Fe (“BNSF”) owned the yard rail and it is their fault. Although the Defendant PRS appeared and defended and never added BNSF to the lawsuit and mentioned BNSF as a party, PRS still owes duty of care to the Plaintiff as an operator of the yard in question. The operator of a business (yard rail) owes to a person who has an express or implied invitation to come upon the premises in connection with that business a duty to exercise ordinary care for his or her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that such person is expressly or impliedly invited to use or might reasonably be expected to use. WPI 120.06.01.

At any rate, there is no doubt that a duty owed to the Plaintiff and

that duty is breached. The duty was breached by unsafe and dangerous maneuver of the top pick coming out of a stack of containers at a time and day busy at the yard rail. The truck was where he was suppose to be and was lawfully exiting after being loaded, and the top pick was going to one side of the yard to another without a load.

The Taylor operating guide (for the top pick in question), which is admitted into evidence as exhibit 31, states that the driver must look to the direction of travel. The operating guide at page 3 states “use care when traveling with or without a load” “always look in the direction of travel. Keep a clear view, and slow down and sound horn at cross aisles and other locations where vision is obscured.”

The top pick driver approached from the aisle to the main street where the trucks turn to exit without care, and had taken the slightest of care i.e. this accident could have been easily prevented. The Taylor guide warns from backing up. The top pick driver stated that he prefers and “likes” driving in reverse. The mechanic with 18 years of repairing the top picks stated that it is safer and better to drive the top pick forward rather than backing up. The only time the operating guide permits backing up is when a “load interferes.” Even then the operating guide states “...look and keep a clear view of the path of travel; use extreme care in maneuvering. Do not rely on mirrors for backing.” Undisputedly, there is

a duty owed to the Plaintiff and the Defendants breached the standard duty of care to use ordinary and reasonable care to the Plaintiff who was a business invitee.

All of the requirements for establishing liability have been met in our case. The Defendants were well aware of, or should be aware of the unreasonable risk of harm of backing out of a large equipment from an alley of containers without spotters, flags, or warning. As a result, Negusie's truck was crashed and he sustained serious personal injuries.

The top pick operator admitted that he has no evidence of any wrongdoings by the Plaintiff. The top pick operator stated that he did not read or used the Taylor operating guide after he was first hired although the guide states on page 1, "Because the operator is so vital to safety and production, a list of precautions appears first. Read and practice these until they become second nature." Furthermore, the operating guide warns of "Death or serious injury may result from improper operation of this machine."

In sum, all the testimonies and evidence in this case support Plaintiff's version of the facts. In more true than not basis, the evidence supports a finding of liability on the part of the Defendant especially when the standard is "preponderance of the evidence." The Court erred that there is no duty owed to the Plaintiff other than the duty defined by the

facility. Even if the Court insists that the only duty that is applicable herein, the evidence shows that the Plaintiff did not do anything to violate the rules, regulations or standard set by the yard.

III. THE COURT ERRED ADMITTING AND GIVING WEIGHT TO ERIC STRANDBERG'S INCOMPLETE DEPOSITION WHEN MR. STRANDBERG REFUSED TO TESTIFY IN TRIAL IN DEFIANCE OF SUPOENA.

The Court stated that it had considered and found the deposition of Eric Strandberg useful in reaching its verdict. RP 694. Mr. Strandberg was under subpoena and refused to show up for trial and the Defendants' counsel stated that: "... We're left with Eric Strandberg. And I don't think the policeman that used to be in here earlier this morning could get him into trial right now.... Eric Strnadberg's just not going to be here" RP 25.

Over the objection of Plaintiff's counsel as to the incompleteness of the deposition, the Court did not take any action and decided to read the deposition. The Plaintiff's counsel reserved his objection because Mr. Strandberg, as difficult it was to depose him, testified that the top pick was moving at the time of the incident. RP 175.

Q. Was the pick moving at the accident?

A. He must have been moving.

Further, he confirms why he thinks the Pick was moving. RP 176 at 8-14.

Q.What made you say the pick was moving?

A. Well, he had to be moving.

Q. Well, they don't usually sit and park.

A. He wouldn't just park the way he was doing. If we go to break, we park them. We don't go to break and leave our machines parked in the middle of the yard....

Then, the above deposition testimony by Eric Strandberg could have easily direct the Court to find liability because Mr. Reed as seen above expressly indicated that if he knew or find anything to support that the top pick was moving, then he will find liability on the part of the defendant.

Mr. Strandberg's testimony and Mr. Reed's deposition testimony read together would have clearly established liability against the Defendant. The Court should not have refused to read Mr. Reed's deposition who is a manger, but only read a witnesses deposition, who was present and available (for all legal purposes), was under subpoena, and refused to come to Court. Still, the Court unfairly gave Eric Strandberg's deposition more weight, found it useful, and based its decision of liability.

Therefore, the Court could have compelled or forced the testimony of Eric Strandberg to come to Court and testify instead of reading his **INCOMPLETE** deposition and substantially relying upon the deposition. It is also important to note that the Court has to look up the rule and confirmed that Mr. Strandberg was under subpoena when the trial commenced. RP 28. Still, the Court did not take any action to have him testify live in lieu of using his partial and incomplete deposition.

IV. UNDER COURT RULE 50, PLAINTIFF WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF DEFENDANT'S LIABILITY.

CR 50(b) provides, in relevant part:

that a party not later than 10 days after the entry of judgment or after the jury is discharged if no verdict is returned, whether or not the party has moved previously for judgment as a matter of law and whether or not a verdict is returned, a party may move for a judgment as a matter of law. CR 50(b) also states, if a verdict was returned, the Court may, in disposing of the motion for judgment as a matter of law, allow the judgment to stand or may reopen the judgment as a matter of law.

Although this case was tried without a jury, a motion for judgment as a matter of law is proper when a vital issue may be decided by the Court. Belli v. Shaw, 98 Wn.2d 569, 657 P.2d 315 (1983). The issue of "liability" and "causation" be decided by the Court. Plaintiff submits that the issue of Defendant's liability for the existence of duty to the Plaintiff who was a business invitee (duty, breach of duty and causation) on the part of the Defendants have been proven by a preponderance of the evidence in this case. There is no evidence for the trial Court to find that the Defendants were not negligent and did not owe a duty to the Plaintiff, and did not proximately caused Plaintiff's injury.

CR 50 provides the Court the opportunity to determine issues of law where there is no evidence that would sustain a verdict in favor of the non-moving party. Blackburn v. Evergreen Chrysler-Plymouth, 53 Wn.

App. 146, 765 P.2d 922 (1989). In this case, looking at the evidence and testimony in light most favorable for the defendant, the Court can clearly see there is a duty owed to the Plaintiff and the breach of that duty on the part of the Defendants that caused Plaintiff's injury occurred at PRS/SIG terminal. The preponderance of the evidence clearly shows that the Plaintiff's truck got hit by a top pick that was backing out of an alley like stack of containers. The Defendants did not contest that Plaintiff did anything wrong or violated any yard rules on the date in question. In fact, Defendant admits through its manager saying: "no yard rules were violated" "...the driver (Plaintiff) was not at fault" for the accident of December 18, 2006.

As outlined in this brief, by failing to employ a proper lookout, failing to back up from a stack of containers, Defendant PRS/SIG breached the standard of duty owed to a business invitee and truck that was in the premises to pick up a container. Thus, Defendant's action was negligent and the duty owed to the Plaintiff was violated as a matter of law.

The trial Court, in its verdict, did not find a duty on the part of the Defendants other than outlined by the facility, namely the rule yard equipments have "right-of-way." Conversely, the trial Court is saying that there is no duty owed to the Plaintiff and the only duty is the one the

Plaintiff owed to the defendants. Clearly, there is a duty of care that is owed to the Plaintiff because he was a business invitee and was at PRS/SIG terminal lawfully.

Additionally, all the testimonies taken all together and individually confirm that liability against the Defendant has been established beyond and above the preponderance of the evidence standard. This appeal and the request for new trial is supported by all the exhibits including the Deposition of Charles Reed (*see above*), the Subpoena and affidavit of service on Eric Strandberg, the accident pictures in the evidence, the testimony of doctor Dresang, the medical records from Harborview, and Greenwood Medical, and the summary of trial testimony by the following witnesses who testified at trial (below is a list of persons who testified regarding liability and incident at PRS/SIG on December 18, 2006):

Negusie Birru, Family Practitioner Dr. Steven Dresang , PRS's terminal Manager Charles Reed, Eric Strnaberg by deposition, PRS's Mechanic Morgan, and Patrick O'Shields (top pick operator and defendant). The following is a brief outline summary of each of their testimony.

Negusie Birru (hereinafter "Plaintiff" "Negusie"), testified:

1. He is an immigrant from Ethiopia and came to the U.S. with his wife and 3

children in 2002. He normally works from 5:30 a.m. to 7:00 p.m. or later.

2. On December 18, 2006, at approximately 10:45 a.m., Negusie went to PRS/SIG terminal to pick up a container as he did hundreds of times before. Negusie is aware of and obeyed all the terminal or yard rules as he did previously. He did not have any prior violation of the yard rule. He did not violate any of the yard rules that were posted on the entrance or gate.
3. Negusie testified that he was not in hurry, he was paying attention, and he was not using his radio or phone. Simply put, nothing distracted him. He was where he suppose to be and heading to the exit, as he did before, in prudent and safe manner
4. He did not see the yard equipment, the machine or top pick that was backing out of a stack of containers to go to a maintenance shop. Negusie said had he seen the top pick, he would have yield or stopped but the top pick was backing out of a stacking of containers and there was no way for Negusie to see.
5. The top pick did not have a spotter, did not have a warning flag as in the other terminals, did not warn him that the top pick is backing out of the stack of containers, which are up to three stacks.
6. He was rightly and properly attempting to exit by turning right and heading to the out-gate.

7. Negusie was thrown from his seat laterally to the passenger seat and fell between the seats his boots upside down as a result of the impact between the truck and the top pick.
8. Negusie was transported by ambulance to Harborview Hospital emergency room after this incident, the same day, and treated for his injuries.

See RP 36-162.

Patrick O'Shields the top Pick Operator and defendant testified:

1. He works and operates for PRS/SIG
2. He had previously hit a truck while backing up and that he was found to be at fault.
3. He said he was backing out of a stack of containers and he "likes backing up" as oppose to driving forward.
4. He did not have a load/container when the crash occurred.
5. He backed out from a stack of containers and when he saw a truck heading to him, he slammed on his break and waited for the impact.
6. He said he would refuse drive a top pick had PRS/SIG decided to put a flag on the back of the top pick.
7. He did not read the operating manual after he was hired, and he said it was easier for him to go to the maintenance shop backing up.

8. He saw the truck driver (the Plaintiff) upside down, his boots up in the truck immediately after the impact.
9. He admitted that if the truck had hit him (as he repeatedly claims), the driver of the truck would have fallen forward, not to side as he did in this case.

10. He said he did not know why the accident occurred and he has no evidence whatsoever that the truck driver was at fault.

See RP 190-328.

Mr. Eric Strandberg under subpoena but testified by deposition (incomplete):

- 1) He filled out the accident report stating he was an eyewitness, but at a deposition admitted he did not see the accident.

- 2) He did not see the accident, but loaded the Plaintiff's truck and assumed or guessed that the accident may have been cause because the Plaintiff was using his cell phone or nextle radio. But, he did not see any such act.

- 3) He was certain that and repeatedly stated that the top pick was moving at the time of the impact giving rise to Mr. Reed's testimony that the Defendant is at fault. Mr. Reed said had he known or found evidence the top pick was moving then the Defendants are liable.

- 4) His deposition was not complete and he had to go to Dr. appointment for his ailing wife.

Mr. **Richard Morgan** Mechanic at PRS/SIG testified:

- 1) He examined the top pick in question but he was not the first mechanic to do so after the accident.
- 2) He stated that he has been at PRS repairing top picks for 18 years. He said if you slam your break suddenly the rack will cause the top pick to flip.
- 3) He stated that without a load, it is safer and better visibility to drive the top pick forward than on reverse or backing when it was not loaded.

This an important and KEY testimony from Defendants “expert” and very experienced mechanic at PRS. The trial Court completely ignored or gave no weight whatsoever in its findings).

See RP 335-345

Physical Therapist **Izette Swan** testified:

- 1) She was the physical therapist of Negusie after Negusie’s accident and he was referred to her by the family practitioner Dr. Steven Dresang.
- 2) She stated that Negusie’s injuries are consistent with someone being hit by a heavy truck from the side.
- 3) She remembers things well but did not know the details of the accident as it was told to her by Negusie.
- 4) She treated him and she did not use an interpreter to talk with him. In her chart note, she stated that he may have move to the passenger side to avoid the accident.

See RP 497-522.

Family Practitioner **Dr. Steven Dresang** testified:

- 1) He has been a family practitioner for the past 10 years or more.
- 2) He has been Negusie's family physician prior to the accident of December 18, 2006.
- 3) He received and reviewed Negusie's medical records from Harborview Hospital.
- 4) Negusie's injuries were casually consistent with a person being hit from the side by a large object.
- 5) Negusie's almost four months of work releases authorized by him were related to the accident at PRS on December 18, 2006. Dr. Dresang stated that Negusie had a pre-existing back problem, but the accident made it exacerbated. The shoulder and other pain were exclusively caused by the accident.
- 6) He stated that Negusie was unable to continue his treatment because of a financial hardship and Negusie will need extended future medical treatment to address his back problem.

See RP 525-590.

V. THE TRIAL COURT SHOULD HAVE DECLARED A MIS-TRIAL BECAUSE THE DEFENDANTS' COUNSEL MENTIONED, ARGUED, AND REFERRED TO PLAINTIFF'S LIABILITY INSURANCE.

ER 411 States:

Evidence that a person was or was not insured against

liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

The trial Court overruled Plaintiff's objection when Defendants' counsel argued, in his closing statement, in an effort to reduce and minimize Plaintiff's damages, that Plaintiff had liability insurance, he did not pay for during his injury and off work. This case is was also about property damages in which Plaintiff claim to have suffered a loss of his truck that was totaled. RP 665.

Therefore, violating the pre-trial ruling and the motion in limine by discussing issue of insurance, the Defendant will prejudice the trier-of-facts in this case who is the judge. It forces the Court to consider the existence of collateral sources in this case. Knowing that Plaintiff was insured for liability at the time of accident may lead to reduction of Plaintiff's damages, if any (not the case here because of Defense verdict. Thus, the Court should grant a new trial for violation of motion in limine by the Defendants.

VI. CONCLUSION

For the reasons set out above, Plaintiffs respectfully request that the Court of Appeals find the trial Court erred in denying Plaintiff's

motion for a new trial and reverse and remand the case to the trial Court
for new trial.

RESPECTFULLY SUBMITTED this 14th day of June 2010.



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Attorney for Appellants.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **BRIEF OF APPELLANT on:**

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ATTORNEYS FOR RESPONDENTS

by causing full, true, and correct copies thereof by personally serving and delivering one and true copy of this brief, on June 14, 2010, to Mr. Thomas G. Waller at their last-known office address listed above.


Shakespear N. Feyissa

JUN 14 PM 12:30