

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT - LAW DIVISION

GARY SMITH, )  
Plaintiff, )  
vs )  
HORIZON CARTAGE, INC.et al )  
Defendants. )

**PLAINTIFF'S MEDIATION SUMMARY**

**INTRODUCTION**

This is a survival and wrongful death action brought on behalf of the wife and children of 46 year old Gary Smith. He was run over and crushed by a 34 ton tractor-trailer on 12-5-01. He is survived by his wife of 24 years (Kathy) and his two daughters, 21 year old Stacey and 18 year old Kelly. Compensation is sought for the terrifying moments that preceded death and for the substantial economic and societal loss death has imposed.

**SETTING**

The accident happened on 12-5-01 at a strip-mall construction site near the intersection of Route 59 and 95<sup>th</sup> Street in Naperville, Illinois. It was 11:46 A.M. on a day when the weather was clear, dry and mild. Smith was working at the site as a foreman for Hardin Paving Company who had the contract for paving the mall parking lot. Gary was run over by a backing truck operated by Jose Arteaga and owned by Horizon Cartage, Inc. Horizon Cartage had been hired by Hardin Paving to deliver binder and asphalt to the site. Arteaga was an employee of Horizon and was acting within the course and scope of his employment when the tragedy occurred. The truck was a tractor-dump trailer combination loaded with binder (gravel). It had a combined length of forty feet and a gross

weight of sixty-eight thousand nine hundred pounds. (Ex. 1) It was equipped with door mounted side-view mirrors on both the driver and passenger doors and with round convex mirrors immediately below each side-view mirror. (Ex. 1) The truck also had a backup alarm.

The accident occurred in a section of the parking lot east of a building under construction and west of a frontage road that runs north and south. (Ex. 2) The stone base for the lot had been laid and the binder and asphalt surfaces were being applied when Smith was killed.

### **OCCURRENCE**

Arteaga testified at deposition that Smith came up to the driver's window while his truck was parked in the lot on the east side of the building facing south. (Ex. 2) He said Smith told him to pull out east to the frontage road because they needed to get a smaller truck (six wheeler) into the lot to pave an area between two parking islands. (Ex. 2) He said Smith told him to wait out on the frontage road and that he should back in when called by Smith. Arteaga admitted that Smith was his spotter.

Arteaga pulled his truck out the exit with the tractor facing east. (Ex. 3) The front tires of the tractor were touching the easterly curb of the frontage road. The rear wheels of the trailer were just inside the lot and the north side of the trailer was three-four feet from the south edge of the parking island. His truck was north of the truck occupied by witness Kuhlman which was parked twenty to twenty-five feet south along the east curb of the frontage road. (Ex. 3 & 5)

While parked on the frontage road, Arteaga observed through his left side mirror the six wheeler being backed into the area between the parking islands by use of a spotter

(Raul Villalobos) and he also saw laborers ready to spread the asphalt. (Ex. 3 & 4)

After the six wheeler was positioned between the parking islands, Arteaga saw Smith in his left-side mirror facing east (toward Arteaga) motioning for him to back up. That was the last time he saw Smith before the accident. Smith was standing at the time in the parking lot two to three feet from the side of the trailer and ten feet to the rear of the trailer (but not behind it). Circle A on exhibit 8 is where Arteaga said Smith was standing when he motioned Arteaga to back up.

Witness Kuhlman saw Smith motion Arteaga back and then saw Smith turn north and instruct the six-wheeler to back in further between the parking islands. Kuhlman said that Smith changed the direction he was facing (from east to north) but that he remained in the same general location from the time he motioned Arteaga back to the time of impact. The "X" on exhibit 8 is where Kuhlman said Smith was standing when he motioned Arteaga back.

Kuhlman made his observations while seated in the driver's seat of his northbound six wheeler parked along the east curb of the frontage road south of the parking lot entrance . (Ex. 3 & 5) He saw Smith before the Arteaga truck backed up into his line of sight and thereafter saw only his feet in the space between the bottom of the trailer and the ground. He then lost sight of the feet just before impact when the rear duals of the tractor obstructed his view.

After Smith motioned for him to back up, Arteaga said he put the truck in reverse and looked in both mirrors. He backed up in a straight line for fifteen to twenty feet and then started to angle the trailer to the right. He looked in the left and right mirrors 2-3 times each while backing up the fifteen-twenty feet in a straight line. He said he saw nothing in either mirror while backing up this fifteen to twenty feet, including no people, no vehicles

and no equipment. He said he was going about three miles per hour and that backing up the fifteen to twenty feet took one or two minutes.

He began to turn the trailer to the right (south) once inside the parking lot. He cannot describe the angle of the turn but it was not "much". The accident happened within "seconds" of the time he started to turn the tractor to the right. He doesn't know how far the truck traveled to the right before the accident but would estimate a "couple of feet". In addition to looking in both mirrors 2-3 times while backing straight, he said he also looked in both mirrors 2-3 times each while backing up to the right. He saw nothing on any of these 4-6 occasions.

The first notice Arteaga had of an accident was hearing screams. He said he stopped within "seconds" but saw nothing in his mirrors. Witness Kuhlman also heard screams and he ran across the frontage road from his truck to the Arteaga truck. He observed that Smith had been run over by the left front and rear duals of the tractor and that the truck had stopped with the left front dual on his chest. The body was found with the head pointing south (under the truck) and the feet pointing north. The truck was put back in gear and driven forward enough (1-1½ feet) to get the front duals off Smith. He was then pulled from between the front and rear duals. (Ex.6)

The position of the truck after it was moved forward to free the body is shown in photograph exhibit 4 and diagram exhibit 7. Circle B on exhibit 8 is where Arteaga believes the rear wheels of the trailer were at the time of the accident. Circle C on exhibit 8 is where Arteaga believes the front and rear drive wheels on the left side were when the truck was brought to a stop after impact.

## LIABILITY

It is universally true that a truck driver must maintain eye contact with his spotter when backing up and that he must stop backing up if he loses sight of the spotter. This is particularly important at a construction site where the environment is busy and dynamic. The rule exists for the safety of the spotter and other workers on the ground. Continuing to back up without visual contact can put the spotter at risk if he stumbles or becomes distracted, disabled or otherwise incapable of protecting himself. The driver has the ultimate burden because he controls the movement of a potentially lethal instrumentality.

In this case, Arteaga admitted that Smith was serving as his spotter at the time of the accident. He testified that he has worked with spotters in the past when backing up a tractor trailer. He knew that the driver should always keep the spotter in his view for safety reasons. He said that if the spotter is out of view, he will stop the truck, get out and tell the spotter to stay in view.

Arteaga testified that he saw Smith in the left mirror motion him to back up. He said Smith was visible for only "seconds" and that he did not see Smith until after the impact. He admitted that he did not know where Smith went, what he was doing or what happened to him - - - and he made no effort to find out. Most importantly, he admitted that he continued to back up not seeing Smith and not knowing if Smith was safe.

Arteaga is clearly liable on the basis of his admissions alone. If his deposition testimony is true, that he looked 4-6 times in his left mirror and never saw Smith, he violated a cardinal rule of construction site safety: he continued backing up after losing sight of his spotter.

Arteaga is liable even if his testimony about looking in the left mirror is untrue. The rule against backing when the spotter is not seen makes Arteaga liable whether he looked

and did not see or he did not look. Either way, the spotter was not located and the truck should have stopped. The catastrophic result of this breach - the death of a human being - is precisely what the rule was designed to prevent.

Although Arteaga is liable whether or not he looked, his testimony that he looked to the left multiple times and did not see Smith is simply not credible. Since he saw Smith motion him back and Smith did not move after doing so (according to Kuhlman), Smith would have been seen if Arteaga looked 4-6 times in the left mirror while backing straight 15-20 feet as he claims he did. Kuhlman acknowledged that Arteaga should have seen Smith as he backed straight and before the trailer angled to the right.

Arteaga's testimony that he looked 4-6 times to his left is also not credible because it conflicts with what he told the police immediately after the accident. The police report states that Arteaga said "while he was backing he was steering the tractor-trailer to the right while looking through the right side mirror and rear window. Arteaga advised that he did at one point look in his left side mirror but did not see Smith or anyone else."

The fact that Smith was not seen proves that Arteaga did not look multiple times in the left mirror and that he paid more attention to the right side as he admitted to the police. Concentrating on the right side when he knew his spotter was on the left is plainly negligent. That is why he embellished at deposition the attention he gave to the left side.

Finally, Arteaga's deposition testimony is inconsistent with the police report in another respect. Arteaga testified that he did not see Smith again after being motioned back yet the police report says that "Arteaga stated that Smith had turned away and started giving direction to another driver (Freddy Villegas) whose truck was stopped on the east side of the building." (This is the six wheeler located between the parking islands. Ex. 4 & 7) If this version is true, it is an admission that Arteaga knew Smith was distracted

and that he continued to back up notwithstanding the obvious risk. Proceeding in the face of a known danger represents a reckless disregard for safety (standard for punitive damages) and not just ordinary negligence.

### **CONTRIBUTORY NEGLIGENCE**

Gary Smith shares some responsibility for this tragedy. As a spotter, he is expected to keep an eye on the truck he is backing up. The far greater weight of the negligence, however, lies with Horizon and Arteaga for several reasons.

First, as indicated earlier, the driver of the backing vehicle is in a superior position to avoid harm to the spotter because the driver controls truck movement. Although the spotter is supposed to stay in view, he can be out of view because of disability, distraction or accident. Only the driver can avoid tragedy by stopping the truck when the spotter is not seen. That is why ultimate responsibility lies with the driver.

Second, Arteaga knew that Smith had multiple responsibilities and that he was involved in coordinating and directing other trucks on the job site. Arteaga knew or should have known that Smith could become distracted as a result of other duties thereby making it imperative that he not move if Smith was out of sight.

Third, Arteaga knew or should have known that the backup alarm on his truck could not be relied upon as a sufficient warning to justify backing up when the spotter was not in view. The presence of a backup alarm has never been an exception to the rule that a driver must stop when the spotter is out of sight. More specifically, however, Arteaga knew or should have known that ambient noise on the job site would make it difficult to distinguish his alarm from other noise sources. He knew, for example, that the six wheeler backing into the adjacent parking islands had an active alarm and that the nearby paving

machine made significant noise. Raul Villalobos, who helped Smith back in the six wheeler, specifically said that he did not know if Arteaga's alarm was on because "there was so much noise going on" with the paver and the alarm of the other truck.

Finally, Arteaga's act of either not looking on the left side or ignoring what he saw is qualitatively far more culpable than Smith's apparent attention to other duties. Smith knew the rule that a backing driver must stop when the spotter is out of view and may have relied upon that while simultaneously performing other tasks.

## **DAMAGES**

### **SURVIVAL ACTION**

The physical pain and emotional suffering experienced by Gary can be conservatively described as horrific. It is clear that he was consciously aware of his impending death from the moment he fell into the path of the truck until the weight of 34 tons prevented his escape. Those moments were filled with absolute fear, panic and doom.

The physical pain was equally horrifying. The autopsy shows multiple abrasions covering the face, head, arms, legs, chest and back and multiple fractures to the chest, legs and pelvis. The pattern of bruises and abrasions on the right arm and right leg were consistent with tire marks. The diaphragm was torn on both sides with the stomach, liver and spleen herniated into the chest cavity. There were multiple lacerations to the lungs, liver and spleen. There was marked tearing of the connective tissue and muscles of the neck with exposure of the neck tendons. The pain of being crushed was reflected in the unmistakable screams from Gary easily heard by several workers over the loud frenzy of the construction site.



## **WRONGFUL DEATH**

### **Economic Loss**

Gary was 46 years old at the time of his death and had a life expectancy of 30 years. He had been employed in the paving business most of his adult life and had been with Hardin Paving for 5 years. His annual income at the time of death was \$75,983.00.

Included with this summary is an economic analysis prepared by Dr. Charles Linke, professor emeritus of finance at the University of Illinois at Urbana Champaign. (Ex. 9) He states that the present cash value of the economic loss resulting from the death of Mr. Smith is \$1,528,009.00 to \$1,636,708.00.

### **Loss of Society**

Gary had an exceptionally close and loving relationship with his wife and daughters. The presumption of a "substantial" pecuniary loss that applies here is corroborated by the genuine love, affection, care, attention, companionship and comfort they derived from Gary.

Gary and Kathy were high school sweethearts. They graduated together in 1973 and married in 1978. It was the only marriage for both of them and they never separated or divorced. They were married for 24 years and had two children. Stacey was born on 5-24-81. Kelly was born on 9-8-83. (Ex. 10)

The photographs included with this summary capture the loss of society much better than words. They give life to the warmth, charm, spontaneity, determination and gentleness of Gary's personality. (Exs. 11 & 14) They reflect the profound devotion and commitment he had to Kathy and the genuine joy and fulfillment in their relationship. (Ex. 12) They also illustrate the love, support, nurturing, guidance, stability and companionship

he provided for Stacey and Kelly. (Ex. 13) The pictures reflect a zest for life that Gary shared with those who knew and loved him.

In addition to the photographs, attached are two reflections written by Kathy that express in her words the emotional comfort and support she received from Gary and the level of intimacy they shared together. One is the eulogy she gave at Gary's memorial service. (Ex. 15) The other is a letter she sent to me transmitting family photographs. (Ex. 16)

### **INSURANCE**

Defendants Horizon and Arteaga are insured through West Bend Mutual Insurance Company under a single limit policy of \$1,000,000.00 and an umbrella policy of \$5,000,000.00. Total coverage for this occurrence is \$6,000,000.00.

### **COMPARABLE VERDICTS AND SETTLEMENTS**

Jury verdicts and settlements from Cook County are included documenting wrongful death awards from \$10,525,000.00 to \$50,000,000.00. (Ex. 17) Jury verdicts and settlements are also included documenting survival awards that exceed \$1,000,000.00 for as little as 60 seconds of fear or pain. (Ex. 18)

### **CONCLUSION - DEMAND**

The jury verdicts in Cook County for survival and wrongful death claims make clear that this case has serious excess potential regardless of the level of contributory negligence assessed. It possesses the most important predictors of value: an exceptionally genuine and appealing societal loss, a credible and significant economic loss

and a Cook County venue. We believe the verdict expectancy of this case is between \$15,000,000 and \$20,000,000. There have been at least 11 (not exhaustive) death verdicts or settlements (not including survival claims) of \$15,000,000.00 or more in the last three years with damage profiles very similar to the Smith case. The addition of a significant survival claim and the likelihood of a significantly lower comparative assessment makes an excess verdict even more foreseeable.

Accordingly, we will accept the policy limits of \$6,000,000.00 in full settlement of this case. This includes all elements of the wrongful death claim (society and economic) and the survival claim for conscious fear and pain.