

**State of Minnesota
In Supreme Court**

Nancy M. Meyer, as Trustee for the heirs of Margaret Mphosi, deceased,
Joshua Chairu Mphosi, deceased, Lucas Mphosi, injured,
Jehoshophat Mphosi, injured, and Nancy M. Meyer as guardian ad litem
for Lucas Mphosi, injured, Jehoshophat Mphosi, injured,

Appellant,

and

Bunmi Obembe and Christopher Obembe,

Intervenors,

North Dakota Department of Human Services,

Intervenor,

v.

Bibian Nwokedi,

Defendant,

and

Enterprise Rent A Car Co. of Montana/Wyoming, d/b/a
Enterprise Rent a Car of the Dakotas/Nebraska,

Respondent.

**BRIEF OF *AMICUS CURIAE* TRUCK RENTING AND
LEASING ASSOCIATION, INC.**

RICHARD P. SCHWEITZER* (D.C. Bar #364457)

CRAIG M. CIBAK* (D.C. Bar #460045)

RICHARD P. SCHWEITZER, PLLC

1776 K Street, N.W., Suite 800

Washington, D.C. 20006

(202) 223-3040

Counsel for Truck Renting and Leasing Association, Inc.

*Admitted pro hac vice

(ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGE)

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COUNSEL CONTINUED

Duane A. Lillehaug
Maring Williams Law Office, P.C.
1220 Main Avenue, Suite 105
P.O. Box 2103
Fargo, North Dakota 58107-2103
(701) 241-4141
Attorneys for Appellant

Andre Mura
Center for Constitutional Litigation, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2803
Attorneys for Appellant

Craig Richie
Richie & Associates
203 8th Street South
P.O. Box 2172
Fargo, North Dakota 58107-2172
(701) 235-5513
Attorneys for Appellant

Michael L. Weiner
Yaeger, Jungbauer & Barczak, PLC
745 Kasota Avenue
Minneapolis, Minnesota 55414
(612) 333-6371
*Attorneys for Amicus Curiae Minnesota
Association for Justice*

Mark Fraase
Johnson, Ramstad and Mottinger PLLP
15 South 9th Street
Fargo, North Dakota 58103-1830
(701) 235-7501

Theodore Smetak
Arthur, Chapman, Kettering, Smetak &
Pikala, P.A.
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, Minnesota 55402-3214
(612) 339-3500
Attorneys for Respondent

Wayne Aarestad
Wayne G. Aarestad Law Firm
417 Main Avenue, Suite 502
P.O. Box 9275
Fargo, North Dakota 58107-9275
(701) 232-1795
Attorneys for Defendant Bibian Nwokedi

Jean Mullen
John S. Garry
Assistant Attorney General
Office of the Attorney General
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 282-5719
*Attorneys for North Dakota Dept. of
Human Services*

Jeannie Probo-Peterson
Johnson, Provo-Peterson, O'Neill, LLP
332 Minnesota Street, Suite West 975
First National Bank Building
St. Paul, Minnesota 55101
(651) 227-2534
Attorneys for Defendant Bibian Nwokedi

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STATEMENT OF THE ISSUES, CASE AND FACTS

The Truck Renting and Leasing Association, Inc. (“TRALA”) is satisfied with the statements of the issues, case and facts as set forth in the briefs of Appellant and Respondent Enterprise Rent-A-Car Co. (“ERAC”), and in accordance with Minn. R. Civ. App. Proc. 128.02 subd. 2 declines to offer alternatives to those statements.¹

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* is a national trade association whose member companies rent or lease vehicles in interstate commerce.² TRALA, among others, previously joined in a coalition to advocate for the adoption of 49 U.S.C. § 30106, commonly referred to as the “Graves Amendment,” enacted into law by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 10208 (Aug. 10, 2005) (“SAFETEA-LU” or the “Federal statute”), and the repeal of vicarious liability statutes in several states and in Canada. Vicarious liability laws adversely affect TRALA’s member companies by substantially raising the costs of doing business nationwide, and limiting the availability of insurance coverage for owners of rented and leased vehicles. Because rented and leased vehicles are routinely driven across state lines, and such vehicles are an integral part of the seamless flow of interstate transportation, TRALA’s members are forced to account for those states, such as

¹ Pursuant to Minn. R. Civ. App. Proc. 129.03, TRALA states that its undersigned counsel solely and exclusively drafted this Brief, and no counsel for any party, intervenor or other *amicus* authored the Brief in whole or in part. TRALA also states that no person other than TRALA made a monetary contribution to the preparation or submission of this Brief.

² A list of TRALA Member Companies is included in the Addendum.

Minnesota, that impose vicarious liability on vehicle lessors. These extra costs are spread throughout the industry, and prior to enactment of the Graves Amendment TRALA estimated that vicarious liability requirements cost vehicle rental and leasing companies upwards of \$100 million annually.

TRALA, headquartered in Alexandria, Virginia, is a voluntary, not-for-profit national trade association founded in 1978 to serve as a unified and focused voice for the truck renting and leasing industry. Its mission is to foster a positive legislative and regulatory climate within which companies engaged in leasing and renting vehicles and trailers and related businesses can compete fairly in the North American marketplace.

TRALA members engage in commercial truck renting and leasing,³ vehicle finance leasing, and consumer truck rental. The membership encompasses the full spectrum of the industry, including major national independent firms such as Ryder System, Penske Truck Leasing, U-Haul, Budget and Enterprise Truck Rental, as well as small and medium-size businesses that generally participate as members of three group systems: Mack Leasing, Volvo Truck Leasing, PacLease, IdealLease and NationalLease. In total, these nearly 500 companies operate more than 4,000 commercial lease and rental locations and more than 18,000 consumer rental locations throughout the United States, Canada and Mexico.⁴

³ The term “renting” is a term of art in the vehicle leasing industry, generally meaning a transaction granting the exclusive use of a vehicle for 30 days or fewer, whereas a lease generally means a transaction granting the exclusive use of a vehicle for more than 30 days. Use of the term herein “lease” includes rentals.

⁴ The TRALA membership also includes more than 100 supplier member companies providing equipment, products, and services to TRALA members.

The truck renting and leasing industry involves a vast network of truck transportation, logistics and related services. In 2003 there were 4,734,964 commercial trucks in classes 3 through 8⁵ registered in the United States. Of that total, some 896,155, or approximately 19 percent, were operated pursuant to some form of lease agreement. Moreover, TRALA members account for upwards of 40 percent of all of the new commercial motor vehicles in classes 3 through 8 purchased each year in the United States.

Truck leasing customers represent virtually every segment of the North American economy.⁶ Almost one-fifth of commercial trucks in the United States are operated under lease agreements. For vehicles operating in interstate commerce, as much as 90 percent of the total number of commercial vehicles may be operating under a lease agreement.

Importantly, truck lessors do not control where a vehicle is operated once the lessee takes possession of the vehicle.⁷ For example, a vehicle may be leased to a

⁵ Classes 3 through 8 include commercial trucks over 10,000 pounds Gross Vehicle Weight (“GVW”) to 80,000 pounds GVW and above. Commercial trucks over 10,000 pounds GVW are generally subject to federal and state motor carrier safety regulations. *See* 49 C.F.R. Part 390.

⁶ Those segments include the following: (1) wholesale/retail, (2) manufacturing, (3) general freight, (4) food processing/distribution, (5) miscellaneous other, (6) services, (7) forestry/lumber/wood products, (8) beverage processing/distribution, (9) agricultural farm, (10) moving and storage, (11) landscaping/horticulture/nursery service, (12) individual owner-operators, (13) petroleum, (14) sanitation/refuse, (15) government miscellaneous, (16) hazardous materials, (17) mining/quarry, (18) construction, (19) vehicle transporters, (20) specialized/heavy hauling, (21) sanitation-refuse combination, (22) general freight hazmat, (23) emergency vehicles, and (24) utility services.

⁷ *See, e.g., Truck Renting and Leasing Ass’n, Inc. v. Comm’r of Revenue*, 433 Mass. 733; 746 N.E.2d 143, 145 (2001) (Lessors “retained ownership of the vehicles and the lessees were granted ‘exclusive dominion and control’ at all times.”); *Marx v. Truck Renting and*

customer in North Dakota by a lessor located in North Dakota, and with no commercial locations outside of that state, but the customer may operate the vehicle in dozens of states throughout the term of the lease without seeking permission from or even notifying the lessor. Further, according to data from the American Trucking Associations,⁸ the average length of a single trip for all trucking operations is 469 miles, indicating these vehicles operate over a wide range of states on a daily basis.

To aid in this freedom of movement, truck lessors generally register their vehicles over 26,000 pounds through the International Registration Plan, which allows the vehicles to be operated in all states without any special permits or additional licensing. Lessors also generally arrange to pay fuel taxes for these vehicles through the International Fuel Tax Agreement, which serves as a clearinghouse for state fuel tax payments to each state in which the vehicle is operated.

TRALA's members also include the Industry Council for Vehicle Renting and Leasing⁹ (the "Industry Council"), a coalition of automobile and truck lessors formed to

Leasing Ass'n, Inc., 520 So.2d 1333 (Miss. 1987) (“[N]either Ryder nor Saunders have equipment here and do not consistently utilize the Mississippi highways. In fact, they have no control over which highways the lessees of their vehicles use once those vehicles are leased.”).

⁸ Thomas M. Corsi, *The Truckload Carrier Industry Segment, Trucking in the Age of Information*, Ashgate Publishing (2004); based on the author's calculations from 2001 Motor Carrier Annual Report, American Trucking Associations, Inc., Alexandria, Virginia.

⁹ The Industry Council members are Avis Budget Group, Daimler Chrysler Truck Financial, Dollar Thrifty Automotive Group, Enterprise Rent-A-Car, Key Equipment Finance, Navistar Financial Corporation, Penske Truck Leasing Company, Ryder System, U-Haul International, and PACCAR Financial Services Corporation.

address the issues facing the broader vehicle renting leasing industry, including state vicarious liability laws.

This free flow of vehicles in interstate commerce illustrates why vicarious liability imposed by a single state can adversely affect vehicle leasing operations nationwide. In the above example, if the vehicle leased in North Dakota is operated by the lessee in Minnesota and is involved in an accident in this state, the lessor could be subject to the liability imposed under Minnesota law, without ever having any intent to do business in the state or to subject itself to such laws.

Moreover, the leased vehicle does not even have to be operated in Minnesota to subject the lessor to vicarious liability. If the injured party is a resident of Minnesota, or the parties have some other connection to the state, the trial court may, through choice of law principles, opt to apply the substantive law of Minnesota, including its vicarious liability statute, even if the accident occurred outside of Minnesota and/or the lawsuit is brought in the courts of another jurisdiction besides Minnesota.¹⁰

Minnesota's vicarious liability law therefore increases the costs of doing business for all car and truck lessors wherever their principal place of business or the location of their leasing facilities. For lessors located in Minnesota or in a bordering state, the potential liabilities, and therefore the increased costs of operation, are much greater, resulting in significantly higher consumer prices. Because truck lessors provide vehicles

¹⁰ This possibility was discussed in congressional hearings during the consideration of a precursor to the Graves Amendment. *See* Prepared Statement of Rep. Oxley, The Rental Fairness Act, 1999 WL 959128 (Oct. 20, 1999).

to virtually every type of manufacturing, wholesale and retail entity in the country, the increased costs show up in higher costs of distributing virtually every type of product sold in the United States.

The history of the Graves Amendment illustrates the devastating impact that “liability without fault” laws have on vehicle lessors: many leasing entities were forced out of the market due to vicarious liability laws in just a handful of states.¹¹ For example, a number of press articles described the additional costs and other effects of the New York vicarious liability law on vehicle lessors in that state. One article noted, “Try to reserve a Hertz or Avis vehicle in Brooklyn or the Bronx, and you may face a surcharge of \$60 or \$80 a day over what the same car would rent for in the rest of the country.” Walter Olson, *Silver’s Wreck*, N.Y. Post, June 9, 2003.

This cost imposed a heavy toll on lessors. An April 1, 2004 article from the New York Sun noted, “By most estimates there were still about 400 independent rental agencies operating in New York two years ago. Today, there are only about 50. Within a year, there may be none.” William Tucker, *The Great Car-Rental Wipeout*, N.Y. Sun, April 1, 2004. *See also*, Tom Incantalupo, *Auto Leasing May Return to NY, Companies Would Resume Leasing If Bush Signs Bill Freeing Them from 1924 State Law on Accident Liability*, Newsday, Aug. 2, 2005; Michael Cooper, *Congress Passes Bill*

¹¹ *See* Prepared Statement of Ms. Sharon Faulkner, the Rental Fairness Act, 1999 WL 959129 (Oct. 20, 1999) (stating that due to vicarious liability laws she sold her small car rental company to a competitor and that over 300 car rental companies had closed in New York between 1990 and 1999).

Nullifying a State Law, and Making It Easier to Lease Cars in New York, N.Y. Times, Aug. 4, 2005.

The Graves Amendment eliminated vicarious liability to impose a uniform, nationwide legal structure under which a vehicle lessor could not be held liable for damages resulting from an accident merely because it owned the vehicle. This approach affords consistent and predictable application of liability laws based on fault alone, which promotes the free flow of interstate commerce.

Minnesota was one of a handful of states that retained vicarious liability before the Graves Amendment. Some 44 states had already eliminated vicarious liability for lessors.

The overwhelming weight of legal authority shows that Congress was within its power to pass the Graves Amendment, and specifically intended to preempt Minnesota's vicarious liability laws. Moreover, TRALA's membership offers significant support for the notion that the Graves Amendment substantially impacts interstate commerce.

ARGUMENT

I. MINNESOTA IS ONE OF THE SMALL MINORITY OF STATES WHICH IMPOSED VICARIOUS LIABILITY ON MOTOR VEHICLE LESSORS THAT CONGRESS SPECIFICALLY INTENDED TO PREEMPT BY THE GRAVES AMENDMENT.

Prior to enactment of the Graves Amendment, only a small number of states, including Minnesota, imposed vicarious liability on vehicle renting and leasing companies. In introducing his amendment, Rep. Sam Graves (6th Dist. - Mo.) stated the law's purpose:

Mr. Chairman, I am here today to correct an inequity in the car and truck renting and leasing industry. By reforming vicarious liability to establish a national standard that all but a small handful of States already follow, we will restore fair competition to the car and truck renting and leasing industry and lower costs and increase choices for all consumers.

151 Cong. Rec. H1200 (daily ed. March 9, 2005).

In an earlier version of the Graves Amendment, Congress considered the Rental Fairness Act of 1999 (“RFA”) H.R. 1954, 106th Cong. (2002), which contained language similar to the Graves Amendment but which did not pass Congress.¹² The House Commerce Committee report on the RFA emphasized that the law intended to counteract a limited number of states that maintained vicarious liability laws. The report states:

Vicarious liability is liability for the tort or wrong of another person. It is an exception to the general legal rule that each person is accountable for his own legal fault, but in the absence of such fault is not responsible for the actions of others. *In a small minority of States*, companies that rent or lease motor vehicles are held ‘vicariously’ liable for the negligence of their renters or lessees. . . . *These small number* of vicarious liability laws pose a significant competitive barrier to entry for smaller companies attempting to compete in these markets who cannot afford insurance coverage for potentially unlimited liability.

H.R. Rep. 106-774, pt. 1, at 4-5 (July 20, 2000) (emphasis added).

The legislative history also shows that Minnesota specifically was one of those states whose vicarious liability laws were intended to be preempted. Representative Jerrold Nadler of New York, an opponent of the legislation, listed Minnesota as among the states with laws that would be preempted:

¹² The court may consider the legislative history of the RFA because its language and purpose was nearly identical to the Graves Amendment. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 261-63 (1994).

This amendment, if passed, would nullify the laws of 15 States and the District of Columbia and would have the disastrous effect of allowing rental car companies to lease vehicles to uninsured drivers with no recourse for innocent victims should an accident occur. . . . Anybody, Republican or Democrat, who is from Arizona, Connecticut, Delaware, Iowa, Maine, Nevada, New York, Rhode Island, the District of Columbia, California, Florida, Idaho, Michigan, *Minnesota*, Oklahoma, and Wisconsin should not vote for this amendment, Republican or Democrat, unless you want to say to your State legislators: *We are going to preempt* the law of New York, of California, of Florida, wherever, because we know better.

151 Cong. Rec. H1200 (daily ed. March 9, 2005) (Rep. Nadler) (emphasis added).

Minnesota's own Representative James Oberstar also spoke in opposition to the Graves amendment. 151 Cong. Rec. H1202 (daily ed. March 9, 2005).

The "Minority Views" section of the House report also lists Minnesota among those states whose laws would be preempted by the RFA. H.R. Rep. 106-774, pt. 1, at 13 ("The proponents of H.R. 1954 intend that the legislation preempt 'vicarious liability' laws in 11 states (Florida, New York, California, Iowa, Michigan, *Minnesota*, Nevada, Idaho, Maine, Connecticut, and Rhode Island) and the District of Columbia. . .") (emphasis added)). During hearings on the RFA, Minnesota was listed as one of the states whose law would be preempted by the federal act. *See* Prepared Statement of Mr. Richard H. Middleton, Jr.,¹³ 1999 WL 9591131, at 3 (Oct. 20, 1999) (listing Minnesota as a state imposing vicarious liability).

¹³ Incidentally, at the time of his testimony Mr. Middleton was the President of the Association of Trial Lawyers of America, the former name of the Center for Constitutional Litigation, P.C. which is representing Appellants in this matter. Even Appellants' own attorneys recognized specifically that Minnesota law would be preempted by the federal statute.

Both the plain language and the legislative history of the Graves Amendment demonstrate Congress expressly intended to give the statute preemptive effect. Not only was the Graves Amendment intended to preempt state laws generally, but the legislative history confirms that Congress intended to preempt Minnesota law specifically.

The Graves Amendment was an attempt to bring those few states in line with the vast majority of states and provide a consistent, uniform level of protection for vehicle renting and leasing companies. Congress found that in light of the inherently interstate nature of the vehicle renting and leasing business, a uniform, national standard was needed. *See* Statement of Rep. Graves, 151 Cong. Rec. H1200 (daily ed. March 9, 2005) (“Since companies cannot prevent their vehicles from being driven to a vicarious liability State, they cannot prevent their exposure to these laws and must raise their rates accordingly. These higher costs have driven many small companies out of business, reducing the consumer choice and competition that keeps costs down.”); H. Rpt. 106-774, pt. 1, at 4 (“Further, because rented or leased motor vehicles are frequently driven across State lines, these small number of vicarious liability laws impose a disproportionate and undue burden on interstate commerce by increasing rental rates for all customers across the Nation.”).

This legislative history shows that Minnesota was in the small minority of states that continued to impose vicarious liability on vehicle renting and leasing companies. Congress sought to preempt those states’ vicarious liability laws to provide a uniform national standard protecting companies from liability based solely on the fault of the

driver. There can be no doubt Congress specifically intended to preempt Minnesota's law.

II. THE MINNESOTA NO-FAULT AND SAFETY RESPONSIBILITY ACTS ARE NOT MINIMUM FINANCIAL RESPONSIBILITY LAWS MEANT TO BE SAVED FROM PREEMPTION BY SUBSECTION (B)(2) OF THE GRAVES AMENDMENT.

TRALA wholeheartedly supports ERAC's arguments that the Minnesota statutes imposing vicarious liability up to the limits of \$115,000 per person/\$350,000 per accident are preempted by the Graves Amendment and are not saved by that amendment's two savings clauses.

Appellants contend that the Minn. Stat. §§ 169.09 and 65B.49 subd. 5a, read together, constitute "financial responsibility" laws saved from preemption by the Graves Amendment's saving clauses. But that contention is belied by the ordinary meaning and use of that term in both federal and state law. The term denotes laws that require vehicle owners and operators to show proof of minimum levels of insurance such that they can respond in damages for liability as a prerequisite to registering the vehicle.

Neither the Graves Amendment nor SAFETEA-LU defines the term "financial responsibility." Thus, the court must assume that Congress used the ordinary and common meaning of the term. *State of Minnesota v. Heckler*, 718 F.2d 852, 860-61 (8th Cir. 1983); *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1246 (11th Cir. 2008) ("When statutory terms are undefined, we typically infer that Congress intended them to have their common and ordinary meaning, unless it is apparent from context that the disputed term is a term of art."); *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1266

(11th Cir. 2006) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

In the highest court yet to rule on the Graves Amendment, the United States Court of Appeals for the Eleventh Circuit in *Garcia* held that the common usage of the term “financial responsibility” refers to “state laws which require either liability insurance or a functionally equivalent arrangement.” *Garcia*, 540 F.3d at 1247. The court in *Garcia* noted the common definition of the phrase in Black’s Law Dictionary, which “defines financial responsibility only to include requirements that motorists have proof of ‘insurance or other financial accountability.’” *Id.* at 1248 (*quoting* Black’s Law Dictionary at 663 (8th ed. 2004)). For the Graves Amendment specifically, *Garcia* “conclude[d] that Congress used the term ‘financial responsibility law’ to denote state laws which impose insurance-like requirements on owners or operators of motor vehicles, but permit them to carry, in lieu of liability insurance per se, its financial equivalent, such as a bond or self-insurance.” *Id.* at 1247 (also noting in a footnote that those duties may arise as a condition of licensing or registration).

Additionally, the court can look at Congress’ use of the term “financial responsibility” in other statutes. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (comparing similar language in the Employee Retirement Income Security Act to determine the preemptive effect of the Airline Deregulation Act). In the context of the registration requirements for commercial motor carriers, federal law provides that the Secretary of Transportation

shall *register* a person to provide transportation . . . as a motor carrier if the Secretary finds that the person is willing and able to comply with—

.

(c) the *minimum financial responsibility* requirements established by the Secretary pursuant to sections 13906 and 31138.

49 U.S.C. § 13902(a)(1) (emphasis added). Section 13906(a)(1) of Title 49 U.S.C. provides that

the Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes pursuant to, or as is required by, sections 31138 and 31139, and the laws of the State or States in which the registrant is operating, to the extent applicable.

Section 31138(a) requires the Secretary of Transportation to “prescribe regulations to require minimum levels of financial responsibility sufficient to satisfy liability amounts established by the Secretary.” The statute requires “minimum amounts” of “financial responsibility” in subsection (b), and requires evidence of financial responsibility in subsection (c). Section 31139 contains similar provisions.¹⁴

Congress has used the term “financial responsibility” in a very particular way to describe the minimum levels of insurance or other surety to ensure that the motor carrier can respond in damages if it is held liable for death, injury or destruction of property. Importantly, those minimum levels of financial responsibility are required to register as a motor carrier with the federal government.

¹⁴ Pursuant to these statutes, the Federal Motor Carrier Safety Administration has promulgated minimum financial responsibility regulations for commercial motor vehicles at 49 C.F.R. Part 387.

The Graves Amendment uses this same kind of language. It exempts from preemption state “*financial responsibility* or insurance standards on the owner of a motor vehicle for the *privilege of registering* and operating a motor vehicle.” 49 U.S.C. 30106(b)(1) (emphasis added). Similar to the federal motor carrier registration statutes, “financial responsibility” is used in the Graves Amendment to mean those state laws which impose *minimum insurance requirements* as a condition to *registering a vehicle*.

Other states use the term “financial responsibility” to mean the requirement that vehicle owners obtain minimum levels of insurance as a condition to register the vehicle or to register and operate a vehicle after the owner has been involved in an accident. The cases and statutes cited herein show that the term financial responsibility is commonly used to refer to minimum insurance or surety requirements, and not maximum levels of vicarious liability as imposed by state law. *See, e.g., Del Real v. United States fire Insurance Crum & Forster*, 64 F. Supp. 2d 958, 962-63 (E.D. Ca. 1998) (“The average layperson would assume that the reference in the contract to the applicable financial responsibility law is to the familiar liability policy limit requirements of \$15,000 for a single person in one accident for bodily injury or death, \$30,000 per accident for bodily injury or death where there is more than one injured party, and \$5,000 for property damage in one accident, as established in Insurance Code § 11580.1 and Vehicle Code § 16506.”); *Progressive Insurance Co., v. Simmons*, 953 P. 2d 510, 521 n.13 (Ak. 1998) (“A person whose license is suspended under the [Alaska Mandatory Automobile Insurance Act, Title 28, ch. 22 Alaska Statutes] is required to file proof of insurance under the [Motor Vehicle Safety Responsibility Act, title 28, ch. 20 Alaska Statutes]

before his or her driving privileges may be restored. See AS 28.22.061.”); *Quetawki v. Prentice*, 303 F. Supp. 737 (D. N.M. 1968) (New Mexico Financial Responsibility Act, N.M. Stat. Ann. §§ 64-24-1-4 and 64-24-42-104 “provides for suspension of the driver’s license and automobile license plates without a hearing where the motorist whose privileges are being suspended has been involved in an accident, is uninsured, and is unable to post security for possible damages.”); *Lonesathirath v. Avis Rent-A-Car System, Inc.*, 937 F. Supp. 367, 371-72 (E.D. Pa. 1995) (holding the only provision of the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. Ann. §§ 1701-1799.7, applying to Avis was section 1787 providing for minimum coverage limits of \$15,000 per person and \$30,000 per accident).¹⁵

In short, a financial responsibility law requires a person to have a minimum level of assets available to cover damages *if that person is held liable for damages*. A vicarious liability law is a completely different concept – it provides that a person may be held liable for injury without establishing fault, regardless of whether the person has any

¹⁵ See also, Ga. Code Ann. 40-2-26(d)(2) (2006) (“No vehicle registration or renewal thereof shall be issued to any motor vehicle unless the tag agent receives satisfactory proof that the motor vehicle is subject to a policy of insurance that provides the *minimum motor vehicle insurance coverage* required by Chapter 34 or Title 33 or an approved self-insurance plan . . .”) (emphasis added) (App. 97-101); S.C. Code (unannotated) 56-9-20 (11) (defining “proof of financial responsibility” as “Proof of ability to respond to damages for liability . . . in the amount of fifteen thousand dollars because of bodily injury to or death of one person in any one accident and, subject to this limit for one person, in the amount of thirty thousand dollars because of bodily injury to or death of two or more persons in any one accident . . .”) and S.C. Code (unannotated) 56-10-10 (“Every owner of a motor vehicle required to be registered in this State shall maintain the security required by Section 56-10-20 . . .” which requires insurance policies for “at least the minimum coverages specified in Sections 38-77-140 through 38-77-230 . . .”) (App. 90-96).

assets to cover the damages. Minnesota's limits of \$115,000/\$350,000 under Minn. Stat. § 65B.49 subd. 5a(i) are not minimum financial responsibility laws imposed for the purpose of registering a vehicle. They are caps on damages that may be awarded when the rental or leasing company is found vicariously liable under Minn. Stat. § 169.09.

Appellant's arguments under the second part of the Graves Amendment's savings clause, 49 U.S.C. § 30106(b)(2), fare no better. That clause preserves state laws which impose liability on renting or leasing companies if they fail to meet the state's minimum insurance requirements. As ERAC points out, Minnesota maintains a number of laws for failing to maintain minimum insurance. Respondent's Brief at 20.

This is, in fact, the only logical reading of the Graves Amendment. A finding that the Graves Amendment's savings clauses preserve Minn. Stat. §§ 169.09 and 65B.49 subd. 5a would allow the exception to swallow the rule. Under no circumstances would a rental and leasing company be able to escape vicarious liability for the fault of the renter. *See Garcia*, 540 F.3d at 1248 ("If we construe the Graves Amendment's savings clause as appellants wish, it would render the preemption clause a nullity."). For that reason, among others, virtually every court that has confronted the Graves Amendment has upheld its preemption of state law. *See, e.g., Garcia*, 540 F.3d 1242; *Flagler v. Budget Rent A Car System, Inc.*, 538 F. Supp. 2d 557, 558 (E.D.N.Y. 2008) ("There is no question but that the Graves Amendment preempts state laws that impose vicarious liability on businesses that rent or lease motor vehicles."); *Jasman v. DTG Operations, Inc.*, 533 F. Supp. 2d 753, 758 (W.D. Mich. 2008) ("Based on the cited authority, the Court finds the Graves Amendment preempts Michigan's Motor Vehicle Civil Liability

Act and that owners of vehicles, such as Dollar Rental, are not liable solely by reason of being the owner [**12] of the vehicle.”). Additionally, the United States District Court for the District Court of Minnesota, in a recent decision which has not yet been published, followed the Court of Appeals decision in this matter and found that the Graves Amendment preempts Minnesota law. *Canal Insurance Co. v. Kwik Kargo, Inc. Trucking*, Civil Case No. 08-439 (JNE-RLE) (D. Minn. April 21, 2009) (*see* Addendum).

There is no doubt that Minnesota intended to encourage, if not require, rental companies to obtain residual insurance to cover losses up the amounts specified in Minn. Stat. § 65B.49, subd. 5a. Appellant concludes, therefore, that because that statute requires insurance, it must be a financial responsibility statute. *See* Appellant’s Brief at 12. But that conclusion ignores the plain meaning of the term financial responsibility law as a requirement for vehicle owners to maintain insurance or its equivalent for the privilege of registering a vehicle to ensure minimum levels of compensation should the owner be found liable.

Where Appellant’s argument falls apart is in its failure to recognize that the Graves Amendment prohibits states from imposing vicarious liability on rental companies in the first place. If there is no vicarious liability under Minn. Stat. § 169.09, the caps placed on that liability under Minn. Stat. § 65B.49, subd. 5a become inoperative. The vicarious liability damage caps are wholly dependent on the imposition of liability under § 169.09, subd. 5a. Without liability, there can be no damages, capped at \$115,000/\$350,000 or not.

Appellant essentially mixes two separate and distinct legal concepts – liability which results in an award of damages and proof of ability to pay those damages. The Graves Amendment preempts the former and preserves the latter. Liability refers to the finding of fault by a tortfeasor by reason of his actions or inactions which resulted in damages to another. Vicarious liability artificially imposes liability on another party simply because of that party’s relationship with the real tortfeasor. *Nadeau v. Melin*, 110 N.W.2d 29, 34 (Minn. 1961). Regardless of the fairness of placing liability on a party who is not the real tortfeasor, the concept is still one of holding someone accountable for the injuries of another.

The proof of ability to respond in damages for the privilege of registering a vehicle, however, is a completely different concept. It refers to the interest of the state, acting on behalf of persons who will be injured in vehicle accidents, to ensure that there is some amount of money available to compensate the injured party. Requiring proof of the ability to respond in damages is not the same as requiring someone to be liable for damages.

In this regard, Appellant asserts that reading the Graves Amendment as ERAC and the Court of Appeals did would also negate Minn. Stat. § 65B.48, subd. 3(1) and § 65B.49 subd. 3(1), which impose minimum financial responsibility requirements on vehicle owners for the purposes of registering a vehicle in the amounts of \$30,000 for one person and \$60,000 per accident for bodily injury. Appellant’s Brief at 21-22. TRALA agrees with ERAC that that argument is not before this Court. There is no reason for this Court to rule whether the Graves Amendment preempts § 65B.49, subd. 3. Because

ERAC agreed to pay those minimum amounts into the court as a matter of contract leaves only the question of whether ERAC is subject to vicarious liability damages under Minn. Stat. §§ 169.09 subd. 5a and 65B.49 subd. 5a(i).

As ERAC points out and the Court of Appeals found, ERAC agreed to pay the amounts specified in § 65B.49, subd. 3 as part of its rental agreement. Respondent’s Brief at 9 n.5 (“ERAC’s rental agreement lawfully limited its self-insured obligation to Minnesota’s minimum limit for residual liability . . .”) and 19-20 (“ERAC undisputedly has complied with [financial responsibility] laws by self-insuring for the first \$2 million in accordance with North Dakota self-insurance law and by committing a portion of its self-insurance obligation contractually for the protection of an operator of a rented motor vehicle . . .); *Meyer v. Nwokedi*, 759 N.W.2d 426, ___¹⁶ (Minn. App. 2009) (“Further, in accordance with the rental agreement, Enterprise has paid the \$60,000 per accident limit into court.”), and ___ (“The rental agreement contractually limited Enterprise’s liability to Minnesota’s minimum residual liability insurance obligation.”). In making these payments, ERAC was acting essentially as an insurer by contractually agreeing to cover the driver of its vehicle up to the minimum levels of financial responsibility required in § 65B.49, subd. 3.

TRALA asserts, however, that absent provisions in the rental agreement to the contrary, vehicle rental and leasing companies owe *no* obligation to pay damages even in the amounts provided for in Minnesota’s minimum financial responsibility statute solely because of the torts committed by the renter/driver. The Graves Amendment is clear that

¹⁶ The full pagination for this opinion has not yet been provided.

no vicarious liability may be imposed on vehicle leasing and rental companies. The fact that a state has purported to limit damages incurred under vicarious liability, for either \$350,000 or \$60,000, does not overcome the Graves Amendment's strict prohibition on imposing liability on rental companies in the first place. In fact, of the twelve states in the U.S. that had vicarious liability statutes outlawed at the time of enactment of the Graves Amendment in 2005, only three allowed unlimited vicarious liability. The other states had some form of limited or capped vicarious liability in place. Congressman Graves, through his public statements and testimony on the issue prior to passage, made clear his intention that his legislation would preempt vicarious liability completely in every state in the union. 151 Cong. Rec. H1200-02 (daily ed. March 9, 2005). The suggestion that a form of capped vicarious liability was intended to be allowed to continue through the MFR provision in the Graves Amendment is incompatible with the plain language of the statute and this legislative history.

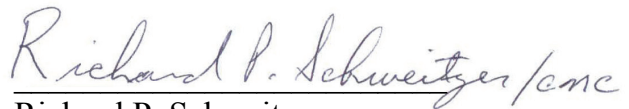
That rental companies may not be required to pay those minimal damages for vicarious liability under § 65B.49 subd. 3 does not mean that provision has no effect. Under subsection (b)(1) of the Graves Amendment, states may continue to require rental and leasing companies to maintain insurance on the vehicles they own as a prerequisite for registering those vehicles. Rental and leasing companies may be called upon to pay damages from that insurance in any number of circumstances. In many instances, like this case, rental companies provide insurance for their renters through the rental agreement. As ERAC points out, rental and leasing companies are not immune from all liability under the Graves Amendment. They may be sued for their own negligence in

renting or leasing a vehicle. The minimum financial responsibility insurance requirements of Minn. Stat. § 65B.49 subd. 3 therefore, are unaffected by the Graves Amendment except to the extent that they impose vicarious liability on a vehicle rental or leasing company.

CONCLUSION

For the foregoing reasons and the reasons set forth in Respondent's brief, TRALA urges this Court to uphold the Court of Appeals' decision.

Respectfully submitted,

A handwritten signature in cursive script that reads "Richard P. Schweitzer /cmc".

Richard P. Schweitzer

Craig M. Cibak

Richard P. Schweitzer, P.L.L.C.

1776 K Street, N.W.

Washington, D.C. 20006

(202) 223-3040

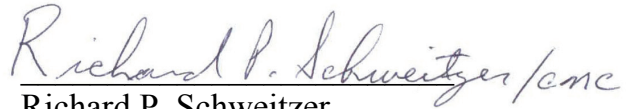
Attorneys for *Amicus Curiae*

Truck Renting and Leasing Assoc., Inc.

June 3, 2009

CERFIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amicus Curiae* Truck Renting and Leasing Association, Inc. conforms to Minn. R. Civ. App. P. 132.01, subd. 3(c)(1) for an *amicus* brief produced with proportionally spaced font. There are 5,044 words in this Brief, which was produced using Microsoft Office Word 2003.



Richard P. Schweitzer

Craig M. Cibak

RICHARD P. SCHWEITZER, P.L.L.C.

1776 K Street, N.W.

Washington, D.C. 20006

(202) 223-3040

Attorneys for *Amicus Curiae*

Truck Renting and Leasing Assoc., Inc.

June 3, 2009

ADDENDUM

ADDENDUM

List of TRALA Member Companies.....1-10

Canal Insurance Co. v. Kwik Kargo, Inc. Trucking.....11-17

TRALA MEMBER COMPANIES

1ST SOURCE BANK
3PL CORPORATION
3-STATE TRUCK LEASING & RENTAL
A & D TRUCK LEASING
A. A. NATIONALEASE
A.M. HAIRE TRUCK BODIES
ACME LEASING NATIONALEASE
ACME NATIONALEASE
ADVANTAGE NATIONALEASE
ADVANTAGE TRUCK LEASING
AIM NATIONALEASE
AIROLDI BOTHERS NATIONALEASE
AIRWAYS NAT TRUCK RENTALS
ALBANY MACK LEASING
ALCOA WHEEL & TRANSPORTATION PRODUCTS
ALL MAINTENANCE NATIONALEASE
ALL SERVICES LEASING, INC.
ALL STAR IDEALEASE
ALLISON TRANSMISSION INC.
ALLSTATE LEASING, LLC
ALLSTATE OHIO LEASING, LLC
ALLTRUCK LEASING
AMTRALEASE TRUCK RENTAL
ANTHONY LIFTGATES, INC.
ANTRIM NATIONALEASE
ARAMARK UNIFORM SERVICES
ARCHER IDEALEASE
ARTHUR LEASING
ARVINMERITOR, INC.
ASTLEFORD IDEALEASE
ATTERBERY IDEALEASE
AUTOCAR TRUCK CORPORATION
AUTOW NATIONALEASE
AVION TRANSPORTATION GRAPHICS
B.I.T. IDEALEASE
BADGERLAND IDEALEASE
BANNER RENTAL & LEASING LLC
BARCO IDEALEASE
BAYVIEW PACLEASE
BCI IDEALEASE
BELL LEASE
BENDIX COMMERCIAL VEHICLE SYSTEMS LLC
BENTLEY TRUCK SERVICES, INC.
BERGEY'S LEASING ASSOCIATES
BIG FREIGHT SYSTEMS, INC.
BLUEGRASS IDEALEASE
BOWMAN TRUCK LEASING, LLC
BRATTAIN IDEALEASE
BRICKYARD IDEALEASE
BRIDGESTONE BANDAG TIRE SOLUTIONS
BRIGHT NATIONALEASE
BRODY TRANSPORTATION CO.
BROWN NATIONALEASE
BRUCKNER LEASING CO., INC.

BTR TRUCKS, INC.
BUSH TRUCK LEASING, INC.
BUSTIN INDUSTRIAL PRODUCTS
BWAB IDEALEASE
C & D NATIONALEASE
C & W NATIONALEASE
C.L.E. NATIONALEASE
C.T.S. LEASE & RENTAL
CALGARY PETERBILT LEASING
CALMONT NATIONALEASE
CALMONT PACIFIC LEASING
CAMION INTERNATIONAL WEST ISLAND
CARCO NATIONALEASE
CARMENITA LEASING
CARMICHAEL NATIONALEASE
CAROLINA IDEALEASE
CARRIER IDEALEASE
CARRIER TRANSICOLD
CARTER EXPRESS
CASCADIA IDEALEASE
CATAWBA RENTAL COMPANY,
CENTER CITY IDEALEASE
CENTER STATE IDEALEASE
CENTRAL ILLINOIS NATIONALEASE
CENTURY LEASING LLC
CHAMPLAIN LEASING, INC.
CHARTER IDEALEASE
CHEESEMAN LLC
CHESAPEAKE TRUCK LEASING,
CIT PACLEASE
CITICAPITAL COMMERCIAL CORPORATION
CLR LEASING
CMA, LLC DBA DOUBLE COIN TIRE
COAST COUNTIES PETERBILT PACLEASE
COASTAL IDEALEASE
COFFMAN NATIONALEASE
COMDATA CORPORATION
CONTINENTAL TIRE NORTH AMERICA, INC.
CONVOY LEASCO LLC
CONWAY BEAM LEASING
COOKSON IDEALEASE
CORCENTRIC
CORNHUSKER IDELALEASE L.L.C.
COTTINGHAM & BUTLER, INC.
CO-VAN IDEALEASE
COVINGTON ASSOCIATES LLC
CPC LOGISTICS INC.
CROSSROADS TRUCK SOLUTIONS
CUMBERLAND IDEALEASE
CUMMINGS LEASING, INC.
CUMMINS FILTRATION
CUMMINS INC.
CURRIE LEASING
CUSTOM TRUCK LEASING, INC.
DACO NATIONALEASE
DAIMLER FINANCIAL SVCS

DAIMLER TRUCKS N. AMERICA
DALCO NATIONALEASE
DANA HOLDING CORPORATION
DAWSON TRUCK PARTS
DEALER SOLUTIONS LLC
DEBAUCHE IDEALEASE
DECAROLIS TRUCK RENTAL INC.
DEFIANCE TRUCK IDEALEASE
DELMAR, A PART OF CENGAGE LEARNING
DEL-VAL LEASING COMPANY
DENNIS NATIONALEASE
DETROIT DIESEL CORPORATION
DIAMOND IDEALEASE
DIAMOND TRUCK LEASING CORPORATION
DIVERSIFIED TRUCK LEASING
DIXON HUGHES PLLC
DODGE CITY IDEALEASE
DONAHUE IDEALEASE
DONALDSON COMPANY, INC.
DORAN LEASING COMPANY
DOUBLE COIN TIRES
DSU NATIONALEASE
DSU PETERBILT PACLEASE
EAST COAST IDEALEASE
EASTERN MICHIGAN PACLEASE
EATON CORPORATION - ROADRANGER
EDDIE'S LEASING
EDMONTON KENWORTH LEASING
EFFINGHAM IDEALEASE
ELLIOT WILSON PACLEASE
EMPIRE TRUCK RENTAL LLC
ENHANCED VEHICLE APPLICATIONS LLC
ENRICH SOFTWARE CORP.
ENTERPRISE COMMERCIAL TRUCKS
EZ FUEL & TANK SOLUTIONS
F. W. STRECKER LEASING SYSTEM
FIRSTLEASE, INC.
FIVE STAR IDEALEASE
FLEET LOGIC LLC
FLEET MASTER, INC.
FLEET ONE, LLC
FLEETMASTER LEASING CORPORATION
FLEETNET AMERICA, INC.
FLEMING NATIONALEASE
FOLTZ TRUCKING INC.
FONTAINE INTERNATIONAL
FORD MOTOR CO. - NORTH AMERICAN FLEET OPERATIONS
FOUR RIVERS PACLEASE
FOUR STAR LEASING, LLC
FOUR STAR TRANSPORTATION
FOX & JAMES NATIONALEASE
FOX IDEALEASE
FRAZEE IDEALEASE
FREEDOM TRUCK CENTERS
FREIGHTLINER CORPORATION
FREIGHTLINER OF TOLEDO

FREIGHTLINER RED DEER
FRENCH-ELLISON PACLEASE
FRONTIER IDEALEASE
FRONTIER PETERBILT PACLEASE
FURLOW'S IDEALEASE
G.L. SAYRE PETERBILT PACLEASE
GABRIELLI PACLEASE
GARAGE ROBERT IDEALEASE
GATR OF SAUK RAPIDS
GE CAPITAL FLEET SERVICES
GE CAPITAL SOLUTIONS
GENERAL MOTORS FLEET & COMMERCIAL OPERATIONS
GENERAL TRUCK LEASING, LLC
GIBBS IDEALEASE
GLOVER IDEALEASE
GOLDEN STATE PETERBILT PACLEASE
GOODMAN IDEALEASE
GOODYEAR TIRE & RUBBER COMPANY
GRANE NATIONALEASE
GREAT DANE TRAILERS
GREAT LAKES IDEALEASE
GREAT LAKES PACLEASE
GREAT PLAINS IDEALEASE
GREAT PLAINS TRUCK LEASING
GREAT WEST TRUCK LEASE & RENTALS, LTD.
H.K. TRUCK SERVICES, INC.
H.L. GAGE SALES, INC.
HANSON IDEALEASE
HARCO NATIONAL INSURANCE COMPANY
HARVEY IDEALEASE
HARVEY MACK SALES & SERVICES
HAWKEYE IDEALEASE
HDA PARTS NETWORK
HENDRICKSON
HERCULES MANUFACTURING COMPANY
HERITAGE TRUCK LEASING
HERMANN NATIONALEASE
HIGHWAY MOTORS IDEALEASE
HILL IDEALEASE
HINO TRUCKS
HOGAN MOTOR LEASING, INC.
HOLCOMB NATIONALEASE
HORNOI NATIONALEASE
HORTON, INC.
HUB TRUCK NATIONALEASE
HUDSON VALLEY IDEALEASE
HUNTER IDEALEASE
HUNTER PETERBILT PACLEASE
HUSKY IDEALEASE
HUSKY NATIONALEASE
IDEALEASE OF ACADIANA
IDEALEASE OF ATLANTA
IDEALEASE OF BALTIMORE
IDEALEASE OF BALTIMORE EAST
IDEALEASE OF CENTRAL MARYLAND
IDEALEASE OF CENTRAL NEW YORK

IDEALEASE OF CENTRAL WISCONSIN
IDEALEASE OF CERNI MOTORS
IDEALEASE OF CHICAGO
IDEALEASE OF CHICAGO-HUNTLEY
IDEALEASE OF DETROIT
IDEALEASE OF EL PASO
IDEALEASE OF FLINT
IDEALEASE OF FREDERICK
IDEALEASE OF GREENSBURG
IDEALEASE OF HAGERSTOWN
IDEALEASE OF HAWAII
IDEALEASE OF HOUSTON
IDEALEASE OF JACKSON
IDEALEASE OF JACKSONVILLE
IDEALEASE OF LAS CRUCES
IDEALEASE OF LIMA
IDEALEASE OF LOS ANGELES
IDEALEASE OF MADISON
IDEALEASE OF MAINE
IDEALEASE OF MIAMI
IDEALEASE OF MODESTO/TURLOCK
IDEALEASE OF NORTHEAST WISCONSIN
IDEALEASE OF ORLANDO
IDEALEASE OF PLATTSBURGH
IDEALEASE OF RENO/SPARKS
IDEALEASE OF RICHMOND
IDEALEASE OF SAN DIEGO
IDEALEASE OF SAVANNAH
IDEALEASE OF STOCKTON
IDEALEASE OF TEXARKANA
IDEALEASE OF TOLEDO
IDEALEASE OF TRI-CITIES TN-VA
IDEALEASE OF TUPELO
IDEALEASE OF WESTERN MICHIGAN
IDEALEASE PETERBOROUGH
IDEALEASE, INC.
IMPERIAL SUPPLIES LLC
INDIANA MACK LEASING LLC
INLAND KENWORTH
INLAND PACLEASE
INTERLIFT, INC.
INTERNATIONAL DECISION SYSTEMS, INC.
INTERNATIONAL TRUCK & ENGINE CORPORATION
INTERSTATE NATIONALEASE
INTERSTATE TRUCK LEASING
IRL IDEALEASE LTD
ITS COMPLIANCE, INC.
J & B LEASING INC.
J. T. & S. TRUCK RENTAL
J.J. KELLER & ASSOCIATES, INC.
JAIN TRUCK LEASE LTD
JASBRO NATIONALEASE
JEL IDEALEASE
JOHNSON REFRIGERATED TRUCK BODIES
JOST INTERNATIONAL
JX PACLEASE - MILWAUKEE

K. NEAL IDEALEASE
KALMAR INDUSTRIES CORP.
KARMAK, INC.
KENWORTH NORTHWEST PACLEASE
KENWORTH OF CENTRAL CALIFORNIA NATIONALEASE
KENWORTH OF CENTRAL CALIFORNIA PACLEASE
KENWORTH OF SAVANNAH PACLEASE
KENWORTH OF SOUTH FLORIDA
KENWORTH ONTARIO PACLEASE
KENWORTH QUEBEC PACLEASE
KEY EQUIPMENT FINANCE
KEYSTONE NATIONAL TRUCK
KIDRON
KINGMAN NATIONALEASE
KINNIE-ANNEX GROUP, INC.
KIRK NATIONALEASE
KOCH NATIONALEASE
KRISKA NATIONALEASE
KRIS-WAY TRUCK LEASING, INC.
LAKE CITY IDEALEASE
LANDMARK IDEALEASE
LANDMARK TRUCK LEASING NATIONALEASE
LARSEN NATIONALEASE
LAWRENCE NATIONALEASE
LAYDON COMPOSITES, LTD
LEASE LINE NATIONALEASE
LEROY HOLDING COMPANY, INC.
LES CAMIONS DE L'OUTAOUAIS
LES LOCATIONS RAINVILLE INC.
LESCO IDEALEASE
LESCO NATIONALEASE
LESHER NATIONALEASE
LEWIS LEASING IDEALEASE
LEYMAN LIFT GATES
LILLEY IDEALEASE
LOBSTER TRUCK LEASING & RENTAL
LOCATION BRISTAR IDEALEASE
LOCATION BROSSARD NATIONALEASE
LOCATION DAGENAIS INC
LOCATION DE CAMIONS EUREKA,
LOCATION DE CAMIONS EXCELLENCE PACLEASE
LOCATION DE CAMIONS PACLEASE
LOCATION DU PARC (1987) INC
LOCATION GARAGE LAGUE LTEE
LOCATION IDEALEASE AMIANTE
LOCATION IDEALEASE RIVIERE DU LOUP
LOCATION INTER-ESTRIE INC.
LOCATION INTERLOC INC.
LOCATION NRJ
LOCATION PINARD, INC.
LOCATION REDMOND IDEALEASE
LOCATION ROBERT NATIONALEASE
LOGISTIC LEASING LLC
LOGISTICS MANAGEMENT
LONESTAR TRUCK GROUP
LONGHORN IDEALEASE

M & K NATIONALEASE
MACK LEASING SYSTEM/VOLVO TRUCK LEASING
MACK TRUCKS, INC.
MANEY LEASING
MANHEIM
MARTIN'S PETERBILT PACLEASE
MATHENY LEASING, INC.
MAXIM RENTALS AND LEASING
MAXON LIFT CORPORATION
MAYS RENTAL AND LEASING
MBB INTERLIFT
MCCANDLESS IDEALEASE OF ARIZONA
MCCOY NATIONALEASE
MCKENNA TRUCK CENTER
MENDON NATIONALEASE
METRO LEASING CO., INC.
METRO NATIONALEASE
MGM BRAKES
MHC TRUCK LEASING, INC.
MIAMI VALLEY IDEALEASE
MICHELIN NORTH AMERICA, INC.
MILLER NATIONALEASE
MINUTEMAN TRUCKS INC.
MIRAMAR NATIONALEASE
MITSUBISHI FUSO TRUCK OF AMERICA, INC.
MORGAN CORPORATION
MOTOR TRUCK PACLEASE
MTC PACLEASE
NATIONAL SEATING/COMMERCIAL VEHICLE GROUP
NATIONALEASE OF KANSAS CITY
NATIONALEASE OF MAINE
NATIONALEASE OF SAN DIEGO
NAVISTAR FINANCIAL CORPORATION
NAVISTAR INTERNATIONAL CORPORATION
NEC NATIONALEASE
NELSON LEASING INC
NICKEL CITY IDEALEASE
NOERR IDEALEASE
NORCAL PACLEASE
NORDIC IDEALEASE
ODESSA TECHNOLOGIES
O'HALLORAN INTERNATIONAL INC
OLD DOMINION NATIONALEASE
PACCAR LEASING COMPANY
PACIFIC NATIONALEASE
PACLEASE JACKSONVILLE
PACLEASE NORTHCOAST
PACLEASE NORTHEAST PA
PACLEASE OF BALTIMORE
PACLEASE OF COLUMBIA
PACLEASE OF COUNCIL BLUFFS
PACLEASE OF JACKSON
PACLEASE OF SOUTHERN NEW ENGLAND
PACLEASE OF UPSTATE NEW YORK
PACLEASE OF WEST MICHIGAN
PACLEASE PETERBILT OF LOUISIANA

PALMER LEASING GROUP
PAPE KENWORTH PACLEASE
PARRISH LEASING INC.
PASSAIC-CLIFTON DRIV-UR-SELF SYSTEM, INC
PATRIOT IDEALEASE
PATSY'S LEASING CORPORATION
PEOPLNET INC.
PETERBILT ATLANTIC PACLEASE
PETERBILT MANITOBA PACLEASE
PETERBILT OF ONTARIO GROUP, LEASING DIVISION
PETERBILT PACIFIC LEASING, INC.
PETERBILT PACLEASE OF IDAHO
PETERBILT PACLEASE OF LAS VEGAS
PETERBILT PACLEASE OF RENO/SPARKS
PETERBILT-PACLEASE OF SPRINGFIELD
PHH FIRSTFLEET CORP.
PLM TRAILER LEASING
POWELL'S IDEALEASE
POWER CITY IDEALEASE
PRAIRIE/ARCHWAY IDEALEASE
PREMIER PACLEASE
PRICE IDEALEASE
PUBLIC SERVICE TRUCK RENTING, INC.
R & M ASSET SOLUTIONS
R. L. POLK & COMPANY
RALEIGH TRUCK LEASING
RAPID WAYS NATIONALEASE
REGIONAL IDEALEASE
RGV IDEALEASE
RIDGE RENTALS
RIVER STATES NATIONALEASE
RIVER STREET IDEALEASE
RIVER VALLEY TRUCK CENTERS,
RIVERVIEW IDEALEASE
ROBERTS IDEALEASE
ROCKET IDEALEASE
ROCKFORD KENWORTH PACLEASE
RSD NATIONALEASE
RUSH ENTERPRISES, INC.
RUSH IDEALEASE
RYDER FUEL SERVICES
SAF-HOLLAND
SALEM NATIONALEASE
SALEM TRUCK LEASING
SANTEX IDEALEASE
SCHILLI NATIONALEASE
SCHMIDT NATIONALEASE
SCHOW'S NATIONALEASE
SCHULTZ IDEALEASE, INC.
SCOTT IDEALEASE
SCULLY NATIONALEASE
SELKING IDEALEASE
SHEALY MACK LEASING, INC.
SIGNATURE SERVICE
SILVER EAGLE MANUFACTURING
SIVA NATIONALEASE

SKYBITZ, INC.
SOUTHEASTERN LSG. AND RENTAL CO., LLC
SOUTHERN TRUCK LEASING
SOUTHLAND IDEALEASE
SOUTHLAND IDEALEASE OF ALABAMA
SOUTHLAND PACLEASE
SOUTHWEST IDEALEASE
SOUTHWEST LEASING
STAHL PETERBILT PACLEASE
STAR TRUCK RENTALS
STEPCO NATIONALEASE
STERNBERG IDEALEASE
STOOPS NATIONALEASE
SUN STATE IDEALEASE
SUPERIOR DIESEL
SUPPOSE-U-DRIVE NATIONALEASE
SUPREME CORPORATION
TALLMAN IDEALEASE
TANDET NATIONALEASE
TCI LEASING/RENTALS
TERRA ENVIRONMENTAL TECHNOLOGIES INC.
THE TABS GROUP ACCOUNTANCY CORP.
THERMO KING CORPORATION
TIDEWATER IDEALEASE
TIMMINS IDEALEASE
TLC NATIONALEASE
TODCO
TRAILCON LEASING INC.
TRAILMOBILE CORP
TRANS FLEET SERVICES LLC
TRANS POWER NATIONALEASE
TRANSCO LEASING COMPANY,
TRANSERVICE LEASING
TRANSPORT COMMERCIAL LEASING
TRANSPORT LEASING
TRANSPORT NATIONALEASE
TRANSPORTATION ALLIANCE BANK
TREBAR LEASING
TRI COUNTY LEASING
TRI LEASING NATIONALEASE
TRIMBLE MOBILE SOLUTIONS,
TRIPLE-T LEASING
TRI-STATE IDEALEASE INC.
TRUCK AND TRAILER LEASING CORPORATION
TRUCK CENTER SOUTH IDEALEASE
TRUCK LEASING & RENTAL
TRUCK LEASING, INC.
TRUCK SALES LEASING INC.
TRUCK-LITE CO., INC.
TRUCKWAY NATIONALEASE
TWIN STATE IDEALEASE
U.S. TRUCK BODY
UHL IDEALEASE
ULTRON LIFT CORP.
UNITED TRUCK CENTERS, INC.
UNIVERSAL NATIONALEASE

UTILITY TRAILER MANUFACTURING CO.
UTILITY/PETERBILT PACLEASE
UTS NATIONALEASE
VALLEY PETERBILT PACLEASE
VALLEY TRUCK LEASING
VALLEY TRUCK LEASING NATIONALEASE
VALOR MANUFACTURING
VIRGINIA TRUCK LEASING NATIONALEASE
VISUAL MARKING SYSTEMS, INC.
VOLUNTEER TRUCK RENTAL, INC.
VOLVO TRUCKS NORTH AMERICA,
VT SPECIALIZED VEHICLES CORP
WALLACE INTERNATIONAL TRUCKS
WALLWORK NATIONALEASE
WALTCO TRUCK EQUIPMENT COMPANY
WARD IDEALEASE
WATERS IDEALEASE
WAYCON IDEALEASE OF CHATHAM
WAYCON IDEALEASE OF GODERICH
WAYCON IDEALEASE OF GUELPH
WEST BROTHERS TRANSPORTATION SERVICES
WEST RIVER INTERNATIONAL,
WEST TEXAS PETERBILT PACLEASE
WESTERN PACIFIC LEASING
WESTERN TORONTO IDEALEASE
WESTERN TRUCK LEASING
WESTRAN IDEALEASE
WHITEFORD KENWORTH PACLEASE
WHITE'S IDEALEASE
WICHITA KENWORTH PACLEASE
WIELAND IDEALEASE
WIERS IDEALEASE
WILLIAMS NATIONALEASE
WITT INTERNATIONAL TRUCKS
WOODBINE IDEALEASE
WORKHORSE CUSTOM CHASSIS,
WORLDWIDE EQUIPMENT LEASING, INC.
XATA CORPORATION
YOKOHAMA TIRE CORPORATION
YORK NATIONALEASE

2009 U.S. Dist. LEXIS 35177, *

Canal Insurance Company, Plaintiff, v. Kwik Kargo, Inc. Trucking, Clear Lake Enterprises, LLC, Matthew Anderson, Duane Wolff, and Wolff Agency, Inc., Defendants, and Kwik Kargo, Inc. Trucking, Third-Party Plaintiff, v. Duane Wolff and Wolff Agency, Inc., Third-Party Defendants.

Civil No. 08-439 (JNE/RLE)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2009 U.S. Dist. LEXIS 35177

April 21, 2009, Decided
April 21, 2009, Filed

CORE TERMS: tractors, insured, lawsuit, summary judgment, motor vehicles, vicarious liability, omissions, carrier, attorney fees, lease, reimbursement, vicariously liable, indemnification, endorsement, obligated, partial, genuine, late notice, deposition, reimburse, settling, answered, Graves Amendment, breach of fiduciary duty, issue of material fact, damages resulting, named insured, interrogatory, settlement, nonmovant

COUNSEL: [*1] Daniel E. Hintz, Esq., Johnson & Lindberg, P.A., appeared for Plaintiff Canal Insurance Company.

Todd A. Kelm, Esq., Kelm & Reuter, P.A., appeared for Defendants Clear Lake Enterprises, LLC, and Kwik Kargo, Inc. Trucking.

Aaron M. Simon, Esq., Tomsche, Sonnesyn & Tomsche, P.A., appeared for Defendants Duane Wolff and Wolff Agency, Inc.

Defendant Matthew Anderson did not appear.

JUDGES: JOAN N. ERICKSEN, United States District Judge.

OPINION BY: JOAN N. ERICKSEN

OPINION

ORDER

Canal Insurance Company (Canal) brings this action against Kwik Kargo, Inc. Trucking (Kwik Kargo), Clear Lake Enterprises, LLC (Clear Lake), Wolff Agency, Inc., Duane Wolff, and Matthew Anderson. Canal seeks recovery for payments it made to settle a lawsuit arising out of a motor vehicle accident in Mississippi. The case is before the Court on Canal's motion for partial summary judgment and the motion of Wolff and the Wolff Agency (collectively, Wolff Defendants) for summary judgment. For the reasons set forth below, the Court grants the Wolff Defendants' motion and grants Canal's motion in part and denies it in part.

I. BACKGROUND

On August 19, 2004, a Peterbilt semi-tractor (Tractor) driven by Anderson in Mississippi rear-ended a Pontiac Sunfire [*2] driven by Sharon Jordan. Anderson was driving the Tractor in the course and scope of his employment with Kwik Kargo, a motor carrier engaged in the business of hauling freight. Kwik Kargo leased the Tractor from Clear Lake, an equipment leasing company, pursuant to a written lease agreement executed in 1999. Kwik Kargo and Clear Lake are solely owned by Kenneth Kotzer. Kathleen Kotzer, who is married to Kenneth Kotzer, works at Kwik Kargo as a secretary.

At the time of the accident, Canal provided liability insurance for approximately thirty of Kwik Kargo's semi-tractors under policy number 444696 (Policy). The Tractor, however, was not listed on the Policy. The Policy included a "Form MCS-90 Endorsement for Motor Carrier Policies of Insurance for Public Liability Under [Sections 29](#) and [30](#) of the

Motor Carrier Act of 1980" (MCS-90), which required Canal to "pay . . . any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically [*3] described in the policy." Kwik Kargo obtained the Policy through the Wolff Agency, which is owned by Wolff.

Jordan sued Kwik Kargo and Anderson in Hinds County Circuit Court, Mississippi, on November 7, 2005 (Jordan lawsuit).¹ In January 2006, the Wolff Agency received a letter from Jordan's attorney enclosing a copy of Jordan's complaint. The Wolff Agency faxed the letter and complaint to Kwik Kargo on January 19, 2006, along with a request for information about the vehicle involved in the accident, but did not forward the letter or complaint to Canal.

----- Footnotes -----

¹ The [*4] exhibits submitted by Kwik Kargo and Clear Lake include a copy of a complaint filed by Jordan against Kwik Kargo and Anderson in Rankin County Circuit Court, Mississippi, on September 1, 2005. The Rankin County complaint is virtually identical to the Hinds County complaint, except that it alleges the accident occurred in Rankin County rather than Hinds County. A Kwik Kargo fax transmittal form indicates that Kwik Kargo faxed a copy of the Rankin County complaint to the Wolff Agency on September 9, 2005, and again on August 30, 2007. No evidence suggests that the Wolff Agency took any action with respect to the Rankin County complaint.

----- End Footnotes-----

On August 16, 2007, a default judgment in the amount of \$ 209,988.24 was entered against Kwik Kargo and Anderson in the Jordan lawsuit. Jordan's attorney sent a letter demanding payment of the judgment to Canal on August 20, 2007. Canal settled the Jordan lawsuit and satisfied the judgment by paying Jordan \$ 75,000, and alleges that it incurred \$ 7,928.50 in attorney fees and investigatory costs in doing so.

Canal filed suit against Kwik Kargo, Clear Lake, and Anderson in this Court on February 20, 2008, alleging breach of contract against Kwik Kargo and [*5] seeking indemnification from Kwik Kargo, Clear Lake, and Anderson under the MCS-90, the Policy, and a Filed Policy Indemnity Agreement. Anderson, who is pro se, answered in a letter. Kwik Kargo and Clear Lake answered, and Kwik Kargo filed a Third-Party Complaint against the Wolff Defendants alleging breach of contract, breach of fiduciary duty, and negligence. The Wolff Defendants answered the Third-Party Complaint. Canal then filed an Amended Complaint which reiterated Canal's original claims, asserted a claim of negligence against Kwik Kargo, and asserted claims of breach of contract and breach of fiduciary duty against the Wolff Defendants. The Wolff Defendants answered the Amended Complaint and made a Cross-Claim seeking indemnification from Kwik Kargo and Clear Lake. Kwik Kargo and Clear Lake answered the Amended Complaint and the Cross-Claim and made a Cross-Claim seeking indemnification from the Wolff Defendants.

II. DISCUSSION

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). [*6] The movant "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the movant satisfies its burden, the nonmovant must respond by submitting evidentiary materials that "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In determining whether summary judgment is appropriate, a court must look at the record and any inferences to be drawn from it in the light most favorable to the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

A. Canal's Motion

Canal seeks summary judgment that Kwik Kargo and Clear Lake are liable for all reasonable amounts paid by Canal in settling the Jordan lawsuit, all reasonable costs and attorney fees incurred by Canal in settling the Jordan lawsuit, and all reasonable costs and attorney fees incurred by Canal in pursuing reimbursement from Kwik Kargo and Clear Lake during this lawsuit. Although Canal does [*7] not expressly seek partial summary judgment on a specific claim, it appears that Canal's arguments are directed to its claim for indemnification under the MCS-90. The Court first considers Kwik Kargo's liability under the MCS-90.

The MCS-90, which is a federal form promulgated and set out verbatim in 49 C.F.R. § 387.15 (2008), amends the Policy "to assure compliance by the insured . . . as a motor carrier of property, with Sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Highway Administration and the Interstate Commerce

Commission (ICC)."² Century Indem. Co. v. Carlson, 133 F.3d 591, 594 (8th Cir. 1998). "The MCS-90 provides a broad guaranty that the insurer will pay certain judgments incurred by the insured regardless of whether the motor vehicle involved is specifically described in the policy or whether the loss was otherwise excluded by the terms of the policy." *Id.* The MCS-90 "was directed at trucking companies' practice of using leased or borrowed vehicles, which often resulted in evasion of safety requirements and confusion about financial responsibility for damage caused by the operation of the vehicles." Wells v. Gulf Ins. Co., 484 F.3d 313, 316 (5th Cir. 2007). [*8] The MCS-90 originated from the desire of the ICC "that the public be adequately protected when a licensed carrier uses a leased vehicle to transport goods pursuant to an ICC certificate."³ *Id.* at 316-17.

----- Footnotes -----

² The substance of the MCS-90 did not change between 2004 and 2008.

³ Congress abolished the ICC in 1995. See ICC Termination Act, 109 Stat. 803 (1995). "The ICC's authority to regulate motor carriers was transferred to the Department of Transportation, but the old ICC regulations remain in effect until the new regulations are promulgated." John Deere Ins. Co. v. Nueva, 229 F.3d 853, 855 n.3 (9th Cir. 2000) (citation omitted).

----- End Footnotes-----

The dispute between Kwik Kargo and Canal centers on the statement in the MCS-90 that "[t]he insured agrees to reimburse the company . . . for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement." Kwik Kargo acknowledged in its memorandum in opposition to Canal's motion that the Tractor was not listed on the Policy at the time of the Jordan accident. Kwik Kargo contends, however, that there are genuine issues of material fact as to whether Kwik Kargo asked to have [*9] the Tractor listed on the Policy because Kenneth Kotzer testified during his deposition that the Tractor "should have been" listed on the Policy. Kwik Kargo contends that if the Tractor had been listed on the Policy, Canal would have been obligated to satisfy Jordan's judgment independent of the MCS-90, and therefore has no right of reimbursement under the MCS-90. Canal responds that the issue with respect to reimbursement under the MCS-90 is whether the Tractor was listed on the Policy, not whether it should have been listed. Canal also responds that there is no evidence that Kwik Kargo ever asked to have the Tractor listed on the Policy.

The Court first considers whether there is evidence that Kwik Kargo asked to have the Tractor listed on the Policy. Kwik Kargo initially asserted in its responses to Canal's Interrogatories that it asked the Wolff Agency to list the Tractor on the Policy during an April 2004 meeting between the Kotzers, Wolff, and Wolff Agency customer service representative Bettie Marnich.⁴ Kenneth Kotzer testified during his deposition, however, that he did not know whether the Tractor was discussed at the April 2004 meeting. He also testified that he did not remember [*10] any specific discussions or communications about the Tractor, that he had no recollection of contacting the Wolff Agency about the Tractor before the accident, and that he had no documentation showing that the Tractor was ever listed on the Policy. Kathleen Kotzer testified that she did not recall the April 2004 meeting or ever asking the Wolff Agency to include the Tractor on the Policy. Kwik Kargo did not identify any other evidence indicating that Kwik Kargo ever asked the Wolff Agency to list the Tractor on the Policy. Kwik Kargo cannot create an issue of fact regarding whether the Kotzers asked the Wolff Agency to list the Tractor on the Policy by relying on its responses to Canal's Interrogatories. See Stearns v. McGuire, 154 Fed. Appx. 70, 76 (10th Cir. 2005) (holding that defendant could not create an issue of fact by relying on an earlier interrogatory response while ignoring later contradictory deposition testimony); Darnell v. Target Stores, 16 F.3d 174, 176-77 (7th Cir. 1994) ("[Plaintiff] cannot 'create issues of fact' by relying on the affidavits of [witnesses], which [the witnesses] contradicted in their own [subsequent] depositions."). Moreover, Kenneth Kotzer's allegation [*11] that the Tractor "should have been" listed is insufficient to create a genuine issue of material fact that Kwik Kargo ever asked the Wolff Agency to list the Tractor on the Policy. See Putman v. Unity Health Sys., 348 F.3d 732, 733-34 (8th Cir. 2003) ("To survive a motion for summary judgment, the nonmoving party must 'substantiate his allegations with sufficient probative evidence that would permit a finding in his favor based on more than mere speculation, conjecture, or fantasy.'").

----- Footnotes -----

⁴ Kwik Kargo asserted in its responses to Canal's Interrogatories that the Kotzers provided a written list of vehicles to be listed on the Policy to the Wolff Agency at the April 2004 meeting, but this list is not in the record.

----- End Footnotes-----

At the hearing on Canal's motion, Kwik Kargo asserted that the Court should not grant summary judgment because Kwik Kargo intends to call at trial Marnich, the Wolff Agency customer service representative who received Kwik Kargo's requests relating to insurance, to establish that Kwik Kargo asked the Wolff Agency to list the Tractor on the

Policy. Kwik Kargo may not avoid summary judgment by asserting that it can produce evidence that will support its arguments at trial. See *Rodriguez-Pinto v. Tirado-Delgado*, 982 F.2d 34, 39 (1st Cir. 1993) [*12] ("[T]he nonmovant cannot avoid summary judgment merely by promising to produce admissible evidence at trial."); 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2727 (3d ed. 1998) ("The nonmovant is not entitled to a trial on the basis of a hope that he can produce some evidence at that time."). The Court therefore grants partial summary judgment of liability on Canal's claim for indemnification against Kwik Kargo under the MCS-90.

The Court turns to Clear Lake's liability under the MCS-90. Canal contends that Clear Lake is liable because the MCS-90 provides that "[t]he insured agrees to reimburse" and Clear Lake is an insured under the Policy. The Policy defines an insured as follows:

III. PERSONS INSURED: Each of the following is an insured under this insurance to the extent set forth below:

(a) the named insured;

...

(d) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a), (b) or (c) above.

Specifically, Canal contends that Clear Lake is an insured under paragraph (d) of the Policy because paragraphs 7 and 8 of the lease for the Tractor between Clear Lake and Kwik [*13] Kargo provide that "[Clear Lake] agrees to retain exclusive possession, control and use of said vehicles for the duration of this contract, within the meaning of, and only for the purpose of compliance with the ruling of the Interstate Commerce Commission" and that "[Clear Lake] agrees to assume full responsibility to the public, and all regulatory bodies having jurisdiction." Canal contends that this language renders Clear Lake "contractually liable" for the acts and omissions of Kwik Kargo, making Clear Lake an insured under paragraph (d) of the Policy.

Courts have interpreted the phrase "any other person or organization but only with respect to his or its liability because of acts or omissions of an insured" and similar language as requiring vicarious liability for the acts of an insured by the entity sought to be found an insured. See, e.g., *Koch Asphalt Co. v. The Farmers Ins. Group*, 867 F.2d 1164, 1166-68 (8th Cir. 1989) (holding Koch Asphalt was not an insured under a clause defining insured as "another person or organization but only with respect to his or its liability because of [acts] or omissions of an insured" because it was being held liable for its own conduct, not the [*14] conduct of an insured); *Vulcan Materials Co. v. Cas. Ins. Co.*, 723 F. Supp. 1263, 1264-65 (N.D. Ill. 1989) (holding that the phrase "any other person or organization but only with respect to his or its liability because of acts or omissions of an insured" is "plainly a vicarious liability provision and nothing more: It insures all those who may be vicariously liable for acts or omissions of the named insured"); *Canal Ins. Co. v. Earnshaw*, 629 F. Supp. 114, 120 (D. Kan. 1985) (holding that a defendant was not an insured as "any other person or organization but only with respect to his or its liability because of acts or omissions of an insured" because he was being sued for his own negligence, not for the negligence of another defendant, and no claims of negligence were asserted based on the relationship between the two defendants); *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 294 (Fla. 2007) ("We hold that the phrase 'any other person with respect to liability because of acts or omissions' of the named insured covers only an additional insured's vicarious liability for the negligent acts or omissions of the named insured."). The Court finds these cases persuasive and concludes that for [*15] Clear Lake to qualify as an insured under paragraph (d) of the Policy, Clear Lake must be vicariously liable for the acts of an insured.

Here, paragraphs 7 and 8 of the lease for the Tractor, at most, create a contractual obligation owed to Kwik Kargo by Clear Lake.⁵ These paragraphs do not establish a legal relationship between Clear Lake and Kwik Kargo that renders Clear Lake vicariously liable for Kwik Kargo's conduct. See *Sutherland v. Barton*, 570 N.W.2d 1, 5 (Minn. 1997) ("[V]icarious liability is the 'imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons.'" (quoting *Black's Law Dictionary* 1566 (6th ed. 1990))).

----- Footnotes -----

⁵ Clear Lake contends that paragraphs 7 and 8 are void as against the public policy behind the MCS-90 and 49 C.F.R. § 387.15. The Court does not address the enforceability of paragraphs 7 and 8 because, for the reasons given above, even if the Court assumes these paragraphs are enforceable, Canal has not shown that Clear Lake is an insured under the Policy.

----- End Footnotes-----

With respect to Anderson, the lease for the Tractor provides that Kwik Kargo agrees to furnish a driver for the Tractor and that the driver [*16] shall be the employee of Kwik Kargo. Canal has not identified any evidence indicating that, contrary to this lease provision, Anderson was employed by or the agent of Clear Lake, or otherwise supporting the imposition of vicarious liability on Clear Lake. Instead, Canal contends that Clear Lake is vicariously liable for Anderson's actions under [Minn. Stat. § 170.54](#) (2004), which provides that "[w]hensoever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof." ⁶

----- Footnotes -----

⁶ [Minn. Stat. § 170.54](#) was renumbered as [Minn. Stat. § 169.09, subd. 5a](#), in 2005. 2005 Minn. Laws 1877.

----- End Footnotes-----

As an initial matter, the Court questions the applicability of this statute to reimbursement pursuant to the MCS-90 given the extensive federal regulation of interstate motor carriers, which includes the promulgation of the MCS-90. In addition, the Minnesota Court of Appeals has held that [49 U.S.C. § 30106 \(Supp. V 2005\)](#), generally known as the **Graves Amendment**, preempts the Minnesota statute with respect to owners [*17] of rental vehicles. See [Meyer v. Nwokedi](#), 759 N.W.2d 426, 428-31 (Minn. Ct. App.), rev. granted (Minn. Mar. 31, 2009). The **Graves Amendment** provides:

An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if--

(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and

(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner). [49 U.S.C. § 30106\(a\)](#). Any attempt to impose vicarious liability on Clear Lake, which leases tractors and trailers to Kwik Kargo, through [Minn. Stat. § 170.54](#) is precluded by the **Graves Amendment** in the absence of allegations of negligence or criminal wrongdoing on the part of Clear Lake. ⁷ Moreover, [Minn. Stat. § 170.54](#), which by its terms states "[w]hensoever any motor vehicle shall be operated within this [*18] state . . . the operator thereof shall in case of accident," is inapplicable to accidents that occur outside of Minnesota. [Boatwright v. Budak](#), 625 N.W.2d 483, 488 (Minn. Ct. App. 2001) ("[W]e hold that [Minn. Stat. § 170.54](#) applies only to accidents that occur within Minnesota."). Canal cannot impose vicarious liability on Clear Lake pursuant to [Minn. Stat. § 170.54](#) because the Jordan accident occurred in Mississippi. See *id.*

----- Footnotes -----

⁷ The **Graves Amendment** applies to any action "commenced on or after [August 10, 2005,] without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before [August 10, 2005]." [49 U.S.C. § 30106\(c\)](#). Both the Jordan lawsuit and this lawsuit were filed after August 10, 2005.

----- End Footnotes-----

Mississippi does not impose liability on the owner of a vehicle for the acts of a permissive driver in the absence of an agent or employee relationship. See [West Bros. v. Herrington](#), 244 Miss. 1, 139 So. 2d 842, 843-44 (Miss. 1962); see also Kenneth J. Rojc and Kathleen E. Stendahl, *Vicarious Liability of Motor Vehicle Lessors*, 59 *Bus. Law.* 1161, 1162 & nn.10-11 (2004) (identifying Mississippi as a jurisdiction that does not have vicarious liability for motor [*19] vehicle lessors). Because no evidence suggests that Clear Lake is vicariously liable for the acts of Anderson or Kwik Kargo and Canal cannot impose vicarious liability on Clear Lake under [Minn. Stat. § 170.54](#), the Court concludes that Clear Lake is not an "insured" under paragraph (d) of the Policy. The Court denies Canal's motion for partial summary judgment that Clear Lake is liable to Canal under the MCS-90.

Clear Lake sought dismissal of all claims against it in its memorandum in opposition to Canal's motion. Canal responds that Clear Lake's request is improper because Clear Lake served and filed its request 22 days before the scheduled hearing rather than the 45 days required by Local Rule 7.1(b)(1). Clear Lake's request for dismissal is untimely and fails to comply with the requirements for supporting documents set forth in Local Rule 7.1(b)(1). However, because the definition of "insured" found in paragraph (d) of the Policy requires vicarious liability and Canal

has offered no evidence indicating that Clear Lake is vicariously liable for Anderson or Kwik Kargo, it appears that summary judgment that Clear Lake is not liable to Canal under the MCS-90, the Policy, or the Filed [*20] Policy Indemnity Agreement is warranted. The Court orders Canal to show cause by May 22, 2009, why summary judgment of non-liability to Clear Lake should not be granted. If Canal is unable to do so or makes no argument, the Court will dismiss Canal's claims against Clear Lake.

The Court next considers the scope of Canal's reimbursement. The MCS-90 policy provides that the insured "agrees to reimburse the company . . . for any payment that the company would not have been obligated to make . . . except for the agreement contained in this endorsement." Kwik Kargo must reimburse Canal for a reasonable amount paid by Canal in settling the Jordan lawsuit because Canal would not have been obligated to settle the Jordan lawsuit except for the MCS-90. See *Adams v. Royal Indem. Co.*, 99 F.3d 964, 972 (10th Cir. 1996) ("In situations where the policy absent the endorsement did not insure the vehicle which caused the injuries, the endorsement explicitly requires that the insured reimburse the insurer because the insurer's payment to the injured motorist is a 'payment the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.'" [*21] (quoting 49 C.F.R. § 387.15)). Canal also seeks reasonable costs and attorney fees incurred in the settlement of the Jordan lawsuit and in pursuing reimbursement from Kwik Kargo during this lawsuit. The Court concludes that these costs and fees are payments that Canal would not have been obligated to make except for the MCS-90, and grants partial summary judgment that Kwik Kargo is liable for these payments.

B. Wolff Defendants' Motion

The Wolff Defendants seek dismissal of all of the claims of Canal, Kwik Kargo, and Clear Lake against the Wolff Defendants on two grounds. First, they contend that no evidence shows that Kwik Kargo asked the Wolff Defendants to list the Tractor on the Policy. Second, they argue that Canal and Kwik Kargo are unable to show any damages resulting from Canal's late notice of the Jordan lawsuit.

With respect to whether Kwik Kargo asked the Wolff Defendants to list the Tractor on the Policy, Kwik Kargo contends that summary judgment is inappropriate because there is contradictory evidence as to Kwik Kargo's customary manner of asking the Wolff Defendants to add vehicles to the Policy. Specifically, the Kotzers testified that it was Kwik Kargo's custom to ask [*22] the Wolff Agency to add vehicles to the Policy over the telephone, but Wolff testified that changes to coverage were always made in writing, typically via facsimile. Regardless of whether Kwik Kargo customarily requested changes over the telephone or in writing, for the reasons given with respect to Canal's motion, there is no evidence that Kwik Kargo asked to have the Tractor listed on the Policy. In the absence of any such evidence, Kwik Kargo has not raised a genuine issue of material fact as to whether Kwik Kargo asked the Wolff Agency to list the Tractor on the Policy. The Court therefore grants the Wolff Defendants summary judgment on Canal's claims for negligence, breach of contract, and breach of fiduciary duty for the failure to list the Tractor on the Policy and on the Cross-Claim of Kwik Kargo and Clear Lake for indemnification.

With respect to damages, the Wolff Defendants argue that Canal and Kwik Kargo cannot show damages resulting from Canal's late notice of the Jordan lawsuit. "Under Minnesota law, damages may not be speculative, remote, or conjectural. However, once the fact of damages is proved with certainty, the extent of the damages need only be shown to have a [*23] reasonable basis in the evidence." *Storage Tech. Corp. v. Cisco Sys., Inc.*, 395 F.3d 921, 928 (8th Cir. 2005) (citation omitted). Rhea Culbertson Fleming, Esq., Canal's corporate representative, testified during her deposition that she could not quantify any prejudice that Canal suffered as a result of the entry of default judgment and subsequent settlement for \$ 75,000 in the Jordan lawsuit. Fleming testified that she could not "speculate as to what may have been available" or state what the settlement value of the Jordan lawsuit would have been had Canal received timely notice of it. Finally, she testified that determining the prejudice to Canal in terms of attorney fees "would have to be based on a lot of speculation, and I simply don't know."

Canal did not respond to the Wolff Defendants' motion. Kwik Kargo contends that its damages would be the sum of the \$ 75,000 paid by Canal to settle the Jordan lawsuit and the attorney fees and costs sought by Canal less the premium Kwik Kargo would have paid to list the Tractor on the Policy. This argument fails, however, because there is no evidence that Kwik Kargo asked the Wolff Defendants to list the Tractor on the Policy. With respect [*24] to Canal's damages, Kwik Kargo presented no evidence of what a reasonable settlement of the Jordan lawsuit would have been had Canal received timely notice of the suit. Because there is nothing in the record that would permit a factfinder to calculate the damages resulting from Canal's late notice of the Jordan lawsuit, Canal and Kwik Kargo cannot show damages resulting from the late notice. Cf. *id.* at 928-29 (affirming summary judgment when nothing in the record permitted a jury to calculate damages). The Court grants summary judgment on Kwik Kargo's claims for breach of contract, breach of fiduciary duty, and negligence and on Canal's claims against the Wolff Defendants to the extent they are based on Canal's late notice of the Jordan lawsuit.

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Canal's Motion for Partial Summary Judgment [Docket No. 53] is GRANTED IN PART and DENIED IN PART.

2. Kwik Kargo is liable to Canal under the MCS-90 for all reasonable amounts paid by Canal in settling the Jordan lawsuit, all reasonable costs and attorney fees incurred by Canal in settling the Jordan lawsuit, and all reasonable [*25] costs and attorney fees incurred by Canal in pursuing reimbursement from Kwik Kargo during this lawsuit.

3. Canal is ORDERED TO SHOW CAUSE why summary judgment should not be granted with respect to Clear Lake's non-liability on or before May 22, 2009. If Canal makes no argument or is unable to show cause, the Court will dismiss Canal's claims against Clear Lake.

4. The Wolff Defendants' Motion for Summary Judgment [Docket No. 58] is GRANTED.

5. Canal's Amended Complaint [Docket No. 33] is DISMISSED WITH PREJUDICE insofar as it asserts claims against the Wolff Defendants.

6. Kwik Kargo's Third-Party Complaint [Docket No. 12] and Kwik Kargo and Clear Lake's Cross-Claim [Docket No. 37] against the Wolff Defendants are DISMISSED WITH PREJUDICE.

Dated: April 21, 2009

/s/ Joan N. Ericksen

JOAN N. ERICKSEN

United States District Judge

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