

IN THE SUPREME COURT OF THE STATE OF VERMONT  
DOCKET NO. 2012-335 and 2012-384

SANDRA J. MURPHY, PERSONAL REPRESENTATIVE AND ADMINISTRATOR  
OF THE ESTATE OF CHRISTOPHER MURPHY,  
Plaintiff-Appellant

v.

SENTRY INSURANCE,  
Defendant-Appellee

APPEAL FROM VERMONT SUPERIOR COURT, CHITTENDEN UNIT  
Docket No. S653-06 CnC

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Appellant's Amended Printed Case

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SANDRA J. MURPHY, PERSONAL REPRESENTATIVE AND  
ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER MURPHY  
POWELL, ORR & BREDICE, PLC  
By: Steven A. Bredice, Esq.  
Powell Orr & Bredice PLC  
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Williston, Vermont 05495  
Telephone: 802-878-1500

STATE OF VERMONT  
CHITTENDEN COUNTY, SS.

SANDRA J. MURPHY, personal representative	)	
and ADMINISTRATOR of the ESTATE of	)	
CHRISTOPHER MURPHY,	)	
Plaintiff	)	
	)	Chittenden Superior Court
v.	)	Docket No. S653-06 CnC
	)	
SENTRY INSURANCE,	)	
Defendant	)	

**FOURTH AMENDED COMPLAINT**

NOW COMES Plaintiff, by and through her attorneys, Powell Orr & Bredice PLC, and hereby complains pursuant to 14 V.S.A § 1492 against Defendant as follows:

1. Plaintiff Sandra J. Murphy is a resident of the town of Underhill, County of Chittenden, State of Vermont.
2. Sandra J. Murphy is the widow and personal representative of Christopher Murphy, and the administrator of his estate.
3. At all times material to this Complaint, Christopher Murphy was an employee of Mactaw, Inc. d/b/a Pete's RV Center (hereinafter "Pete's RV" or "Pete's"), a Vermont corporation with a principal place of business in South Burlington, County of Chittenden, State of Vermont.
4. On June 15, 2004, while in the employ of Pete's RV, Christopher Murphy suffered serious injuries as a result of a forklift tip-over.
5. On June 17, 2004, Christopher Murphy succumbed to these injuries and died.
6. The forklift involved in Christopher Murphy's death was fitted with an after-market attachment fabricated by Pete's R.V. prior to the tip-over of June 15, 2004.

7. The attachment referred to in the preceding paragraph was intended by its fabricator to enable the forklift to be used to tow recreational vehicles such as "fifth-wheel" campers.

8. The tip-over underlying this lawsuit happened while Christopher Murphy was using a forklift, as fitted with this unapproved after-market attachment, on June 15, 2004, to transport a "fifth-wheel" camper from one location to another on premises then occupied by Pete's R.V., at the employer's direction.

9. The use of forklifts with unapproved after-market attachments to move RVs was a commonly performed operation of Pete's at all times material to this lawsuit prior to the death of Christopher Murphy.

10. Defendant Sentry provided safety consultations to Pete's R.V. prior to the death of Christopher Murphy.

11. Sentry's initial safety consultation at Pete's R.V. began with an inspection conducted in person on April 3, 2002, at Pete's South Burlington location by an employee of Sentry acting within the scope of his duties.

12. At the time of this April 3, 2002, inspection, Sentry was not Pete's Workers' Compensation carrier.

13. Rather Sentry, as of April 3, 2002, was Pete's commercial general liability carrier.

14. A stated purpose of this April 3, 2002, safety consultation at Pete's by Sentry was to improve employee safety.

15. As of this April 3, 2002, safety consultation, Sentry's safety services consultant was aware of the requirement, codified in 29 C.F.R. 1910.178, that the use of any after-market

modifications, additions or attachments to a forklift be approved in writing by the manufacturer and that a template attesting to the approval be affixed to the forklift.

16. At the time of his April 3, 2002, safety consultation, Sentry's safety service consultant knew that the reason for this requirement was to ensure that such after-market attachments did not pose an undue risk of dangerous tip overs.

17. At the time of his April 3, 2002, safety consultation, Sentry's safety service consultant saw that Pete's had a forklift on its premises.

18. This forklift was equipped at the time of this April 3, 2002, safety consultation with an unapproved after-market attachment in violation of 29 C.F.R. 1910.178.

19. At the time of his April 3, 2002, safety consultation, Sentry's safety services consultant did not notice this unapproved and unlawful attachment to the forklift.

20. At the time of his April 3, 2002, safety consultation, Sentry's service consultant did not inquire as to the existence of any attachment.

21. Rather, he incorrectly assumed, without verification, that there was none.

22. Sentry's services consultant also did not inform himself about the use of the forklift.

23. Rather, he assumed without verification that the forklift was being used only to move materials on pallets.

24. At the time of his April 3, 2002, safety consultation, Sentry's services consultant saw that Pete's had RVs including fifth-wheel campers on its premises.

25. At this time, Sentry's safety service consultant also incorrectly assumed, without verification, that the fifth-wheel campers he observed on Pete's premises were being moved only with pickup trucks.

26. In actuality, Pete's was, as of Sentry's April 3, 2002 safety consultation, routinely using a forklift with an unapproved attachment to move RVs including fifth-wheel campers, often on sloping ground.

27. On or about April 16, 2002, Sentry's safety services consultant provided to Pete's a report on his April 3, 2002, inspection with recommendations regarding employee safety at Pete's.

28. On or about October 21, 2003, Sentry's safety services consultant again performed a hazard survey and generated a report, which was provided to Pete's on November 5, 2003, this time in connection with workers' compensation coverage by Sentry, which became effective on February 24, 2003.

29. This second loss-prevention report failed to identify the forklift as configured at Pete's as unlawful or potentially hazardous.

30. This second loss-prevention report failed to identify the process of using forklifts with unapproved attachments to move fifth-wheel campers as hazardous.

31. This second loss-prevention report failed to provide a warning or recommendation to Pete's to discontinue use of forklifts with unapproved attachments to move fifth-wheel campers in favor of a safe and lawful method.

32. The forklift tip-over resulting in the death of Christopher Murphy involved a forklift with an unapproved attachment, which attachment was nearly identical to that which was present at Pete's during Sentry's April 3, 2002 and October 21, 2003, safety consultations.

33. The forklift tip-over resulting in the death of Christopher Murphy involved substantially the same personnel as those who owned, operated and were employed by Pete's at

the time of Sentry's April 3, 2002 and October 21, 2003, safety consultations.

34. The forklift tip-over resulting in the death of Christopher Murphy involved substantially the same process, i.e. using a forklift with an unapproved attachment to move fifth-wheel campers, as that which was routinely used by Pete's as of Sentry's April 3, 2002 and October 21, 2003, safety consultations.

35. Due to the death of Christopher Murphy as the result of the tip-over of a forklift at Pete's while towing a fifth-wheel camper using an unapproved attachment, Pete's was cited by the Vermont Occupational Health and Safety Administration for a violation of 29 C.F.R. 1910.178(a)(4), and penalized in the amount of \$4,200.00.

**COUNT I – NEGLIGENCE (RESPONDEAT SUPERIOR)**

36. The allegations in paragraphs 1 through 35 are repeated and reasserted herein.

37. While Sentry was not required to undertake the duty of inspecting Pete's for safety problems, once Sentry, through its employee, began consulting with Pete's regarding safety problems it undertook a duty to exercise reasonable care.

38. Defendant Sentry, through its employee, failed to exercise reasonable care in the safety consultation provided to Pete's in its capacity as Pete's commercial general liability carrier, based on the April 3, 2002, inspections and April 16, 2002, report and recommendations.

39. As a result of this failure to exercise reasonable care, Sentry, through its employee, failed to identify and warn Pete's RV of the dangers of using forklifts with unapproved attachments to tow fifth-wheel trailers.

40. Sentry's failure, through its employee, to timely identify and warn of the hazard posed by the use of the forklift as modified to tow fifth-wheel trailers increased the risk of harm to Christopher Murphy.

41. This omission by Sentry, through its employee, deprived Pete's of the ability to fulfill its duty to provide Christopher Murphy with a safe workplace.

42. Pete's relied on this safety consultation.

43. Sentry's negligent safety consultation inspection was a substantial factor in causing the death of Christopher Murphy.

44. The acts and/or omissions of Defendant Sentry, through its employee, as described above constitute negligence such that Plaintiff may recover of Defendant.

### COUNT II – CORPORATE NEGLIGENCE

45. The allegations in paragraphs 1 through 44 are repeated and reasserted herein.

46. At all times material to this complaint, Sentry held itself out to its insureds, including Pete's R.V., as possessing expertise to be relied on as a resource to improve workplace safety.

47. Sentry undertook corporately to provide safety consultations to its insureds, including Pete's R.V.

48. Sentry's training and supervision of, and policies concerning, its safety sciences/services consultants and their activities were not undertaken with reasonable care insofar as Sentry failed to adequately deal with identifying and addressing materials handling hazards.

49. Sentry's failure to exercise reasonable care as regards the undertaking discussed in the preceding paragraphs increased the risk of harm to Christopher Murphy.

50. Sentry's failure to exercise reasonable care as regards the undertaking discussed in the preceding paragraphs deprived Pete's of the ability to fulfill its duty to provide Christopher Murphy with a safe workplace.

51. Pete's relied on Sentry's safety sciences/services consultations.

52. Sentry's corporate negligence was a substantial factor in causing the death of Christopher Murphy.

53. The acts and/or omissions of Defendant Sentry Insurance as described above constitute corporate negligence such that Plaintiff may recover of Defendant.

**COUNT III – GROSS NEGLIGENCE (RESPONDEAT SUPERIOR)**

54. The allegations in paragraphs 1 through 53 are repeated and reasserted herein.

55. While Sentry was not required to undertake the duty of inspecting Pete's for safety problems, once Sentry, through its employee, began consulting with Pete's regarding safety problems it undertook a duty to exercise reasonable care.

56. Defendant Sentry, through its employee, failed to exercise reasonable care in the safety consultation provided to Pete's in its capacity as Pete's workers' compensation carrier, based on the October 21, 2003 inspection and November 5, 2003 report and recommendation.

57. As a result of this failure to exercise reasonable care, Sentry, through its employee, failed to identify and warn Pete's RV of the dangers of using forklifts with unapproved attachments to tow fifth-wheel trailers.

58. Sentry's failure, through its employee, to timely identify and warn of the hazard posed by the use of the forklift as modified to tow fifth-wheel trailers increased the risk of harm to Christopher Murphy.

59. This omission by Sentry, through its employee, deprived Pete's of the ability to fulfill its duty to provide Christopher Murphy with a safe workplace.

60. Pete's relied on this safety consultation.

61. Sentry's negligent safety consultation inspection was a substantial factor in

causing the death of Christopher Murphy.

62. The acts and/or omissions of Defendant Sentry, through its employee, as described above constitute gross negligence such that Plaintiff may recover of Defendant.

**COUNT IV – CORPORATE NEGLIGENCE**

63. The allegations in paragraphs 1 through 62 are repeated and reasserted herein.

64. At all times material to this complaint, Sentry held itself out to its insureds, including Pete's R.V., as possessing expertise to be relied on as a resource to improve workplace safety.

65. Sentry undertook corporately to provide safety consultations to its insureds, including Pete's R.V.

66. Sentry's training and supervision of, and policies concerning, its safety sciences/services consultants and their activities were not undertaken with reasonable care insofar as Sentry failed to adequately deal with identifying and addressing materials handling hazards in relation to workers' compensation safety inspection of Pete's R.V.

67. Sentry's failure to exercise reasonable care as regards the undertaking discussed in the preceding paragraphs increased the risk of harm to Christopher Murphy.

68. Sentry's failure to exercise reasonable care as regards the undertaking discussed in the preceding paragraphs deprived Pete's of the ability to fulfill its duty to provide Christopher Murphy with a safe workplace.

69. Pete's relied on Sentry's safety sciences/services consultations.

70. Sentry's corporate negligence was a substantial factor in causing the death of Christopher Murphy.

71. The acts and/or omissions of Defendant Sentry Insurance as described above

constitute gross corporate negligence such that Plaintiff may recover of Defendant.

WHEREFORE the Plaintiff requests this Court to enter judgment for all relief necessary to make the spouse and children of Christopher Murphy whole pursuant to 14 V.S.A. § 1492, and all other such relief as this Court may deem just.

DATED at Williston, Vermont this 9<sup>th</sup> day of July, 2009.

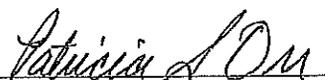
SANDRA J. MURPHY, Personal  
Representative and Administrator  
of the Estate of Christopher Murphy

By: Patricia L. Orr  
For Steven A. Bredice, Esq.  
Attorney for the Plaintiff

**JURY DEMAND**

Plaintiff demands a Trial by Jury on all issues so triable.

SANDRA J. MURPHY, Personal  
Representative and Administrator  
of the Estate of Christopher Murphy

BY:   
FOR Steven A. Bredice, Esq.  
Attorney for the Plaintiff

c: Robert G. Cain, Esq.  
Michael P. Kenney, Esq.

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STATE OF VERMONT

CHITTENDEN COUNTY, SS:

SANDRA J. MURPHY, individually and as )	CHITTENDEN SUPERIOR COURT
ADMINISTRATOR of the ESTATE OF )	DOCKET NO. S653-06CnC
CHRISTOPHER MURPHY )	
Plaintiff )	
)	
v. )	
)	
SENTRY INSURANCE, )	
Defendant. )	

**SENTRY INSURANCE'S ANSWER TO  
PLAINTIFF'S FOURTH AMENDED COMPLAINT**

Sentry Insurance, by and through its attorneys, Paul Frank + Collins P.C., answers Plaintiff's

Fourth Amended Complaint as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted. To the extent that it is implied, Sentry denies that it had knowledge of this prior to the accident.
7. Admitted as stated; denied that Sentry had any knowledge of this prior to the accident.
8. Admitted only that the accident happened while Christopher Murphy was using a forklift with an attachment on it on June 15, 2004, to transport a fifth wheel camper on the

temporary premises of Pete's RV. All other allegations are denied.

9. Admitted only that, after Mr. Murphy's accident, it was revealed by Pete's RV that they used forklifts with unapproved after-market attachments to move RV's at times prior to Mr. Murphy's accident. To the extent that it is implied, it is denied that Sentry had any knowledge of this at any time prior to the accident. All other allegations are denied.

10. Admitted only that Sentry provided inspection/survey services to Pete's RV, as an advisory service, prior to Mr. Murphy's accident. All other allegations are denied.

11. Admitted only that Sentry's initial inspection/survey visit to Pete's RV occurred on April 3, 2002, at Pete's South Burlington location, and that the visit was made by a Sentry employee acting within the scope of his duties. All other allegations are denied.

12. Admitted.

13. Admitted.

14. Denied.

15. Admitted only that the Sentry representative who conducted the April 3, 2002 inspection/survey visit, was aware at that time of the requirements of CFR 1910.178. All other allegations are denied.

16. Admitted only that the Sentry representative who conducted the April 3, 2002 inspection/survey visit was aware of the reason for the requirements of CFR 1910.178. All other allegations are denied.

17. Admitted only that, at the time of the April 3, 2002 inspection/survey visit by Sentry's representative, he observed on Pete's premises a forklift with no modifications, additions, or attachments to it. All other allegations are denied.

18. Denied.

19. Denied that, at the time of Sentry's April 3, 2002 inspection/survey visit, there was any unapproved or unlawful attachment on the forklift at Pete's RV.

20. Admitted only that, at the time of the April 3, 2002 inspection/survey visit at Pete's RV, Sentry's representative did not inquire as to the existence of any attachment. All other allegations are denied.

21. Denied that Sentry's representative was "incorrect" in reasonably believing that the one forklift he observed on Pete's RV's premises was being used lawfully and properly, given that there was no unapproved after-market attachment on the forklift at the time of the inspection/survey visit, no one from Pete's RV informed him of any such attachment, he understood that Pete's RV moved its trailers and RV's properly with pick-up trucks, and forklifts are designed and normally used for moving materials on top of the forks, as Pete's RV was doing. All other allegations are denied.

22. Denied.

23. Denied as stated. Sentry's representative reasonably believed that the one forklift he observed was being used properly to move materials on pallets, given that there was no unapproved after-market attachment on the forklift at the time of the inspection/survey visit, no one from Pete's RV informed him of any such attachment, he understood that Pete's RV moved its trailers and RV's properly with pick-up trucks, and forklifts are designed and normally used for moving materials on top of the forks, as Pete's RV was doing.

24. Admitted only that, at the time of the April 3, 2002 inspection/survey visit at Pete's RV, Sentry's representative saw that Pete's had RVs, including fifth-wheel campers on its premises. All other allegation are denied.

25. Denied that Sentry's representative was "incorrect" in reasonably believing that the

fifth-wheel campers he observed on Pete's RV's premises were being moved only with pick-up trucks. Sentry's response to paragraph 24 is incorporated by reference.

26. Denied that Pete's RV used a forklift with any unapproved attachment to move RVs, including fifth-wheel campers, at any time during Sentry's inspection/survey visit on April 3, 2002.

27. Admitted only that, on or about April 16, 2002, Sentry's representative provided to Pete's RV a report on his April 3, 2002 inspection/survey visit, which noted that, during his visit with Pete's RV's representative, David McGinnis, they discussed Sentry's Safety Trainer, an interactive, internet based training system, which could give Pete's RV a cost-effective means of providing and documenting employee safety training. Denied that Sentry's April 16, 2002 report regarding the April 3, 2002 inspection/survey visit contained recommendations regarding employee safety per se at Pete's RV. Admitted that the report was limited, conditioned and qualified as follows:

This report is provided as an advisory service. It is intended to assist you in the establishment and/or maintenance of your own health and safety programs. The information and recommendations provided herein represent only conditions and exposures which existed at the time this survey was conducted. Variations in management controls, working conditions, production, disposal, processes and equipment may significantly alter or change either occupational or environmental hazards present, or health and safety recommendations necessary. Sentry Insurance, and its affiliates, assumes no authority or obligations to make changes in client operations or to implement recommendations submitted in this report.

Any comments or recommendations relative to regulatory compliance with any local, state, or federal laws, regulations, bulletins and/or administrative orders, are advisory in nature and represent random observations, or tests, of conditions and/or practices at the time of this survey. Sentry Insurance, and its affiliates, do not warrant your compliance nor will they be responsible for any fines, penalties or expenses imposed upon you related to the

same.

All other allegations are denied.

28. Admitted only that Sentry provided inspection/survey services to Pete's RV, as an advisory service, on October 21, 2003, that a follow-up report was generated after the visit by the Sentry consultant, that the report was mailed to Pete's RV on or about November 5, 2003, and that at the time of the visit Sentry had workers' compensation coverage with Pete's RV, in addition to other coverages. All other allegations are denied.

29. Admitted that Sentry's representative's November 5, 2003 report did not refer to any "unlawful or potentially hazardous" "configuration" of the forklift he observed on Pete's RV's premises. To the extent that it is implied, it is denied that the forklift on Pete's RV's premises at the time of Sentry's October 21, 2003 inspection/survey visit was configured in any unlawful or potentially hazardous manner.

30. Admitted that Sentry's representative's November 5, 2003 report relating to his October 21, 2003 inspection/survey visit did not discuss anything regarding the use of forklifts with unapproved attachments to move fifth-wheel campers. To the extent that it is implied, it is denied that the forklift on Pete's RV's premises at the time of Sentry's October 21, 2003 inspection/survey visit was configured in any unlawful or potentially hazardous manner.

31. Admitted that Sentry's representative's November 5, 2003 report relating to his October 21, 2003 inspection/survey visit did not discuss anything regarding the use of forklifts with unapproved attachments to move fifth-wheel campers. To the extent that it is implied, it is denied that the forklift on Pete's RV's premises at the time of Sentry's October 21, 2003 inspection/survey visit was configured in any unlawful or potentially hazardous manner.

32. Admitted only that the forklift accident resulting in the death of Christopher Murphy

involved a forklift with an unapproved tow attachment. Denied that the forklift that Christopher Murphy was using at the time of the accident was substantially similar to the forklift that Sentry's representative observed on Pete's RV's premises at the time of his inspection/survey visits on April 3, 2002 and October 21, 2003. Denied that the forklift that Sentry's representative observed at Pete's RV during his inspection/survey visits on April 3, 2002 and October 21, 2003 was being used at that time with any tow attachments, or that anyone at Pete's RV informed the Sentry representative that the forklift was being used in that manner. All other allegations are denied.

33. The allegations in this paragraph are vague, ambiguous and generally unintelligible, and therefore no answer is required. To the extent that an answer is deemed to be required, Sentry admits only that some of the personnel at Pete's RV who were employed there as of the April 3, 2002 and October 21, 2003 inspection/survey visits by Sentry's representative were also employed there as of the time of Mr. Murphy's accident. All other allegations are denied.

34. Admitted only that, at the time of the accident, Mr. Murphy was using a forklift with an unapproved attachment to move a fifth-wheel camper. It is denied that any forklift was being used with any unapproved attachment to move fifth-wheel campers at the time that Sentry's representative conducted his inspection/survey visits at Pete's RV on April 3, 2002 and October 21, 2003. It is also denied that the forklift that Mr. Murphy was using at the time of the accident was substantially similar to the forklift that was observed by Sentry's representative at the time of his inspection/survey visits on April 3, 2002 and October 21, 2003. All other allegations are denied.

35. Admitted.

### **COUNT I – NEGLIGENCE (RESPONDEAT SUPERIOR)**

36. The answers in paragraphs 1-35 are repeated and reasserted herein.

37. Admitted that Sentry was not required to undertake any duty of inspecting Pete's for

safety problems. Denied that Sentry undertook any such duty. The commercial general liability insurance agreements between Sentry Select Insurance Company and Pete's RV for the policy period February 24, 2002 – February 24, 2003 and February 24, 2003 – February 24, 2004 contained an express policy condition relating to inspections and surveys, as follows:

COMMON POLICY CONDITIONS

.....

D. INSPECTIONS AND SURVEYS

1. We have the right to:

- a. Make inspections and surveys at any time;
- b. Give you reports on the conditions we find;  
and
- c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

- a. Are safe or healthful; or
- b. Comply with laws, regulations, codes or standards.

.....

In addition, the workers' compensation insurance agreement between Sentry Select Insurance Company and Pete's RV for the policy period February 24, 2003 – February 24, 2004, contained an express policy condition relating to inspections, as follows:

## PART SIX – CONDITIONS

### A. Inspection

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your work places are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.

In addition, the inspection/survey visit reports provided by Sentry to Pete's RV contained the following limitations, conditions and qualifications:

This report is provided as an advisory service. It is intended to assist you in the establishment and/or maintenance of your own health and safety programs. The information and recommendations provided herein represent only conditions and exposures which existed at the time this survey was conducted. Variations in management controls, working conditions, production, disposal, processes and equipment may significantly alter or change either occupational or environmental hazards present, or health and safety recommendations necessary. Sentry Insurance, and its affiliates, assumes no authority or obligations to make changes in client operations or to implement recommendations submitted in this report.

Any comments or recommendations relative to regulatory compliance with any local, state, or federal laws, regulations, bulletins and/or administrative orders, are advisory in nature and represent random observations, or tests, of conditions and/or practices at the time of this survey. Sentry Insurance, and its affiliates, do not warrant your compliance nor will they be responsible for any fines, penalties or expenses imposed upon you related to the same.

All other allegations are denied.

- 38. Denied.
- 39. Denied.
- 40. Denied.
- 41. Denied.
- 42. Denied.
- 43. Denied.
- 44. Denied.

### COUNT II – CORPORATE NEGLIGENCE

- 45. The answers in paragraphs 1-44 are repeated and reasserted herein.
- 46. Denied.
- 47. Admitted only that Sentry provided to its insureds, including Pete's RV, as an advisory service only, assistance with their safety efforts, and that part of that assistance included inspection/survey visits. With respect to Pete's RV, the following condition in Sentry Select Insurance Company's commercial general liability policy relating to inspections and surveys defined its obligations as follows:

#### COMMON POLICY CONDITIONS

.....

#### D. INSPECTIONS AND SURVEYS

- 1. We have the right to:
  - a. Make inspections and surveys at any time;
  - b. Give you reports on the conditions we find;  
and

c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

- a. Are safe or healthful; or
- b. Comply with laws, regulations, codes or standards.

....

In addition, the following condition in Sentry Select Insurance Company's workers' compensation insurance policy with Pete's RV relating to inspections defined its obligations as follows:

#### **PART SIX – CONDITIONS**

##### **A. Inspection**

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your work places are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.

In addition, the inspection/survey visit reports provided by Sentry to Pete's RV contained the following limitations, conditions and qualifications:

This report is provided as an advisory service. It is intended to assist you in the establishment and/or

maintenance of your own health and safety programs. The information and recommendations provided herein represent only conditions and exposures which existed at the time this survey was conducted. Variations in management controls, working conditions, production, disposal, processes and equipment may significantly alter or change either occupational or environmental hazards present, or health and safety recommendations necessary. Sentry Insurance, and its affiliates, assumes no authority or obligations to make changes in client operations or to implement recommendations submitted in this report.

Any comments or recommendations relative to regulatory compliance with any local, state, or federal laws, regulations, bulletins and/or administrative orders, are advisory in nature and represent random observations, or tests, of conditions and/or practices at the time of this survey. Sentry Insurance, and its affiliates, do not warrant your compliance nor will they be responsible for any fines, penalties or expenses imposed upon you related to the same.

All other allegations are denied.

- 48. Denied.
- 49. Denied.
- 50. Denied.
- 51. Denied.
- 52. Denied.
- 53. Denied.

**COUNT III – GROSS NEGLIGENCE**  
**(RESPONDEAT SUPERIOR)**

54. The answers in paragraphs 1 through 53 are repeated and reasserted herein.

55. Admitted that Sentry was not required to undertake any duty of inspecting Pete's for safety problems. Denied that Sentry undertook any such duty. The commercial general liability

insurance agreements between Sentry Select Insurance Company and Pete's RV for the policy period February 24, 2002 – February 24, 2003 and February 24, 2003 – February 24, 2004 contained an express policy condition relating to inspections and surveys, as follows:

COMMON POLICY CONDITIONS

....

D. INSPECTIONS AND SURVEYS

1. We have the right to:

- a. Make inspections and surveys at any time;
- b. Give you reports on the conditions we find;  
and
- c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

- a. Are safe or healthful; or
- b. Comply with laws, regulations, codes or standards.

....

In addition, the workers' compensation insurance agreement between Sentry Select Insurance Company and Pete's RV for the policy period February 24, 2003 – February 24, 2004, contained an express policy condition relating to inspections, as follows:

## PART SIX – CONDITIONS

### A. Inspection

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your work places are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.

In addition, the inspection/survey visit reports provided by Sentry to Pete's RV contained the following limitations, conditions and qualifications:

This report is provided as an advisory service. It is intended to assist you in the establishment and/or maintenance of your own health and safety programs. The information and recommendations provided herein represent only conditions and exposures which existed at the time this survey was conducted. Variations in management controls, working conditions, production, disposal, processes and equipment may significantly alter or change either occupational or environmental hazards present, or health and safety recommendations necessary. Sentry Insurance, and its affiliates, assumes no authority or obligations to make changes in client operations or to implement recommendations submitted in this report.

Any comments or recommendations relative to regulatory compliance with any local, state, or federal laws, regulations, bulletins and/or administrative orders, are advisory in nature and represent random observations, or tests, of conditions and/or practices at the time of this survey. Sentry Insurance, and its affiliates, do not warrant your compliance nor will they be responsible for any fines, penalties or expenses imposed upon you related to the same.

All other allegations are denied.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

#### COUNT IV – CORPORATE NEGLIGENCE

63. The answers in paragraphs 1 through 62 are repeated and reasserted herein.

64. Denied.

65. Admitted only that Sentry provided to its insureds, including Pete's RV, as an advisory service only, assistance with their safety efforts, and that part of that assistance included inspection/survey visits. With respect to Pete's RV, the following condition in Sentry Select Insurance Company's commercial general liability policy relating to inspections and surveys defined its obligations as follows:

#### COMMON POLICY CONDITIONS

.....

#### D. INSPECTIONS AND SURVEYS

1. We have the right to:

a. Make inspections and surveys at any time;

b. Give you reports on the conditions we find;  
and

c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

a. Are safe or healthful; or

b. Comply with laws, regulations, codes or standards.

....

In addition, the following condition in Sentry Select Insurance Company's workers' compensation insurance policy with Pete's RV relating to inspections defined its obligations as follows:

**PART SIX – CONDITIONS**

**A. Inspection**

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your work places are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.

In addition, the inspection/survey visit reports provided by Sentry to Pete's RV contained the following limitations, conditions and qualifications:

This report is provided as an advisory service. It is intended to assist you in the establishment and/or

maintenance of your own health and safety programs. The information and recommendations provided herein represent only conditions and exposures which existed at the time this survey was conducted. Variations in management controls, working conditions, production, disposal, processes and equipment may significantly alter or change either occupational or environmental hazards present, or health and safety recommendations necessary. Sentry Insurance, and its affiliates, assumes no authority or obligations to make changes in client operations or to implement recommendations submitted in this report.

Any comments or recommendations relative to regulatory compliance with any local, state, or federal laws, regulations, bulletins and/or administrative orders, are advisory in nature and represent random observations, or tests, of conditions and/or practices at the time of this survey. Sentry Insurance, and its affiliates, do not warrant your compliance nor will they be responsible for any fines, penalties or expenses imposed upon you related to the same.

All other allegations are denied.

- 66. Denied.
- 67. Denied.
- 68. Denied.
- 69. Denied.
- 70. Denied.
- 71. Denied.

### **AFFIRMATIVE DEFENSES**

1. Plaintiff's action is barred, in whole or in part, by Vermont's Workers'

Compensation Act.

2. The court lacks subject matter jurisdiction over the alleged work-related accident.
3. The court lacks personal jurisdiction over Defendant Sentry Insurance.

4. Insufficiency of process.
6. Insufficiency of service of process.
7. The Complaints fails, in whole or in part, to state a claim upon which relief can be granted.
8. The causal negligence of Plaintiff's decedent bars Plaintiff's action, either in whole or in part.
9. Plaintiff's decedent assumed the risk of the accident and his injuries, barring Plaintiff's action.
10. In addition to his own causal negligence, decedent's injury was caused, in whole or in part, by one or more fellow servants/co-employees.
11. Plaintiff's action is barred, in whole or in part, by the applicable statute of limitations.
12. Under the express conditions of the insurance policies between Sentry Select Insurance Company and Pete's RV, Sentry owed no duty to Pete's RV's employees, including Mr. Murphy.

WHEREFORE, Defendant Sentry Insurance requests judgment in its favor, together with its costs and attorneys' fees in defending this action.

Dated at Burlington, Vermont, this 31<sup>st</sup> day of August, 2009.

SENTRY INSURANCE

BY: PAUL FRANK + COLLINS P.C.

By: 

Robert G. Cain, Esq.

P.O. Box 1307

Burlington, Vermont 05402-1307

Pursuant to V.R.C.P. 5:

cc: Steven A. Bredice, Esq.  
Michael P. Kenney, Esq.  
Christopher J. Lynch, Esq.

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only to act with reasonable consideration for the other's safety. If the actor has succeeded in removing the other from a position of danger to one of safety, he cannot change his position for the worse by unreasonably putting him back into the same peril, or into a new one. Thus, while A, who has taken B from a trench filled with poisonous gas, does not thereby obligate himself to pay for B's treatment in a hospital, he cannot throw B back into the same trench, or leave him lying in the street where he may be run over.

§ 324 A. Liability to Third Person for Negligent Performance of Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

See Reporter's Notes.

**Caveat:**

The Institute expresses no opinion as to whether:

- (1) the making of a contract or a gratuitous promise, without in any way entering upon performance, is a sufficient undertaking to result in liability under the rule stated in this Section, or
- (2) there may not be other situations in which one who has entered upon performance may be liable to a third person, where he is committed to the undertaking and cannot withdraw from it without leaving an unreasonable risk of harm to the third person.

**Comment:**

a. The rule stated in this Section parallels the one stated in § 323, as to the liability of the actor to the one to whom he has

See Appendix for Reporter's Notes, Court Citations, and Cross References

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Ch. 12

STANDARD OF CONDUCT

§ 324 A

undertaken to render services. This Section deals with the liability to third persons.

b. This Section applies to any undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his undertaking, or his failure to exercise reasonable care to complete it, or to protect the third person when he discontinues it, results in physical harm to the third person or his things. It applies both to undertakings for consideration, and to those which are gratuitous.

c. *Increasing the risk.* If the actor's negligent performance of his undertaking results in increasing the risk of harm to a third person, the fact that he is acting under a contract or a gratuitous agreement with another will not prevent his liability to the third person. Clause (b) finds common application in cases of the negligent performance of their duties by employees or independent contractors, which creates or increases a risk of harm to third persons. Thus where the negligence of a train dispatcher, a telegraph operator, and an engineer who are rendering services to a railroad company results in a train wreck, each is subject to liability to the injured passengers.

**Illustration:**

1. A operates a grocery store. An electric light hanging over one of the aisles of the store becomes defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the store who is walking down the aisle. B Company is subject to liability to C.

d. *Undertaking duty owed to third person.* Even where the negligence of the actor does not create any new risk or increase an existing one, he is still subject to liability if, by his undertaking with the other, he has undertaken a duty which the other owes to the third person. Thus a managing agent who takes charge of a building for the owner, and agrees with him to keep it in proper repair, assumes the responsibility of performing the owner's duty to others in that respect. He is therefore subject to liability if his negligent failure to repair results in injury to an invitee upon the premises who falls upon a defective stairway, or to a pedestrian in the street who is hurt by a falling sign. Such liability is in addition to that which he may have to the person to whom he has agreed to render the services.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Illustrations:

2. The A Telephone Company employs B to inspect its telephone poles. B negligently inspects and approves a pole adjoining the public highway. Because of its defective condition the pole falls upon and injures a traveler upon the highway. B is subject to liability to the traveler.

3. The A Company employs B as superintendent of building construction work. One of his duties to A Company is to inspect a scaffold erected by an independent contractor, to make sure that it is safe for A Company's workmen. B negligently fails to inspect the scaffold, and as a result of its defective condition, which would have been discovered by proper inspection, the scaffold collapses and C, a workman employed by A Company, is injured. B is subject to liability to C.

e. *Reliance.* The actor is also subject to liability to a third person where the harm is suffered because of the reliance of the other for whom he undertakes to render the services, or of the third person himself, upon his undertaking. This is true whether or not the negligence of the actor has created any new risk or increased an existing one. Where the reliance of the other, or of the third person, has induced him to forgo other remedies or precautions against such a risk, the harm results from the negligence as fully as if the actor had created the risk.

Illustrations:

4. A Company employs B Company to inspect the elevator in its office building. B Company sends a workman, who makes a negligent inspection and reports that the elevator is in good condition. Due to defects in the elevator, which a proper inspection would have disclosed, the elevator falls and injures C, a workman employed by A Company. B Company is subject to liability to C.

5. A Railroad Company employs B as a watchman at its crossing, to give warning to the public of approaching trains. B goes to sleep in his shanty, and fails to warn of the approach of the train. C, an automobile driver who knows of the usual presence of the watchman, approaches the crossing and, receiving no warning, drives onto the track and is struck and injured by the train. B is subject to liability to C.

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Comment on Caveat:

f. Comments d and e on the Caveat to § 323 are applicable to the Caveat in this Section, so far as they are pertinent. As in the case of harm resulting to the person to whom a promise is made, the ancient distinction between "misfeasance" and "non-feasance" has persisted where the harm results to third persons, and decisions holding that the breach of the promise to A can result in no tort liability to B have not been overruled. Again, however, as in the case of harm to the promisee, the courts have tended to seize upon trivial and technical acts of the promisor as a "commencement" of performance and an undertaking of the responsibility, sufficient to make him liable in tort to a third person.

Again there is no essential reason why the breach of a promise, relied upon by the promisee or by a third person, with resulting physical harm to the latter, should not result in liability in tort. Again, however, as under § 323, the question is left open in the absence of sufficient decisions.

§ 325. Failure to Perform Gratuitous Undertaking to Render Services

[The Section is omitted. The matter is now covered by § 323.]

TOPIC 8. PREVENTION OF ASSISTANCE BY THIRD PERSONS

Scope Note: The actor can prevent a third person from rendering aid to another in many ways including the following: first, by so injuring the third person as to make him incapable of giving aid; second, by interfering with his efforts to give aid; third, by injuring or destroying the usefulness of a thing which the third person is using to give aid or by otherwise preventing him from using it; fourth, by obstructing the third person's access to the other.

§ 326. Intentionally Preventing Assistance

One who intentionally prevents a third person from giving to another aid necessary to prevent physical harm to him, is subject to liability for physical harm caused to

See Appendix for Reporter's Notes, Court Citations, and Cross References

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**§ 29 CFR 1910.178****Code of Federal Regulations****TITLE 29--LABOR****PART 1910--OCCUPATIONAL SAFETY AND HEALTH STANDARDS****29 CFR 1910.178 Powered industrial trucks.****29 CFR 1910.178 Powered industrial trucks.****CHAPTER XVII--OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
DEPARTMENT OF LABOR****Subpart N--Materials Handling and Storage**

(a) General requirements. (1) This section contains safety requirements relating to fire protection, design, maintenance, and use of fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by electric motors or internal combustion engines. This section does not apply to compressed air or nonflammable compressed gas-operated industrial trucks, nor to farm vehicles, nor to vehicles intended primarily for earth moving or over-the-road hauling.

(2) All new powered industrial trucks acquired and used by an employer shall meet the design and construction requirements for powered industrial trucks established in the "American National Standard for Powered Industrial Trucks, Part II, ANSI B56.1-1969", which is incorporated by reference as specified in § 1910.6, except for vehicles intended primarily for earth moving or over-the-road hauling.

(3) Approved trucks shall bear a label or some other identifying mark indicating approval by the testing laboratory. See paragraph (a)(7) of this section and paragraph 405 of "American National Standard for Powered Industrial Trucks, Part II, ANSI B56.1-1969", which is incorporated by reference in paragraph (a)(2) of this section and which provides that if the powered industrial truck is accepted by a nationally recognized testing laboratory it should be so marked.

(4) Modifications and additions which affect capacity and safe operation shall not be performed by the customer or user without manufacturers prior written approval. Capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly.

(5) If the truck is equipped with front-end attachments other than factory installed attachments, the user shall request that the truck be marked to identify the attachments and show the approximate weight of the truck and attachment combination at maximum elevation with load laterally centered.

(6) The user shall see that all nameplates and markings are in place and are maintained in a legible condition.

(7) As used in this section, the term, approved truck or approved industrial truck means a truck that is listed or approved for fire safety purposes for the intended use by a nationally recognized testing laboratory, using nationally recognized testing standards. Refer to § 1910.155(c)(3)(iv)(A) for definition of listed, and to § 1910.7 for definition of nationally recognized testing laboratory.

(b) Designations. For the purpose of this standard there are eleven different designations of industrial trucks or tractors as follows: D, DS, DY, E, ES, EE, EX, G, GS, LP, and LPS.

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(1) The D designated units are units similar to the G units except that they are diesel engine powered instead of gasoline engine powered.

(2) The DS designated units are diesel powered units that are provided with additional safeguards to the exhaust, fuel and electrical systems. They may be used in some locations where a D unit may not be considered suitable.

(3) The DY designated units are diesel powered units that have all the safeguards of the DS units and in addition do not have any electrical equipment including the ignition and are equipped with temperature limitation features.

(4) The E designated units are electrically powered units that have minimum acceptable safeguards against inherent fire hazards.

(5) The ES designated units are electrically powered units that, in addition to all of the requirements for the E units, are provided with additional safeguards to the electrical system to prevent emission of hazardous sparks and to limit surface temperatures. They may be used in some locations where the use of an E unit may not be considered suitable.

(6) The EE designated units are electrically powered units that have, in addition to all of the requirements for the E and ES units, the electric motors and all other electrical equipment completely enclosed. In certain locations the EE unit may be used where the use of an E and ES unit may not be considered suitable.

(7) The EX designated units are electrically powered units that differ from the E, ES, or EE units in that the electrical fittings and equipment are so designed, constructed and assembled that the units may be used in certain atmospheres containing flammable vapors or dusts.

(8) The G designated units are gasoline powered units having minimum acceptable safeguards against inherent fire hazards.

(9) The GS designated units are gasoline powered units that are provided with additional safeguards to the exhaust, fuel, and electrical systems. They may be used in some locations where the use of a G unit may not be considered suitable.

(10) The LP designated unit is similar to the G unit except that liquefied petroleum gas is used for fuel instead of gasoline.

(11) The LPS designated units are liquefied petroleum gas powered units that are provided with additional safeguards to the exhaust, fuel, and electrical systems. They may be used in some locations where the use of an LP unit may not be considered suitable.

(12) The atmosphere or location shall have been classified as to whether it is hazardous or nonhazardous prior to the consideration of industrial trucks being used therein and the type of industrial truck required shall be as provided in paragraph (d) of this section for such location.

(c) Designated locations. (1) The industrial trucks specified under subparagraph (2) of this paragraph are the minimum types required but industrial trucks having greater safeguards may be used if desired.

(2) For specific areas of use, see Table N-1 which tabulates the information contained in this section.

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References are to the corresponding classification as used in subpart S of this part.

(i) Power-operated industrial trucks shall not be used in atmospheres containing hazardous concentration of acetylene, butadiene, ethylene oxide, hydrogen (or gases or vapors equivalent in hazard to hydrogen, such as manufactured gas), propylene oxide, acetaldehyde, cyclopropane, diethyl ether, ethylene, isoprene, or unsymmetrical dimethyl hydrazine (UDMH).

(ii)(a) Power-operated industrial trucks shall not be used in atmospheres containing hazardous concentrations of metal dust, including aluminum, magnesium, and their commercial alloys, other metals of similarly hazardous characteristics, or in atmospheres containing carbon black, coal or coke dust except approved power-operated industrial trucks designated as EX may be used in such atmospheres.

(b) In atmospheres where dust of magnesium, aluminum or aluminum bronze may be present, fuses, switches, motor controllers, and circuit breakers of trucks shall have enclosures specifically approved for such locations.

(iii) Only approved power-operated industrial trucks designated as EX may be used in atmospheres containing acetone, acrylonitrile, alcohol, ammonia, benzene, benzol, butane, ethylene dichloride, gasoline, hexane, lacquer solvent vapors, naphtha, natural gas, propane, propylene, styrene, vinyl acetate, vinyl chloride, or xylenes in quantities sufficient to produce explosive or ignitable mixtures and where such concentrations of these gases or vapors exist continuously, intermittently or periodically under normal operating conditions or may exist frequently because of repair, maintenance operations, leakage, breakdown or faulty operation of equipment.

(iv) Power-operated industrial trucks designated as DY, EE, or EX may be used in locations where volatile flammable liquids or flammable gases are handled, processed or used, but in which the hazardous liquids, vapors or gases will normally be confined within closed containers or closed systems from which they can escape only in case of accidental rupture or breakdown of such containers or systems, or in the case of abnormal operation of equipment; also in locations in which hazardous concentrations of gases or vapors are normally prevented by positive mechanical ventilation but which might become hazardous through failure or abnormal operation of the ventilating equipment; or in locations which are adjacent to Class I, Division 1 locations, and to which hazardous concentrations of gases or vapors might occasionally be communicated unless such communication is prevented by adequate positive-pressure ventilation from a source of clear air, and effective safeguards against ventilation failure are provided.

See Table at [http://edocket.access.gpo.gov/cfr\\_2007/julqtr/pdf/29cfr1910.178.pdf](http://edocket.access.gpo.gov/cfr_2007/julqtr/pdf/29cfr1910.178.pdf)

(v) In locations used for the storage of hazardous liquids in sealed containers or liquefied or compressed gases in containers, approved power-operated industrial trucks designated as DS, ES, GS, or LPS may be used. This classification includes locations where volatile flammable liquids or flammable gases or vapors are used, but which, would become hazardous only in case of an accident or of some unusual operating condition. The quantity of hazardous material that might escape in case of accident, the adequacy of ventilating equipment, the total area involved, and the record of the industry or business with respect to explosions or fires are all factors that should receive consideration in determining whether or not the DS or DY, ES, EE, GS, LPS designated truck possesses sufficient safeguards for the location. Piping without valves, checks, meters and similar devices would not ordinarily be deemed to introduce a hazardous condition even though used for hazardous liquids or gases. Locations used for the storage of hazardous liquids or of liquified or compressed gases in sealed containers would not normally

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be considered hazardous unless subject to other hazardous conditions also.

(vi)(a) Only approved power operated industrial trucks designated as EX shall be used in atmospheres in which combustible dust is or may be in suspension continuously, intermittently, or periodically under normal operating conditions, in quantities sufficient to produce explosive or ignitable mixtures, or where mechanical failure or abnormal operation of machinery or equipment might cause such mixtures to be produced.

(b) The EX classification usually includes the working areas of grain handling and storage plants, room containing grinders or pulverizers, cleaners, graders, scalpers, open conveyors or spouts, open bins or hoppers, mixers, or blenders, automatic or hopper scales, packing machinery, elevator heads and boots, stock distributors, dust and stock collectors (except all-metal collectors vented to the outside), and all similar dust producing machinery and equipment in grain processing plants, starch plants, sugar pulverizing plants, malting plants, hay grinding plants, and other occupancies of similar nature; coal pulverizing plants (except where the pulverizing equipment is essentially dust tight); all working areas where metal dusts and powders are produced, processed, handled, packed, or stored (except in tight containers); and other similar locations where combustible dust may, under normal operating conditions, be present in the air in quantities sufficient to produce explosive or ignitable mixtures.

(vii) Only approved power-operated industrial trucks designated as DY, EE, or EX shall be used in atmospheres in which combustible dust will not normally be in suspension in the air or will not be likely to be thrown into suspension by the normal operation of equipment or apparatus in quantities sufficient to produce explosive or ignitable mixtures but where deposits or accumulations of such dust may be ignited by arcs or sparks originating in the truck.

(viii) Only approved power-operated industrial trucks designated as DY, EE, or EX shall be used in locations which are hazardous because of the presence of easily ignitable fibers or flyings but in which such fibers or flyings are not likely to be in suspension in the air in quantities sufficient to produce ignitable mixtures.

(ix) Only approved power-operated industrial trucks designated as DS, DY, ES, EE, EX, GS, or LPS shall be used in locations where easily ignitable fibers are stored or handled, including outside storage, but are not being processed or manufactured. Industrial trucks designated as E, which have been previously used in these locations may be continued in use.

(x) On piers and wharves handling general cargo, any approved power-operated industrial truck designated as Type D, E, G, or LP may be used, or trucks which conform to the requirements for these types may be used.

(xi) If storage warehouses and outside storage locations are hazardous only the approved power-operated industrial truck specified for such locations in this paragraph (c)(2) shall be used. If not classified as hazardous, any approved power-operated industrial truck designated as Type D, E, G, or LP may be used, or trucks which conform to the requirements for these types may be used.

(xii) If general industrial or commercial properties are hazardous, only approved power-operated industrial trucks specified for such locations in this paragraph (c)(2) shall be used. If not classified as hazardous, any approved power-operated industrial truck designated as Type D, E, G, or LP may be used, or trucks which conform to the requirements of these types may be used.

(d) Converted industrial trucks. Power-operated industrial trucks that have been originally approved

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for the use of gasoline for fuel, when converted to the use of liquefied petroleum gas fuel in accordance with paragraph (q) of this section, may be used in those locations where G, GS or LP, and LPS designated trucks have been specified in the preceding paragraphs.

(e) Safety guards. (1) High Lift Rider trucks shall be fitted with an overhead guard manufactured in accordance with paragraph (a)(2) of this section, unless operating conditions do not permit.

(2) If the type of load presents a hazard, the user shall equip fork trucks with a vertical load backrest extension manufactured in accordance with paragraph (a)(2) of this section.

(f) Fuel handling and storage. (1) The storage and handling of liquid fuels such as gasoline and diesel fuel shall be in accordance with NFPA Flammable and Combustible Liquids Code (NFPA No. 30-1969), which is incorporated by reference as specified in § 1910.6.

(2) The storage and handling of liquefied petroleum gas fuel shall be in accordance with NFPA Storage and Handling of Liquefied Petroleum Gases (NFPA No. 58-1969), which is incorporated by reference as specified in § 1910.6.

(g) Changing and charging storage batteries. (1) Battery charging installations shall be located in areas designated for that purpose.

(2) Facilities shall be provided for flushing and neutralizing spilled electrolyte, for fire protection, for protecting charging apparatus from damage by trucks, and for adequate ventilation for dispersal of fumes from gassing batteries.

(3) [Reserved]

(4) A conveyor, overhead hoist, or equivalent material handling equipment shall be provided for handling batteries.

(5) Reinstalled batteries shall be properly positioned and secured in the truck.

(6) A carboy filter or siphon shall be provided for handling electrolyte.

(7) When charging batteries, acid shall be poured into water; water shall not be poured into acid.

(8) Trucks shall be properly positioned and brake applied before attempting to change or charge batteries.

(9) Care shall be taken to assure that vent caps are functioning. The battery (or compartment) cover (s) shall be open to dissipate heat.

(10) Smoking shall be prohibited in the charging area.

(11) Precautions shall be taken to prevent open flames, sparks, or electric arcs in battery charging areas.

(12) Tools and other metallic objects shall be kept away from the top of uncovered batteries.

(h) Lighting for operating areas.

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(1) [Reserved]

(2) Where general lighting is less than 2 lumens per square foot, auxiliary directional lighting shall be provided on the truck.

(i) Control of noxious gases and fumes. (1) Concentration levels of carbon monoxide gas created by powered industrial truck operations shall not exceed the levels specified in § 1910.1000.

(j) Dockboards (bridge plates). See § 1910.30(a).

(k) Trucks and railroad cars. (1) The brakes of highway trucks shall be set and wheel chocks placed under the rear wheels to prevent the trucks from rolling while they are boarded with powered industrial trucks.

(2) Wheel stops or other recognized positive protection shall be provided to prevent railroad cars from moving during loading or unloading operations.

(3) Fixed jacks may be necessary to support a semitrailer and prevent upending during the loading or unloading when the trailer is not coupled to a tractor.

(4) Positive protection shall be provided to prevent railroad cars from being moved while dockboards or bridge plates are in position.

(l) Operator training. (1) Safe operation. (i) The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).

(ii) Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph (l), except as permitted by paragraph (l)(5).

(2) Training program implementation. (i) Trainees may operate a powered industrial truck only:

(A) Under the direct supervision of persons who have the knowledge, training, and experience to train operators and evaluate their competence; and

(B) Where such operation does not endanger the trainee or other employees.

(ii) Training shall consist of a combination of formal instruction (e.g., lecture, discussion, interactive computer learning, video tape, written material), practical training (demonstrations performed by the trainer and practical exercises performed by the trainee), and evaluation of the operator's performance in the workplace.

(iii) All operator training and evaluation shall be conducted by persons who have the knowledge, training, and experience to train powered industrial truck operators and evaluate their competence.

(3) Training program content. Powered industrial truck operators shall receive initial training in the following topics, except in topics which the employer can demonstrate are not applicable to safe operation of the truck in the employer's workplace.

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## (i) Truck-related topics:

- (A) Operating instructions, warnings, and precautions for the types of truck the operator will be authorized to operate;
- (B) Differences between the truck and the automobile;
- (C) Truck controls and instrumentation: where they are located, what they do, and how they work;
- (D) Engine or motor operation;
- (E) Steering and maneuvering;
- (F) Visibility (including restrictions due to loading);
- (G) Fork and attachment adaptation, operation, and use limitations;
- (H) Vehicle capacity;
- (I) Vehicle stability;
- (J) Any vehicle inspection and maintenance that the operator will be required to perform;
- (K) Refueling and/or charging and recharging of batteries;
- (L) Operating limitations;
- (M) Any other operating instructions, warnings, or precautions listed in the operator's manual for the types of vehicle that the employee is being trained to operate.

## (ii) Workplace-related topics:

- (A) Surface conditions where the vehicle will be operated;
- (B) Composition of loads to be carried and load stability;
- (C) Load manipulation, stacking, and unstacking;
- (D) Pedestrian traffic in areas where the vehicle will be operated;
- (E) Narrow aisles and other restricted places where the vehicle will be operated;
- (F) Hazardous (classified) locations where the vehicle will be operated;
- (G) Ramps and other sloped surfaces that could affect the vehicle's stability;
- (H) Closed environments and other areas where insufficient ventilation or poor vehicle maintenance could cause a buildup of carbon monoxide or diesel exhaust;

050007

(I) Other unique or potentially hazardous environmental conditions in the workplace that could affect safe operation.

(iii) The requirements of this section.

(4) Refresher training and evaluation. (i) Refresher training, including an evaluation of the effectiveness of that training, shall be conducted as required by paragraph (l)(4)(ii) to ensure that the operator has the knowledge and skills needed to operate the powered industrial truck safely.

(ii) Refresher training in relevant topics shall be provided to the operator when:

(A) The operator has been observed to operate the vehicle in an unsafe manner;

(B) The operator has been involved in an accident or near-miss incident;

(C) The operator has received an evaluation that reveals that the operator is not operating the truck safely;

(D) The operator is assigned to drive a different type of truck; or

(E) A condition in the workplace changes in a manner that could affect safe operation of the truck.

(iii) An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years.

(5) Avoidance of duplicative training. If an operator has previously received training in a topic specified in paragraph (l)(3) of this section, and such training is appropriate to the truck and working conditions encountered, additional training in that topic is not required if the operator has been evaluated and found competent to operate the truck safely.

(6) Certification. The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

(7) Dates. The employer shall ensure that operators of powered industrial trucks are trained, as appropriate, by the dates shown in the following table.

-----  
If the employee was hired: The initial training and evaluation of that employee must be completed:  
-----

Before December 1, 1999..... By December 1, 1999.

After December 1, 1999..... Before the employee is assigned to operate a powered industrial truck.  
-----

050008

(8) Appendix A to this section provides non-mandatory guidance to assist employers in implementing this paragraph (l). This appendix does not add to, alter, or reduce the requirements of this section.

(m) Truck operations. (1) Trucks shall not be driven up to anyone standing in front of a bench or other fixed object.

(2) No person shall be allowed to stand or pass under the elevated portion of any truck, whether loaded or empty.

(3) Unauthorized personnel shall not be permitted to ride on powered industrial trucks. A safe place to ride shall be provided where riding of trucks is authorized.

(4) The employer shall prohibit arms or legs from being placed between the uprights of the mast or outside the running lines of the truck.

(5)(i) When a powered industrial truck is left unattended, load engaging means shall be fully lowered, controls shall be neutralized, power shall be shut off, and brakes set. Wheels shall be blocked if the truck is parked on an incline.

(ii) A powered industrial truck is unattended when the operator is 25 ft. or more away from the vehicle which remains in his view, or whenever the operator leaves the vehicle and it is not in his view.

(iii) When the operator of an industrial truck is dismounted and within 25 ft. of the truck still in his view, the load engaging means shall be fully lowered, controls neutralized, and the brakes set to prevent movement.

(6) A safe distance shall be maintained from the edge of ramps or platforms while on any elevated dock, or platform or freight car. Trucks shall not be used for opening or closing freight doors.

(7) Brakes shall be set and wheel blocks shall be in place to prevent movement of trucks, trailers, or railroad cars while loading or unloading. Fixed jacks may be necessary to support a semitrailer during loading or unloading when the trailer is not coupled to a tractor. The flooring of trucks, trailers, and railroad cars shall be checked for breaks and weakness before they are driven onto.

(8) There shall be sufficient head room under overhead installations, lights, pipes, sprinkler system, etc.

(9) An overhead guard shall be used as protection against falling objects. It should be noted that an overhead guard is intended to offer protection from the impact of small packages, boxes, bagged material, etc., representative of the job application, but not to withstand the impact of a falling capacity load.

(10) A load backrest extension shall be used whenever necessary to minimize the possibility of the load or part of it from falling rearward.

(11) Only approved industrial trucks shall be used in hazardous locations.

(12)-(13) [Reserved]

050009

- (14) Fire aisles, access to stairways, and fire equipment shall be kept clear.
- (n) Traveling. (1) All traffic regulations shall be observed, including authorized plant speed limits. A safe distance shall be maintained approximately three truck lengths from the truck ahead, and the truck shall be kept under control at all times.
- (2) The right of way shall be yielded to ambulances, fire trucks, or other vehicles in emergency situations.
- (3) Other trucks traveling in the same direction at intersections, blind spots, or other dangerous locations shall not be passed.
- (4) The driver shall be required to slow down and sound the horn at cross aisles and other locations where vision is obstructed. If the load being carried obstructs forward view, the driver shall be required to travel with the load trailing.
- (5) Railroad tracks shall be crossed diagonally wherever possible. Parking closer than 8 feet from the center of railroad tracks is prohibited.
- (6) The driver shall be required to look in the direction of, and keep a clear view of the path of travel.
- (7) Grades shall be ascended or descended slowly.
- (i) When ascending or descending grades in excess of 10 percent, loaded trucks shall be driven with the load upgrade.
- (ii) [Reserved]
- (iii) On all grades the load and load engaging means shall be tilted back if applicable, and raised only as far as necessary to clear the road surface.
- (8) Under all travel conditions the truck shall be operated at a speed that will permit it to be brought to a stop in a safe manner.
- (9) Stunt driving and horseplay shall not be permitted.
- (10) The driver shall be required to slow down for wet and slippery floors.
- (11) Dockboard or bridgeplates, shall be properly secured before they are driven over. Dockboard or bridgeplates shall be driven over carefully and slowly and their rated capacity never exceeded.
- (12) Elevators shall be approached slowly, and then entered squarely after the elevator car is properly leveled. Once on the elevator, the controls shall be neutralized, power shut off, and the brakes set.
- (13) Motorized hand trucks must enter elevator or other confined areas with load end forward.
- (14) Running over loose objects on the roadway surface shall be avoided.

050010

(15) While negotiating turns, speed shall be reduced to a safe level by means of turning the hand steering wheel in a smooth, sweeping motion. Except when maneuvering at a very low speed, the hand steering wheel shall be turned at a moderate, even rate.

(o) Loading. (1) Only stable or safely arranged loads shall be handled. Caution shall be exercised when handling off-center loads which cannot be centered.

(2) Only loads within the rated capacity of the truck shall be handled.

(3) The long or high (including multiple-tiered) loads which may affect capacity shall be adjusted.

(4) Trucks equipped with attachments shall be operated as partially loaded trucks when not handling a load.

(5) A load engaging means shall be placed under the load as far as possible; the mast shall be carefully tilted backward to stabilize the load.

(6) Extreme care shall be used when tilting the load forward or backward, particularly when high tiering. Tilting forward with load engaging means elevated shall be prohibited except to pick up a load. An elevated load shall not be tilted forward except when the load is in a deposit position over a rack or stack. When stacking or tiering, only enough backward tilt to stabilize the load shall be used.

(p) Operation of the truck. (1) If at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

(2) Fuel tanks shall not be filled while the engine is running. Spillage shall be avoided.

(3) Spillage of oil or fuel shall be carefully washed away or completely evaporated and the fuel tank cap replaced before restarting engine.

(4) No truck shall be operated with a leak in the fuel system until the leak has been corrected.

(5) Open flames shall not be used for checking electrolyte level in storage batteries or gasoline level in fuel tanks.

(q) Maintenance of industrial trucks. (1) Any power-operated industrial truck not in safe operating condition shall be removed from service. All repairs shall be made by authorized personnel.

(2) No repairs shall be made in Class I, II, and III locations.

(3) Those repairs to the fuel and ignition systems of industrial trucks which involve fire hazards shall be conducted only in locations designated for such repairs.

(4) Trucks in need of repairs to the electrical system shall have the battery disconnected prior to such repairs.

(5) All parts of any such industrial truck requiring replacement shall be replaced only by parts equivalent as to safety with those used in the original design.

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(6) Industrial trucks shall not be altered so that the relative positions of the various parts are different from what they were when originally received from the manufacturer, nor shall they be altered either by the addition of extra parts not provided by the manufacturer or by the elimination of any parts, except as provided in paragraph (q)(12) of this section. Additional counterweighting of fork trucks shall not be done unless approved by the truck manufacturer.

(7) Industrial trucks shall be examined before being placed in service, and shall not be placed in service if the examination shows any condition adversely affecting the safety of the vehicle. Such examination shall be made at least daily. Where industrial trucks are used on a round-the-clock basis, they shall be examined after each shift. Defects when found shall be immediately reported and corrected.

(8) Water mufflers shall be filled daily or as frequently as is necessary to prevent depletion of the supply of water below 75 percent of the filled capacity. Vehicles with mufflers having screens or other parts that may become clogged shall not be operated while such screens or parts are clogged. Any vehicle that emits hazardous sparks or flames from the exhaust system shall immediately be removed from service, and not returned to service until the cause for the emission of such sparks and flames has been eliminated.

(9) When the temperature of any part of any truck is found to be in excess of its normal operating temperature, thus creating a hazardous condition, the vehicle shall be removed from service and not returned to service until the cause for such overheating has been eliminated.

(10) Industrial trucks shall be kept in a clean condition, free of lint, excess oil, and grease. Noncombustible agents should be used for cleaning trucks. Low flash point (below 100 °F.) solvents shall not be used. High flash point (at or above 100 °F.) solvents may be used. Precautions regarding toxicity, ventilation, and fire hazard shall be consonant with the agent or solvent used.

(11) [Reserved]

(12) Industrial trucks originally approved for the use of gasoline for fuel may be converted to liquefied petroleum gas fuel provided the complete conversion results in a truck which embodies the features specified for LP or LPS designated trucks. Such conversion equipment shall be approved. The description of the component parts of this conversion system and the recommended method of installation on specific trucks are contained in the "Listed by Report."

#### Appendix A to § 1910.178--Stability of Powered Industrial Trucks

(Non-mandatory Appendix to Paragraph (l) of This Section)

##### A-1. Definitions.

The following definitions help to explain the principle of stability:

Center of gravity is the point on an object at which all of the object's weight is concentrated. For symmetrical loads, the center of gravity is at the middle of the load.

Counterweight is the weight that is built into the truck's basic structure and is used to offset the load's weight and to maximize the vehicle's resistance to tipping over.

050012

Fulcrum is the truck's axis of rotation when it tips over.

Grade is the slope of a surface, which is usually measured as the number of feet of rise or fall over a hundred foot horizontal distance (the slope is expressed as a percent).

Lateral stability is a truck's resistance to overturning sideways.

Line of action is an imaginary vertical line through an object's center of gravity.

Load center is the horizontal distance from the load's edge (or the fork's or other attachment's vertical face) to the line of action through the load's center of gravity.

Longitudinal stability is the truck's resistance to overturning forward or rearward.

Moment is the product of the object's weight times the distance from a fixed point (usually the fulcrum). In the case of a powered industrial truck, the distance is measured from the point at which the truck will tip over to the object's line of action. The distance is always measured perpendicular to the line of action.

Track is the distance between the wheels on the same axle of the truck.

Wheelbase is the distance between the centerline of the vehicle's front and rear wheels.

## A-2. General.

A-2.1. Determining the stability of a powered industrial truck is simple once a few basic principles are understood. There are many factors that contribute to a vehicle's stability: the vehicle's wheelbase, track, and height; the load's weight distribution; and the vehicle's counterweight location (if the vehicle is so equipped).

A-2.2. The "stability triangle," used in most stability discussions, demonstrates stability simply.

## A-3. Basic Principles.

A-3.1. Whether an object is stable depends on the object's moment at one end of a system being greater than, equal to, or smaller than the object's moment at the system's other end. This principle can be seen in the way a see-saw or teeter-totter works: that is, if the product of the load and distance from the fulcrum (moment) is equal to the moment at the device's other end, the device is balanced and it will not move. However, if there is a greater moment at one end of the device, the device will try to move downward at the end with the greater moment.

A-3.2. The longitudinal stability of a counterbalanced powered industrial truck depends on the vehicle's moment and the load's moment. In other words, if the mathematic product of the load moment (the distance from the front wheels, the approximate point at which the vehicle would tip forward) to the load's center of gravity times the load's weight is less than the vehicle's moment, the system is balanced and will not tip forward. However, if the load's moment is greater than the vehicle's moment, the greater load-moment will force the truck to tip forward.

## A-4. The Stability Triangle.

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A-4.1. Almost all counterbalanced powered industrial trucks have a three-point suspension system, that is, the vehicle is supported at three points. This is true even if the vehicle has four wheels. The truck's steer axle is attached to the truck by a pivot pin in the axle's center. When the points are connected with imaginary lines, this three-point support forms a triangle called the stability triangle. Figure 1 depicts the stability triangle.

See Image at [http://edocket.access.gpo.gov/cfr\\_2007/julqtr/pdf/29cfr1910.178.pdf](http://edocket.access.gpo.gov/cfr_2007/julqtr/pdf/29cfr1910.178.pdf)

A-4.2. When the vehicle's line of action, or load center, falls within the stability triangle, the vehicle is stable and will not tip over. However, when the vehicle's line of action or the vehicle/load combination falls outside the stability triangle, the vehicle is unstable and may tip over. (See Figure 2.)

See Image at [http://edocket.access.gpo.gov/cfr\\_2007/julqtr/pdf/29cfr1910.178.pdf](http://edocket.access.gpo.gov/cfr_2007/julqtr/pdf/29cfr1910.178.pdf)

#### A-5. Longitudinal Stability.

A-5.1. The axis of rotation when a truck tips forward is the front wheels' points of contact with the pavement. When a powered industrial truck tips forward, the truck will rotate about this line. When a truck is stable, the vehicle-moment must exceed the load-moment. As long as the vehicle-moment is equal to or exceeds the load-moment, the vehicle will not tip over. On the other hand, if the load moment slightly exceeds the vehicle-moment, the truck will begin to tip forward, thereby causing the rear to lose contact with the floor or ground and resulting in loss of steering control. If the load-moment greatly exceeds the vehicle moment, the truck will tip forward.

A-5.2. To determine the maximum safe load-moment, the truck manufacturer normally rates the truck at a maximum load at a given distance from the front face of the forks. The specified distance from the front face of the forks to the line of action of the load is commonly called the load center. Because larger trucks normally handle loads that are physically larger, these vehicles have greater load centers. Trucks with a capacity of 30,000 pounds or less are normally rated at a given load weight at a 24-inch load center. Trucks with a capacity greater than 30,000 pounds are normally rated at a given load weight at a 36- or 48-inch load center. To safely operate the vehicle, the operator should always check the data plate to determine the maximum allowable weight at the rated load center.

A-5.3. Although the true load-moment distance is measured from the front wheels, this distance is greater than the distance from the front face of the forks. Calculating the maximum allowable load-moment using the load-center distance always provides a lower load-moment than the truck was designed to handle. When handling unusual loads, such as those that are larger than 48 inches long (the center of gravity is greater than 24 inches) or that have an offset center of gravity, etc., a maximum allowable load-moment should be calculated and used to determine whether a load can be safely handled. For example, if an operator is operating a 3000 pound capacity truck (with a 24-inch load center), the maximum allowable load-moment is 72,000 inch-pounds (3,000 times 24). If a load is 60 inches long (30-inch load center), then the maximum that this load can weigh is 2,400 pounds (72,000 divided by 30).

#### A-6. Lateral Stability.

A-6.1. The vehicle's lateral stability is determined by the line of action's position (a vertical line that passes through the combined vehicle's and load's center of gravity) relative to the stability triangle. When the vehicle is not loaded, the truck's center of gravity location is the only factor to be considered in determining the truck's stability. As long as the line of action of the combined vehicle's and load's

050014

center of gravity falls within the stability triangle, the truck is stable and will not tip over. However, if the line of action falls outside the stability triangle, the truck is not stable and may tip over. Refer to Figure 2.

A-6.2. Factors that affect the vehicle's lateral stability include the load's placement on the truck, the height of the load above the surface on which the vehicle is operating, and the vehicle's degree of lean.

#### A-7. Dynamic Stability.

A-7.1. Up to this point, the stability of a powered industrial truck has been discussed without considering the dynamic forces that result when the vehicle and load are put into motion. The weight's transfer and the resultant shift in the center of gravity due to the dynamic forces created when the machine is moving, braking, cornering, lifting, tilting, and lowering loads, etc., are important stability considerations.

A-7.2. When determining whether a load can be safely handled, the operator should exercise extra caution when handling loads that cause the vehicle to approach its maximum design characteristics. For example, if an operator must handle a maximum load, the load should be carried at the lowest position possible, the truck should be accelerated slowly and evenly, and the forks should be tilted forward cautiously. However, no precise rules can be formulated to cover all of these eventualities.

[39 FR 23502, June 27, 1974, as amended at 40 FR 23073, May 28, 1975; 43 FR 49749, Oct. 24, 1978; 49 FR 5322, Feb. 10, 1984; 53 FR 12122, Apr. 12, 1988; 55 FR 32015, Aug 6, 1990; 61 FR 9239, Mar. 7, 1996; 63 FR 66270, Dec. 1, 1998; 68 FR 32638, June 2, 2003; 71 FR 16672, Apr. 3, 2006]

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050015



DECLARATIONS

POLICY NUMBER 49-64103-05

FIRST NAMED INSURED AND ADDRESS

PRODUCER 01010128

PETE'S RV CENTER  
(A CORPORATION)  
4016 WILLISTON ROAD  
SOUTH BURLINGTON, VT 05403

O'DONNELL, DANIEL PATRICK  
117 WHEELLOCK ST  
MANCHESTER, NH 03102

Policy Period: From 02-24-02 TO 02-24-03 at 12:01 AM Standard Time  
at your mailing address shown above.

Form of Named Insured's Business: CORPORATION

In return for the payment of the premium, and subject to all the terms  
of this policy, we agree with you to provide the insurance as stated  
in this policy.

This Policy consists of the following coverage parts:

- COMMERCIAL PROPERTY COVERAGE PART
- COMMERCIAL INLAND MARINE COVERAGE PART
- COMMERCIAL CRIME COVERAGE PART
- COMMERCIAL GENERAL LIABILITY COVERAGE PART
- COMMERCIAL AUTO COVERAGE PART
- COMMERCIAL UMBRELLA COVERAGE PART

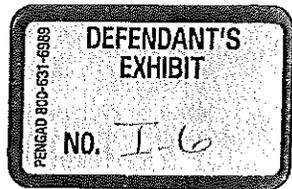
Forms applicable to all coverage parts:  
IL 00 17 11 98 80-2314(SSDO) (Ed. 05-00)

For Service Please Contact Your Sentry Account Manager at The  
Number Listed Above Or Our Service Office At:

4400 E 53RD ST  
DAVENPORT, IA 52807  
800-447-0633

businessproducts\_SSD0@sentry.com

IL DS 00 04 98 (MECH)



PET 49-64103-05 021  
08-29-06

## DECLARATIONS

POLICY NUMBER 49-64103-05

FIRST NAMED INSURED AND ADDRESS:	PRODUCER	01010128
PETE'S RV CENTER 4016 WILLISTON ROAD SOUTH BURLINGTON, VT 05403	IVERS, WILLIAM J P.O. BOX 297 NORTH SALEM, NH 03073 603-893-9425	

POLICY PERIOD: FROM 02-24-03 TO 02-24-04 AT 12:01 AM STANDARD TIME  
 AT YOUR MAILING ADDRESS SHOWN ABOVE.

FORM OF NAMED INSURED'S BUSINESS: CORPORATION

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS  
 OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED  
 IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS:

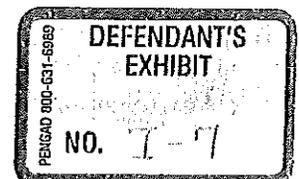
COMMERCIAL PROPERTY COVERAGE PART  
 COMMERCIAL INLAND MARINE COVERAGE PART  
 CRIME AND FIDELITY COVERAGE PART  
 COMMERCIAL GENERAL LIABILITY COVERAGE PART  
 COMMERCIAL AUTO COVERAGE PART  
 COMMERCIAL UMBRELLA COVERAGE PART

FORMS APPLICABLE TO ALL COVERAGE PARTS:  
 IL 00 17 11 98 80-2314(SSDO) (ED. 05-00)

FOR SERVICE PLEASE CONTACT YOUR SENTRY ACCOUNT MANAGER AT THE  
 NUMBER LISTED ABOVE OR OUR SERVICE OFFICE AT:  
 4400 E 53RD ST  
 DAVENPORT, IA 52807  
 563-459-5000

IL DS 00 07 02 (MECH)

PET 49-64103-05 031  
 01-23-03





DECLARATIONS

POLICY NUMBER 49-64103-05

FIRST NAMED INSURED AND ADDRESS

PRODUCER 01010128

PETE'S RV CENTER  
 (A CORPORATION)  
 4016 WILLISTON ROAD  
 SOUTH BURLINGTON, VT 05403

O'DONNELL, DANIEL PATRICK  
 117 WHEELOCK ST  
 MANCHESTER, NH 03102

Policy Period: From 02-24-04 TO 02-24-05 at 12:01 AM Standard Time  
 at your mailing address shown above.

Form of Named Insured's Business: CORPORATION

In return for the payment of the premium, and subject to all the terms  
 of this policy, we agree with you to provide the Insurance as stated  
 in this policy.

This Policy consists of the following coverage parts:

- COMMERCIAL PROPERTY COVERAGE PART
- COMMERCIAL INLAND MARINE COVERAGE PART
- CRIME AND FIDELITY COVERAGE PART
- COMMERCIAL GENERAL LIABILITY COVERAGE PART
- COMMERCIAL AUTO COVERAGE PART
- COMMERCIAL UMBRELLA COVERAGE PART

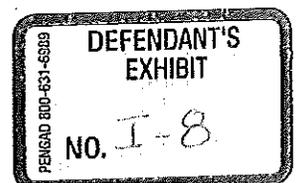
Forms applicable to all coverage parts:  
 IL 00 17 11 98 80-2314(SSDO) (Ed. 05-00)

For Service Please Contact Your Sentry Account Manager at The  
 Number Listed Above Or Our Service Office At:

4400 E 53RD ST  
 DAVENPORT, IA 52807  
 800-447-0633

businessproducts\_SSD0@sentry.com

IL DS 00 07 02 (MECH)



WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY  
INFORMATION PAGE

ITEM CORP. NEW POLICY NUMBER 49-64103-13 00 031  
1. INSURED NAME AND ADDRESS: PRODUCER 01010128  
PETE'S RV CENTER IVERS, WILLIAM J  
4016 WILLISTON ROAD P.O. BOX 297  
SOUTH BURLINGTON VT 05403 NORTH SALEM, NH 03073  
603-893-9425  
PHONE NUMBER (802) 864-9350 1ST NAMED INSURED FEDERAL ID 230289711  
SEE SCHEDULE OF ENTITIES FOR OTHER INSURED ENTITIES

OTHER WORKPLACES NOT SHOWN ABOVE:  
SEE EXTENSION OF INFORMATION PAGE

2. POLICY PERIOD:  
THIS POLICY PERIOD IS FROM 02-24-2003 TO 02-24-2004, 12:01 A.M., STANDARD  
TIME AT THE INSURED'S MAILING ADDRESS.

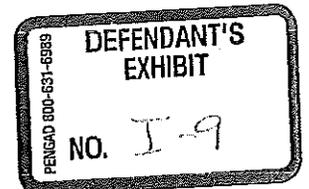
- 3. COVERAGE
  - A. WORKERS COMPENSATION INSURANCE: PART ONE OF THE POLICY APPLIES TO  
THE WORKERS COMPENSATION LAW OF THE STATES LISTED HERE:  
VERMONT
  - B. EMPLOYERS LIABILITY INSURANCE: PART TWO OF THE POLICY APPLIES TO  
WORK IN EACH STATE LISTED IN ITEM 3.A. THE LIMITS OF OUR LIABIL-  
ITY UNDER PART TWO ARE:
    - BODILY INJURY BY ACCIDENT \$ 500,000 EACH ACCIDENT
    - BODILY INJURY BY DISEASE \$ 500,000 EACH EMPLOYEE
    - BODILY INJURY BY DISEASE \$ 500,000 POLICY LIMIT
  - C. OTHER STATES INSURANCE: PART THREE OF THE POLICY APPLIES IN ALL  
STATES EXCEPT THOSE LISTED IN ITEM 3.A., AND THE FOLLOWING:  
AK ME ND OH RI WA WV WY
  - D. THIS POLICY INCLUDES THESE ENDORSEMENTS AND SCHEDULES:
 

WC 00 03 08 0484	WC 00 04 06 0484	WC 00 04 14 0790
WC 00 04 19 0101	WC 00 04 20 1202	WC 44 06 01 0484
WC 44 06 02A 0991		

WC 00 00 01A COPYRIGHT 1987 NATIONAL COUNCIL ON COMPENSATION INSURANCE

PET 49-64103-13 00 031  
03-13-2003  
PAGE 001 M

CONTINUED ON NEXT PAGE



WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY  
INFORMATION PAGE

ITEM	CORP.	RENEWAL OF	POLICY NUMBER 49-64103-13 00 041
1.	INSURED NAME AND ADDRESS:		POLICY NUMBER 49-64103-13 00 031
	PETE'S RV CENTER		PRODUCER 01010128
	4016 WILLISTON ROAD		MASCARELLA, DAVID M
	SOUTH BURLINGTON	VT 05403	APT 104
			3 BLACKBERRY WAY
			MANCHESTER, NH 03102
			603-624-1907

PHONE NUMBER (802) 864-9350

1ST NAMED INSURED FEDERAL ID 230289711

SEE SCHEDULE OF ENTITIES FOR OTHER INSURED ENTITIES

OTHER WORKPLACES NOT SHOWN ABOVE:  
SEE EXTENSION OF INFORMATION PAGE

2. POLICY PERIOD:  
THIS POLICY PERIOD IS FROM 02-24-2004 TO 02-24-2005, 12:01 A.M., STANDARD TIME AT THE INSURED'S MAILING ADDRESS.

3. COVERAGE

A. WORKERS COMPENSATION INSURANCE: PART ONE OF THE POLICY APPLIES TO THE WORKERS COMPENSATION LAW OF THE STATES LISTED HERE:  
VERMONT

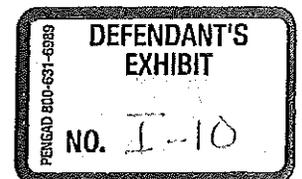
B. EMPLOYERS LIABILITY INSURANCE: PART TWO OF THE POLICY APPLIES TO WORK IN EACH STATE LISTED IN ITEM 3.A. THE LIMITS OF OUR LIABILITY UNDER PART TWO ARE:

BODILY INJURY BY ACCIDENT	\$	500,000	EACH ACCIDENT
BODILY INJURY BY DISEASE	\$	500,000	EACH EMPLOYEE
BODILY INJURY BY DISEASE	\$	500,000	POLICY LIMIT

C. OTHER STATES INSURANCE: PART THREE OF THE POLICY APPLIES IN ALL STATES EXCEPT THOSE LISTED IN ITEM 3.A., AND THE FOLLOWING:  
AK ME ND OH RI WA WV WY

D. THIS POLICY INCLUDES THESE ENDORSEMENTS AND SCHEDULES:

WC 00 03 08	0484	WC 00 04 06	0484	WC 00 04 14	0790
WC 00 04 19	0101	WC 00 04 20	1202	WC 44 06 01	0484
WC 44 06 02A	0991				





Torrance, California 90506-2958



**TOYOTA MOTOR CREDIT CORPORATION**

LEASE NO. \_\_\_\_\_ (TMCC/USE)

**LEASE AGREEMENT  
(EQUIPMENT)**

LEASE DATE: 7/12/00

LESSEE - NAME AND ADDRESS OF PRINCIPAL OFFICE: <u>Mactaw, Inc. DBA/Pete's RV Center.</u> <u>4016 Williston Road</u> <u>So. Burlington, Vermont 05403</u> <input type="checkbox"/> Individual <input type="checkbox"/> Partnership <input checked="" type="checkbox"/> Corporation <input type="checkbox"/> Other		DEALER / LESSOR - NAME AND BUSINESS ADDRESS: <u>Northern Lift Trucks, Inc.</u> <u>683 Pine Street</u> <u>Burlington, Vermont 05401</u>	
ADDRESS OF LOCATION OF EQUIPMENT: <u>Same As Above</u>		JUL 18 2000	
Insurance Company or Agent: <u>Sentry Insurance Co. Pete Jordon</u> Address: <u>P.O.Box 959 Moultonboro, N.H. 03254</u>		Phone No. <u>(603) 284-7456</u>	

This Agreement  is  is not a FULL SERVICE MAINTENANCE AGREEMENT.

The following Exhibits, if any, are attached hereto and incorporated herein by this reference:

Exhibit "A" Addendum To Lease Agreement Exhibit "B" N/A

**1. LEASE OF EQUIPMENT.**

Subject to the terms and conditions of this Lease Agreement ("Agreement"), LESSOR hereby rents to LESSEE and LESSEE hereby rents from LESSOR, the following material handling vehicles complete with all additions, attachments and accessories and all other material handling vehicles described on a Notice of Delivery ("Notice of Delivery") executed by LESSOR and LESSEE from time to time in the form of Supplement No.1 attached hereto and incorporated herein by this reference (collectively referred to as the "Equipment"):

ITEM NO.	QUANTITY	DESCRIPTION / SERIAL NO.	MONTHLY RENTAL PER ITEM	INITIAL TERM	SECURITY DEPOSIT	HOURLY OVERTIME RATE PER ITEM
	One---	New Toyota Industrial Forklift. Model#7FGU30, Serial#60883. 147" Mast, LP Gas System, Dual Drive Tires, 48" Forks, 48" LBR, Yellow Strobe, Back-Up Alarm.	\$444.36 Plus Tax If Applicable.	60 Mo.	-0-	-0-

All Equipment rented hereunder is rented f.o.b., at LESSOR's address set forth above and will be used by LESSEE in LESSEE's operation at the address set forth above and as described in a Survey Report executed by LESSOR and LESSEE (the "Survey Report"). LESSEE shall not remove any of the Equipment to any other place without LESSOR's prior written consent.

Where battery powered Equipment is rented, any additional batteries and chargers other than those provided above and included in the monthly rental per item shall be rented at the additional sole cost and expense of LESSEE.

The rentals shown above have been calculated on the basis of information supplied by LESSEE and data developed by LESSOR as set forth in the Survey Report.

If an hourly overtime rate is shown above, the hourly overtime rate will apply to each hour of use of any Equipment in excess of N/A hours in any calendar quarter as determined by the hour meter or other mechanical device used to record hours of use supplied with the Equipment ("hour meter"). Readings of the hour meter will be taken and billed by LESSOR quarterly. If any hour meter on any Equipment fails to function, thereby rendering an hour meter reading unavailable for such Equipment, the hours of use will be ascertained by computing the average number of hours per month that the Equipment was used during the previous 3 months of recorded usage (or in case such previous period of recorded use shall be less than 3 months, then during such lesser period) and multiplying the monthly average so computed by the number of months, or fractions thereof, during which said hour meter for such Equipment shall have failed to function. LESSEE agrees to pay said overtime rental charges within 10 days from the date of LESSOR'S invoice for such charges.

**2. TERM AND RENEWAL.**

- 2.1 The original term of rental of the Equipment will commence with the delivery thereof and, unless sooner terminated as provided herein, will continue for the number of months set forth above under "Initial Term" (the "Initial Term").
- 2.2 The Initial Term will be extended automatically from month to month after the expiration thereof unless either of the parties gives notice to the other of an intention to terminate such rental at least 60 days prior to the expiration of the Initial Term, or at least 10 days prior to the expiration of any extended term.

until the rented Equipment is put into proper operating condition. The substituted Equipment will be as nearly practicable of the same capacity and general specifications as the rented Equipment; provided, that LESSOR will not be required to provide specialized attachments or accessories, or to make special alterations to the substituted Equipment. Such substituted Equipment will, while in the service of LESSEE, be subject to the terms and conditions and the payment of rentals and charges provided in this Agreement.

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**3. RENT.**

6.4A Obligations of LESSEE - LESSEE, at its own cost and expense, will

Item of Equipment commencing on the day of delivery and continuing on the same day of the month of each successive month thereafter during the Initial Term, as extended pursuant to Section 2.2 above, until the Equipment is returned to LESSOR. All rent and other sums payable to LESSOR will be paid to Toyota Motor Credit Corporation at the address set forth below its signature or at such other address as Toyota Motor Credit Corporation may in writing direct from time to time.

#### 4. DELIVERY.

When Equipment is delivered to LESSEE, LESSOR will prepare and deliver to LESSEE a Notice of Delivery which will set forth separately for each item the following information: item number, a description of the Equipment, serial number and a delivery date. Although LESSOR will try to deliver the Equipment by the delivery date requested, TIME OF DELIVERY IS NOT OF THE ESSENCE AND LESSOR ASSUMES NO LIABILITY FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES FOR FAILURE TO MAKE DELIVERY ON SUCH DATE. LESSEE or LESSEE'S authorized representative will execute such Notice of Delivery and return it to LESSOR.

#### 5. RETURN OF EQUIPMENT.

5.1 LESSEE will return all of the Equipment at the expiration or earlier termination of the lease term, freight prepaid to a point designated by LESSOR. The designated point will be in no event farther than LESSOR'S place of business. The Equipment will be returned in safe operating condition.

5.2 For the purpose of this Article the phrase "safe operating condition" will mean that the Equipment loaded to its rated capacity: (i) has no missing or broken components or accessories; (ii) starts under its own power and idles; (iii) does not leak oil, water, fuel, or any other fluids; (iv) moves through its normal speed ranges in both forward and reverse; (v) steers normally right and left in both forward and reverse; (vi) is able to stop by means of service brakes in a safe distance in both forward and reverse; (vii) lifts, lowers, and tilts normally and without hydraulic oil leaks; and (viii) its attachments, if so equipped, perform all of their required functions. In addition, to be in safe operating condition Equipment will have: (i) serviceable tires, with some remaining tread and without chunking or flat spots; and (ii) operational horn, parking brake and lights.

5.3 If all of the Equipment is not returned in safe operating condition, LESSOR will bill LESSEE for the amount of LESSOR'S then normal charge to its customers for any repairs necessary to place the Equipment in safe operating condition, regardless of whether LESSOR actually performs such repairs, and LESSEE will pay such bill within 30 days after its receipt thereof.

#### 6. MAINTENANCE, CARE AND INSPECTION.

6.1 LESSEE will keep the Equipment in a covered area when not in use. LESSEE will cause the Equipment to be operated only by competent, fully-trained-in-use employees of LESSEE. LESSEE will also assure that the Equipment is operated with driver's overhead guard and load backrest extension installed. LESSEE agrees to operate the Equipment within its rated capacity and not to alter or modify the Equipment.

If this Agreement is a FULL SERVICE MAINTENANCE AGREEMENT, the following provisions will also apply:

6.2A Obligations of LESSOR. Subject to the performance by LESSEE of its obligations with respect to the Equipment, LESSOR will service and maintain the Equipment in proper working condition. LESSEE agrees to make the Equipment available for servicing by representatives of LESSOR at reasonable times during LESSOR'S business hours. LESSEE will provide, without charge to LESSOR, a suitable area within LESSEE'S premises in order that LESSOR'S agents or employees may service each unit of Equipment and perform such repairs as can reasonably be made without removing the Equipment from LESSEE'S premises. The space will be well-lighted, heated and ventilated. Where the number and type of Equipment warrants, LESSEE will provide an adequate, protected storage area and facilities, without charge, in order that LESSOR may maintain an inventory of supplies or parts required in the servicing of the Equipment.

6.3A If any Item of Equipment is out of service for needed repairs, due to normal use, LESSOR will promptly after notice by LESSEE arrange to repair such Equipment. If LESSOR deems it impracticable to promptly repair any such item of disabled Equipment, LESSOR will temporarily substitute similar Equipment in good operating condition

its daily operation, including: (i) the making of a routine check of each unit at the beginning of each shift; (ii) supplying all necessary fuel (gasoline, electric current or L. P. Gas), replacement oil and water; (iii) where applicable, checking the oil level in the crankcase and water in the cooling system daily and checking the air pressure of pneumatic tires weekly; (iv) where battery-powered Equipment is rented, maintaining the proper level of water in the batteries, and installing devices necessary to effectuate such recharging; and (v) where L. P. Gas Equipment is rented, furnishing and storing L. P. Gas fuel and cylinders and changing such cylinders as required.

If this Agreement is NOT A FULL SERVICE MAINTENANCE AGREEMENT, the following provisions will apply:

6.2B LESSOR will inspect the Equipment periodically during the lease term. LESSOR will furnish to LESSEE a report after each such inspection on the condition of each unit of Equipment and any repair work that may be required.

6.3B LESSEE agrees to perform, at its own cost and expense, according to LESSOR'S manuals for maintenance and operation, all Equipment maintenance, service and repair (including both labor and materials) including, but not limited to:

a. Daily maintenance such as (i) the making of a routine check of each item at the beginning of each shift; (ii) supplying all necessary fuel (gasoline, electric current or L. P. Gas), replacement oil and water; (iii) where applicable, checking the oil level in the crankcase and water in the cooling system daily and checking the air pressure of pneumatic tires weekly; (iv) where battery-powered Equipment is rented, maintaining the proper level of water in the batteries, and installing devices necessary to effectuate such recharging; and (v) where L. P. Gas Equipment is rented, furnishing and storing the L. P. Gas fuel and cylinders and changing such cylinders as required.

b. Preventive maintenance service (per lubrication charts in manual).

c. Repairing, overhauling or adjusting of drive line, drive axle, uprights, steering gear, steering axle, hydraulic system brakes, power steering components, chains; and on gas-powered Equipment, the engine, engine accessories, belts, clutch and transmissions; and on battery-powered Equipment, the electric drive and pump motors; and all other routine repair work required to keep the Equipment in good operating condition.

d. Repairing, overhauling or adjusting of battery and charging Equipment, where battery-powered Equipment is rented.

e. Replacing or repairing of tires.

f. Repairs that may be required as determined by LESSOR during its periodic inspection and report to LESSEE.

6.4B LESSEE will, at its own expense during the term hereof and until the return of the Equipment at the expiration of the lease term, maintain the Equipment in good operating order, repair, and appearance and, in effecting maintenance and repairs, will have such work performed only by qualified persons who are satisfactory to LESSOR. If LESSOR, during any inspection, determines that LESSEE has failed to perform its obligations as set forth above with respect to any item of Equipment, LESSOR will give LESSEE written notice thereof. Unless LESSEE performs such obligations within 30 days from the date of such notice, LESSOR will have the right, but not the obligation, to terminate the lease on such Equipment and/or to perform the maintenance, service and repair required to be performed by LESSEE under this Agreement. If LESSOR performs such maintenance, service or repair, LESSEE will pay LESSOR an amount equal to LESSOR'S then normal charge to its customers for similar services, such payment to be made within thirty (30) days after LESSEE receives LESSOR'S invoice with respect thereto.

#### 7. TAXES.

LESSEE will be responsible for and pay when billed by LESSOR any and all taxes, fees, or assessments, however designated, levied, or based, relating to the Equipment or the lease thereof, or the transfer, use, possession or operation of the Equipment, or any combination of the foregoing; including but not limited to personal property taxes, gross receipts taxes, privilege taxes, excise taxes, license taxes, and sales and use taxes, together with any penalties, fines or interest thereon, and excluding only franchise taxes and taxes measured by the net income of the LESSOR. When personal property taxes are not billed on an item basis by the respective governmental authority, LESSOR will determine the appropriate tax liabilities attributable to the leased Equipment on a reasonable basis. LESSEE will give immediate notice to LESSOR of any

reasonable basis. LESSOR will give immediate notice to LESSEE of any

temporarily substitute similar Equipment in good operating condition

**ADDITIONAL TERMS AND CONDITIONS**

attachment, tax notice, or inquiries from taxing authorities concerning taxes, fees, or assessments referred to herein.

any right or remedy available to LESSOR will not operate as a waiver of any other right or remedy. The failure of LESSOR to exercise or a delay by LESSOR in exercising any right or remedy will not operate as a waiver of such right or any other right.

**8. LIABILITY OF LESSEE.**

LESSEE assumes all risks and liability arising from LESSEE's possession, use and operation of the Equipment from the moment of delivery to LESSEE to the moment of return to LESSOR. Unless directly caused by LESSOR'S sole negligence, LESSEE agrees to indemnify and hold LESSOR harmless from any and all of the following whether the same be actual or alleged: all loss, damage, claims, suits, taxes, liens, penalties, fines, liability and expense (including attorneys' fees) arising in any manner as a result of the breach by LESSEE, any agent, employee or servant of LESSEE, any assignee of LESSEE and any other person using or in possession of the Equipment, of any term of this Agreement, or relating directly or indirectly to the possession, use and operation of the Equipment including, but not limited to injuries or death to persons or damages to or destruction of property, claims and liens for storage, labor and materials and all loss of and damage to the Equipment. Should LESSOR assign any of its rights or delegate any of its obligations under this Agreement, LESSEE agrees that LESSOR, LESSOR'S assignee and the officers, directors, stockholders, employees, agents and representatives of LESSOR'S assignee, will be entitled to the indemnity provided hereunder.

**9. INSURANCE.**

LESSEE will provide and pay for all-risk insurance against physical loss or damage to the Equipment in an amount satisfactory to LESSOR. LESSEE will also provide and pay for public bodily injury and property damage liability insurance against loss caused by or arising from LESSEE'S possession, use or operation of the Equipment. The minimum limits for such liability insurance shall be not less than One Million Dollars combined single limit. LESSEE will furnish LESSOR with certificates of insurance evidencing such coverages and designating both LESSOR and its assigns as additional insureds and loss payees under the policy. Such certificates shall provide for 30 days' prior written notice by registered mail to LESSOR of any cancellation or change reducing coverage. The insurance so provided will be effective during the period from the moment of delivery of each item of Equipment under lease to LESSEE until the moment of return receipt by LESSOR. LESSOR reserves the right, but not the obligation, upon failure of LESSEE to furnish such certificates of insurance or upon receipt of a notice of cancellation or change reducing coverage to make such arrangements for insurance as LESSOR believes necessary. LESSEE will pay for the cost of such insurance upon demand.

**10. THEFT OR DESTRUCTION.**

If any of the Equipment is stolen or disappears or is damaged to the extent that it is impossible to place it back into the same condition as when received (ordinary wear and tear excepted) ("Casualty Occurrence"), LESSEE agrees to reimburse LESSOR immediately for the loss of the Equipment by paying LESSOR an amount equal to the then unpaid balance of aggregate rental for such Equipment plus the estimated fair market value at expiration of the lease. Upon receipt of such payment, LESSOR will assign title to the Equipment to LESSEE and LESSEE'S obligations to pay rent shall cease upon such assignment and this Agreement will terminate.

**11. OWNERSHIP.**

It is expressly understood and agreed that this Agreement is a lease only and LESSEE does not acquire title to any of the Equipment. LESSEE will not cause or allow any liens or mortgages of any kind whatsoever to be placed on the Equipment. LESSEE agrees that it will not take any position on any tax returns or other filings with any taxing authority which is inconsistent with the status of this Agreement as a lease or LESSOR'S status as the owner of the Equipment for income tax purposes. LESSEE will not make any improvements other than ordinary maintenance and repairs to the Equipment without the prior written approval of LESSOR.

**12. DEFAULT.**

Any one or more of the following shall constitute an Event of Default:  
 12.1 Default by LESSEE in the payment of any installment of rent or any other amount payable to LESSOR hereunder, if such default shall continue for a period of 10 days after the date such payment is due;  
 12.2 Default by LESSEE in the performance of any other provision of this Agreement, if such default shall continue for a period of 10 days after written notice of such default is given by LESSOR to LESSEE;

**14. LATE CHARGE.**

If a payment due hereunder is received by LESSOR more than 10 days after its scheduled due date, LESSEE shall pay a late charge equal to 5% of the unpaid amount of the late payment, but only once for each such late payment.

**15. WARRANTY SERVICE.**

LESSOR will deliver to LESSEE the factory limited warranty for the Equipment to enable LESSEE to obtain customary warranty service furnished on the Equipment. Other than delivering said factory warranty, there are no representations; promises; statements or warranties; express or implied, unless endorsed hereon in writing, and **THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE. IN NO EVENT SHALL LESSOR BE RESPONSIBLE FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES RESULTING FROM THE EQUIPMENT OR LESSEE'S USE THEREOF.**

**16. ASSIGNMENT.**

16.1 LESSEE will not assign, mortgage or encumber this Agreement or any Equipment leased hereunder, nor sublet or suffer or permit the Equipment to be used by others without the prior written consent of LESSOR. As to any assignment consented to by LESSOR (i) the term of such assignment will not extend beyond the final day of the term of this Agreement, and (ii) the rights of the assignee will be expressly subject and subordinate to all of the terms of this Agreement. It is expressly recognized and acknowledged that LESSEE will remain liable as a principal hereunder and will be bound by and subject to all the terms and conditions hereof notwithstanding any express consent by LESSOR to any such assignment.

16.2 LESSOR will have the right to assign any or all its rights and obligations of LESSOR at any time without the consent of LESSEE and LESSEE agrees to recognize any such assignment and waives notice thereof. LESSOR intends to assign this agreement to Toyota Motor Credit Corporation.

**17. SECURITY DEPOSIT.**

LESSOR may use the Security Deposit to pay all amounts due under this Agreement. If LESSEE performs all of the obligations required to be performed by LESSEE under this Agreement, the Security Deposit will be returned to LESSEE at the end of the term of this Agreement.

**18. REPRESENTATIONS AND WARRANTIES.**

18.1 LESSEE represents and warrants to LESSOR that the information relayed to LESSOR for inclusion in the Survey Report is a true and accurate statement of the facts and circumstances of the anticipated use of the Equipment;

18.2 LESSEE represents and warrants to LESSOR that the Equipment shall only be used in a LESSEE'S trade or business and that in no event for other than a lawful purpose and in compliance with all laws. LESSEE agrees to maintain in unobliterated condition any identification numbers, labels, tags and other markings used to identify the Equipment as LESSOR'S property. LESSEE will comply with all laws and regulations relating to the possession, use and maintenance of the Equipment.

**19. NOTICES.**

All notices pursuant to this Agreement shall be in writing and shall be deemed made when mailed by registered or certified mail, return receipt requested, to LESSEE or LESSOR at their respective addresses set forth on the reverse side of this Agreement or at such other address furnished by either party to the other.

**20. GOVERNING LAW.**

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California and contains the entire agreement of the parties.

**21. FURTHER ASSURANCES.**

From time to time each party will execute and deliver such further instruments and will take such other action as any other party reasonably

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... may request in order to discharge and perform their respective obligations and agreements hereunder.

12.4. LESSEE (i) admits in writing its inability to pay its debts as they become due, (ii) files a petition in bankruptcy or a petition to take advantage of any insolvency act, (iii) makes an assignment for the benefit of creditors, (iv) consents to the appointment of a receiver of itself or of the whole or any substantial part of its property, (v) seeks reorganization or arrangement under the Federal Bankruptcy Laws;

12.5 Any material misrepresentation of fact, circumstance or warranty by LESSEE.

13. REMEDIES.

13.1 If an Event of Default occurs, LESSOR MAY, at its option, exercise any one or more of the following remedies:

a. Proceed by appropriate court action or actions, either at law or in equity, to enforce performance by LESSEE of the applicable covenants and terms of this Agreement or to recover damages for the breach of such covenants and terms;

b. By notice in writing to LESSEE, terminate this Agreement as to all or any of the Equipment rented hereunder, whereupon all right and interest of LESSEE to or in the use of said Equipment will cease. In such event, LESSEE will deliver the Equipment to the place specified in Article 5.1 hereof, or such other place as may be designated by LESSOR, without relieving LESSEE of its other obligations under this Agreement. LESSOR may, directly or by its agents, enter upon the premises of LESSEE without demand or notice, or other premises where any of the said Equipment may be or is reasonably believed to be without demand or notice, and take possession thereof;

c. Sell any of the Equipment at public or private sale, as LESSOR may determine, free and clear of any rights of LESSEE and without any duty to account to LESSEE with respect to such sale or for the proceeds thereof; or

d. Hold, keep, idle or lease to others any of the Equipment, as LESSOR in its sole discretion may determine, free and clear of any rights of LESSEE and without any duty to account to LESSEE with respect to such action or for any proceeds with respect thereto.

13.2 In an Event of Default LESSOR shall have the right to retain all prior rental payments and any security deposit made hereunder, and to recover from LESSEE any and all amounts including rents which, under the terms of this Agreement may be then due and be unpaid hereunder as compensation for the use of said Equipment, plus a reasonable sum for attorney's fees and such expenses as shall be expended or incurred in the seizure of said Equipment or in the enforcement of any right hereunder.

13.3 The remedies provided by this Agreement in favor of LESSOR will not be deemed exclusive, but will be cumulative and will be in addition to all other remedies in LESSOR'S favor existing at law or in equity. LESSEE hereby waives any and all rights of setoff. The exercise of

22. DELAYS.

LESSOR will not incur any liability to LESSEE for any obligations, if prevented by wars, fires, strikes or other labor disputes, accidents, acts of God, governmental regulations or interference, shortages of labor or materials, delays in transportation, non-availability of same from the manufacturer, or other causes beyond LESSOR'S control. IN NO EVENT WILL LESSOR BE LIABLE FOR SPECIAL OR CONSEQUENTIAL DAMAGES.

23. SEVERABILITY AND WAIVER.

Any provision of this Agreement prohibited by applicable law will be ineffective to the extent of such prohibition without invalidating the remaining provisions hereof. The failure of either party to require strict performance of any provision will not diminish that party's right thereafter to require strict performance of any provision.

24. PRIOR APPROVAL.

This Agreement shall not be effective until reviewed and accepted by Toyota Motor Credit Corporation. LESSEE shall not take delivery of the Equipment until such time.

25. SUCCESSORS AND ASSIGNS.

This Agreement shall be binding on, and will inure to the benefit of, the parties hereto and their respective permitted successors and assigns.

26. DEPRECIATION.

If, as to any Equipment, under any circumstances and for any reason whatsoever (and regardless of whether such Equipment is public utility property as defined in the Internal Revenue Code), LESSOR shall lose, or shall not have the right to claim, or there shall be disallowed or recaptured (collectively, a "Loss") any portion of the claimed depreciation deductions for such Equipment, based on the capitalized cost thereof, LESSEE agrees to pay LESSOR upon demand, an amount which will be equal to the sum of an amount which, in the reasonable opinion of LESSOR, shall cause LESSOR'S net yield to equal the net yield that LESSOR would have received if LESSOR had not suffered the Loss with respect to claimed depreciation deductions and the amount of any interest, addition to tax, and/or penalty which may be assessed by any taxing authority in connection with the Loss of the depreciation deductions.

27. SURVIVAL OF COVENANTS, REPRESENTATIONS AND WARRANTIES.

The covenants, representations, warranties and indemnities of LESSEE set forth in this Agreement shall survive the termination of this Agreement.

28. AMENDMENTS OR MODIFICATIONS.

Any amendment or modification to this Agreement must be in writing and signed by all parties.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the day and year first above written.

LESSEE: Mactaw, Inc. DBA/Pete's RV Center.

By: [Signature] Title: \_\_\_\_\_

Assignment of Lease Agreement:

The authorized signature of the LESSOR below has the effect of:

- 1. Accepting the terms and conditions of this Agreement; and
2. Assigning to Toyota Motor Credit Corporation all of LESSOR'S right, title and interest in and to the leased Equipment and this Agreement, including all amounts to become due under it.

Acceptance of Assignment of Lease Agreement:

TOYOTA MOTOR CREDIT CORPORATION

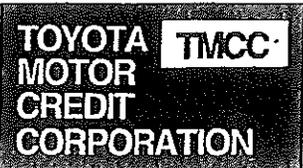
By: [Signature] Title: \_\_\_\_\_

Address: 1515 West 190th Street, P.O. Box 2958 Torrance, California 90509-2958

LESSOR: Northern Lift Trucks, Inc.

By: [Signature] Title: General Manager

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ADDENDUM TO LEASE AGREEMENT

This Addendum to Lease Agreement is incorporated into and made a part of that certain Lease Agreement (Equipment) dated as of July 12th 2000 (the "Lease"), by and between Mactaw, Inc. DBA/ Pete's RV Center as Lessee ("Lessee"), and Northern Lift Trucks, Inc. as Dealer/Lessor ("Lessor").

The following provisions are added to the terms of the Lease:

29. OPTION TO PURCHASE.

JUL 18 2000

Lessor hereby grants to Lessee the option (the "Option") to purchase the Equipment described in the Lease upon termination of the Lease, subject to the terms and conditions set forth herein. The Option shall be exercised, if at all, by written notice to Lessor on or before the date that is 60 days prior to the expiration date of the term of the Lease. If Lessee is in default under any of the terms, covenants and conditions of the Lease at the time that Lessee exercises the Option or any time thereafter, Lessor shall have, in addition to all of Lessor's rights and remedies provided in the Lease, the right to terminate the Option. In the event Lessee exercises the Option within the time period set forth above, Lessee shall deliver to Lessor, upon termination of the Lease and payment in full of all rents and obligations due under the Lease, the amount of -One- Dollars (\$1.00) for each unit of Equipment purchased by Lessee hereunder, plus applicable sales or use tax. Lessor shall execute and deliver to Lessee all documents necessary to effect transfer of ownership of the Equipment upon such payment by Lessee. LESSOR MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AS TO THE CONDITION OF THE EQUIPMENT AS OF THE TERMINATION DATE OF THE LEASE AND LESSEE SHALL PURCHASE THE EQUIPMENT IN ITS "AS-IS" "WHERE-IS" CONDITION. In the event Lessee does not elect to exercise the Option, the Equipment shall be returned to Lessor upon termination of the Lease pursuant to the terms of the Lease.

30. USE OF EQUIPMENT.

Lessee hereby warrants and represents that Lessee is not leasing the Equipment for personal, family, household or agricultural purposes.

In WITNESS WHEREOF, the undersigned have executed this Addendum to Lease Agreement as of the date first set forth in the Lease.

Lessee

Mactaw, Inc. DBA/Pete's RV Center

By: [Signature]

Title: [Signature]

Lessor

Northern Lift Trucks, Inc.

By: [Signature]

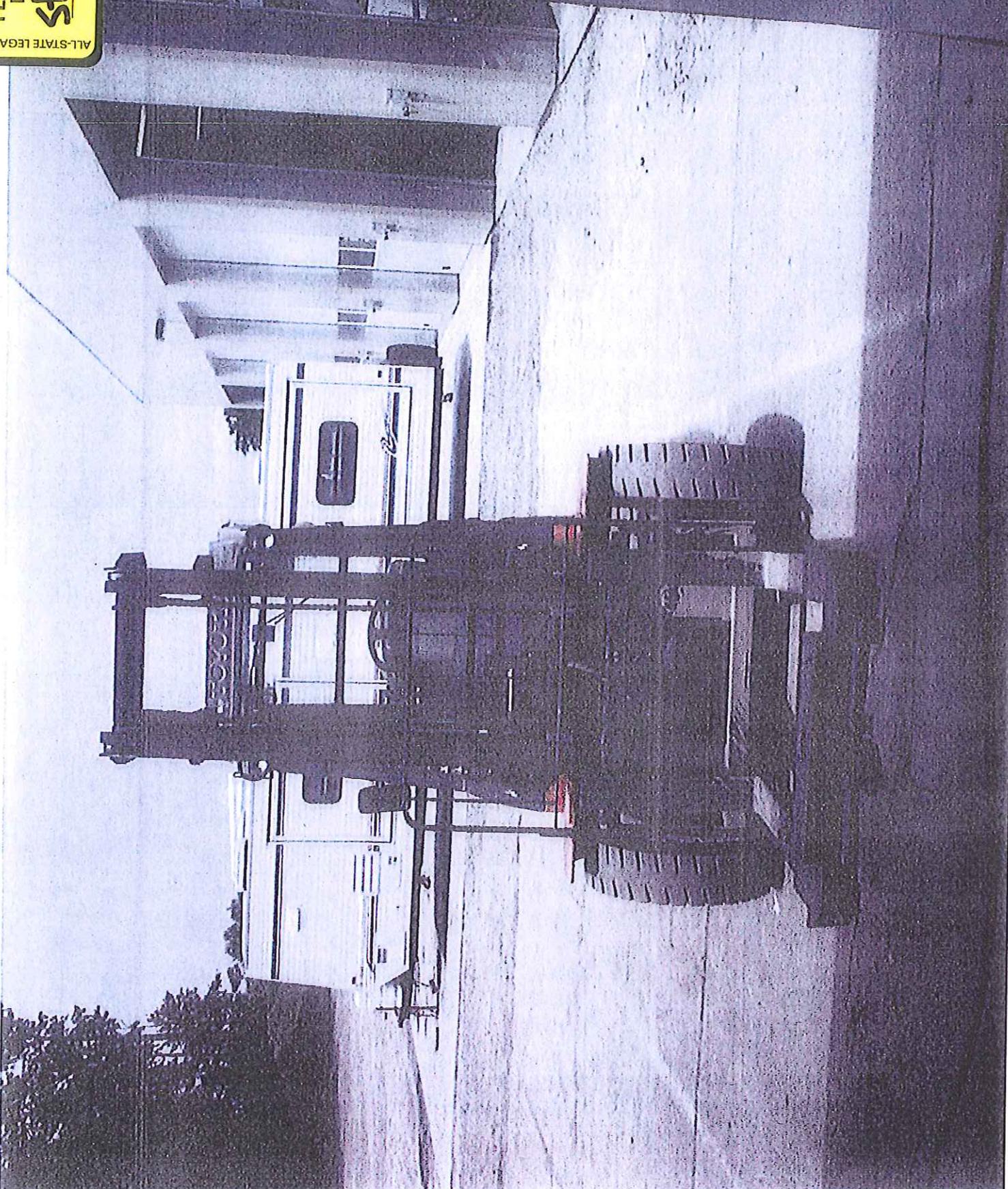
Title: General Manager

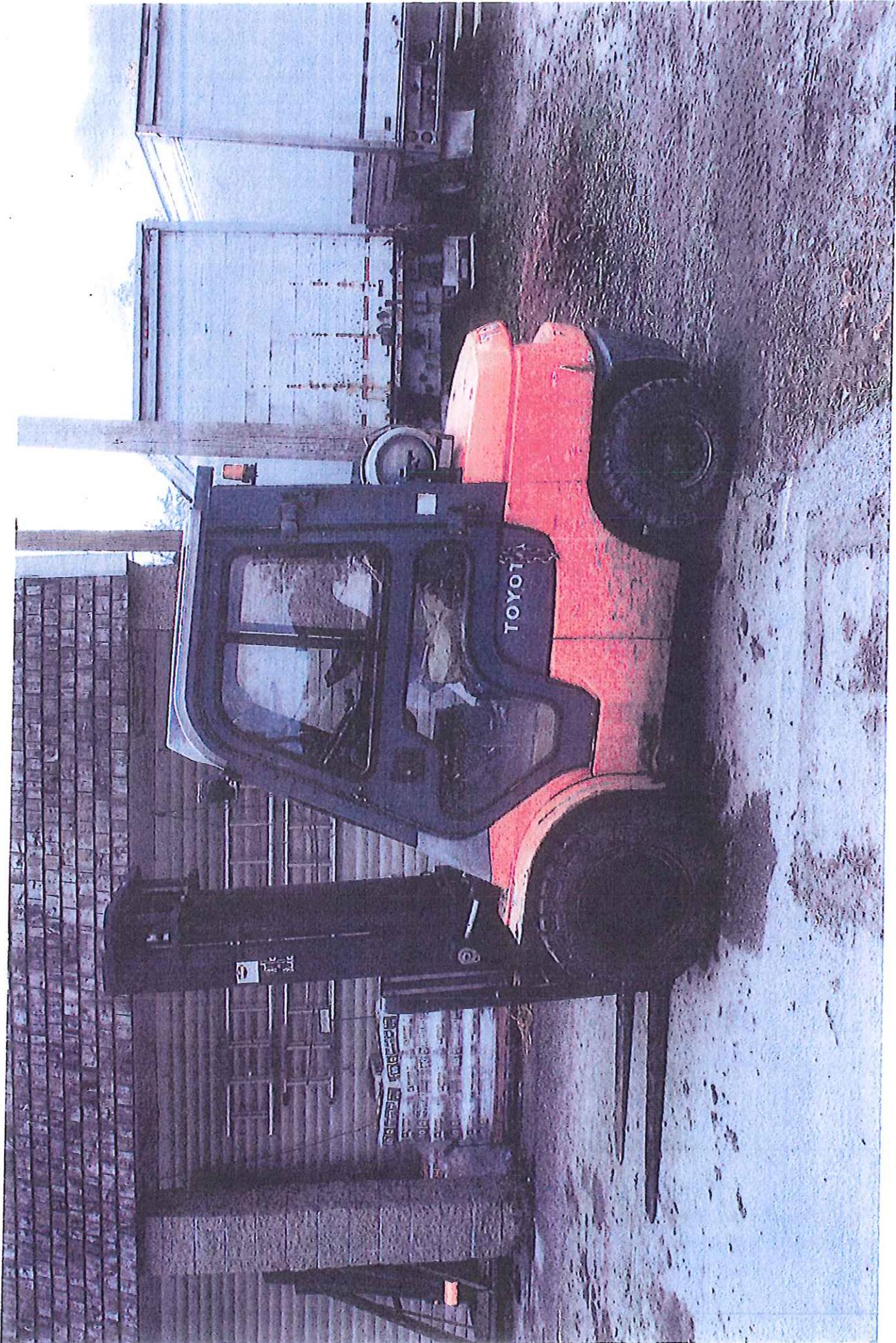
ACKNOWLEDGED AND AGREED: TOYOTA MOTOR CREDIT CORPORATION

By: [Signature]

Title: \_\_\_\_\_

ALL-STATE LEGAL®  
PLAINTIFF'S  
EXHIBIT  
STIP 13





DEFENDANT'S  
EXHIBIT  
NO. Q-129  
P21KAD 800-631-6389

# 11

Call 1-800-886-6111  
1000 Electric Ave  
Starkville, MS 39225  
7-8-19-08  
03-03-05

ACCOUNT #: 4964103

LOCATION: 001

10 FREE SAFETY TRAINING CESS.

VIP CODE: DLR-48BQ08

**Gary L. Smith** ARM, CHSP  
Senior Safety Consultant  
gary.smith@sentry.com



**SENTRY**  
INSURANCE

Safety Services  
1800 North Point Drive  
Stevens Point, WI 54481  
Voice Mail: 877 786-8363 Ext. 3876



(LCCP SURV)

1<sup>st</sup> Survey

### SAFETY SERVICES SURVEY

Account Name: Petes RV Center

Location Address

Street: 4016 Williston Rd

City, State, Zip: South Burlington VT 05403

Account Number: 49-64103

Location Number: 001

Person Contacted: David McGinnis

Position: Treasurer

Sales Terr.: 01010128

Survey Date: April 3, 2002

Consultant/Company: Smith/Sentry

A.1. Underwriter Referral:

Reasons for Underwriter Referral:  
**Application or P.A.P. Discrepancies (A)**

2. Comments: A. Sole occupant? No. One of the owner's son has an office on the second floor for travel rite RV rentals. I'm told this is a totally separate business and has nothing to do with Pete's RV Center.

B. General Data

1. Type of Business: Recreational vehicle dealer

2. Operations: RV dealer. Sales/service/repair of diesel motor homes to Coleman pop-up trailers. Insured is located in a one-and two-story noncombustible building in a nice commercial area. First floor: showroom; sales offices; RV accessories store; parts and services departments. Partial second floor: offices. Also, one of the owners sons has an

office for travel rite RV rentals which is a separate business. The RVs are stored outside in an open lot and there are no security cameras. Equipment in the service department consists of one oxygen/acetylene unit; one forklift and numerous power and manual hand tools.

Vehicles are used primarily within a 50-mile radius to deliver/service RVs but there are four to six long trips a year to Texas or California to deliver RVs to customers as the insured also has about a 1,000-gallon bulk LP gas tank used to fill small LP gas tanks. The bulk tank is not enclosed by a fence and is only protected by two posts in the front.

3. Unusual or hazardous operations not typical of this business classification. None

### C. Property

#### \*1. Construction:

Section 1

Construction Class Noncombustible

Year Built 1962

# Stories 1 story

Area 7,000 sq. ft.

Section 2

Construction Class Noncombustible

Year Built 1985

# Stories 1 & 2 story

Area 6,000 sq. ft.

2. Area occupied by insured 13,000 sq. ft.

Total building area 13,000 sq. ft.

3. Combustibility C - 2

Susceptibility S - 3

\*4. 1.5 miles or more from Atlantic/Gulf Coast or coastal bays

\*5. Public protected property with public hydrant within 1,000 feet and fire department within 5 miles

Comments:

6. Loss Cause Deficiencies:

None

Comments:

7. Special Occupancy Hazards:

**Flammable/Combustible Liquid Storage/Dispensing/Processing**

Comments: B. Small amount of aerosol paint spray cans used for touch-up stored in metal

cabinet. They will spray paint a bumper once or twice a year outside using a spray gun. Several gallons of paint/thinner stored in cabinet. Large paint jobs are sent out.

K. About a 1,000-gallon bucket of LP gas filling station in back of building. Not protected by a fence and inadequately protected by two posts. Amount of gallons sold each year unknown.

8. Building/Equipment Condition & Maintenance  
Excellent

9. Occupancy \*list types of occupants in the exposure zone.  
**Multi-occupancy meeting our guidelines\***

Comments: B. Travel Rite RV Rentals occupies an office on the second floor. This business is run by one of the owner's sons and I'm told that it has nothing to do with Pete's RV Center.

10. Incendiary  
Stable Business Area

11. Security: Following crime/security-related conditions create an unusual hazard to our insured:

**Target merchandise**  
**Inadequate physical protection**

Comments: C. RV equipment.

D. No burglar alarm; no security cameras. Open lot.

12. External Exposures  
No Significant Exposure

13. Private Protection  
Extinguisher Placement & Service Adequate

D. General Liability

1. Premises Liability Hazards

**Other Unusual Hazards**

Comments: M. LP gas buck filling station not enclosed by a fence. See rec.

2. Products/Completed Operations  
Dealer Operations Account - refer to Dealer Supplement

Comments:

E. Auto

**1. Auto Conditions:** Indicate if any of the following conditions exist, comment below:  
**Long haul or heavy truck use (i.e. over 200-mile radius, over 20,000 GVW, or tractor trailer)**

Comments: C. Four to six trips/year to California and Texas to deliver an RV to customer.

**2. Management Controls:** (Indicate if any of the following controls are documented and practiced)

**Less than 10 Vehicles**

Hiring practice includes written application, license verification and reference checks

**G. Additional Supplements/Information:** If supplement requested, i.e., time element, accounts receivable, indicate title followed by narrative.

Comments: Time Element: Would need about 90 days to resume operations.

**H. Loss Experience/Risk Improvement:**

**Losses incurred in last 3 years (evaluate/summarize losses, corrective action taken/planned).**

**Recommendations made – see customer correspondence.**

Comments: B. 6/29/00: Completed operations - installed hitch. \$4,379. All techs receive training on installation.

5/01/00: Vehicle lost control on wet road. \$809.00

8/11/99: IV hit OV while hauling trailer. \$2,458.00.

3/11/00: IV lost control hauling trailer - encountered black ice. \$39,862.

A couple of years ago break-in and theft of TVs, VCRs; amount of claim unknown.

A review of losses reflects a need for a motor vehicle safety program; driver training and enhanced building/lot security.

D. See rec letter. Cooperation is expected.

**General Comments**

8. Building addition showroom in 1985 and original building remodeled/updated at that time.

12. Located next to Burlington Airport. Not in flight path.



# Sentry Insurance

April 16, 2002

Safety Sciences  
P.O. Box 8022  
Stevens Point, WI 54481-8022

800 443-9655  
FAX: 715 346-8672

DAVID MCGINNIS  
PETES RV CENTER  
4016 WILLISTON RD  
SOUTH BURLINGTON VT 05403

ACCOUNT NUMBER: 49-64103  
SALES TERRITORY: 01010128  
LOCATION(S): 001  
4016 WILLISTON RD  
SOUTH BURLINGTON VT 05403

This letter is to confirm my recent visit which was completed in connection with your insurance coverages provided by Sentry Insurance. These calls are made to assist you with your ongoing safety activities. I would like to thank you for the time and courtesies extended to me during this visit.

During this visit, the claims information was delivered and reviewed. I also gathered some general information on your operations and conducted a Hazard Surveillance survey. A review of the claims information indicated the following:

- 06/29/00: Installed hitch on customer's pickup.
- 05/01/00: IV lost control on wet road.
- 03/11/00: IV struck black ice and lost control.
- 08/11/99: IV hauling trailer and collided with OV.

An analysis of losses reflects that a motor vehicle safety program should be developed along with a driver training program.

During my visit, we discussed Sentry Safety Trainer. This interactive, Internet-based training system can give you a cost-effective means of providing and documenting important employee safety training. This type of training can also help you comply with OSHA, DOT, and EPA regulations. For a free guided tour of this service, visit [www.sentrysafetytrainer.com](http://www.sentrysafetytrainer.com) or call our Safety Services Department at 1-800-443-9655 to order lessons. Lessons applicable to your operations includes safe driving, safety orientation, and accident investigation.

This report is provided as an advisory service. It is intended to assist you in the establishment and/or maintenance of your own health and safety programs. The information and recommendations provided herein represent only conditions and exposures which existed at the time this survey was conducted. Variations in management controls, working conditions, production, disposal, processes and equipment may significantly alter or change either occupational or environmental hazards present, or health and safety recommendations necessary. Sentry Insurance, and its affiliates, assumes no authority or obligations to make changes in client operations or to implement recommendations submitted in this report.

Any comments or recommendations relative to regulatory compliance with any local, state or federal laws, regulations, bulletins and/or administrative orders, are advisory in nature and represent random observations, or tests, of conditions and/or practices at the time of this survey. Sentry Insurance, and its affiliates, do not warrant your compliance nor will they be responsible for any fines, penalties or expenses imposed upon you related to the same.

300078

The following recommendation(s) are offered to assist you in controlling your losses:

**Important**

Important recommendations identify an operational or physical deficiency with moderate injury or loss potential and a recommended improvement.

IP  
PKGAS  
2002-04-01: LP gas filling station. The tank should be protected by two additional posts to prevent vehicles from running into them. The bent post should be straightened or replaced. In addition, a fence should be installed around the filling station to prevent tampering.

JE  
2002-04-02: A written vehicle safety policy should be developed and communicated to all drivers to demonstrate management's intent to promote a safe driving record, avoid accidents and serious injury, promote positive customer/public relations, and establish driver performance objectives. The policy should be given to all new drivers and explained to them. A sample policy is outlined in Sentry's "Motor Vehicle Loss Control" Booklet Motor Vehicle Loss Control Plan (92-232). As we discussed, due to the Privacy Act, the insurance company cannot provide a copy of the driver's Motor Vehicle Record (MVR), and it would be up to the dealership or individual to obtain a current one periodically (at least once every three years and after an accident). The insurance company can only provide insurability information without details. MVRs are available through most motor vehicle departments and such information is also available from vendors through the Internet at [www.choicepointinc.com](http://www.choicepointinc.com) and [www.dacservices.com](http://www.dacservices.com).

JE  
2002-04-03: Schedule refresher or periodic driver meetings as an effective way of demonstrating management's interest in achieving a safe driving record. Short monthly or quarterly meetings will keep interest alive and develop improved safety attitudes. Topics can include accident review, vehicle maintenance, route or territorial assignment changes, equipment problems, and defensive driving techniques. I will be happy to assist with special emphasis materials.

JE  
2002-04-04: All employees should sign the sexual harassment policy to acknowledge reading and understanding its contents. Please find enclosed a sample sexual harassment policy. As I indicated, I am available to present a training program on sexual harassment.

IP  
PKGAS  
2002-04-05: Theft or vandalism of RVs and accessories presents a major threat to an RV dealership. Conduct a security evaluation of your operations and implement appropriate measures designed to deter, delay, and detect criminal acts. The best approach is one of perimeter defense. Consider establishing two zones. The first is in the property line, and the second is the outside wall of the building. Consider the following:

- Fencing
- Barriers
- Exterior lighting
- Security cameras

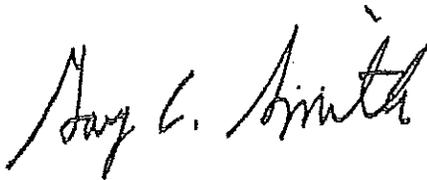
- Burglar alarms

The following educational materials are being provided:

- Sentry Safety Trainer (76-48)
- Motor Vehicle Loss Control Plan (92-232)
- Driver Training (70-127)
- "New Driver Orientation" (70-213)
- Dealer Safety Kit (76-25A)
- Sexual Harassment Policy

Enclosed you will find a green "Recommendation Response Form." Please use it to let us know any actions taken or planned with regard to the important recommendation(s) submitted in this letter. I would appreciate it if you would fax or mail this form to our office within 60 days so we can update your file.

Our Safety Sciences Department is available to assist you with your safety activities and efforts to reduce your exposure to loss. Please call me if you have any questions or want more information.



Gary Smith  
Senior Safety Consultant

Enclosure(s)

THESE PLANS ARE PREPARED FOR THE PURPOSES OF:  
CONCEPTUAL APPROVAL SUBMISSION  
PRELIMINARY APPROVAL SUBMISSION  
ACT 250 SUBMISSION  
FINAL APPROVAL SUBMISSION  
CONSTRUCTION DRAWINGS

**DISCLAIMER/NOTIFICATION OF THE DRAWINGS**  
1. Drawings prepared for approval are intended for preliminary planning, coordination with other disciplines, utility, and approval authorities. They are not intended as final drawings or construction drawings.  
2. Drawings prepared for construction are intended to be used in conjunction with contract documents, specifications, and/or manufacturer literature and to be fully coordinated with other disciplines. They are specific to the project. If any are discovered they are to be brought to the attention of Trudell Consulting Engineers, Inc. before using. If use of these drawings for construction of the Project, the Owner represents that they have reviewed, approved, and accepted the drawings. The drawings shall be considered final approval. Substantial work they receive, site and local approval.  
3. No liability is assumed for errors, omissions, and/or changes (unless indicated by the Engineer on the drawings). Changes to the drawings may only be made by the Engineer.  
4. It is the User's responsibility to ensure that they contain the most current information.



Project Location

No.	Description	Date	By
1	Miscellaneous	10/25/03	RPT

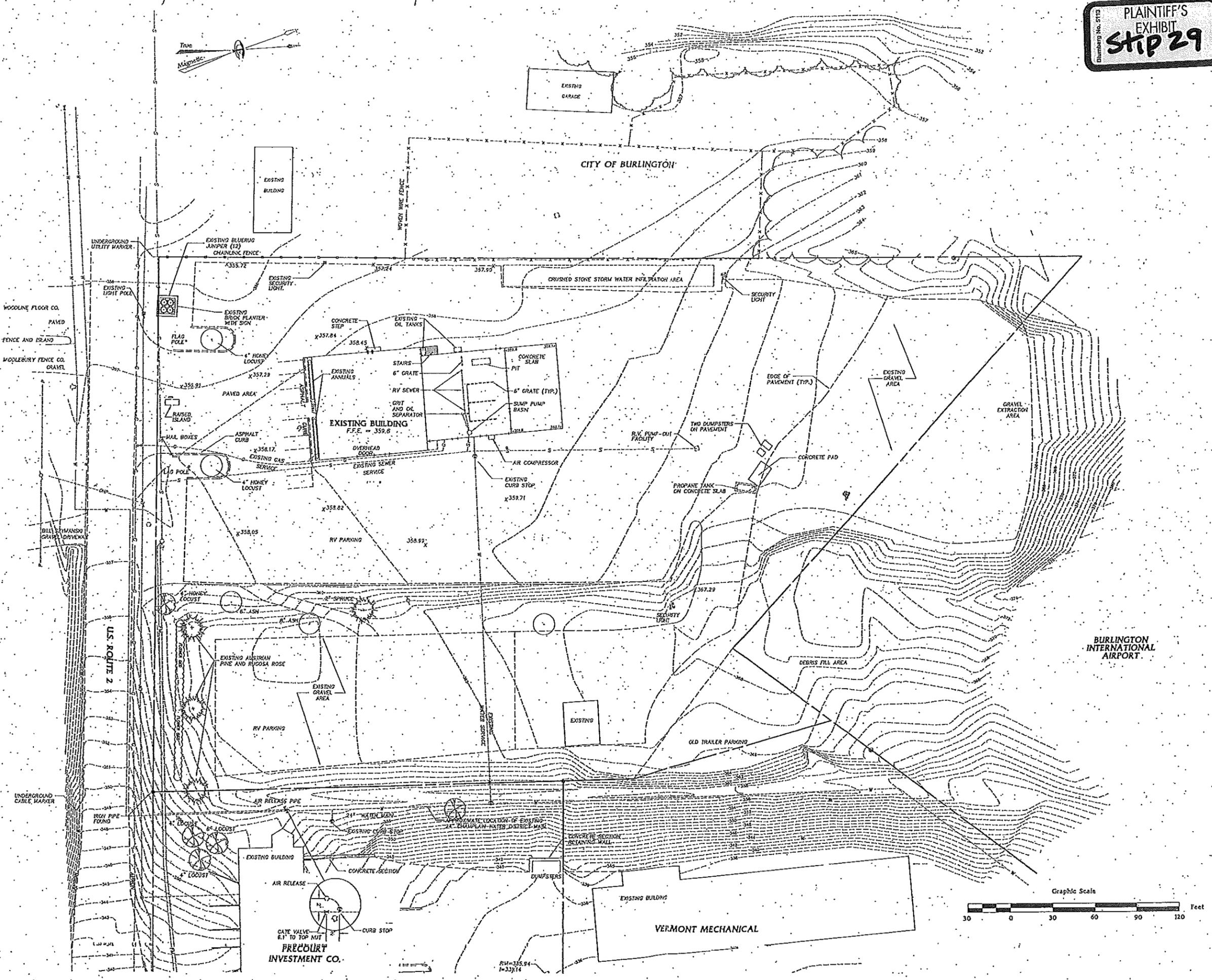


Project Title  
**PETE'S R.V. CENTER**  
4016 Williston Road  
So. Burlington, Vt.

Sheet Title  
**EXISTING CONDITIONS PLAN**

Drawing Number: 92047-54 Extension: 1  
Project manager: RPT Drawn: RPD  
Date: 8/22/2003 F.B. 210 Scale: 1" = 30'  
Project reference: XXX X-Ref: XXX  
Bench file: XXX  
Approved: \_\_\_\_\_

**EC1**





ATT Steve  
Page

BILL OF SALE

Praxair Surface Technologies, Inc., a Delaware corporation having an office at 146 Pembroke Road, Concord, New Hampshire 03301 (hereinafter "Seller"), for and in consideration of the sum of \$ 3,000, does hereby sell, transfer, convey and assign to Terry Shepard of Pete's RV Center, a company having a place of business at 4016 Williston Rd., South Burlington, VT, (hereinafter "Buyer"), the following personal property (the "Equipment") located at Seller's site:

One (1) Yale Fork Lift  
Model : GLCO30CBJUA077 Serial: Y410713

One (1) Yale forklift  
Model : GLCO30CBJUA077 serial: Y410678

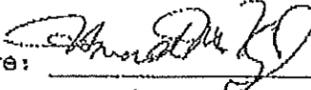
It is expressly understood and agreed that Seller makes no warranties or guarantees, either express or implied, as to the Equipment, except that it is free and clear of all liens and encumbrances. NO WARRANTY OR GUARANTY SHALL BE IMPLIED OR OTHERWISE CREATED UNDER THE UNIFORM COMMERCIAL CODE (OTHER THAN THE WARRANTY OF TITLE AS PROVIDED UNDER THE UNIFORM COMMERCIAL CODE) OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

Buyer acknowledges that it has inspected and, by its execution of this Bill of Sale, hereby accepts the Equipment "AS

IS, WHERE IS" WITH ALL FAULTS. Buyer hereby agrees to indemnify and hold harmless Seller against all claims, liabilities, losses, damages and expenses, of every character whatsoever, for bodily injury, sickness and/or disease, including death, and property damage at any time arising out of Buyer's possession, operation or use of the Equipment from and after the date hereof. Buyer shall be liable for all sales and related taxes and registration fees,

IN WITNESS WHEREOF, the parties hereto have caused this Bill of Sale to be executed as of March 11, 2004.

TATA INCORPORATED

Signature: 

Printed Name: Howard M. Kopych 3/11/04

Buyer:

Signature: 

Printed Name: Perry Sheppard 3-11-04

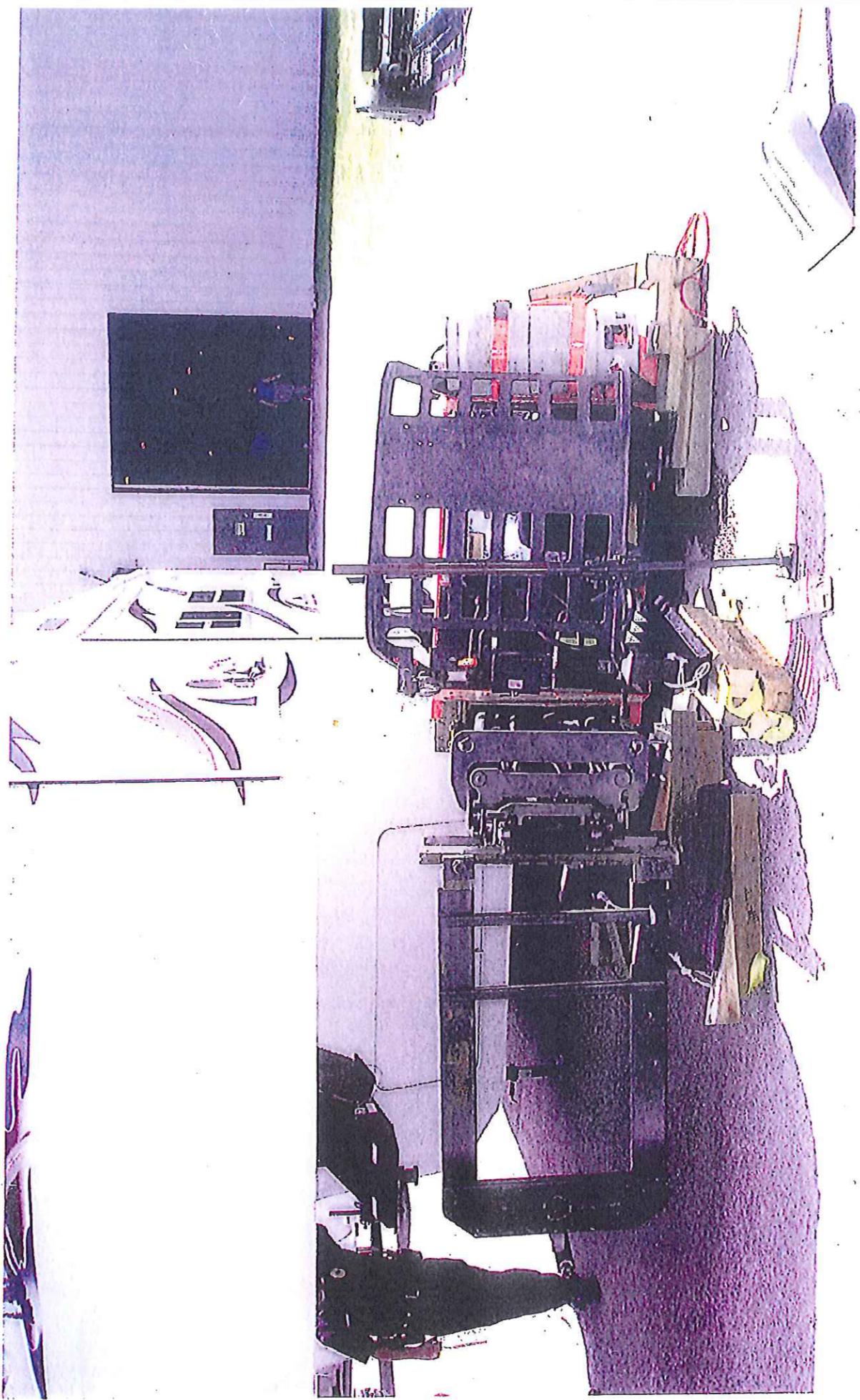
BILLsa3.doc



DEFENDANT'S EXHIBIT  
NO. P-4

PENGAD 800-631-6989  
DEFENDANT'S  
EXHIBIT  
NO. Q-48





Bunberg No. 5113  
PLAINTIFF'S  
EXHIBIT  
Strip 34-A



PLAINTIFF'S  
EXHIBIT  
Blumberg No. 5113  
stip 24-6



JUN 15 2004 4002 51 AMP

PLAINTIFF'S  
EXHIBIT  
skid 35v  
Blumberg No. 5113



## Sentry Insurance

Safety Sciences  
1800 North Point Drive  
P.O. Box 8022  
Stevens Point, WI 54481-8022

800 443-9655  
Fax: 715-346-8015

July 8, 2004

DAVID MCGINNIS  
PETES RV CENTER (A CORPORATION)  
4016 WILLISTON ROAD  
(SALES & SERVICE)  
SOUTH BURLINGTON, VT 05403

ACCOUNT NUMBER: 4964103  
LOCATION(S): 001-4016 WILLISTON ROAD (SALES AND SERVICE)  
002-4016 WILLISTON ROAD (SERVICE)  
003-4016 WILLISTON ROAD (BUILDERS RISK)

### SAFETY CONSULTATION - July 7, 2004

This letter is to confirm my recent visit which was completed in connection with your insurance coverages provided by Sentry Insurance. These calls are made to assist you with your ongoing safety activities. I would like to thank you and Terry Shepard for the time and courtesies extended to me during this visit.

During this visit, I gathered some general information on your operations, completed an accident investigation on the 6/15/04 forklift truck accident, reviewed claims information, and conducted a hazard surveillance survey.

We also discussed Sentry Safety trainer (SST), an online training system which offers 80 training modules on specific OSHA, DOT, and EPA topics.

I also provided you with instructions on ordering our safety publications online through the Sentry web site [sentry.com](http://sentry.com).

During my call, I left a variety of safety publications to assist you with your safety efforts. For your convenience, I am including additional copies with this letter.

The recommendation(s) submitted at the conclusion of this report were discussed during our closing conference. Sentry recommendations are made as a service to you. Should you have any questions or need additional information, please call me.

This report is provided as an advisory service. It is intended to assist you in the establishment and/or maintenance of your own health and safety programs. The information and recommendations provided herein represent only conditions and exposures which existed at the time this survey was conducted. Variations in management controls, working conditions, production, disposal, processes and equipment may significantly alter or change either occupational or environmental hazards present, or health and safety recommendations necessary. Sentry Insurance, and its affiliates, assumes no authority or obligations to make changes in client operations or to implement recommendations submitted in this report.

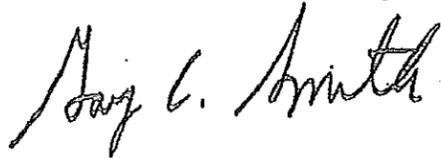
Any comments or recommendations relative to regulatory compliance with any local, state or federal laws, regulations, bulletins and/or administrative orders, are advisory in nature and represent random observations, or tests, of conditions and/or practices at the time of this survey. Sentry Insurance, and its affiliates, do not warrant your compliance nor will they be responsible for any fines, penalties or expenses imposed upon you related to the same.

300029

DAVID McGINNIS  
PETES RV CENTER (A CORPORATION)  
Page 2  
July 8, 2004

To assist you with your safety program, I have included the following educational material for your review:

Motor Vehicle Loss Control (For General Industry) (92-232)  
On The Road to Safe Driving (70-641)  
Prepare Yourself and Your Vehicle For Summer Driving (70-495)  
Powered Industrial Trucks - OSHA Training Requirements (70-338)  
Safety Tips for Powered Industrial Truck Operators (70-331)  
Operator Training for Powered Industrial Trucks-Instructor's Guide (70-260)  
Operator Training for Powered Industrial Trucks-Participant's Workbook (70-261A)



Gary L. Smith



## Recommendations

**Address:** 4016 WILLISTON ROAD  
(SALES & SERVICE)  
SOUTH BURLINGTON, VT 05403

**Location(s):** 001;002;003

**Date of Service:** July 7, 2004

### Status of Previous Recommendations

A review of past recommendations submitted was completed. Their status is summarized below.

Important:

2003-10-01 (Completed)

Regarding the upcoming construction project-schedule a meeting with the general contractor to review the construction emergency plan and general security provisions.

### New Recommendations - Urgent

The following Urgent recommendations identify conditions or practices which present a high probability of serious injury or loss and require immediate attention and corrective action.

2004-7-1

Comply with OSHA Standard: 1910.178, Powered Industrial Trucks,(a)(4): Modifications and additions which affect capacity and safe operation shall not be performed by the customer or user without manufacturers prior written approval. Capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly.

2004-7-2

Comply with OSHA Standard 1910.178, Powered Industrial Trucks, (4)(i)(E)(iii), Refresher Training and Evaluation. An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years. The employer shall certify that each operator has been trained and evaluated.

DAVID McGINNIS  
PETES RV CENTER (A CORPORATION)  
Page 2  
July 8, 2004

### New Recommendations - Important

The following Important recommendations identify an operational or physical deficiency with moderate injury or loss potential and a recommended improvement.

2004-7-3

Schedule periodic driver meetings as an effective way of demonstrating management's commitment to safety. Short monthly or quarterly meetings will develop improved safety attitudes. Topics can include accident reviews, route or territorial assignment changes, equipment problems, vehicle maintenance, and defensive driving.

Consideration should be given to using the following Sentry Safety Trainer Lessons:

Lift Truck Requalification  
The Three Dimensions of Safe Driving

300032

051302



## COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

## A. CANCELLATION

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
  - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
  - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

## B. CHANGES

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

## C. EXAMINATION OF YOUR BOOKS AND RECORDS

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

## D. INSPECTIONS AND SURVEYS

1. We have the right to:
  - a. Make inspections and surveys at any time;
  - b. Give you reports on the conditions we find; and

IL 00 17 11 98

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## COMMON POLICY CONDITIONS - CONTINUED

## c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
  - a. Are safe or healthful; or
  - b. Comply with laws, regulations, codes or standards.
3. Paragraphs 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.
4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

## E. PREMIUMS

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

## F. TRANSFER OF YOUR RIGHTS AND DUTIES UNDER THIS POLICY

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

IL 00 17 11 98

Copyright, Insurance Services Office, Inc., 1998

DATE: November 5, 2003  
 TO: UNDERWRITING OR TO:  
 COPIES TO: STANDARD DISTRIBUTION OTHER:  
 FROM: Gary Smith  
 CROSS REFERENCE TO: ACCT#      LOC#



Sentry Insurance



ACCOUNT NAME: PETES RV CENTER  
 LOCATION: 001  
 ADDRESS: 4016 WILLISTON RD  
 SOUTH BURLINGTON VT 05403

ACCOUNT NUMBER: 49-64103  
 SALES TERRITORY: 01010128

SUBJECT(S) COVERED	
<input type="checkbox"/>	URGENT RECOMMENDATION FOLLOW-UP
<input type="checkbox"/>	IMPORTANT RECOMMENDATION FOLLOW-UP
<input type="checkbox"/>	ADVISORY RECOMMENDATION FOLLOW-UP
<input checked="" type="checkbox"/>	GENERAL INFORMATION
<input type="checkbox"/>	PHONE CONSULTATION
<input checked="" type="checkbox"/>	PAP (PREFERRED ACCOUNT PROFILE)

REC(S) COMPLIED: 2002-04-02, 2002-04-03, 2002-04-04  
 REC(S) IN PROGRESS (NOT RESTATED): 2002-04-01, 2002-04-05  
 REC(S) NO PROGRESS (COMPLIANCE UNLIKELY):  
 REC(S) UPGRADED TO URGENT:

## COMMENTS:

Insured took boat in on trade for an RV. President of company lives on a lake so he moored the boat at his dock to sell it. Apparently the area round the transom leaked and the bilge pump didn't work due to a dead battery. Consequently, the boat sunk at the dock.

Also, the insured had two four-wheelers and a trailer stolen. They don't sell four-wheelers. They were used for display only to market RV trailers/haulers.

PAP:

Is there a person responsible for safety - yes. Terry Shepard, president.

Is there an appropriate safety program - yes.



STATE OF VERMONT

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

Commissioner of Labor & Industry,  
Petitioner,

v.

Pete's RV Center, aka Pete's Trailer Mart,  
Respondent

Docket No.: RB811

RECEIVED

MAY 11 2005

LABOR & INDUSTRY

Settlement Agreement

This V.O.S.H.A. enforcement proceeding is scheduled for a contested hearing on May 3rd, 2005. In order to avoid the time and expense of a contested hearing the parties have agreed to settle this contest on the following terms:

2. Solely for the purposes of this V.O.S.H.A. proceeding, Respondent Pete's RV admits that it violated V.O.S.H.A. Code 29 C.F.R. 1910.178(a)(4) at its work site, on Shunpike Road, South Burlington Vt. when it used a forklift adapter to move 5<sup>th</sup> wheel trailers without obtaining the forklift manufacturer's prior written approval. This shall not be considered an admission for any other purpose or proceeding.

3. V.O.S.H.A. agrees to reduce the penalty for this violation to \$4200.00.

4. Pete's RV agrees to pay the \$4200.00 penalty within thirty (30) days of the V.O.S.H.A. Review Board's acceptance of this settlement agreement. This settlement agreement shall become effective on May 31, 2005.

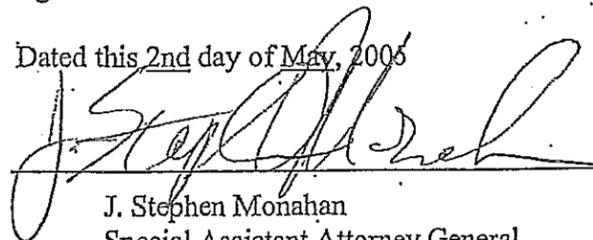
RECEIVED

MAY 11 2005

LABOR & INDUSTRY

6. Pete's RV Center shall not use a forklift with additions or modifications that have not been approved in writing by the manufacturer.
7. The parties agree that the V.O.S.H.A. Review Board may issue a Final Order reflecting the terms of this settlement agreement.

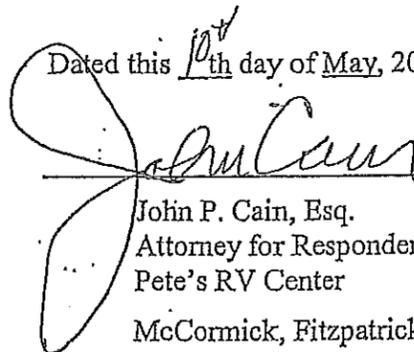
Dated this 2nd day of May, 2005



J. Stephen Monahan  
Special Assistant Attorney General  
Attorney for the Commissioner

Vt. Dept. Labor & Industry  
National Life Building  
Drawer 20  
Montpelier VT 05620-3401  
Tele: (802) 828-2138  
E-Mail:  
js.monahan@labind.state.vt.us@labind.state.vt.us

Dated this 10<sup>th</sup> day of May, 2005



John P. Cain, Esq.  
Attorney for Respondent  
Pete's RV Center

McCormick, Fitzpatrick,  
Kasper & Burchard, P.C.  
40 George Street  
P.O. Box 638  
Burlington Vt 05402-0638  
Tele.: (802) 863-3494  
E-mail: jpc@mc-fitz.com

900397

STATE OF VERMONT

OCCUPATIONAL SAFETY AND  
HEALTH REVIEW BOARD  
DOCKET NO. RB811

COMMISSIONER OF LABOR AND INDUSTRY,  
Complainant

v.

PETE'S RV CENTER, aka PETE'S TRAILER MART,  
Respondent

ORDER

WHEREAS the Complainant issued Citation against Respondent on August 17, 2004, as the result of VOSHA Inspection #305536427, alleging two serious violations of the VOSHA Code with proposed penalties in the total amount of \$8,400.00 imposed thereon;

AND WHEREAS the Respondent filed its Notice of Contest on August 27, 2004;

AND WHEREAS pending appeal the parties entered into the following Stipulation dated May 2, 2005, for the Complainant, and May 10, 2005, for the Respondent:

Solely for the purposes of this V.O.S.H.A. proceeding, Respondent Pete's RV admits that it violated V.O.S.H.A. Code C.F.R. 1910.178(a)(4) at its work site on Shunpike Road, South Burlington Vt when it used a forklift adapter to move 5<sup>th</sup> wheel trailers without obtaining the forklift manufacturer's prior written approval. This shall not be considered an admission for any other purpose or proceeding.

V.O.S.H.A. agrees to reduce the penalty for this violation to \$4200.00.

Pete's RV agrees to pay the \$4200.00 penalty within thirty (30) days of the V.O.S.H.A. Review Board's acceptance of this settlement agreement. This settlement shall become effective on May 31, 2005.

Pete's RV Center shall not use a forklift with additions or modifications that have not been approved in writing by the manufacturer.

The parties agree that the V.O.S.H.A. Review Board may issue a Final Order reflecting the terms of this settlement agreement."

AND WHEREAS the Board has approved the Stipulation as filed;

NOW THEREFORE, it is hereby

ORDERED, that the Citation issued to the Respondent on August 17, 2004, as the result of VOSHA Inspection #305536427 is amended to conform with the Stipulation hereinbefore set forth and is finally approved. It is further

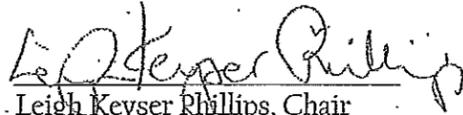
ORDERED, that the Respondent abate all remaining violations within the time

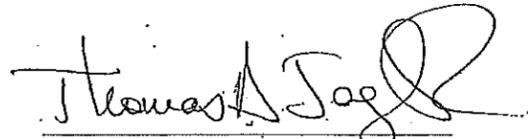
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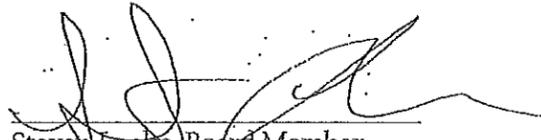
prescribed by law and pay \$4200.00 unto the State of Vermont within thirty (30) days.

Dated at Montpelier, Washington County, State of Vermont, this 1<sup>st</sup> day of June, 2005.

VERMONT OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

  
Leigh Keyser Phillips, Chair

  
Thomas A. Jagielski, Board Member

  
Steven Locke, Board Member

### CLOSING INSTRUCTIONS

Members of the jury, we are at that part of the trial when I instruct you on the law. You will then go to the jury room to decide the case. You are the sole judges of the facts in this case. You must, however, apply the law as I explain it, even if you disagree with it. You may not base your decision on sympathy or prejudice. The attorneys have presented to you their different views of what the evidence shows, but what the attorneys say is not evidence. The evidence is the testimony you have heard and the exhibits that were admitted. As jurors, your fundamental duty is to determine the facts from that evidence.

### BURDEN OF PROOF

At the start of the case, I explained the burden of proof, and the fact that the party with the burden of proof must establish the elements of their claims by a preponderance of the evidence. Please review my instruction on that issue.

### WITNESS CREDIBILITY

It is up to you to decide whether the witnesses you have heard are credible, and what weight to give to their testimony. You may believe some, all or none of any witness's testimony.

In determining credibility, you should use your common sense and life experience. You may wish to consider whether the witnesses had a motive for testifying in a certain way; whether they made any prior inconsistent statements outside of court which might cause you to doubt their testimony at trial; whether they made prior consistent statements that might support their testimony at trial; whether they appeared to you to be telling the truth; whether they appeared to have an accurate memory about what happened; whether they were in a position to see and hear what was happening; and the extent to which their testimony is supported or contradicted by other evidence in the case.

### EXPERT WITNESSES

Some witnesses testify for the purpose of giving an opinion on the basis of special knowledge, training, or experience. We refer to these as "expert witnesses." In evaluating their testimony, you should evaluate their credibility just as you would with any other witness. You should also evaluate whether the witness' opinion is supported by the facts that have been proved, and whether the opinion is supported by the witness' learning and/or experience.

### CORPORATION AS A PARTY

An organization, business or corporation is made up of people and only acts through those people, its employees. Therefore, actions taken by Gary Smith within the scope of his employment with Sentry Insurance are legally considered actions of Sentry.

A business or corporation is entitled to the same fair trial as any person or individual. This means that you as jurors must treat the defendant, Sentry, in this case the same way you would if it was a person or individual and not a business entity.

### NEGLIGENCE

Remember that there are two different dates on which Sentry's representative, Gary Smith, came to Pete's to do a safety review. The plaintiff claims that Sentry's employee, Gary Smith, was negligent in connection with the *April 2002* safety review. I will discuss the 2003 safety review separately in a minute.

Negligence is the failure to follow a legal duty to exercise reasonable care under the circumstances, with harm resulting. Reasonable care is the care a prudent or careful adult would exercise under the same or similar circumstances in order to avoid injury to themselves or the person or property of others. Negligence may consist of not doing something that a reasonably prudent person would do, or it may consist of doing something that a reasonably prudent person

would not do, under the same or similar circumstances. One is not required to make the best possible choice in every situation. Conduct is negligent only if it creates an unreasonable risk of harm.

To prove that Sentry was negligent Mrs. Murphy must prove all of the following elements:

- (1) That Sentry had a duty of care towards Christopher Murphy, and
- (2) That Sentry breached that duty by failing to use reasonable care; and
- (3) That the failure to use reasonable care was a legal cause of injury to Mr. Murphy.

***Duty and Breach.*** Duty, as it is understood in the law, means a legal obligation to do or not do some act, depending on the particular circumstances of the case. Breach of duty means a failure to use reasonable care in discharging that duty.

You must determine whether Mrs. Murphy has shown, by a preponderance of the evidence, that Sentry owed Christopher Murphy a duty of care. If you find that Sentry took on a duty to provide safety services to Pete's RV, then Sentry was required to exercise reasonable care in doing so. Sentry can be liable for harm to Mr. Murphy if Sentry's failure to use reasonable care caused at least one of the following three things to happen:

- (a) An increased risk of harm to Mr. Murphy. In other words, Mrs. Murphy must show that Sentry's actions created an entirely new risk or increased a risk that was already existing before any inspections; or
- (b) Sentry took over part of a duty Pete's RV owed to Mr. Murphy to provide a safe workplace. Mrs. Murphy could prove this by, for example, showing that Pete's RV lacked safety expertise and that Sentry offered to fill that gap; or

(c) Pete's RV relied on Sentry's actions, and because of that reliance Pete's RV or Mr.

Murphy chose not to take precautions against a risk of harm.

The existence and scope of Sentry's duty depends upon the nature and extent of what Sentry agreed to do and the parties' course of conduct. You have heard evidence that there were contracts of insurance between Sentry and Pete's RV Center in effect at the time of the incident. The terms of those contracts do not alone define the scope of the duty that Sentry owed to Pete's and Mr. Murphy. You may consider the language contained in the insurance policies and the loss prevention reports issued by Sentry in deciding whether a duty existed, and the breadth and scope of any duty. However, you may also consider any other evidence in this case in determining this issue, including the entire course of conduct between the parties.

***Legal Cause of Harm.*** If you find that Sentry breached a duty toward Mr. Murphy, then you must decide whether Mrs. Murphy has proved that the breach was a legal cause of Mr. Murphy's death. An injury is legally considered to be caused by an act only if the injury would not have occurred without that act. The injury must either be a direct result or a reasonably probable consequence of the act. If the injury was not caused by the breach, or would have occurred regardless of the breach, then legal cause has not been shown.

There may be more than one legal cause of harm. If Mr. Murphy's death was not caused at least in part by Sentry, then legal cause has not been shown. If the plaintiff fails to prove such a causal link, then she cannot win on her claim of negligence.

#### GROSS NEGLIGENCE

The plaintiff claims that Sentry's employee, Gary Smith, was grossly negligent in connection with the *October 2003* safety inspection he conducted at Pete's RV. In contrast to the April 2002 safety review, you may not find Sentry liable in connection with the October 2003

safety review on the basis of ordinary negligence. Instead, you may find liability in connection with the 2003 review only if you find that Sentry's conduct amounted to *gross* negligence.

Gross negligence is a failure to use even a slight degree of care. It is more than an error of judgment, momentary inattention, or loss of presence of mind. It is indifference to the duty owed to others. In other words, gross negligence is more egregious and blameworthy than ordinary negligence. For example, it may only be ordinary negligence for a driver to look away from the road for a moment while driving, but it might be gross negligence to look away for a moment after seeing that a small child was standing by the edge of the road.

In order to prove her claim of gross negligence, Mrs. Murphy is required by law to prove all of the elements of negligence that I just described above – duty, breach of duty and legal cause of harm – *and* she must prove an additional element. Specifically, she must prove that Sentry's actions showed not just a lack of reasonable care, but a failure to use even a slight degree of care to prevent harm to others

#### THE ACTIONS OF PETE'S RV

As I told you at the start of the case, Sentry argues that Pete's RV was negligent and is solely responsible for Mr. Murphy's death. Pete's is not a party to this case. You should not speculate about why Pete's is not being sued in this case, as that is a legal matter for the court and is unrelated to what you must decide.

You must consider whether Pete's was solely or partly responsible for Mr. Murphy's death. In doing so, you must apply the same steps I just explained above for determining whether Sentry was negligent. That is, you must consider what duty Pete's owed Mr. Murphy, whether that duty was breached, and whether any such breach of duty caused Mr. Murphy's death.

I instruct you that all employers have a duty to maintain a reasonably safe workplace. In addition, employers have a duty to follow safety regulations. In this case, it is undisputed that Pete's violated safety regulations of the Vermont Department of Occupational Safety and Health (VOSHA) concerning unapproved forklift attachments. Under the law, you must therefore presume that Pete's breached a duty of care unless the evidence convinces you that Pete's had a legitimate reason for violating the regulations. If you do not find that Pete's had a legitimate reason to violate the regulations, then you must find that Pete's was negligent. I instruct you that ignorance of the regulation is not a legitimate reason for violating a regulation.

If you decide that Pete's was negligent, whether because of the violation of the safety regulation or for another reason, you must decide whether Pete's actions were the sole legal cause of Mr. Murphy's death. If you decide that Pete's actions were the sole cause, then you should stop here, fill out the verdict form, and advise the Court Officer that you have a verdict. If you decide that Pete's was partly responsible for Mr. Murphy's death but that Sentry was also partly responsible, then you must proceed with the instructions below.

#### INTERVENING CAUSE

If you find that Sentry and Pete's were both negligent, and that both parties' negligence caused Mr. Murphy's death, you must also consider whether any action by Pete's was a later intervening factor that was not reasonably foreseeable by Sentry. That is, if Sentry was negligent and also should have foreseen that Pete's might later be negligent, Sentry is still legally responsible for its negligence. However, if Sentry was negligent but Pete's later did something negligent that Sentry had no reason to foresee, under the law that later negligence excuses Sentry's earlier negligence.

COMPARATIVE NEGLIGENCE

If you decide that Sentry was *not* negligent, *or* that Pete's was negligent and was solely responsible for Mr. Murphy's death, *or* that Pete's negligence was an intervening cause, you should go directly to the verdict form and fill it out. However, if you decide that Sentry was negligent, *and* that any negligence by Pete's was neither the sole cause nor an intervening cause of Mr. Murphy's death, then you need to consider what we call "comparative negligence."

Sentry alleges that Christopher Murphy was comparatively negligent. That means Sentry is saying that Mr. Murphy was at least partially, if not entirely, responsible for his death. Unlike the rest of the issues in this case, Sentry has the burden of proving this claim. To succeed on this claim, Sentry must prove both of the following elements by a preponderance of the evidence:

- (1) That Christopher Murphy failed to exercise reasonable care for his own safety; and
- (2) That his failure to use reasonable care was a legal cause of his death.

For the purpose of the question of comparative negligence, the same definitions I gave you a minute ago for duty, breach, and legal cause of harm all apply here as well. Remember that there can be more than one legal cause of an injury.

If you find that Christopher Murphy did use reasonable care under the circumstances, then he was not comparatively negligent. If you find that Mr. Murphy did not use reasonable care under the circumstances but that such failure was not a legal cause of his death, then Mr. Murphy was not comparatively negligent. Reasonable care is not the greatest possible care, rather it is ordinary care, given all the circumstances existing at the time and place of the accident.

If you find that Mr. Murphy did not use reasonable care under the circumstances, *and* that failure was a legal cause of his death, then you must compare Mr. Murphy's negligence with Sentry's negligence. The negligence of Mr. Murphy and the negligence of Sentry must total 100%. You must determine what percentage of the accident and resulting death was from Mr. Murphy's negligence, and what percentage was from Sentry's negligence. In doing these calculations, you should not consider Pete's percentage of negligence at all. If you find that Mr. Murphy's negligence is a greater percentage of the total harm than Sentry's negligence, then Mr. Murphy cannot recover anything and your deliberations are done. If you decide that Sentry's negligence is a larger percentage of the harm than that of Mr. Murphy, then you must go on to decide what damages the Murphy family suffered.

#### DAMAGES

If you find that Sentry was negligent or grossly negligent, and also that any negligence on the part of Christopher Murphy was less than or equal to any negligence on the part of Sentry, then you must consider what damages the plaintiff is entitled to. The plaintiff in this case is Sandra Murphy as administrator of Christopher Murphy's estate. This means that you may award damages to Sandra Murphy and to her two children, John and Kyle Murphy. "Damages" means the amount of money that you decide a person is entitled to for what has happened to him or her. I am giving you instructions about damages so that you will know how to proceed if you reach this point in your deliberations. It does not mean that I have any opinion about whether you should or should not award damages in this case.

In this case, any award of damages is intended to reasonably compensate the family for injuries suffered as a result of Christopher Murphy's death. You may provide compensation for the following kinds of injuries:

1. Loss of Economic Support and Services: The family's loss of Christopher Murphy's economic support and services, including his earnings from employment and the value of household labor he would have provided. In determining the amount of any such losses, you may consider Christopher Murphy's life expectancy. The parties have agreed that the average life expectancy for a man who was age 47 in 2004 is 31.4 more years.
2. Non-Economic Damages: The family's loss of Christopher Murphy's companionship, care, nurture, comfort, protection, and intellectual, moral and physical training. Under our law, you cannot include any damages for the family's grief or mental anguish.

Any damages you award may not be based on sympathy, prejudice, or on speculation or guesswork. Only "actual damages" can be awarded. The plaintiff has the burden of proving damages by the preponderance of the evidence. Where the amount of the damages can be calculated in dollar terms, the plaintiff must present evidence to demonstrate the appropriate amount. However, where there is no specific measurable dollar value for the damages, then the plaintiff does not have to prove the exact dollar value of the injury. Among the types of evidence you may consider in reaching your decision are the physical, emotional, and psychological bonds between Sandra Murphy and Christopher Murphy, between Kyle Murphy and Christopher Murphy, and between John Murphy and Christopher Murphy. You may also consider the extent to which each of these individuals shared interests and activities with Christopher Murphy. By the same token, you may also consider the lack of such bonds, or the level of discord that existed in each of these relationships. It is up to you as jurors to determine the value of any loss that you find the family members have suffered as a result of Mr. Murphy's death.

PERSONAL CONSUMPTION

If you decide to award damages for future lost earnings, you must reduce Christopher Murphy's projected future earnings by the amount that he would have spent personally. In other words, any award for lost earnings must be limited to the amount that would have been available to, or spent on, the other family members.

REDUCTION TO PRESENT VALUE

You heard evidence about the present value of money: that is, what amount today is the equivalent of a larger amount over a period of time, taking into account projections about both interest and changes in the cost of living. It is up to you to decide, based upon the evidence you have heard and seen, how to calculate such figures. However, I instruct you that any award for losses the Murphy family will suffer in the future must be reduced by you to its present value. The idea is to determine how much money, invested today, would provide over time the amount you determine the family is entitled to receive in the future. In other words, if you decided to award Mrs. Murphy \$10 a year for the next ten years, how much would you need to give her today for her to have that \$10 per year in the future?

WORKER'S COMPENSATION BENEFITS

As you have heard, Sentry was the workers' compensation insurer for Pete's RV Center at the time of the forklift incident. However, this case is not about the parties' rights and obligations arising under the Workers' Compensation Act. It is about whether Sentry should be held liable to Mrs. Murphy under the principles of negligence. Your duty in this case is to completely disregard any worker's compensation aspects of this case. What worker's compensation benefits were received, or the amount of those benefits, should play no role in your decision.

DUTY TO DELIBERATE

You as jurors must reach a unanimous verdict. It is your duty to talk with each other with the goal of reaching a unanimous decision one way or the other, if you can do so without sacrificing your individual judgment. Each of you must decide the case for yourself, but only after a fair consideration of the evidence with your fellow jurors. Do not hesitate to re-examine your own views and change your opinion if you are convinced you were wrong. However, do not give in just because of the opinion of your fellow jurors.

Sympathy has no role in your decision. You are the judges of the facts in this case and your responsibility is to determine the facts from the evidence that you have heard.

VERDICT / FOREPERSON'S DUTIES

Your first task as jurors will be to select your Foreperson. The Foreperson acts as a chairperson or moderator. It is the Foreperson's duty to assure that discussion is carried on in a sensible and orderly fashion, that the issues are fully and fairly discussed, and that every juror has a chance to say what he or she thinks.

If you decide that you need to communicate with me, please give a note to the Court Officer, signed by the Foreperson. However, you should never say in any note or in any comment to the Court Officer how the jury is leaning, what the different views of the jurors are, or how many jurors view the case in a certain way.

Attached to these instructions is a verdict form. The form provides specific questions for you to answer. As you reach unanimous agreement on each issue, the Foreperson should fill in the blanks. When you finish your deliberations, the Foreperson should sign and date the form, and advise the Court Officer that you have reached a verdict. We will then call you back into the courtroom and I will ask the Court Clerk to read the jury's verdict.

Members of the Jury, thank you for the work that you are about to do.

Dated at Burlington, Vermont this 30th day of August, 2011

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Helen M. Toor  
Superior Court Judge

AUG 31 2011

VERDICT FORM: MURPHY v. SENTRY INSURANCE

CHITTENDEN UNIT

1. Was the conduct of Gary Smith:

a. Negligent in connection with the April 3, 2002 Safety Services Survey?

Yes  No

b. Grossly negligent in connection with the October 21, 2003 Safety Services Survey?

Yes  No

If your answer to either Question 1(a) or 1(b) is Yes, proceed to Question 2. If your answer to both Questions 1(a) and 1(b) is No, stop here, sign below, and tell the Court Officer that you have a verdict.

2. Was Pete's RV negligent?

Yes  No

If your answer to this question is Yes, proceed to Question 3. If your answer to this question is No, proceed to Question 4.

3. Was Pete's RV solely responsible for Mr. Murphy's death?

Yes  No

If your answer to this question is Yes, stop here, sign below, and tell the Court Officer that you have a verdict. If your answer to this question is No, proceed to Question 4.

4. Were the actions or omissions of Gary Smith a legal cause of Christopher Murphy's death?

Yes  No

If your answer to this Question is Yes, proceed to Question 5. If your answer is No, stop here, sign below, and tell the Court Officer that you have a verdict.

5. Do you find that Pete's RV Center's negligence, if any, was an intervening cause of the accident and Christopher Murphy's death?

Yes  No

If your answer to this Question is Yes, stop here, sign below, and tell the Court Officer that you have a verdict. If your answer to this Question is No, proceed to Question 6.

6. Was Christopher Murphy comparatively negligent?

Yes  No

If your answer to this Question is Yes, proceed to Question 7. If your answer is No, go directly to Question 8.

7. Determine what percentage of the total negligence you attribute to Christopher Murphy and what percentage you attribute to Sentry Insurance:

a. Christopher Murphy	<u>15</u> %
b. Sentry Insurance	<u>85</u> %
TOTAL	<u>100</u> %

If you attribute 50% or less of the total negligence to Christopher Murphy, proceed to Question 8. If you attribute more than 50% of the total negligence to Christopher Murphy, stop here, sign below, and tell the Court Officer that you have a verdict.

8. What are the total amounts of the following categories of damages?  
(If you have found any comparative negligence, the court will use the percentage you calculated to reduce the plaintiff's recovery. For the purposes of this question, you should include the total damages that you find the family has suffered or will suffer.)

a. Loss of Economic Support and Services:	<u>\$ 940,000</u>
b. Non-Economic Damages:	
(i) To Sandra Murphy:	<u>\$ 200,000</u>
(ii) To Kyle Murphy:	<u>\$ 400,000</u>
(iii) To John Murphy:	<u>\$ 400,000</u>

We the jury unanimously agree to the above.

Foreperson: *Reyle Day*

Date: 8/31/2011

EXHIBIT A

STATE OF VERMONT

SUPERIOR COURT  
CHITTENDEN UNIT

CIVIL DIVISION  
DOCKET NO. S0653-06 CnC

SANDRA J. MURPHY, )  
 personal representative and )  
 ADMINISTRATOR of the )  
 ESTATE OF CHRISTOPHER MURPHY, )  
 Plaintiff, )  
 )  
 v. )  
 )  
 SENTRY INSURANCE, )  
 Defendant. )

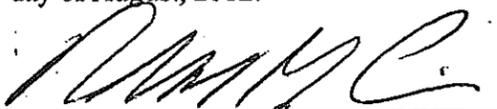
VERMONT SUPERIOR COURT  
 AUG 14 2012  
 CHITTENDEN UNIT

**AFFIDAVIT OF ROBERT G. CAIN**  
**IN SUPPORT OF DEFENDANT'S**  
**MOTION FOR AN AWARD OF COSTS**

I, Robert G. Cain, on oath depose and say as follows:

1. The attached Bill of Costs identifies and specifies the allowable costs that were incurred and paid by Sentry Insurance in connection with its defense of the above-captioned civil action.
2. The costs identified in the attached Bill of Costs were reasonably and necessarily incurred and paid in connection with Sentry Insurance's defense of the above-captioned civil action.
3. The statements set forth in this Affidavit are made based upon my personal knowledge, and are believed to be true and correct.

Dated at Burlington, Vermont, this 14<sup>th</sup> day of August, 2012.

  
 \_\_\_\_\_  
 Robert G. Cain

**Sandra Murphy as Administrator of the Estate of Christopher Murphy v. Sentry Insurance**  
**(attached is documentation supporting each cost incurred and paid)**

<b>Court Reporter Bills</b>		
09/14/07	Smith, Gary (9/12/07 Depo)	Depos Unlimited, Inc. \$126.60
11/08/07	Hier, Lloyd; McGinnis, Todd; Shepard, Chad (11/06/07 Depos)	Depos Unlimited, Inc. \$222.60
03/17/08	McGinnis, David (03/14/08 Depo)	Depos Unlimited, Inc. \$118.60
04/11/08	Shepard, Terry (04/08/08 Depo)	Depos Unlimited, Inc. \$105.00
02/11/09	Marzyrski, Dale (02/03/09 Depo)	Willette Court Reporting, LLC \$351.50
03/13/09	Murphy, Sandra (2/25/09 & 3/3/09 Depos)(Transcript Copy & e-trans provided to Michael Kenney, Esq.)	Curlay Court Reporting \$508.30
03/16/09	Murphy, Sandra (2/25/09 & 3/3/09 Depos)(Original Transcript & e-trans provided to Paul Frank + Collins P.C.)	Curlay Court Reporting \$1,833.30
06/08/09	Preston, Jay William (06/05/09 Depo)	Depos Unlimited, Inc. \$959.00
08/24/09	Rossetti, Joseph (08/19/09 Depo)	Capitol Court Reporters, Inc. \$250.40
10/19/09	Rossetti, Joseph (10/14/09 Depo)	Depos Unlimited, Inc. \$826.50
10/22/09	McGinnis, Terry & Shepard, Terry (10/20/09 Depo)	Depos Unlimited, Inc. \$975.95
11/06/09	Vestrand, Rannie/Kirk, David/Jimmo, James (11/05/09 Depo)	Depos Unlimited, Inc. \$167.50
11/08/09	Jenkins, Stanley (11/08/09 Depo)	Depos Unlimited, Inc. \$150.00
12/02/09	Mitchell, Jim & Cooper, Louis (11/30/09 Depo)	Depos Unlimited, Inc. \$970.00
12/10/09	Ackerman, Jim & Johnson, Holly (12/10/09 Depo)	Depos Unlimited, Inc. \$1,015.95
12/23/09	Monty, Robert (12/23/09 Depo)	Depos Unlimited, Inc. \$478.95
10/05/10	Dodge, David A. (09/15/10 Depo)	Coastal Reporting, LLC \$270.80
10/21/10	Johnson, John E. & Lash, TJ (10/19-20/10 Depo)	Depos Unlimited, Inc. \$554.00
11/12/10	Westin, Alan B. (10/25/10 Depo)	Depos Unlimited, Inc. \$372.75
11/19/10	Simpson, Scott (11/19/10 Depo)	Depos Unlimited, Inc. \$382.00
11/27/10	Keith, Robert (11/27/10 Depo)	Depos Unlimited, Inc. \$355.00
12/17/10	Murphy, Kyle (12/17/10 Depo)	Depos Unlimited, Inc. \$355.00
12/20/10	Murphy, John (12/15/10 Depo)	Depos Unlimited, Inc. \$315.50
01/01/11	Miller, Max (01/31/11 Depo)	Depos Unlimited, Inc. \$173.00
01/27/11	Burgess, Kimberly (01/18/11 Depo)	Depos Unlimited, Inc. \$309.75
<b>Total Court Reporter Bills</b>		<b>\$12,747.95</b>

Filing Fees			
12/19/11	Post-Judgment Motion	Vermont Superior Court	\$78.75
12/20/11	Renewed Motion for Judgment as a Matter of Law and Motion for New Trial	Vermont Superior Court	\$157.50
<b>Total Filing Fees</b>			<b>\$236.25</b>

Sheriff/Service Bills			
08/07/09	Northern Lift Truck (David Kirk) (Service of Deposition Subpoena)	Chittenden Co. Sheriff's Dept.	\$58.14
08/07/09	Northern Lift Truck (David Kirk) (Services of Deposition Duces Tecum Subpoena)	Chittenden Co. Sheriff's Dept.	\$50.00
09/30/09	Mactaw, Inc.; McGinnis, David; Lash, T.J.; Lfitech Handling, Inc.; Rosetti, Joseph (Northern Lift Truck); Shepard, Terry (Service of Deposition Duces Tecum Subpoenas)	Chittenden Co. Sheriff's Dept.	\$367.89
11/17/09	Green Mountain Safety Consulting, LLC (Service of Process)	Chittenden Co. Sheriff's Dept.	\$55.94
11/19/09	Jim Mitchell (Service of Deposition Duces Tecum Subpoena)	Addison Co. Sheriff's Dept.	\$64.74
11/19/09	Ackerman Equipment (Service of Deposition Subpoena)	Washington Co. Sheriff's Dept.	\$66.94
08/19/10	Lash, T.J. (Service of Process)	Chittenden Co. Sheriff's Dept.	\$60.44
01/19/11	Agency of Human Resources, Department for Children & Families (Service of Deposition Duces Tecum Subpoena)	Washington Co. Sheriff's Dept.	\$63.70
01/26/11	Miller and Silverstein (Service of Process)	Chittenden Co. Sheriff's Dept.	\$71.18
08/03/11	Monahan, J. Stephen (\$53.90); Treadwell, John R. (\$50.00); Belanger, Van George (\$51.02); Maguire, Cindy (\$50.51)	Washington Co. Sheriff's Dept.	\$205.43
08/22/11	Holly Johnson (Service of Trial Subpoena)	Chittenden Co. Sheriff's Dept.	\$57.54
08/23/11	Kenyon Enterprises, Inc. (Mark Poulin) (Service of Trial Subpoena)	Washington Co. Sheriff's Dept.	\$70.40
08/23/11	James Ackerman, c/o Ackerman Equipment (Service of Trial Subpoena)	Washington Co. Sheriff's Dept.	\$55.54
<b>Total Sheriff/Service Bills</b>			<b>\$1,247.88</b>

Witness Fees			
09/21/09	Lfitech Handling, Inc.		\$34.40
09/21/09	Lfitech Handling, Inc.		\$34.40
09/21/09	Mactaw, Inc. (Witness Fee & Mileage)		\$35.50
09/21/09	McGinnis, Dave (Witness Fee & Mileage)		\$35.50
09/21/09	Rosetti, Joseph (Witness Fee & Mileage)		\$32.20
09/21/09	Shepard, Terry (Witness Fee & Mileage)		\$35.50

11/10/09	Ackerman Equipment, Inc. (Subpoena & Notice of Depo)		\$76.49
11/10/09	Cooper, Louis O. (Witness Fee & Mileage - Deposition)		\$38.80
11/10/09	Green Mountain Safety Consulting, LLC (Subpoena & Notice of Depo)		\$32.31
11/10/09	Mitchell, Jim (Witness Fee & Mileage - Deposition)		\$50.20
01/05/11	Miller, Max (Witness Fee & Mileage - Deposition)		\$32.66
01/05/11	Silverstein, Robert (Witness Fee & Mileage - Deposition)		\$31.02
07/11/11	Barrows, Mike (Witness Fee & Mileage)		\$75.23
07/11/11	Belanger, Van George (Witness Fee & Mileage)		\$72.40
07/11/11	Burgess, Kim (Witness Fee & Mileage)		\$33.56
07/11/11	Cooper, Louis O. (Witness Fee & Mileage - Trial Subpoena)		\$34.27
07/11/11	Howell, Thomas (Witness Fee & Mileage)		\$122.13
07/11/11	Jenkins, Stanley (Witness Fee & Mileage)		\$53.88
07/11/11	Jimmo, Jim (Witness Fee & Mileage)		\$31.38
07/11/11	Keith, Robert (Witness Fee & Mileage)		\$30.60
07/11/11	Kirk, David (Witness Fee & Mileage)		\$31.38
07/11/11	Kronoff, David (Witness Fee & Mileage)		\$31.76
07/11/11	Marcoux, Jon (Witness Fee & Mileage)		\$31.76
07/11/11	McGinnis, Dave (Witness Fee & Mileage)		\$38.03
07/11/11	McGinnis, Todd (Witness Fee & Mileage)		\$34.27
07/11/11	Monty, Robert (Witness Fee & Mileage)		\$34.27
07/11/11	Murray, Randall (Witness Fee & Mileage)		\$58.06
07/11/11	Rosetti, Joseph (Witness Fee & Mileage)		\$34.27
07/11/11	Shepard, Chad (Witness Fee & Mileage)		\$31.38
07/11/11	Shepard, Terry (Witness Fee & Mileage)		\$34.27
07/11/11	Simpson, Scott (Witness Fee & Mileage)		\$34.27
07/11/11	Sweeney, Jay (Witness Fee & Mileage)		\$30.58
07/11/11	Vartulli, Joe (Witness Fee & Mileage)		\$34.27
07/11/11	Vestrand, Rannie (Witness Fee & Mileage)		\$34.27
07/25/11	Sutton, Donald (Witness Fee & Mileage)		\$63.40
08/19/11	Ackerman, James (Witness Fee & Mileage)		\$34.27
08/19/11	Glidden, Osburn (Witness Fee & Mileage)		\$76.09
08/22/11	Kenyon, Douglas (Witness Fee & Mileage)		\$111.40
			\$73.29
	<b>Total Witness Fees</b>		<b>\$1,741.96</b>

Mediator Fee		Sloane and Walsh	
06/07/10	Mediator Fee	Total Mediator Fee	\$2,625.00
		Total Mediator Fee	\$2,625.00



MICHAEL P. KENNEY Direct 860 297-4654 kenney@halloran-sage.com  
Also admitted in Maine and Vermont

September 29, 2007

Ms. Carmen A. Cote  
Chief Deputy Clerk  
Chittenden Superior Court  
175 Main St.  
Burlington, VT 05401

Re: Sandra Murphy, Individually and as Adm. of the Estate of  
Christopher Murphy v. Sentry Insurance Corp.  
Docket No. : S0653-2006CnC  
Our File No. : 11899.0043

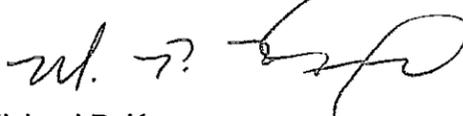
Dear Carmen:

This office has been engaged to represent the defendant in this matter, Sentry Insurance Corp. If you would, kindly enter my appearance on behalf of the defendant. This appearance will be in addition to the appearance of Robert G. Cain, which is already on file.

Thank you for your time and assistance. If you have any questions or concerns feel free to contact me. Otherwise, I look forward to seeing you at the status conference on October 6.

Very truly yours,

HALLORAN & SAGE LLP



Michael P. Kenney  
Vermont Bar #3982

Copy to:  
Robert G. Cain, Esq.  
Steven A. Bredice, Esq.  
MPK/snl

STATE OF VERMONT  
CHITTENDEN COUNTY, SS:

SANDRA J. MURPHY, Administrator	)	CHITTENDEN SUPERIOR COURT
of the ESTATE OF CHRISTOPHER	)	DOCKET NO. S653-06 CnC
MURPHY,	)	
Plaintiff,	)	
	)	
v.	)	
	)	
SENTRY INSURANCE,	)	
Defendant.	)	

**MOTION FOR ADMISSION PRO HAC VICE**

Pursuant to V.R.C.P. 79.1(e), the undersigned counsel, Robert G. Cain, Esquire, a member in good standing of the Vermont Bar, moves the court for the admission of Christopher J. Lynch, Esquire, *pro hac vice*.

**MEMORANDUM OF LAW**

1. Christopher J. Lynch, Esquire, is a practicing attorney and is a member in good standing of the State Bar of Connecticut. Attorney Lynch practices with the Connecticut law firm of Halloran & Sage LLP, 225 Asylum Street, Hartford, Connecticut, 06103, telephone number (860) 522-6103.

2. Attached hereto as Exhibit 1 is the Affidavit of Christopher J. Lynch, Esquire, in support of this Motion for Admission *Pro Hac Vice*.

3. Attorney Lynch has filed a *pro hac vice* licensing statement form with the Court Administrator, has paid the required fee, and the Court Administrator has issued a *pro hac vice* licensing card to Attorney Lynch. See Exhibit 2.

4. The undersigned, Robert G. Cain, Esquire, is actively associated with Attorney Lynch with respect to the above-captioned matter

5. Attorney Lynch shall serve as lead counsel on behalf of Sentry Insurance with respect to the above-captioned matter.

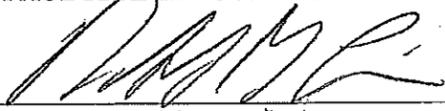
6. Attorney Lynch shall at all times be associated in this matter with Robert G. Cain, a member of the bar of this State, upon whom all process, notices and other papers shall be served and who shall sign all papers filed with the court.

WHEREFORE, the undersigned hereby moves the court to admit the appearance *pro hac vice* of Christopher J. Lynch, Esquire, including an order that all communications, including but not limited to, correspondence, discovery and pleadings, be made directly to counsel appearing *pro hac vice*.

DATED at Burlington, Vermont, this 18<sup>th</sup> day of May, 2009.

SENTRY INSURANCE

BY: PAUL FRANK + COLLINS P.C.

By:   
Robert G. Cain, Esq.

Pursuant to V.R.C.P. 5:

cc: Steven A. Bredice, Esq.  
Michael P. Kenney, Esq.  
Christopher J. Lynch, Esq.

**APPROVED AND SO ORDERED** this \_\_\_\_ day of May, 2009.

\_\_\_\_\_  
Hon. Dennis R. Pearson, Esq.  
Presiding Judge

STATE OF VERMONT  
CHITTENDEN COUNTY, SS:

SANDRA MURPHY, ADMINISTRATOR	)	CHITTENDEN SUPERIOR
OF THE ESTATE OF CHRISTOPHER	)	COURT
MURPHY,	)	DOCKET NO.: S653-06CnC
	)	
Plaintiff,	)	
V.	)	
	)	
SENTRY INSURANCE,	)	
	)	
Defendant.	)	

**AFFIDAVIT OF CHRISTOPHER J. LYNCH, ESQ.**  
**IN SUPPORT OF MOTION FOR ADMISSION PRO HAC VICE**

I, Christopher J. Lynch, Esq., being duly sworn, hereby depose and state as follows:

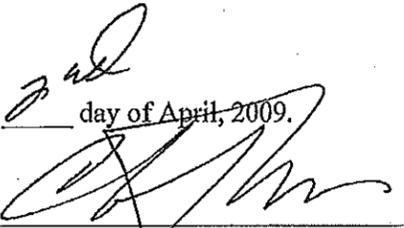
1. I am over the age of 18 and believe in the obligations of an oath;
2. I have personal knowledge of the facts contained herein;
3. I have been practicing law since 1984 and am a member in good standing of the bars of the State of Connecticut, the United States District Court for the District of Connecticut.
4. I am an attorney with the law offices of Halloran & Sage LLP, 225 Asylum St, Hartford CT 06103.
5. I certify that I have never been denied admission to any court; I do not have a grievance pending against me; I have never been reprimanded, suspended, placed on inactive status, disbarred; and I have never resigned from the practice of law.
6. I have a longstanding attorney/client relationship with Sentry Insurance, the defendant in this matter, which predates this cause of action and the subject matter of this litigation.
7. Through my years of work as an attorney, I have acquired a specialized skill and knowledge with respect to products liability cases and cases involving fork lift accidents, which are important to the trial of this case.

8. Pursuant to V.R.C.P. 79.1(e), I will at all times be associated with Attorney Robert G. Cain, of Paul, Frank + Collins, P.C., One Church St., Burlington, Vermont.

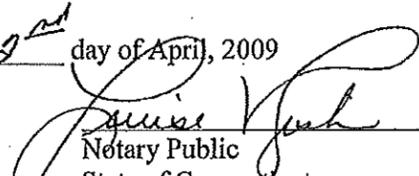
9. The facts stated herein are true and accurate to the best of my knowledge and belief.

Further your Affiant sayeth not.

DATED at Hartford, Connecticut this 2<sup>nd</sup> day of April, 2009.

  
\_\_\_\_\_  
Christopher J. Lynch

Subscribed and sworn to this 2<sup>nd</sup> day of April, 2009

  
\_\_\_\_\_  
Notary Public  
State of Connecticut  
Notary Seal:

**LOUISE V. GISH**  
**NOTARY PUBLIC**  
MY COMMISSION EXPIRES JUNE 30, 2010

1434062v.1

EXHIBIT 2

*Vermont Pro Hac Vice License*

I hereby certify that  
Christopher J. Lynch  
Pro Hac Vice license # 307

is an attorney duly licensed in Docket No. S653-06 Cnc and has paid  
the fee required by the Licensing of Attorneys Ru.les, § 13.



*Robert J. Freeman*

Acting Court Administrator

**FILE COPY**

Vermont *Pro Hac Vice* Licensing Statement

**INSTRUCTIONS:** This is a fillable form; to begin, click on a section, then tab to all other sections. Should you experience difficulty, you may print out this form and fill it in by hand. Fill out the form, print and notarize, keeping a copy for yourself. Mail this fully completed form with the appropriate fee to ATTORNEY LICENSING, 2418 Airport Road, Suite 2, Barre, VT 05641 with a Certificate of Good Standing from a licensing state or the District of Columbia. A separate licensing statement for each case must be completed. The fee for each licensing statement is \$200. Checks should be made payable to ATTORNEY LICENSING. Please allow two weeks for processing. Questions should be directed to jud-atlylicensing@state.vt.us

Name: Christopher J. Lynch

Office Address: Halloran & Sage LLP

225 Asylum St.

City: Hartford State: CT Zip Code: 06103

Phone Number: 860-522-6103 Fax Number: 860-548-0006 Email Address: lynchc@halloran-sage.com

Licensing State or DC Court: CT Date Admitted: 1984 Current Status: Active

Name of Case: Sandra Murphy, Adm. v. Sentry Insurance Docket No.: S653-06CnC Court: Chittenden Superior

Name of Sponsoring Vermont Attorney: Robert G. Cain Sponsor's Vermont License Number: \_\_\_\_\_

I request that the fee be waived to enable me to represent an indigent client pro bono.   
Please attach a supporting statement.

By my signature, I certify that I am not suspended nor disbarred in any jurisdiction. I certify that I am in good standing and admitted to practice in the licensing state or DC court of: Connecticut

I understand that I must comply with and am subject to Vermont Statutes and Rules of the Vermont Supreme Court, including the Rules of Professional Conduct and the Rules Governing Establishment and Operation of the Professional Responsibility Program.

Dated this 2<sup>nd</sup> day of April, 2009. [Signature]  
Applicant Signature

Subscribed and sworn to before me this 2<sup>nd</sup> day of April, 2009.  
[Signature]  
Notary Public Signature

**LOUISE V. GISH**  
**NOTARY PUBLIC**  
MY COMMISSION EXPIRES JUNE 30, 2010

My Commission Expires 6/30/2010

Upon acceptance of this application, you will be mailed a *pro hac vice* licensing card. Please allow two weeks for processing. The card shall be filed in the court in which the case is pending, along with a motion by a member of the Vermont Bar pursuant to V.R.C.P. 79.1(e), V.R.Gr.P. 44.2(b), V.R.F.P. 15(e), V.R.P.P. 79.1(d) or V.R.A.P. 45.1(e).

*State of Connecticut  
Supreme Court*

*I, Michele T. Angers, Chief Clerk of the Supreme Court of the State of  
Connecticut and keeper of the Seal thereof,*

*Do hereby certify, that, in the Superior Court at Hartford  
on the 15th day of November, 1984*

**Christopher John Lynch**

*of*

**West Hartford, Connecticut**

*having been examined and found duly qualified, was sworn as an attorney and admitted  
to practice before all the courts of this state, and that said attorney is a member in good  
standing of the Bar of this State pursuant to Practice Book §2-65.*

*In Testimony Whereof, I have hereunto set my hand  
and affix the Seal of the Supreme Court of the State of  
Connecticut, at Hartford, this day April 2, 2009*

*Michele T. Angers*  
**Michele T. Angers**

*Chief Clerk*



ATE:

INVOICE NO.	INVOICE DATE	DESCRIPTION	NET AMOUNT
11899.0043 11899 0043	04/01/2009 217 68	711311	\$200.00
			\$200.00

PLEASE DETACH AND RETAIN THIS STATEMENT AS YOUR RECORD OF PAYMENT.

Thank You

ORIGINAL CHECK HAS A COLORED BACKGROUND PRINTED ON CHEMICAL REACTIVE PAPER, WHICH CONTAINS A TRUE WATERMARK, AND HAS MICRO-PRINTING IN THE SIGNATURE LINE.

**HALLORAN & SAGE LLP**  
 ONE GOODWIN SQUARE  
 225 ASYLUM STREET  
 HARTFORD, CT 06103

**WEBSTER BANK**  
 WATERBURY, VT 05671  
 81-7010/2111

No. 089451

CHECK DATE	CHECK AMOUNT
04/01/2009	\$200.00

PAY TO THE ORDER OF  
 THE SUM \*\*\*200 DOLLARS AND 00 CENTS  
 ATTORNEY LICENSING  
 2418 AIRPORT ROAD  
 SUITE 2  
 BARRRE, VT 05641

NOT VALID AFTER 90 DAYS

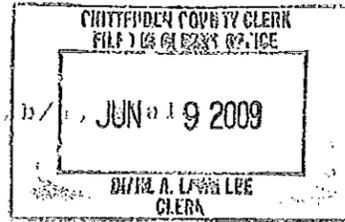
*[Signature]*  
 AUTHORIZED SIGNATURE

⑈089451⑈ ⑆211170101⑆10 0008975108⑈

DOCKET NUMBER: S0653-06 Cn

Korpiy, Sandra J., et al VS Mackew, Inc. d/b/a

ENTRY REGARDING MOTION



TITLE OF MOTION: Defendant Sentry Insurance Company's Motion for Admission  
Pro Hac Vice (Christopher J. Lynch, Esq.)

DATE MOTION FILED: 5/20/09

RESPONSE FILED:

Steven A. Bradice, Esq.	5/20/09 No objection per cover letter
John P. Cain, Esq.	NONE
Peter W. Joslin, Esq.	NONE

GRANTED      COMPLIANCE BY \_\_\_\_\_

DENIED

SCHEDULED FOR HEARING ON: \_\_\_\_\_ AT \_\_\_\_\_; TIME ASSIGNED \_\_\_\_\_

OTHER

*Dennis R. Pearson*  
 \_\_\_\_\_  
 JUDGE DENNIS R. PEARSON      DATE: *6/9/09*

COPIES SENT TO:

Steven A. Bradice, Esq.  
 Robert G. Cain, Esq.  
 John P. Cain, Esq.  
 Peter W. Joslin, Esq.  
 Michael P. Korpiy, Esq.

ORIGINAL

STATE OF VERMONT  
CHITTENDEN COUNTY, SS.

-----  
 SANDRA J. MURPHY, Individually and as )  
 Administrator of the Estate of )  
 Christopher Murphy )  
 v. )  
 MACTAW INC., d/b/a PETE'S RV CENTER, ) Vt. Superior Court  
 TODD MCGINNIS, SENTRY INSURANCE CORP., ) Docket No. S653-06cnc  
 JOHN DOES 1-3, ABC INSURANCE COMPANY, )  
 DEF INSURANCE CO., GHI INSURANCE CO., )  
 Uvw CO., and XYZ CO. )  
 -----

DEPOSITION  
 OF  
 TERRY SHEPARD  
 Taken on April 8, 2008, at 10:15 AM  
 At the offices of Paul Frank + Collins  
 Burlington, Vermont

A p p e a r a n c e s :

STEVEN BREDICE, ESQ., of the firm of Powell, Orr & Bredice, 400 Cornerstone Drive, Suite 240, Williston, Vermont; on behalf of the Plaintiff.

ROBERT G. CAIN, ESQ., of the firm of Paul Frank + Collins, P.O. Box 1307, Burlington, Vermont; on behalf of Defendant Sentry Insurance.

THOMAS P. SIMON, ESQ., of the firm of McCormick, Fitzpatrick, Kasper & Burchard, P.O. Box 638, Burlington, Vermont; on behalf of Defendant McGinnis.

PETER B. JOSLIN, ESQ., of the firm of Theriault & Joslin, P.O. Box 249, Montpelier, Vermont; on behalf of David McGinnis.

REPORTER: Sherri L. Bessery, RMR, CRR

DEPOS UNLIMITED, INC.  
 P.O. Box 4595  
 Burlington, Vermont 05406-4595  
 (802) 658-1188  
 depos@together.net

DEPOS UNLIMITED, INC.

I N D E X

<u>Witness</u>	<u>Page</u>
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Examination by Mr. Bredice -----	3
Examination by Mr. Cain -----	59
Examination by Mr. Simon -----	62
Re-Examination by Mr. Bredice -----	83
Re-Examination by Mr. Cain -----	83
Re-Examination by Mr. Simon -----	

<u>Exhibit</u>	<u>Marked For Identification</u>
Deposition 7 - Diagram	5
Deposition 8 - Diagram	13

\* \* \*

IT IS HEREBY STIPULATED AND AGREED BY AND  
between counsel that notice of the taking of the  
deposition has been given; that qualifications of  
the Notary Public shall be waived; and that all  
objections except as to the form of the question  
shall be reserved to the time of trial.

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STATE OF VERMONT  
CHITTENDEN COUNTY, SS.

ORIGINAL

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3	SANDRA MURPHY, Administrator )	
4	of the Estate of Christopher )	
5	Murphy )	
6	v. )	Vt. Superior Court
7		Docket S653-06CnC
8	SENTRY INSURANCE )	
9	-----	

DEPOSITION  
OF  
TERRY SHEPARD  
Taken on October 20, 2009, at 2:22 PM  
At the offices of Paul Frank + Collins  
Burlington, Vermont

A p p e a r a n c e s :

CHRISTOPHER LYNCH, ESQ., of the firm of Halloran &  
Sage, One Goodwin Square, 225 Asylum Street,  
Hartford, CT 06103; and  
ROBERT CAIN, ESQ., of the firm of Paul Frank +  
Collins, P.O. Box 1307, Burlington, Vermont;  
on behalf of Sentry Insurance.  
on behalf of Sentry Ins.

STEVEN BREDICE, ESQ., of the firm of Powell, Orr  
& Bredice, 400 Cornerstone Drive, Suite 240,  
Williston, Vermont; on behalf of the  
Plaintiff.

PETER JOSLIN, ESQ., of the firm of Theriault &  
Joslin, 141 Main Street, Montpelier, Vermont;  
on behalf of David McGinnis.

REPORTER: Sherri L. Bessery, RMR, CRR

DEPOS UNLIMITED, INC.  
P.O. Box 4595  
Burlington, Vermont 05406-4595  
(802) 658-1188  
depos@together.net

DEPOS UNLIMITED, INC.



ORIGINAL  
1

STATE OF VERMONT  
CHITTENDEN COUNTY, SS.

1		
2	-----	
3	SANDRA J. MURPHY, Individually and as )	
4	Administrator of the Estate of )	
5	Christopher Murphy )	
6	v. )	Vt. Superior Court
7	MACTAW INC., d/b/a PETE'S RV CENTER, )	Docket No. S653-06CnC
8	TODD MCGINNIS, SENTRY INSURANCE CORP., )	
9	JOHN DOES 1-3, ABC INSURANCE COMPANY, )	
10	DEF INSURANCE CO., GHI INSURANCE CO., )	
11	UVW CO., and XYZ CO. )	
12	-----	

8 DEPOSITION  
 9 OF  
 10 DAVID MCGINNIS  
 11 Taken on March 14, 2008, at 1:30 PM  
 12 At the offices of Paul Frank + Collins  
 13 Burlington, Vermont.

12 A p p e a r a n c e s:

13 STEVEN BREDICE, ESQ., of the firm of Powell, Orr &  
14 Bredice, 400 Cornerstone Drive, Suite 240,  
Williston, Vermont; on behalf of the Plaintiff.

15 ROBERT G. CAIN, ESQ., of the firm of Paul Frank +  
16 Collins, P.O. Box 1307, Burlington, Vermont; on  
behalf of Defendant Sentry Insurance.

17 THOMAS P. SIMON, ESQ., of the firm of McCormick,  
18 Fitzpatrick, Kasper & Burchard, P.O. Box 638,  
Burlington, Vermont; on behalf of Defendant  
McGinnis.

19 PETER B. JOSLIN, ESQ., of the firm of Theriault &  
20 Joslin, P.O. Box 249, Montpelier, Vermont; on  
21 behalf of David McGinnis.

22 REPORTER: Sherri L. Bessery, RMR, CRR

23 DEPOS UNLIMITED, INC.  
 24 P.O. Box 4595  
 Burlington, Vermont 05406-4595  
 (802) 658-1188  
 25 depos@together.net

DEPOS UNLIMITED, INC.



ORIGINAL

STATE OF VERMONT  
CHITTENDEN COUNTY, SS.

SANDRA MURPHY, Administrator  
of the Estate of Christopher  
Murphy

v.

SENTRY INSURANCE

Vt. Superior Court  
Docket S653-06cnc

DEPOSITION  
OF

DAVID MCGINNIS

Taken on October 20, 2009, at 11:03 AM  
At the offices of Paul Frank + Collins  
Burlington, Vermont

A p p e a r a n c e s :

CHRISTOPHER LYNCH, ESQ., of the firm of Halloran &  
Sage, One Goodwin Square, 225 Asylum Street,  
Hartford, CT 06103; on behalf of Sentry Ins.

STEVEN BREDICE, ESQ., of the firm of Powell, Orr  
& Bredice, 400 Cornerstone Drive, Suite 240,  
Williston, Vermont; on behalf of the  
Plaintiff.

PETER JOSLIN, ESQ., of the firm of Theriault &  
Joslin, 141 Main Street, Montpelier, Vermont;  
on behalf of David McGinnis.

REPORTER: Sherri L. Bessery, RMR, CRR

DEPOS UNLIMITED, INC.  
P.O. Box 4595  
Burlington, Vermont 05406-4595  
(802) 658-1188  
depos@together.net

I N D E X

<u>Witness</u>	<u>Page</u>
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Examination by Mr. Lynch -----	3
Examination by Mr. Bredice -----	88
Re-Examination by Mr. Lynch -----	109
Re-Examination by Mr. Bredice -----	127

<u>Exhibit</u>	<u>Marked For Identification</u>
Deposition 1 - Document Production	9
Deposition 2 - Exam Materials	12
Deposition 3 - Kubota Brochure	13
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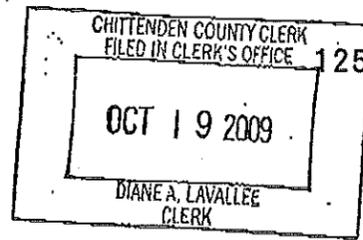
\*\*\*THIS TRANSCRIPT CONTAINS REQUESTS FOR INFORMATION.  
SEE PAGE 74, LINE 16; PAGE 93, LINE 5.\*\*\*

\* \* \*

IT IS HEREBY STIPULATED AND AGREED BY  
AND between counsel that notice of the taking  
of the deposition has been given; that  
qualifications of the Notary Public shall be  
waived; and that all objections except as to  
the form of the question shall be reserved to  
the time of trial.

\* \* \*

STATE OF VERMONT  
CHITTENDEN SUPERIOR COURT



DOCKET NUMBER: S0653-06 CnC

Murphy, Sandra J., et al VS Mactaw, Inc., d/b/s, etal

ENTRY REGARDING MOTION

TITLE OF MOTION: Plaintiff's Motion for Protective Order

DATE MOTION FILED: 10/05/09

ADDITIONAL MEMO: 10/16/09 Pltf's reply & supplemental

RESPONSE FILED:

Robert G. Cain, Esq. 10/14/09 Def Sentry's memo in opposition  
John P. Cain, Esq. NONE  
Peter B. Joslin, Esq. --filed-- 10/13/09 Non-Party witnesses response

GRANTED COMPLIANCE BY \_\_\_\_\_  
 DENIED  
\_\_\_\_ SCHEDULED FOR HEARING ON: \_\_\_\_\_ AT \_\_\_\_\_, TIME ALLOTTED \_\_\_\_\_  
\_\_\_\_ OTHER

*If the depositions reveal old ground,  
the court can be contacted for a  
ruling. Otherwise, they may proceed.*

*Helen M. Toor*  
\_\_\_\_\_  
JUDGE HELEN M. TOOR

*10/19/09*  
\_\_\_\_\_  
DATE

COPIES SENT TO:

Steven A. Bredice, Esq.  
Robert G. Cain, Esq.  
John P. Cain, Esq.  
Michael P. Kenney, Esq.  
Christopher J. Lynch, Esq.  
Peter B. Joslin, Esq.

## STATE OF VERMONT

SUPERIOR COURT  
Chittenden UnitCIVIL DIVISION  
Docket No. S0653-06 CnCSANDRA J. MURPHY, personal  
representative and ADMINISTRATOR of  
the ESTATE OF CHRISTOPHER MURPHY  
Plaintiff

DEC 19 2011

v.

SENTRY INSURANCE  
DefendantRULING ON MOTION FOR ENTRY OF JUDGMENT AND TAXATION OF COSTS

This is a wrongful-death case in which Plaintiff Sandra J. Murphy, as administrator of her deceased husband's estate, sues Defendant Sentry Insurance (Sentry). Sandra Murphy's husband, Christopher Murphy, died after a forklift he was operating at Pete's RV Center (his employer) tipped over. The forklift was equipped with an unapproved towing attachment, and Christopher Murphy was using the forklift to tow a fifth-wheel camper. Sentry was Pete's RV's workers' compensation and general liability insurer at the time of the accident, and performed safety surveys at Pete's RV prior to the incident. Plaintiff sued Sentry, alleging that Sentry was negligent and grossly negligent in performing the safety surveys because it failed to identify and warn of the dangers of using forklifts with unapproved towing attachments.

The case was tried before a jury from August 15 to August 31, 2011 with Judge Toor presiding. The jury returned a verdict finding that Sentry was negligent in connection with its April 3, 2002 safety services survey. At the time of that survey, Sentry was Pete's RV's general liability insurer, but was not yet its workers compensation insurer. The jury found that Pete's RV was also negligent, but not solely responsible for Christopher Murphy's death.<sup>1</sup> The jury also found that Christopher Murphy was comparatively negligent, but that only 15% of the total negligence (as between Christopher Murphy and Sentry) was attributable to him. The jury found total damages to be as follows:

Loss of Economic Support and Services:	\$940,000
Non-economic Damages to Sandra Murphy:	\$200,000
Non-economic Damages to Kyle Murphy:	\$400,000
Non-economic Damages to John Murphy:	\$400,000.

<sup>1</sup> Pete's RV was not a party to the suit because it is an employer protected by the Workers' Compensation Act. See 21 V.S.A. § 622 ("Right to compensation exclusive").

The parties had also stipulated that medical bills and funeral expenses totaled \$41,247.75. It also appears undisputed that, as Pete's RV's workers' compensation insurer, Sentry has paid a total of \$283,782.84 as of September 27, 2011 (and increasing by \$668.60 every week).

After the jury rendered its verdict, the court noted that the parties would attempt to negotiate a stipulated judgment. No such stipulated judgment was produced. Instead, on September 12, 2011, Plaintiff filed a Verified Petition for Costs and Pre-Judgment Interest and also a motion for entry of judgment and taxation of costs. In her motion, Plaintiff asks the court to enter judgment in the amount of \$1,684,060.59<sup>2</sup> plus taxable costs in keeping with her Verified Petition for Costs and Pre-Judgment Interest (totaling \$52,253.96).<sup>3</sup> Since that date, the parties have exchanged numerous filings, ending on October 12, 2011 with Plaintiff's response to Sentry's "Sur-Sur-Sur-Reply." The court has reviewed the parties' filings, held a hearing on November 17, 2011 on the issues raised, and has also reviewed Plaintiff's post-hearing "Supplemental Memorandum of Law" (filed Nov. 18, 2011), and Sentry's response (filed Nov. 28, 2011).<sup>4</sup> The court turns now to those issues.

#### I. "Tender Back" after Judgment or "Set Off" in the Judgment

Plaintiff maintains that judgment should be entered for her in the full amount of \$1,684,060.59 plus costs and interest. After Sentry has satisfied the judgment, Plaintiff asserts that under 21 V.S.A. § 624(e) & (f) she must "reimburse" or "tender back" to Sentry the amount of Sentry's workers' compensation lien, but reduced by Sentry's pro-rata share of Plaintiff's costs and expenses, which Plaintiff says reduces the amount she must "tender back" to \$171,009.78. Sentry counters that under *Derosia v. Duro Metal Products Co.*, 147 Vt. 410 (1986) (*Derosia I*), Plaintiff does not get a judgment for the full \$1,684,060.59 with the obligation to "tender back" some amount. Instead, according to Sentry, Plaintiff's judgment must be reduced ("set off") by the amount of compensation that Sentry has already paid as the workers' compensation insurance carrier.

<sup>2</sup> Plaintiff arrives at this figure by accounting for Christopher Murphy's 15% comparative negligence. The sum of all the damages awarded by the jury, plus the stipulated medical bills and funeral expenses, is \$1,981,247.75. Taking 85% of that figure, Plaintiff arrives at \$1,684,060.59.

<sup>3</sup> In her original Verified Petition for Costs and Pre-Judgment Interest (filed Sept. 12, 2011), Plaintiff reaches the \$52,253.96 figure by taking the sum of the following amounts: (1) \$15,193.74 in taxable costs; (2) pre-judgment interest up to the date of the verdict on past medical bills totaling \$29,434.29, funeral burial expenses totaling \$6,065.82, and economic losses totaling \$1,560.11.

<sup>4</sup> At the hearing, the court noted Sentry's November 3, 2011 motion to designate Judge Toor—who presided at trial but who rotated to the Addison Unit on September 6, 2011—to hear and decide all post-trial motions. The undersigned indicated that most of the issues raised in the post-verdict filings appeared to be legal rather than factual, and that the court would consider the legal issues and in the course of doing so make a determination as to whether any factual issues preclude the undersigned from resolving this portion of the case. The undersigned concludes that there is no need for Judge Toor to resolve the issues concerning the mechanics of entering judgment. To that extent, Sentry's motion is denied.

As a general rule, workers' compensation is the exclusive remedy for workplace injuries. *Dunham v. Chase*, 165 Vt. 543, 543 (1996) (mem.) (citing the exclusivity provision in Vermont's Workers' Compensation Act (WCA), 21 V.S.A. § 622). The exception is where a compensable injury is caused under circumstances creating legal liability in a person other than the employer. *Id.* (citing the WCA's dual-liability provision, 21 V.S.A. § 624(a)). In *Derosia I*, the Supreme Court concluded in a 3-2 opinion that if a workers' compensation carrier undertakes to provide, rather than pay for, benefits and services (such as safety inspections), the carrier could be liable in tort as "a person other than the employer." 147 Vt. at 413. In other words, the Court in *Derosia I* held that "employers and insurers, though statutorily identical for most purposes, are not treated the same in all circumstances under the dual-liability provisions of the Workers' Compensation Act. Insurers undertaking workplace safety inspections assume a personal duty apart from the employer's nondelegable duty to maintain a safe workplace." *Chayer v. Ethan Allen, Inc.*, 2008 VT 45, ¶ 20, 183 Vt. 439. This holding remains the law in Vermont, although it is narrowed by 21 V.S.A. § 624(h), which allows tort suits against workers' compensation insurers conducting workplace inspections only when they commit gross negligence or willful misconduct. *Id.* ¶ 21.

Here, the jury found that Sentry was not grossly negligent with respect to its October 21, 2003 safety services survey, but that it was (ordinarily) negligent with respect to its April 3, 2002 safety services survey.<sup>5</sup> The issue here is what recovery Plaintiff may have against Sentry in light of 21 V.S.A. § 624(e), which provides that when a plaintiff recovers against a third party, the workers' compensation insurance carrier is to be reimbursed for compensation paid to the employee. The twist in this case is that Sentry is *both* the "third party" *and* the workers' compensation insurance carrier. Sentry is not only a tortfeasor who must compensate Plaintiff for the harm caused by breaching a duty of care, but is also an insurance carrier who has already paid workers' compensation benefits and is entitled to be reimbursed for those payments out of Plaintiff's recovery against itself.

The analysis begins with the following two provisions from Vermont's Workers' Compensation statutes:

(e) In an action to enforce the liability of a third party, the injured employee may recover any amount which the employee or the employee's personal representative would be entitled to recover in a civil action. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits. Reimbursement required under this subsection,

<sup>5</sup> At the time of the April 3, 2002 inspection, Sentry was not yet Pete's RV's workers' compensation insurance carrier, and thus Plaintiff did not need to prove gross negligence with respect to that inspection.

except to prevent double recovery, shall not reduce the employee's recovery of any benefit or payment provided by a plan or policy that was privately purchased by the injured employee, including uninsured-underinsured motorist coverage, or any other first party insurance payments or benefits.

(f) Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effecting the recovery. Attorney fees, unless otherwise agreed upon, shall be divided among the attorneys for the plaintiff as directed by the court. The expenses of recovery above mentioned shall be apportioned by the court between the parties as their interests appear at the time of the recovery.

21 V.S.A. § 624(e) & (f). Plaintiff contends that Sentry's payment of workers' compensation benefits is a lien on the recovery and not a setoff, and that after judgment is entered and paid, the satisfaction of the lien can be addressed. She steadfastly maintains that the verdict should not be reduced by an offset, but that Sentry instead has a lien. Sentry argues that the reimbursement to which it is entitled should come in the form of a setoff in the judgment against it.

*Derosia I* explains how to handle the reimbursement in cases like this, where the "third party" tortfeasor is the same as the insurance carrier. The carrier is "entitled to set-off, in a judgment against itself as tortfeasor, the amount of compensation paid as insurance carrier." 147 Vt. at 414.<sup>6</sup> This is certainly not inconsistent with § 624(e)'s requirement that "[a]ny recovery . . . shall reimburse" the carrier. Nor does a setoff, as Plaintiff fears, reward a wrongdoer. Indeed, even Plaintiff's calculations reimburse Sentry for the payments it has already made (although Plaintiff reduces that reimbursement for Sentry's alleged pro-rata share of Plaintiff's fees and expenses—an issue treated below).<sup>7</sup> Other courts agree that a setoff to the judgment is appropriate in cases such as this. E.g., *Ray v. Transamerica Ins. Co.*, 208 N.W.2d 610, 614–15 (Mich. Ct. App. 1973) (applying statutory language virtually identical to § 624(e) to a case of alleged negligent inspection by employer's insurer, and concluding that "[t]he trial court acted properly in allowing set-off against the verdict of all compensation paid by the defendant").

Plaintiff's other arguments against setting off the payments from the judgment are unpersuasive. The Legislature's decision to narrow *Derosia I* by enacting § 624(h) does

<sup>6</sup> The parties argue at length about whether this statement by the *Derosia I* Court is dicta. Even if this statement were not essential to the ruling in *Derosia I*, it is still highly persuasive as to the proper course of action in a case such as this.

<sup>7</sup> In fact, neither party's proposed course of action would result in a double recovery, since both sets of calculations reimburse Sentry for the payments it has already made. At the November 17 hearing, the court asked Plaintiff what the difference is between a "set off" and her "tender back" preference. Counsel for Plaintiff explained that the size of the judgment affects interest during the pendency of any appeal, and also makes a \$90,000 difference in the attorneys' fee. In her post-hearing memorandum, Plaintiff also notes that it would also impact the amount of costs she must pay.

not mean that the Legislature also meant to reject the *Derosia I* Court's opinion that a setoff in the judgment was the proper method in cases such as this. The fact that the Legislature left intact the "reimbursement" language in § 624(e) does not indicate that the Legislature intended something other than setoff. As mentioned above, a setoff is not inconsistent with § 624(e)'s reimbursement language. To the contrary, if the Legislature disagreed with the setoff language in *Derosia I*, it would have changed § 624(e) instead of leaving it the same. See *Dubaniewicz v. Houman*, 2006 VT 99, ¶ 13, 180 Vt. 367 (legislative inaction following a court interpretation of a statute "at least suggests legislative acquiescence").

Plaintiff asserts that the opinion of the court in *Barney v. Paper Corporation of America*, Civ. A. Nos. 86-15, 86-238, 1988 WL 221243 (D. Vt. Mar. 11, 1988) supports her position that Sentry's payment of workers' compensation benefits is a lien on the recovery and not a setoff. Nothing in that opinion affirmatively states that the "reimbursement" mandated by § 624(e) must come as a payment from the plaintiff after the insurance carrier enters judgment for the full amount of damages rather than as a setoff in the judgment. Certainly *Barney* discusses a workers' compensation "lien." Other courts have done the same. See *Pulitano v. Thayer St. Assocs., Inc.*, No. 407-9-06 Wmcv, 2009 WL 6557342 at \*1 (Vt. Super. Ct. Oct. 23, 2009) (Wesley, J.), available at <http://www.vermontjudiciary.org/20062010%20TCdecisioncvl/2010-3-29-1.pdf> ("Upon paying benefits to Plaintiff, Travelers acquired a lien pursuant to 21 V.S.A. § 624(e), applicable against any recovery Plaintiff might obtain from third party tortfeasors."). However, nothing in either *Barney* or in *Pulitano* suggests that the right way to handle the carrier's lien where the insurance carrier is also a tortfeasor is anything other than a setoff in the judgment against the carrier.

Similarly, Plaintiff urges the court to rely upon *Smith v. American Employers' Insurance Co.*, 163 A.2d 564 (N.H. 1960), cited with approval by the *Derosia I* Court.<sup>8</sup> She says that *Smith* stands for the proposition that a tortfeasor insurer should be treated as a lienholder under a workers' compensation statute rather than a beneficiary of an offset. As in *Barney* and *Pulitano*, the *Smith* opinion does state that the "the employer has a lien upon any recovery by the employee from a third person in a tort action to the extent of the compensation payments it has made to the employee." 163 A.2d at 567. However, the opinion goes on to state that, "the defendant will be allowed to set off against any verdict against it obtained by the plaintiff in the tort action the amount of the compensation it has paid or has become obligated to pay her, on behalf of her employer, thereby preventing double recovery." *Id.* *Smith* actually supports Sentry's position.

<sup>8</sup> The New Hampshire Supreme Court in *Smith* held that the compensation carrier of an employer could be sued in a third party action and did not share the immunity of the employer to common law actions granted by New Hampshire's workers' compensation act. That holding was superseded by statute shortly after it was handed down. See *Corson v. Liberty Mut. Ins. Co.*, 265 A.2d 315, 317 (N.H. 1970) (noting that after *Smith* was decided, the legislature "amended the statute by adding the carrier specifically to those exempt from common law action under RSA 281:14"). After *Derosia I*, Vermont's Legislature did not go so far as to exempt carriers from liability, but—as described above—limited their liability to gross negligence or willful misconduct.

Finally, in her post-hearing memorandum, Plaintiff notes that Sentry's liability arises from a general liability inspection rather than a workers' compensation inspection. That circumstance, however, does not change the fact that Sentry is to be reimbursed for its lien, nor does it affect whether the reimbursement should come in the form of a setoff in the judgment.

II. Whether the Judgment Should Include a Setoff for *Future Workers' Compensation Payments*

The next issue is whether Sentry's setoff should include not only past payments, but also the value of all *future* workers' compensation benefits. Sentry says that it did not initially include probable future payments in the setoff contained in its proposed judgment order because it presumed that Plaintiff would not stipulate that such benefits were readily ascertainable. Pointing to Plaintiff's Revised Memorandum, Sentry maintains that Plaintiff admits that the value of all future workers' compensation benefits is readily ascertainable. See Pl.'s Revised Mem. Supporting her Mot. for Judgment Order and Taxation of Costs at 2 (filed Sept. 26, 2011) ("Sentry's present value interest [as of October 2011] in future compensation it has been relieved of paying is \$351,890."). Sentry says that since the value of future benefits is readily ascertainable, there is no reason why Sentry's setoff for past compensation paid should not also include future benefits as well. In support, Sentry maintains that the language of § 624(e)—with its mention of reimbursement for "any amounts paid or payable"—is broad enough to encompass ascertainable future benefits.

Plaintiff maintains that Sentry receives a discharge from its future obligation to pay benefits because the verdict is treated as an "advance." She therefore argues that setting off the future workers' compensation benefits would result in a double-debit: she would no longer receive those benefits *and* she does not get them in the form of a judgment either. Sentry counters that a setoff for future benefits does not result in a double-debit because Sentry seeks the setoff for future benefits *in lieu of* discontinuing the stream of future benefits. Sentry's Sur-Sur-Reply at 6 (filed Oct. 6, 2011). In her most recent filing, Plaintiff asserts that she has misapprehended a critical legal issue, and now says that by definition her future benefits cannot possibly be readily ascertainable because under 21 V.S.A. § 635, those benefits could end upon certain contingencies such as remarriage or death.

The court disagrees with Sentry's assertion that the language of § 624(e) is broad enough to encompass ascertainable future benefits. The reference to amounts "payable" is specifically limited those amounts "to date of recovery," and thus has a built-in temporal limit. *West v. Western Casualty & Surety Co.* does not compel a contrary result because the plaintiff on appeal actually did not object to a set-off for future payments, and because the Illinois statute at issue there did not include the "to date of recovery" limitation. 846 F.2d 387, 401–02 (7th Cir. 1988). *Wall v. Conn Welding & Machine Co.*, 179 A.2d 235 (Pa. Super. Ct. 1962), is distinguishable because it dealt with reimbursement of attorneys fees and not the carrier's reimbursement from the injured employee's recovery. In any case, because Sentry seemed to initially be content not to

include the value of future benefits in the setoff, and because Plaintiff's most recent position is that the present value of those future benefits is not readily ascertainable, it seems sensible to decline to include the value of those benefits in the setoff. The balance of Plaintiff's recovery should be treated as an advance payment by the employer on account of any future payment of compensation benefits. 21 V.S.A. § 624(e).

### III. Whether Sentry's Setoff Should be Reduced by a Share of Plaintiff's Costs of Recovery

The third issue is whether Sentry's setoff should be reduced by Sentry's alleged proportionate share of Plaintiff's attorneys' fees and costs. Plaintiff has consistently maintained that Sentry must bear its proportionate share of the expenses of her recovery, and that Sentry's share should be calculated in accordance with *Barney v. Paper Corporation of America*, Civ. A. Nos. 86-15, 86-238, 1988 WL 221243 (D. Vt. Mar. 11, 1988).

For its part, Sentry also cites *Barney*, in which the court noted that 21 V.S.A. § 624(e) requires, as a first step, that the expenses of recovery be deducted from the amount of recovery, and that the expenses of recovery so deducted are defined in § 624(f) and "are to be apportioned by the court between the parties as their interests appear at the time of the recovery." 1988 WL 221243, at \*2. Sentry argues that, because it is now a judgment debtor, it receives no net benefit from the jury award (and in fact accrued a substantial net loss), and thus has an "interest" in Plaintiff's recovery that is less than zero. Sentry relies on the following reasoning from *Ray v. Transamerica Insurance Co.*:

The theory behind the statute [Michigan's Workmen's Compensation Act] is that when the injured plaintiff recovers against a third-party tortfeasor the insurer is benefited and should therefore contribute to plaintiff's cost of recovery. *Potter v. Veto*, 355 Mich. 328, 94 N.W.2d 832 (1959). This case is different in that Transamerica is most definitely not benefiting from Mr. Ray's recovery. Indeed, the parties are adversaries in all respects. To allow plaintiff's claim would be to force the insurer to underwrite plaintiff's litigation. The trial court acted properly in allowing set-off against the verdict of all compensation paid by the defendant and in disallowing plaintiff's motion for expenses.

208 N.W.2d 610, 614-15 (Mich. Ct. App. 1973). Sentry concludes that § 624(f) and *Ray* prohibit the sharing of recovery expenses in this case.

In reply, Plaintiff cites no authority, but says that Sentry *should* be forced to underwrite her litigation because it deserves no sympathy and should pay these additional costs. Plaintiff cites the collateral source rule for the policy of preventing wrongdoers from escaping liability for their conduct even where plaintiffs might obtain a double recovery. Plaintiff supplies an extensive list of what it describes as tactics Plaintiff says Sentry employed that needlessly increased her costs and expenses, and argues that Sentry should receive no credit for bad behavior.

The court concludes that it is not appropriate for Sentry to underwrite Plaintiff's litigation as punishment for the alleged abuses Plaintiff says Sentry committed prior to trial. If Plaintiff feels sanctions are called for under V.R.C.P. 11, she should file (or should have filed) a separate motion. See V.R.C.P. 11(c)(1) (motion for sanctions must be made separately from other motions or requests).

The court finds the reasoning in *Ray* persuasive, especially in light of the fact that the court in that case was applying a statutory provision that is materially identical to § 624(f). The reasoning in *Ray* does not, as Plaintiff argues, reward the wrongdoer. Section 624(f)'s requirement is not about rewarding or punishing either party, but merely requires the expenses of recovery to be apportioned according to the parties' interests. Here, as in *Ray*, the parties' interests are totally adverse, and Sentry is not benefitting from Plaintiff's recovery. Neither does this reasoning ignore the purposes behind § 624(f). As the *Ray* court explained, the purpose is to require the insurer who benefits from the plaintiff's recovery against a third party to contribute to the plaintiff's costs of recovery. When the insurer *is* the third-party tortfeasor, the plaintiff's recovery does not benefit the insurer.

#### IV. Application of the Above Conclusions to Calculate the Judgment

Plaintiff may recover any amount which she would be entitled to recover in a civil action. 21 V.S.A. § 624(e). Here, accounting for Christopher Murphy's 15% negligence, the jury rendered a verdict for the Plaintiff in the amount of \$1,684,060.59. Section 624(e) goes on to describe a three-step process for distributing the amount recovered. *Barney v. Paper Corporation of America*, Civ. A. Nos. 86-15, 86-238, 1988 WL 221243, at \*2 (D. Vt. Mar. 11, 1988). Here, there is no real issue with the *priorities* of distribution, since the recovery is sufficient to pay the expenses of recovery and Sentry's lien. The issue is determining the *size* of the judgment to be entered for Plaintiff against Sentry.

The parties agree that Sentry must be reimbursed for its lien. The court has ruled that the reimbursement for the payments Sentry has already made should be handled as a setoff in the judgment. Calculating Sentry's lien is straightforward: it was \$283,782.84 as of September 27, 2011 and has been increasing by \$668.60 every week. As of December 8, 2011, it comes to \$291,137.44.

The setoff does not include any *future* workers compensation payments that Sentry might make.

Plaintiff incurred "expenses of recovery," defined as "the reasonable expenditures, including attorney fees, incurred in effecting the recovery." 21 V.S.A. § 624(f). The court must apportion the expenses of recovery between the parties as their interests appear at the time of recovery. *Id.* Because the court has concluded that Sentry need not underwrite Plaintiff's litigation, however, Sentry's proportionate share of Plaintiff's expenses of recovery is \$0.

This leaves the question of taxable costs. Pursuant to V.R.C.P. 54(d)(1), “[c]osts other than attorneys’ fees shall be allowed as of course to the prevailing party, as provided by statute and by these rules, unless the court otherwise specifically directs.” To the extent that Sentry argues that Plaintiff is not the “prevailing party” because the jury found Sentry not to be grossly negligent, found Christopher Murphy to be 15% comparatively negligent, and did not award more damages to Sandra Murphy for loss of companionship, the court disagrees. The jury awarded Plaintiff a substantial dollar amount. Just because Plaintiff did not win on every single point or issue does not mean that she is not the “prevailing party.” To the extent Plaintiff could be said to be only “partially successful,” she can still be regarded as the prevailing party. 10 Wright, Miller, Kane & Marcus, Federal Practice and Procedure: Civil 3d § 2667 (WL updated 2011).

Rule 54(d)(1) gives the court discretion in awarding costs. *Peterson v. Chichester*, 157 Vt. 548, 553 (1991). Sentry asks the court to exercise its discretion and disallow any costs because of what Sentry characterizes as Plaintiff’s “overreaching” during trial. As with Plaintiff’s claim that Sentry should pay her attorneys’ fees as punishment for alleged abuses, Sentry’s claim of misconduct against Plaintiff should be addressed separately.

It appears that Sentry does not dispute that most of the \$11,223.97 in costs that Plaintiff asserts are “taxable” are indeed taxable. Sentry’s position is that \$3,096.15 out of that \$11,223.97 is actually not taxable. Of the \$3,096.15 that Sentry disputes, \$2,871.70 is disputed for the same reason: Sentry says that Plaintiff spent that sum to order transcripts of thirteen depositions noticed and conducted by Sentry, and that V.R.C.P. 54(g) only permits taxation of costs to the prevailing party who actually “took” the deposition. Sentry’s Objection at 12–13 (filed Sept. 19, 2011). Plaintiff maintains that Rule 54(g) does not limit deposition costs to the party who noticed the deposition, and that the transcripts were of the depositions of Sandra Murphy herself as well as other fact witnesses, all of whom testified at trial. Pl.’s Reply at 11 n.4 (filed Sept. 26, 2011).

Under V.R.C.P. 54(g), the court has discretion regarding the taxing of costs in the taking of depositions. The thirteen depositions were for witnesses who testified at trial. The fact that Sentry noticed and took the depositions is immaterial. Plaintiff required deposition transcripts to prepare cross-examination, and could also anticipate using them as tools for impeachment. See *Sykes v. Napolitano*, 755 F. Supp. 2d 118, 121 (D.D.C. 2010) (taxing against plaintiff the costs the prevailing defendant incurred in purchasing copies of depositions noticed by plaintiff); *Brookins v. Wissota Promoters Assoc., Inc.*, No. A3-00-06, 2001 WL 629258, at \*5 (D.N.D. Feb. 15, 2001) (taxing against defendant the costs the prevailing plaintiff incurred in procuring copies of deposition transcripts, where the depositions were noticed by the defendant). Similar logic applies for the remaining disputed amount of \$224.45 (incurred to acquire a transcript of David Dodge’s testimony in a separate action). The court therefore concludes that taxable costs amount to \$11,223.97.

In sum, Sentry’s setoff is \$291,137.44. That setoff is not reduced by any share of Plaintiff’s “expenses of recovery.” Deducting the setoff from \$1,684,060.59, the court

concludes that judgment should be entered in favor of Plaintiff in the amount of \$1,392,923.15 plus taxable costs in the amount of \$11,223.97.

The court has calculated the principal amount due (\$1,392,923.15) and the costs allowed to Plaintiff (\$11,223.97). The final issue relates to the question of interest that has accrued up to and including the date of entry of judgment, since that amount must also be included in the judgment. V.R.C.P. 54(a). In her September 12, 2011 petition, Plaintiff requested pre-judgment interest up to the date of the verdict on past medical bills totaling \$29,434.29, funeral burial expenses totaling \$6,065.82, and economic losses totaling \$1,560.11. In its September 19, 2011 opposition, Sentry appeared to agree that Plaintiff should receive prejudgment interest on the award for medical, funeral, burial expenses, and interim economic losses up to the date of the verdict. See Opp'n at 15 (filed Sept. 19, 2011). However, in its October 3, 2011 sur-reply, Sentry argued that it had already compensated Plaintiff for all of the medical expenses and \$5,500 of the funeral and burial expenses as required by the Workers' Compensation Act, and thus should not be required to pay Plaintiff prejudgment interest as if those payments were never made. Sentry calculated that prejudgment interest on medical expenses should be \$0, and on funeral and burial expenses should be only \$1,434.77. Sentry did not object to Plaintiff's calculation for prejudgment interest on economic loss.

Plaintiff did not object to Sentry's calculations in her subsequent filings. At the November 17, 2011, she conceded that Sentry did in fact pay all of the medical expenses and most of the funeral and burial expenses, but noted that Sentry conceded that it owed approximately \$1,400. Putting together all of these concessions, the court concludes that Sentry owes Plaintiff a total of \$2,994.89 in prejudgment interest up to the date of the verdict, consisting of \$1,434.77 for funeral and burial expenses and \$1,560.11 in economic losses.

Finally, Plaintiff seeks an additional \$553.66 per day in pre-judgment interest from the date of the verdict to the date that judgment is entered.<sup>9</sup> Sentry acknowledges that V.R.C.P. 54(a) states that prejudgment interest accrues up to and including the date of entry of judgment, but argues that Plaintiff is not entitled to interest between the date of the verdict and the date on which judgment is entered because the entry of judgment has been postponed by Plaintiff's submission of an erroneous proposed judgment order. Sentry asserts that it would be unfair for Sentry to pay any additional interest just because it has insisted on its rights in response to Plaintiff's filings.

Here, both parties have raised and argued several points regarding the entry of judgment. If Sentry's argument is that Plaintiff's arguments were entirely frivolous or unwarranted by any existing law, then Sentry should seek sanctions pursuant to V.R.C.P. 11. That would be a more appropriate method of addressing any alleged abuses than cutting off interest to which Plaintiff is entitled pursuant to Rule 54(a). There were 100 days between August 31, 2011 and December 8, 2011, including the 8th. One hundred

<sup>9</sup> Plaintiff presumably calculates this by taking 12% of \$1,684,060.59 to calculate the annual simple interest on the total damages attributable to Sentry, and then dividing by 365 to arrive at an equivalent daily interest.

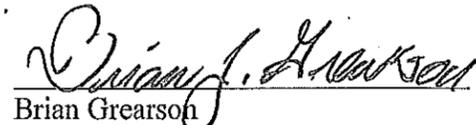
times \$553.66 is \$55,366.00. The court will add that sum to the \$2,994.89 in prejudgment interest.

ORDER

Sentry's motion to designate Judge Toor to hear and decide all post-trial motions is denied in part. The undersigned concludes that there is no need for Judge Toor to decide the issues discussed above.

Plaintiff's motion for entry of judgment and taxation of costs is granted in part and denied in part. The court will enter judgment in the principal amount of \$1,392,923.15, plus \$11,223.96 in taxable costs and \$58,360.89 in prejudgment interest.

Dated at Burlington this 8th day of December 2011.

  
Brian Grearson  
Presiding Superior Court Judge

VERMONT SUPERIOR COURT  
FILED

JUL 31 2012

VERMONT SUPERIOR COURT  
CHITTENDEN UNIT  
CIVIL DIVISION

CHITTENDEN UNIT

SANDRA J. MURPHY, personal  
representative and ADMINISTRATOR of  
the ESTATE of CHRISTOPHER MURPHY  
Plaintiff

v.

SENTRY INSURANCE  
Defendant

Docket No. S0653-06 CnC

RULING ON POST-TRIAL MOTIONS

This case was tried to a jury in August of 2011. It involves the death of a forklift driver at the workplace in June of 2004, and turns on the scope of an insurer's liability when it provides safety inspections at the workplace of an insured company in connection with general liability insurance. Defendant has filed post-trial motions: a renewed motion for judgment as a matter of law, and a motion for new trial.<sup>1</sup> In evaluating these motions, the court must look at the evidence presented at trial in the light most favorable to the plaintiff. Familiarity with the case and the court's prior rulings is presumed for purposes of the following discussion. Because the court concludes that one issue is determinative here, the court does not reach all of Sentry's arguments.

Section 324A of the Restatement

Sentry argues that the court erred in charging the jury that only one of the three subsections of Section 324A of the Restatement (Second) of Torts needed to be shown to establish liability for negligent inspection: an increased risk of harm, an undertaking to

<sup>1</sup> A motion to alter or amend the judgment was previously ruled on by Judge Grearson.

perform a duty owed by Pete's to Mr. Murphy, or reliance by Pete's or Mr. Murphy on the inspection. Sentry points to case law in other jurisdictions rejecting the three-part analysis of 324A. While there is some logic to the analysis in those cases, Vermont law is binding upon this court. Our Supreme Court has expressly stated that the three sections are alternatives. Derosia v. Liberty Mutual Ins. Co., 155 Vt. 178, 183 and 187 (1990) (referring to "either" options a, b or c, and noting that "[t]he negligent inspection may result either in an increase in the risk of harm, in an undertaking to perform a duty owed by another to a third person, or in reliance by the insured or the employee of the insured upon the undertaking"). The Kennerly case refers to two of the three possible theories of liability – reliance or an increased risk of harm – but does not say that the third is no longer an alternative basis for liability. Kennerly v. State, 2011 VT 121, ¶ 13. The third basis was not relevant in Kennerly because the issue in that case was the undertaking by the police to do a welfare check on the decedent at her daughter's request. Because the daughter had no legal duty to check on her mother, there was no claim that the police had taken over such a legal duty. The court concludes that Kennerly did not change the law in Vermont. Thus, there remain three ways to show liability under 324A.

The first basis for liability, then, is an increased risk of harm. The court agrees that there was no evidence upon which the jury could find an increased risk of harm based upon Sentry's actions. Nothing Sentry did increased the risk that already existed. Sentry did not affirmatively bless the use of the attachment or the forklift, and did not encourage its use. Sentry did not suggest changes to its use that made it more dangerous. There was just no action by Sentry that created any greater risk than already existed from

perform a duty owed by Pete's to Mr. Murphy, or reliance by Pete's or Mr. Murphy on the inspection. Sentry points to case law in other jurisdictions rejecting the three-part analysis of 324A. While there is some logic to the analysis in those cases, Vermont law is binding upon this court. Our Supreme Court has expressly stated that the three sections are alternatives. Derosia v. Liberty Mutual Ins. Co., 155 Vt. 178, 183 and 187 (1990) (referring to "either" options a, b or c, and noting that "[t]he negligent inspection may result either in an increase in the risk of harm, in an undertaking to perform a duty owed by another to a third person, or in reliance by the insured or the employee of the insured upon the undertaking"). The Kennerly case refers to two of the three possible theories of liability – reliance or an increased risk of harm – but does not say that the third is no longer an alternative basis for liability. Kennerly v. State, 2011 VT 121, ¶ 13. The third basis was not relevant in Kennerly because the issue in that case was the undertaking by the police to do a welfare check on the decedent at her daughter's request. Because the daughter had no legal duty to check on her mother, there was no claim that the police had taken over such a legal duty. The court concludes that Kennerly did not change the law in Vermont. Thus, there remain three ways to show liability under 324A.

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the use of the small forklift and homemade attachment to move huge vehicles as heavy as ten thousand pounds.

The second basis for liability is that Pete's changed its position in reliance upon Sentry. The court agrees that there was no evidence to support this theory. Pete's did nothing that could be considered a change of position, or reliance. Although Murphy argues that continuing to use the same type of forklift attachment was a change in position, the court concludes that no reasonable jury could so conclude.

That leaves one theory as a basis for liability: whether under Restatement 324A(b) Sentry had "undertaken to perform a duty owed by [Pete's] to [Mr. Murphy]." Sentry argues that Plaintiff was required to prove that Sentry had taken on "primary" responsibility for employee workplace safety. *Derosia* does not speak in those terms, but it did frame the issue as whether the jury "could reasonably have concluded that the defendant *undertook an obligation to provide a safe workplace[.]*" 155 Vt. at 186 (emphasis added). Certainly, merely undertaking to provide some services to another is not enough. Instead, that is merely the initial step in determining whether 324A applies. That is, 324A speaks *first* of one who undertakes to provide services the provider should recognize as necessary to protect a person or property, and *then* of whether the undertaking was "to perform a duty owed by the other to a third person." 324A(b). Both criteria must be met to establish liability.

It is established that Sentry did offer some service to Pete's, so the first question is resolved. The important question is *what* services Sentry undertook to provide, and *whether those included performing at least part of Pete's' duty to provide its employees*

*with a safe workplace.*<sup>2</sup> The jury was required to separately assess two different inspections done in different years, one undertaken under the workers' compensation policy and the other under the general liability policy. The jury found no liability for the safety inspection done in connection with the worker's compensation policy in this case, and thus the issue is whether the inspection done in connection with the *general liability* policy could give rise to the duty necessary under 324A(b). In other words, could the jury reasonably have found that, in doing the April 2002 general liability inspection, Sentry took on even a portion of Pete's duty to provide a safe workplace for Mr. Murphy?

The court concludes that the answer to this question must be "no." Had this been a worker's compensation inspection, as was the 2003 inspection, it might have supported the claim that Sentry was assuring Pete's that its current workplace practices were adequate to protect its employees. This inspection was not directed at worker's compensation claims, however, and thus the focus was not on employee safety. Unlike the employer in *Derosia*, which involved a series of worker's compensation inspections, Pete's could not have reasonably concluded that Sentry was taking on any part of its duty to provide a safe workplace for its employees. The general liability policy addressed claims against Pete's by third parties. The 2002 inspection was never designed to reduce claims related to employee safety. Nor could the jury reasonably so conclude.

Murphy points to the following exchange in the deposition of a Sentry inspector, Gary Smith, as evidence that the inspection at issue was designed to address employee safety:

Q: But the purpose [of your visits] is to improve the safety of the employees at the businesses that Sentry insures?

---

<sup>2</sup> It is undisputed that an employer has such a duty.

A: Sure, we try to do that, absolutely.

Smith Deposition, p. 15 (Sept. 12, 2007). However, that testimony was general background testimony about Smith's job, and was not directed to what Sentry did for Pete's. It did not address the inspection in question, nor did it address the difference between a workers' compensation inspection and a general liability inspection. Because there must be evidence about what Sentry undertook to do *in this particular case*, that slim reed of testimony cannot sustain the verdict here.

Aside from the lack of any affirmative evidence to support the idea that the inspection supplanted Pete's duty, the relevant policy in place at the time of the April 2002 inspection stated that although Sentry had the right to make inspections at any time, any inspections they make "relate only to insurability" and they "do not make safety inspections." Ex. I-6 pp. 2-3. It goes on to say: "We do not undertake to perform the duty of any person or organization to provide for the health or safety of any person or organization to provide for the health or safety of works or the public." *Id.* p. 3.

In addition, although Murphy argues that the inspection covered the entire workplace, that is a gross overstatement. The inspector walked through the workplace, but there was no evidence at all that he was inspecting every piece of equipment in the workplace, or assessing how all of that equipment was used. There was certainly no evidence that he inspected the forklift or attachment at issue in this case, or that he was asked or expected to so. There was just no reasonable basis on which the jury could conclude that Sentry undertook to assure a safe workplace for Pete's employees, or to assure the safety of all the equipment that employees were using, as a result of that 2002 walk-through.

Order

For the above reasons, the court grants the motion for judgment as a matter of law and does not reach Sentry's additional claims. The jury's verdict is vacated and judgment will be entered as a matter of law for Sentry.

Dated at Burlington this 31st day of July, 2012.

Helen M. Toor / CAC  
Helen M. Toor  
Superior Court Judge

Vermont Superior Court

VERMONT SUPERIOR COURT  
CHITTENDEN UNIT  
CIVIL DIVISION

OCT 09 2012

Chittenden Unit

SANDRA J. MURPHY, personal  
representative and ADMINISTRATOR of  
the ESTATE of CHRISTOPHER MURPHY  
Plaintiff

v.

SENTRY INSURANCE  
Defendant

Docket No. S0653-06 CnC

RULING ON DEFENDANT'S MOTION FOR COSTS

In July of 2012 this court entered judgment for the Defendant. Defendant has now moved for costs. Plaintiff argues that a defendant is never entitled to costs unless it recovers something on a counterclaim.

This is just not the law. The fact that Rule 68 allows a defendant to sometimes recover costs even when a plaintiff wins does not mean that a defendant cannot recover costs when the defendant wins. As the United States Supreme Court said in Delta Air Lines v. August, 450 U.S. 346, 352 (1981), "costs are usually assessed against the losing party," and "liability for costs is a normal incident of defeat." Murphy's tortured interpretation of that case and of the Vermont rules is unpersuasive. Costs are routinely awarded for the defendant when there is a defense verdict, and Murphy's claims to the contrary are unavailing.

Murphy does not argue until its third memorandum on this motion for costs that any of the specific items of costs sought by Defendant are inappropriate. In that memorandum Murphy asserts that Sentry is not entitled to a few items of costs, First.

Murphy argues that deposition costs should be limited because duplicate copies of a transcript were made for out-of-state counsel, and one deposition was unnecessarily redone. The court agrees on the first point and will deduct the cost of \$508.30. Based upon Sentry's reference to Judge Pearson's order concerning the re-deposing of witnesses, the \$975.95 fee is appropriate.

Murphy also suggests deduction of other items of costs without justifying such deductions. Filing fees and service fees are routinely awarded to the successful party in a lawsuit. The court sees no reason to treat the mediator's fee differently.

Order

The motion for costs is granted. Defendant is awarded its costs in the amount of \$17,490.74.

Dated at Charlotte this 8th day of October, 2012.

  
Helen M. Toor  
Superior Court Judge

## RULE 54. JUDGMENTS; COSTS

(a) **Definition; Form; Amount.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings. In an action where monetary relief is awarded, the amount of the judgment shall include the principal amount found to be due, all interest accrued on that amount up to and including the date of entry of judgment, and all costs allowed to the prevailing party.

(b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Demand for Judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) **Allowance of Costs; Attorney's Fees.**

(1) *Costs other than Attorneys' Fees.* Costs other than attorneys' fees shall be allowed as of course to the prevailing party, as provided by statute and by these rules, unless the court otherwise specifically directs. Costs shall be taxed against the State of Vermont only to the extent permitted by law.

(2) *Attorneys' Fees.*

(A) Claims for attorneys' fees for services rendered in connection with a pending action, and related nontaxable expenses, shall be made by motion in the action unless the applicable substantive law provides for the recovery of such fees as an element of damages to be proved at trial or in an independent action.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a separate judgment shall be entered as provided in Rule 58.

(D) The court shall, insofar as possible, resolve issues relating to fees without extensive evidentiary hearings and may refer issues relating to the value of services or other items recoverable under this rule to a master under Rule 53 without regard to the provisions of paragraph (2) of subdivision (b) thereof.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules.

(e) **Taxation of Costs.** Costs shall be taxed by the clerk, and upon notice when the adverse party has appeared in person or by attorney. A party objecting to the clerk's taxation may appeal to the Presiding Judge, setting forth in writing the items objected to, with the party's objections.

(f) **Costs in Trustee Cases.**

(1) In trustee cases, costs will be taxed as follows:  
Counsel fee for each term, \$3.00.

Counsel fee on actual hearing before the court, \$5.00.

Disclosures and answers, 15 cents per folio, but in no case less than \$1.00.

Attendance of counsel before commissioners, \$2.00 per day.

Attendance of trustees before commissioners, 6 cents per mile travel and \$2.00 per day.

Counsel fee on jury trial, from \$10.00 to \$20.00.

(2) Costs are not to be allowed trustees after the question of their liability is determined, for awaiting the determination of the suit against the principal debtor.

(3) Members of a firm summoned as trustees in their partnership capacity shall be allowed costs as of only one trustee, except for actual and necessary travel and attendance.

(4) When a material fact in a disclosure or an answer is denied by the plaintiff and found against the trustee, and the trustee shall be held

chargeable by reason thereof, costs subsequent to such disclosure or answer shall not be allowed the trustee.

(g) **Costs on Depositions.** The taxing of costs in the taking of depositions shall be subject to the discretion of the court. No costs shall be allowed unless the court finds that the taking of the deposition was reasonably necessary, whether or not the deposition was actually used at trial. Taxable costs may include the cost of service of subpoena upon the deponent, the reasonable fee of the officer before whom the deposition is taken, the stenographer's reasonable fee for attendance, and the cost of the original transcript of the testimony or such part thereof as the court may fix.—Amended Dec. 11, 1980, eff. Feb. 2, 1981; Feb. 22, 1996, eff. July 1, 1996.

#### CROSS REFERENCES

Application of this rule to civil proceedings in district court, see Rule 54, District Court Civil Rules.

Judgment in class action, see Rule 23(c), Vermont Rules of Civil Procedure.

Offer of judgment, see Rule 68, Vermont Rules of Civil Procedure.

#### Reporter's Notes—1996 Amendment

Rule 54(d) is amended by renumbering the existing rule as paragraph (1) and adopting paragraph (2) to incorporate the provisions of the 1993 amendment of Federal Rule 54(d). A related amendment is made simultaneously to Rule 58. The purpose of the amendments is to provide a standardized procedure for those cases in which the prevailing party is entitled to attorneys' fees by law or in which fees are to be awarded by the court from a common fund. See, generally, Advisory Committee's Note to 1993 Amendment of Federal Rule 54(d).

Former Rule 54(d) is now numbered as Rule 54(d)(1), with an amendment to make clear that the general costs provisions of the rule do not apply to awards of attorneys' fees.

Rule 54(d)(2) establishes a new procedure by motion in a pending action for recovery of attorneys' fees and related litigation expenses incurred in connection with the pending action and available by law, whether or not denominated "costs." The rule is only procedural in its effect. It creates no new substantive right to recover attorneys' fees, and it does not determine whether attorneys' fees are to be considered "costs" in other contexts such as the calculation of the amount to be paid by an offeree who has not accepted an offer of judgment under Rule 68. Existing law continues to govern these matters.

There are two situations in which existing procedures for the award of attorneys' fees will continue to govern. (1) Rule 54(d)(2)(A) makes clear that the procedure under the rule does not apply to fees that are to be pleaded and proved as an element of substantive damages, either in the pending action or in a separate action. For example, when sought under a mortgage pursuant to Rule 80.1(b)(1) and (f), or as suit money under 15 V.S.A. § 607 after a divorce judgment, fees must be claimed and proved as therein provided. (2) Subparagraph (E) excludes fees awarded as sanctions for violations of the rules. See, e.g., Rule 37(a)(4).

Rule 54(d)(2)(B) provides that a motion for fees must be made within 14 days after entry of judgment. The period is designed to assure that the opposing party is aware of the claim before the time for appeal has run and to allow the court in a nonjury case to act on the claim immediately after rendering its judgment on the merits, when the matters in issue are still fresh. The period may be extended by the court, or a longer period may be allowed by statute

in a particular case. The motion does not affect the finality of the judgment for appeal purposes except as provided in the simultaneous amendment of Rule 58. When an appeal on the merits has been taken, the trial court may rule or defer decision on the motion for fees, or may by order permit a new motion to be filed within a specified time after resolution of the appeal. Entry of a new judgment on remand or under Rule 59 automatically begins a new period for filing. See federal Advisory Committee's Note. The final sentence of Federal Rule 54(d)(2)(B), permitting the court to order that the motion disclose any agreement concerning the fees claimed, has been omitted. The trial courts may develop such a practice in the future under the rule if circumstances warrant.

Rule 54(d)(2)(C) assures that the parties have an adequate opportunity to present argument and evidence on all matters pertaining to the award of fees. Subparagraph (D), however, is intended to discourage extensive evidentiary hearings and to make clear that any necessary factual investigation may be conducted by a master. Subparagraph (C) also provides for findings of fact and conclusions of law under Rule 52 and a separate judgment under Rule 58 to facilitate appellate review of the award of fees.

#### Reporter's Notes—1981 Amendment

Rule 54(a) is amended in conjunction with the simultaneous amendment of Rule 69. The latter amendment clarifies the procedure for computing and levying execution for post-judgment interest. Amended Rule 54(a) makes clear that the amount of a judgment includes pre-judgment interest and costs.

Pre-judgment interest may be of two kinds: (1) Interest expressly provided for in a contract or note, which is recoverable as an element of the indebtedness sued upon. This interest runs for the period and at the rate agreed. See *Willard v. Pinard*, 65 Vt. 160, 26 A. 67 (1892) (parties may stipulate for interest on each item in a book account). See, generally, *McCormick*, *Damages* 205-06 (1935). (2) Interest awarded as damages for detention of money due for breach or default. This interest is awarded as of right when the principal sum recovered is liquidated or capable of ready ascertainment and may be awarded in the principal sum recovered or other forms of damage. The interest is calculated at the statutory legal rate in effect at the time of calculation (currently 12% simple annual interest under 9 V.S.A. § 41a(a)). The interest ordinarily runs from the time of maturity or demand for payment or the time of default, which may be the time that the action is commenced. See *Pillsbury v. Taylor*, 117 Vt. 399, 93 A.2d 102 (1952) (maturity of note); *Van Velsor v. Dzewaltowski*, 136 Vt. 103, 385 A.2d 1102 (1978) (commencement of suit and counterclaim in action on construction contract); *Pobwin v. Tucker*, 128 Vt. 142, 259 A.2d 781 (1969) (establishment of right in suit to recover consideration); *Norman v. American Woolen Co.*, 117 Vt. 28, 84 A.2d 125 (1951) (date of workmen's compensation award in suit on award); *Lash v. Lash Furniture Co. of Barre, Inc.*, 130 Vt. 517, 296 A.2d 207 (1972) (interest in trier's discretion in stockholder's derivative suit against majority stockholder); *Tyrrell v. Prudential Ins. Co. of America*, 109 Vt. 6, 17, 192 A. 184, 189 (1937) (interest begins at time of jury verdict because that would prove death under the insurance policy and put the insurer in default).

#### Reporter's Notes

This rule is substantially similar to Federal Rule 54, with some modifications and additions taken from the Maine rule and prior Vermont practice.

Rule 54(a), defining "judgment," generally to include a decree and any appealable order, is a necessary part of the merger of law and equity under the rules. The term as thus defined is used throughout the rules, especially those pertaining to entry of judgment, post-judgment proceedings, and appeals, and applies not only to what formerly were chancery decrees but to

actions for the appointment of a receiver and in actions brought by or against a receiver shall be governed by these rules.—Amended Nov. 27, 1979, eff. Jan. 1, 1980.

## CROSS REFERENCES

Application of this rule to civil proceedings in district court, see Rule 66, District Court Civil Rules.

## Reporter's Notes—1980 Amendment

This rule is amended in the same manner, and for the same reasons, as Rule 16.1. See the Reporter's Notes to the 1980 amendment to that rule.

## Reporter's Notes

This rule is similar to Federal Rule 66. It makes applicable to receivership proceedings the provisions of the rules, except where statutes expressly provide a different procedure. The rule does not affect the legal capacity or substantive rights of a receiver. See *Clifford v. West Hartford Creamery Co.*, 108 Vt. 229, 153 A. 205 (1931). There is a general equitable jurisdiction over the appointment of receivers which may be invoked either in a separate action, brought by complaint or upon motion in a pending suit. See *Clifford v. West Hartford Creamery Co.*, supra; *Westinghouse Elec. Mfg. Co. v. Barre & Montpelier Traction & Power Co.*, 97 Vt. 306, 123 A. 201 (1924); *Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 A. 1017 (1916); *Langdon v. Vermont & C. R. Co.*, 54 Vt. 593 (1882). A number of statutory receivership provisions applicable to particular kinds of matters exist. See 8 V.S.A. §§ 1651-1665 (bank receiverships); 11 V.S.A. § 444 (receivership for corporation in contempt for failure to produce books and records); 11 V.S.A. §§ 492-495 (receivership for winding up of corporation); 12 V.S.A. §§ 4481-4485 (receivership for management of attached stock of a manufacturing establishment).

The second sentence of the rule is based on former Chancery Rule 14.

## RULE 67. DEPOSIT IN COURT

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, or in an action in which trustee process is used, a trustee, may upon notice to every other party, and by leave of court, deposit with the court all or part of such sum or thing whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court. Money paid into court under this rule shall be deposited in such depository as the court having custody shall designate (which designation shall be minuted on the docket) and shall be withdrawn therefrom upon order of the clerk, countersigned by any Superior Judge. The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.—Amended, Oct. 21, 1983, eff. Jan. 1, 1984.

## CROSS REFERENCES

Application of this rule to civil proceedings in district court, see Rule 67, District Court Civil Rules.

## Reporter's Notes—1984 Amendment

This rule is amended as part of the series being made to conform to recent amendments to the Federal Rules of Civil Procedure. See Reporter's Notes—1984 Amendment to Rule 7. The amendments clarify the availability of deposit into the court and the procedure. See Advisory Committee Note—1983 Amendment to F.R.C.P. 67, 97 F.R.D. 226 (1983).

## Reporter's Notes

This rule is substantially identical to Federal Rule 67, but the last sentence is based upon Maine District Court Civil Rule 67, because there is no statutory provision in Vermont for deposit of such funds. There was no exact equivalent of this rule in prior Vermont practice. Former County Court Rule 37, providing for the payment of an admitted portion of plaintiff's claim into court, was in effect an offer of judgment procedure. See Reporter's Notes to Rule 68. The principal use of the rule is to permit a stakeholder who disclaims all interest in the action to pay or deliver the money or thing in suit into court. See 3 Barron & Holtzoff, *Federal Practice and Procedure* § 1461 (Wright ed. 1958). Inclusion of the trustee permits the holder of attached property to relinquish all claim to such property and avoid further proceedings.

## ANNOTATIONS

Cited. Cited in *Abbiaji v. Butthura & Sons, Inc.* (1994) 161 Vt. 314, 639 A.2d 988.

## RULE 68. OFFER OF JUDGMENT

At any time more than 10 days before the trial begins or within such shorter time as the court may approve, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer or within such shorter time as the court may order the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days, or such shorter

time as the court may approve, prior to the commencement of hearings to determine the amount or extent of liability.

## CROSS REFERENCES

Application of this rule to civil proceedings in district court, see Rule 68, District Court Civil Rules.

## Reporter's Notes

This rule is substantially identical to Federal Rule 68, with a modification taken from the Maine rule. The rule is similar in effect to former County Court Rule 37, which permitted defendant to pay all or part of a contract claim into court as an offer to accept judgment for the sum paid, and to 12 V.S.A. § 2140 (now superseded), which permitted tender of the amount of the demand at least three days before trial. The rule, however, applies to all actions and all forms of relief and permits an offer to be made not only before trial but after a decision on liability alone has been reached. The rule differs from Federal Rule 68 in giving the court discretion to permit an offer less than 10 days prior to trial or hearing. This more flexible provision is desirable in light of the simpler nature of much state-court litigation.

## ANNOTATIONS

1. Generally. If an offer of judgment is made at any time more than 10 days before the trial begins an offeree will be liable for costs incurred after the offer if the judgment finally obtained by the offeree is not more favorable than the offer of judgment; the plain language of the rule makes timely an offer of judgment served more than 10 days before the trial begins, irrespective of when the trial would have begun but for other events. *Abbiati v. Buttura & Sons, Inc.* (1994) 161 Vt. 314, 639 A.2d 988.

2. Construction. Where defendants' offer of judgment in civil rights action failed to specify whether offer included costs and attorneys' fees, court was required to interpret offer as allowing plaintiffs to obtain costs and attorneys' fees in addition to judgment amount specified in the offer. *Rule v. Tobin* (1998) 168 Vt. 166, 719 A.2d 869.

Civil rights defendants invoked procedural rule governing offers of judgment in order to obtain a tactical advantage, and their negligence or mistake in failing to specify whether offer included costs and attorneys' fees did not amount to hardship or injustice entitling them to relief from judgment. *Rule v. Tobin* (1998) 168 Vt. 166, 719 A.2d 869.

## RULE 69. EXECUTION

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. No execution running against the body shall be issued to enforce a judgment in any civil action for money damages. In addition to the procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution, as provided by law, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

Executions shall be made returnable within sixty days from the date thereof. Executions may be issued so long as the judgment remains

unsatisfied, but not after eight years from the date of rendition of the judgment. Actions or motions to renew or revive judgments shall not be a prerequisite to issuance of a writ of execution as long as the eight-year period has not expired.

The judgment creditor shall deliver to the officer levying execution a list of exemptions, which the officer shall serve on the judgment debtor, together with a copy of the writ of execution.

In the writ of execution, the clerk shall set forth the amount of post-judgment interest due per day, calculated on the full amount of principal included in the judgment at the maximum rate allowed by law. In levying execution, the officer shall collect per diem interest in the daily amount from the date of entry of judgment to and including the date of satisfaction. If an execution is returned partially satisfied, the return shall show the date of partial satisfaction. The amount collected shall be first applied to interest accrued to that date. Interest on the portion of the judgment remaining unsatisfied shall be computed from the date of partial satisfaction and collected in the same manner on any subsequent levy of execution.

Process to enforce a judgment for the delivery of possession of land shall be a writ of possession.—Amended Dec. 11, 1980, eff. Feb. 2, 1981; Dec. 28, 1981, eff. March 1, 1982; Nov. 4, 1994, eff. March 1, 1995.

## CROSS REFERENCES

Application of this rule to civil proceedings in district court, see Rule 69, District Court Civil Rules.

## Reporter's Notes—1995 Amendment

Rule 69 is amended to assure a uniform procedure throughout the state regarding notice to a judgment debtor of statutory exemptions of property from execution. The amendment requires service of a list of exemptions with the writ of execution. The amendment is amended to make clear that execution is to be levied only against nonexempt property and to refer to an attached list of exemptions. An appropriate list is provided in present Form 84.

In 1987, Rules 4.1(d) and 4.2(d), (f), (k), and Forms 2, 2A, and 21A were amended and Form 84 was added to provide that a list of federal and state statutory exemptions should be served with writs of attachment and trustee process. These amendments were intended to comply with due process requirements of notice. See Reporter's Notes to 1987 amendments; *McCahey v. L.P. Investors*, 774 F.2d 543 (2d Cir. 1985). Due process also requires notice of available exemptions in post-judgment proceedings. *McCahey v. L.P. Investors*, supra; Note, "Vermont's New Debtor Exemption Statute," 13 Vt. L. Rev. 609 (1988).

The requirement of service of a list of exemptions does not apply to the writ of replevin or the writ of possession. Those writs assert a right to possession of property that is claimed or has been adjudicated as a matter of substantive law. The statutory exemptions are not applicable to such possessory claims, because the exemptions are intended to protect certain classes of property from levy to satisfy monetary claims unrelated to possession of specific property.

Subdivision (24): Repealed.  
Subdivision (25): Amended generally.

## CROSS REFERENCES

Accounting for fees, see § 361 of Title 4.  
Illegal fees, see § 1145 of this title.

## ANNOTATIONS

Constitutionality, 1  
Distribution fees, 3  
Fees for letters testamentary, 4  
Judge's fees, 2  
Limitation of actions, 5

1. **Constitutionality.** Case holding graduated probate "distribution fee" formerly imposed by this section to be a tax violative of proportional contribution clause of state constitution applies to such taxes paid before date of the case by an estate not closed by final decree. In re Estate of Webb (1978) 136 Vt. 582, 397 A.2d 81.

Where there is no apparent legislative intent to impose a tax, where fee rates vary greatly and arbitrarily without apparent reason, and where the amount of levy varies greatly depending solely upon the technical process used to achieve a passing of decedent's interest upon death, there is a palpable violation of the proportional contribution clause contained in state constitution, and the levy of a distribution fee as a tax cannot be sustained. In re Estate of Eddy (1977) 135 Vt. 468, 380 A.2d 530.

2. **Judge's fees.** There is nothing in this section which authorizes probate judge to charge fees for his own use for his time and services against estates under probate in his court. 1956-58 Op. Atty. Gen. 32.

3. **Distribution fees.** Distribution charge imposed by this section, either before or after amendment, is on its face totally disproportionate to any services rendered by the probate court, and if its imposition, at the rate of either ½ percent or 1 percent, is to be justified, it must be justified as a tax. In re Estate of Eddy (1977) 135 Vt. 468, 380 A.2d 530.

Settlement proceeds for wrongful death are not part of decedent's estate, or of the residue therein, for purposes of computing decree fee of this section. *Bassett v. Vermont Tax Dept.* (1977) 135 Vt. 257, 376 A.2d 731.

Legislature intended to require distribution fee to be measured by the value of residue to be assigned, either by decree of court or by voluntary act of executor or administrator, to persons entitled to same under terms of will or under statute of distribution. 1936-38 Op. Atty. Gen. 568.

Where administrator converted real and personal property into cash, residue would be cash on hand at time of final accounting after payment of charges required by 14 V.S.A. § 1721 to be assigned to persons entitled to same under will or statute of distribution, and where that part of estate which remains after payment of charges required by 14 V.S.A. § 1721 to be assigned to persons entitled to same under will or statute of distribution, is in stocks and bonds, such stocks and bonds are the residue upon which decree fee must be paid; market value of such residue at time of final accounting is measure by which decree fee is determined. 1936-38 Op. Atty. Gen. 91.

Section 6821 of this title does not furnish rule for determining time when net assets of estate must be valued for ascertaining decree fee required by (prior) sub-div. 22 of this section. 1936-38 Op. Atty. Gen. 91.

4. **Fee for letters testamentary.** Viewed as either a fee or a tax, charge for granting letters testamentary was improperly imposed since it was imposed for a particu-

lar act, the issuance of letters testamentary, and act did not occur until after repeal of the charge. In re Estate of Eddy (1977) 135 Vt. 468, 380 A.2d 530.

Where repealed fee for issuance of letters testamentary was assessed improperly, proper fee to be assessed was amended fee of \$15.00, imposed before the letters testamentary were issued. In re Estate of Eddy (1977) 135 Vt. 468, 380 A.2d 530.

5. **Limitation of actions.** Statute providing that an action to recover money paid under protest for taxes shall be commenced within one year after the cause of action accrues did not apply to what legislature called, and considered to be, a fee, when it passed former provision of this section providing for a graduated probate distribution fee imposed upon final probate court decree, and that court later found the fee to be a tax in violation of proportional contribution clause of state constitution did not make it a tax for purposes of the statute of limitations. In re Estate of Webb (1978) 136 Vt. 582, 397 A.2d 81.

§ 1435. **Repealed. 1981, No. 33, § 3.**

## HISTORY

This section relating to fee exception in the settlement of estate of deceased persons, formerly section 1434, was derived from V.S. 1947, § 10,543; P.L. § 9038; G.L. § 7421; P.S. § 6219; 1896, No. 120, § 2; V.S. § 5274; 1882, No. 61.

§ 1436. **Fee for certification of appointment as notary public**

For the issuance of a certificate of appointment as a notary public, the county clerk shall collect a fee of \$15.00, of which \$10.00 shall accrue to the state and \$5.00 shall accrue to the county.—Added 1987, No. 1, § 1, eff. Feb. 1, 1987.

## CROSS REFERENCES

Exemptions from fee, see § 1403 of this title.

Filing and recording certificate of appointment of notary public, see § 442 of Title 24.

*Subchapter 3. Taxation of Costs*

§ 1471. **Taxation of costs**

There shall be taxed in the bill of costs to the recovering party in the supreme or superior court a fee equal to the entry fees, the cost of service fees incurred and the total amount of the certificate of witness fees paid.—Amended 1973, No. 106, § 11, eff. 30 days from April 25, 1973; 1977, No. 235 (Adj. Sess.), § 9.

## HISTORY

Source. 1951, No. 236. V.S. 1947, § 10,537. P.L. § 9032. G.L. § 7435. P.S. § 6234. R. 1906, § 6101. 1902, No. 153, § 7. V.S. § 5389. 1890, No. 28. 1886, No. 61. 1884, No. 129, § 2. R.L. §§ 988, 4508. 1878, No. 41. G.S. 126, §§ 35, 36.

Amendments—1977 (Adj. Sess.). Amended section generally.  
—1973. Amended section generally.

1 A. Correct.

2 Q. And that attachment if I could just go over this  
3 with you a little bit wouldn't it -- and the forklift  
4 would be able to go so that the attachment would go under  
5 the overhanging hitch on the trailer?

6 A. Right.

7 Q. Okay. So you needed that -- that ability to get  
8 under the trailer and put an -- an attachment in there?

9 A. Yes.

10 Q. To follow that procedure?

11 A. Yes.

12 Q. Okay. Now, why is it that Pete's did not  
13 typically use pickup trucks to move RVs around at the  
14 warehouse or at its main headquarters?

15 A. Well, the biggest reason was the room we had.  
16 They -- they parked them close and it was -- it wasn't  
17 feasible to use a truck because you didn't have the  
18 maneuverability with a pickup truck.

19 Q. And is that why they were using the forklifts?

20 A. Yes.

21 Q. Let me talk to you about June 15th of 2004. You  
22 were working for Pete's on that day?

23 A. Yes.

24 Q. And were you carrying out a specific assignment  
25 for Pete's?

1 blocking which was put there by rescue. Is that the  
2 position of -- of the vehicles involved in the accident as  
3 they came to rest after the accident sequence?

4 A. Yes.

5 Q. I'd move for the admission of Stipulated 34(a).

6 THE COURT: It'd be admitted.

7 MR. BREDICE: Thank you.

8 THE COURT: I'm just assuming if you say  
9 stipulated that there's no objections.

10 BY MR. BREDICE:

11 Q. Now, that's the fork -- is that the forklift  
12 that was involved in -- in Chris' accident?

13 A. Yes.

14 Q. Do you see the attachment on that forklift? Let  
15 me show you the picture. I'm showing you a copy of it.

16 A. Yes, I do.

17 Q. All right. And would you be able to tell me on  
18 this copy of stipulated 34(a) that's on the projector  
19 where the attachment is located?

20 A. Right under the fifth wheel edge.

21 Q. Is that what you mean?

22 A. That's it.

23 Q. Thank you. Do you have a sense about the  
24 relative size of the two forklifts? The Yale and the  
25 Toyota?

1 A. Relative size between them?

2 Q. Yeah.

3 A. Toyota was definitely heavier.

4 Q. Have you used forklifts at Pete's?

5 A. I have.

6 Q. Have you ever used them to move RVs?

7 A. I have.

8 Q. And have you ever used them to move pallets?

9 A. Yes.

10 Q. Have you done one with greater frequency than  
11 the other?

12 A. More -- more pallets than campers, yeah.

13 Q. More pallets than campers? Stan, I'm going to  
14 ask you if just to -- to -- you do recall taking a  
15 deposition in this case right or giving one.

16 A. Yes.

17 Q. Let me -- let me talk to you about that a little  
18 bit. I'm going to hand you your deposition. Do you  
19 recognize this?

20 A. Yes.

21 Q. And -- and what is that?

22 A. This is my deposition.

23 Q. What was the date of your deposition Stan?

24 A. November 6th, 2009.

25 Q. Let me ask you to turn to Page 115 if I could.

1 Q. I want to talk to you a little bit about the  
2 forklifts at Pete's. We talked about the Toyota; correct?

3 A. Yes.

4 Q. Okay. Could we put up that picture of the  
5 Toyota that you had 13 something? And that's -- that's  
6 the one we wanted to look at. This Toyota forklift sir as  
7 you said it was quite a bit bigger than the Yales?

8 A. Yes.

9 Q. Okay. And it also -- it had four tires in the  
10 front --

11 A. Yes.

12 Q. -- two on each side?

13 A. Yes, it did.

14 Q. Two on each side?

15 A. Two on each side.

16 Q. And it almost had a cab; right?

17 A. Yes.

18 Q. So that the operator was in an enclosed cab like  
19 compartment?

20 A. Yes.

21 Q. Now, this forklift this Toyota to your knowledge  
22 was almost essentially used at the Pete's headquarters not  
23 at the warehouse?

24 A. Yes.

25 Q. Okay. And these Yale forklifts there were two

1 of them that Pete's had purchased?

2 A. I couldn't tell you if there was two or not. I  
3 see the one.

4 Q. Okay, all right. But the Yale forklift that you  
5 saw was clearly smaller in size than the Toyota; correct?

6 A. Yes.

7 Q. And clearly smaller in its capacity to lift  
8 things; correct?

9 A. Yes.

10 Q. If we could go back to that other photo we had  
11 up. I'm not sure we can actually see it on it. I think  
12 it was the last one you had up Attorney Bredice of the  
13 forklift.

14 MR. BREDICE: 13a the Yale, the Toyota?

15 MR. LYNCH: Yes.

16 MR. BREDICE: 13a?

17 MR. LYNCH: No, I'm sorry. Give me just a  
18 moment Your Honor.

19 THE COURT: Certainly.

20 (PAUSE)

21 MR. LYNCH: Your Honor, we have stipulated to  
22 the introduction with Attorney Bredice of a lot of  
23 photographs from the police that they took at the accident  
24 and I have them on a disc and so when I refer to them I  
25 will identify them both by their stipulated exhibit number

1 employee of Pete's RV?

2 A. At one time, yes.

3 Q. What were the dates of your full-time employment  
4 for Pete's RV?

5 A. The fall of 1993 to 1998.

6 Q. When did you go on a part-time basis?

7 A. 1998.

8 Q. When you went to a part-time basis, were you  
9 working with -- with a regular schedule?

10 A. I worked a regular schedule in the summer for a  
11 year or two and did not work in the winter.

12 Q. Was there a certain number of days per week that  
13 you worked in the summer?

14 A. Well -- well, full time I had a five-day -- five  
15 or six day schedule like everybody else and then I went to  
16 part-time where I only worked two or three days a week and  
17 I also worked special events, special promotions, covered  
18 for vacations.

19 Q. During the time that you worked at Pete's RV  
20 prior to this accident to your knowledge did Pete's have a  
21 forklift?

22 A. Yes, they did.

23 Q. What was that forklift used for?

24 A. Unloading freight and moving RVs.

25 Q. Which was the predominant use?

1 A. Moving RVs.

2 Q. What was the ratio between the -- the usage for  
3 moving or reasonable usage for freight?

4 A. Well, by best estimate? 80-20.

5 Q. And the 80 being?

6 A. RVs.

7 Q. And the 20 being?

8 A. The -- the freight and --

9 Q. And when you moved freight, can you be more  
10 specific are we talking about palletized goods?

11 A. Well, we're talking about items that come in RV  
12 parts and supplies that come in on a pallet that are too  
13 heavy to handle. I mean there are stuff that is --  
14 there's things that come in in boxes that can be handled  
15 by hand and we're also talking about larger parts to  
16 campers and motor homes that come in on a truck and -- and  
17 have to be handled by a -- by a forklift to unload them.

18 Q. And when you're unloading palletized goods with  
19 a forklift, is there a special step that you would have to  
20 take in order to do that?

21 A. I don't know sir because I never did it.

22 Q. Oh, okay.

23 A. I never did that.

24 Q. Well, let me ask you this. How was the forklift  
25 at Pete's in the years since they bought it from '99 to

1 this accident in 2004 how was it stored in terms of the  
2 attachment?

3 A. The attachment meaning the attachment for moving  
4 RVs?

5 Q. Yes.

6 A. It was left on the ground outside the building.

7 Q. Okay. Was the -- was the forklift usually with  
8 the attachment on it?

9 A. Normally, yes.

10 Q. Okay. So it was -- when it was not on the  
11 forklift, it was stored on the ground outside the  
12 building?

13 A. Correct.

14 Q. Under normal conditions did the forklift remain  
15 -- did the attachment remain on the forklift?

16 MR. LYNCH: Objection, Your Honor, leading..

17 MR. MONTY: Yes, it did.

18 THE COURT: Okay, hold on. When there is an  
19 objection, you just have to wait but overruled.

20 BY MR. BREDICE:

21 Q. So are your answers, sir is that to the question  
22 did the attachment remain on the forklift when it was  
23 parked at Pete's typically the answer is?

24 A. Yes.

25 Q. And then when it -- when something came in that

1 required the use of a pallet, what would happen to the  
2 attachment?

3 A. It would be removed and left on the ground until  
4 the freight or pallets were unloaded.

5 Q. And then what happen to the attachment?

6 A. Well, sometimes it would be clicked back on  
7 immediately and sometimes the people that -- working in a  
8 parts department wouldn't put it back on and whoever  
9 needed to use it next would reattach it.

10 Q. And how frequently -- how -- how much time would  
11 typically pass between the time that the attachment or the  
12 forklift wasn't being used in pallets and the attachment  
13 was put back on to use it to move RVs again?

14 A. Usually not very long.

15 Q. Was there a -- was there a primary use strike  
16 that. In terms of the location at Pete's where the  
17 forklift would be used was it ever used in service? The  
18 service department?

19 A. Well, I guess I would call parts part of service  
20 and did they use it out there? They may have.

21 Q. Well, what would the -- what would the service  
22 mechanics and repair people use the forklift for?

23 A. Oh, if they had a -- if they had a RV generator.

24 Q. Would they move it to -- use it to move RVs as  
25 well?

1 A. Yes, the service people would use it to move RVs  
2 if they -- if they needed to to bring in RVs in for  
3 service or repair.

4 Q. Let me ask you this question. What is the  
5 typical -- what -- what is the general reason why the  
6 forklift was used to move RVs around the premises at  
7 Pete's?

8 A. Their mobility and convenience. They were --  
9 they were easy to maneuver because at a RV dealership RVs  
10 are typically stored or shown close together so I mean you  
11 have, you know, like a lot of RVs and not -- not always a  
12 lot of space. So it's easy to maneuver a RV into a  
13 position with the forklift.

14 Q. Have you seen that process in use at other RV  
15 dealers in the --

16 A. I have.

17 Q. Yes?

18 A. Yes.

19 Q. In the time frame between say 1999 and 2000 and  
20 Chris' accident?

21 A. I don't recall exactly the time frame but I have  
22 been on other RV -- RV dealers lots and -- and seen them  
23 in use for the same reason, the same purpose.

24 Q. I want to talk to you about the day of Chris'  
25 accident and I want to ask if you recall what you were

1 refrigerators for the RVs?

2 A. Yes.

3 Q. Okay. And stoves for the RVs?

4 A. Yes.

5 Q. And these things would need to be handled with a  
6 forklift like you or I certainly I couldn't go and pick it  
7 up and take it off the back of the truck?

8 A. You or I.

9 Q. Okay. The -- the Yale forklifts we've -- we've  
10 talked about the Toyota back at Pete's the -- the Yale  
11 forklifts it's my understanding that they were purchased  
12 by Pete's after the temporary warehouse was -- was rented?

13 A. I believe so.

14 Q. Okay.

15 A. I believe so but I -- I couldn't tell you just  
16 when.

17 Q. And those Yale forklifts well first of all did  
18 you ever operate them?

19 A. Yes.

20 Q. Okay. And did you ever operate the Toyota?

21 A. Yes.

22 Q. Okay. The Yale forklifts they were much smaller  
23 than the Toyota?

24 A. Yes.

25 Q. Okay. Both in terms and size and lifting

1 capacity?

2 A. I don't know what the capacity was from one to  
3 the other but in size certainly.

4 Q. And the Yales had different tires on them then  
5 the Toyota?

6 A. Yes.

7 Q. Okay. The Toyota in the front had four big  
8 round tires?

9 A. Yes.

10 Q. Okay. And the Yales -- the Toyotas also had a  
11 cab; right that enclosed you?

12 A. Yes.

13 Q. Okay. And the Yales had smaller tires?

14 A. Yes, sir.

15 Q. Okay. And some of the Yale tires were  
16 essentially bald?

17 A. Yes.

18 Q. Smooth?

19 A. Smooth, yes.

20 Q. Yeah, maybe not bald but smooth?

21 A. Yes.

22 Q. And was it your understanding that those Yales  
23 were supposed to be used on concrete floors or flat  
24 surfaces and not in dirt gravel; if you know?

25 A. I don't know.

1 Q. Mr. McGinnis -- Todd, rather -- have you -- have  
2 you been to other RV dealers -- had you been to other RV  
3 dealerships in the 2003, 2002, 2001 timeframe?

4 A. Yes.

5 Q. Had you seen forklifts towing RVs with similar  
6 attachments to the ones at Pete's during that timeframe?

7 A. Yes, I have.

8 Q. Was that something you had seen at a number of  
9 other dealerships?

10 DEFENSE ATTORNEY: Objection; leading.

11 MR. BREDICE: What --

12 THE COURT: Overruled.

13 THE WITNESS: Yes, I've seen it at many  
14 dealerships.

15 BY MR. BREDICE:

16 Q. Now, I want to talk to you about the use pattern  
17 of the forklift at -- at Pete's RV. In addition to moving  
18 RVs, was there another use that you sometimes put that  
19 forklift to?

20 A. Yes. We'd use it to move parts when we got parts  
21 deliveries.

22 Q. When, typically -- how frequently would the parts  
23 deliveries come?

24 A. I believe they would come on Tuesdays or  
25 Wednesdays of the week, I believe.

1 Q. And these are the palletized parts we're talking  
2 about?

3 A. Yes.

4 Q. Versus smaller parts that are just unloaded off  
5 of a FedEx truck that someone can carry inside?

6 A. Correct.

7 Q. Was there a typical time of day when the -- when  
8 the -- when the trucks with palletized loads would show up  
9 at the RV dealership on Tuesdays and Wednesdays?

10 A. I don't know the answer to that.

11 Q. Okay. Do you have a rough sense of the  
12 allocation of the use of the forklift as between RVs and  
13 palletized parts?

14 A. The majority of the time, it was used to move  
15 RVs.

16 Q. Do you have a -- can you estimate the percentage?

17 A. 90 percent.

18 Q. When the forklift was not in use, did Pete's have  
19 a particular protocol for storing it?

20 DEFENSE ATTORNEY: Object to the form;  
21 leading.

22 THE COURT: Sustained.

23 BY MR. BREDICE:

24 Q. What would you do with the forklift when it  
25 wasn't in use?

1 A. It was parked in a designated parking spot so the  
2 next person who needed to use it could use it.

3 Q. How was the spot designated?

4 A. There was painted markings on the pavement.

5 Q. Where was the spot located?

6 A. Just off the -- the rear of the shop.

7 Q. When you say shop, do you mean the service area?

8 A. Yes.

9 Q. When the forklift was stored there, was the  
10 attachment on it or off it?

11 DEFENSE ATTORNEY: Objection.

12 THE COURT: Overruled.

13 That means you can answer it. I'm sorry.

14 THE WITNESS: I'm sorry. I get confused.

15 It -- it sometimes would be on it; sometimes it would  
16 be off it.

17 BY MR. BREDICE:

18 Q. Was there a majority one way or the other?

19 A. The majority of the time, it would be on it.

20 Q. Again, a percentage estimate?

21 A. Probably --

22 DEFENSE ATTORNEY: Just so it's clear, the  
23 witness understands he's -- we're not asking him to guess.

24 MR. BREDICE: We're asking for  
25 probabilities.

1 Mr. Murphy was involved with that day, or --

2 A. It was a large one. I don't remember.

3 Q. And that fifth wheel that you were towing up the  
4 ramp, fair to say, weighed about 10,000 pounds?

5 A. It could have. Again, I don't even remember what  
6 it was.

7 Q. Okay. Well, could you estimate the weight of the  
8 one that you were towing up the ramp that day?

9 MR. BREDICE: Objection; foundation.

10 THE COURT: Sustained.

11 BY MR. LYNCH:

12 Q. You were towing a fifth wheel up the ramp that  
13 day; correct?

14 A. That's correct.

15 Q. How much did it weigh?

16 A. I have no idea.

17 Q. How tall was it?

18 A. I don't know. I mean, they all come in different  
19 heights. I mean, I could give you a guess.

20 Q. No. I'm not asking for guesses; I'm asking you  
21 if you know. How long was it? Was it a 30-footer?

22 A. Again, I don't recall.

23 Q. All right. So you're using -- by the way, the  
24 Yale forklift that you were using, that forklift was  
25 smaller than the Toyota back at Pete's; correct?

1 A. Yes.

2 Q. Okay. Significantly smaller?

3 A. It was smaller. I don't know how to quantify  
4 significantly.

5 Q. Well, do you know what the weight differential  
6 was between the Toyota and the Yale?

7 A. In how much they weighed?

8 Q. Yes. Do you know how much the weight difference  
9 was between the two of them?

10 A. I don't.

11 Q. Do you know if it was thousands of pounds?

12 A. I -- I don't know what the capacity of either  
13 are, or the weights of either are, so it would be hard to  
14 say.

15 Q. All right. That was my next question. Do you  
16 know what the capacity -- the lifting capacities were of  
17 the Toyota versus the Yale?

18 A. No, sir.

19 Q. Did you know what the lifting capacity of the  
20 Yale was?

21 A. No, sir.

22 Q. And -- but the Yale forklift that you were using  
23 that day was the same type that Mr. Murphy was using, it  
24 was smaller than the Toyota; correct?

25 A. Yes.

1 Q. Okay. It had -- the Toyota had these two big  
2 front wheels in the front?

3 A. Yes.

4 Q. I should say four -- had two on either side?

5 A. Right.

6 Q. Okay. And it had a cab?

7 A. Yes.

8 Q. Okay. And the Yale had only one wheel on each  
9 side in the front and no cab?

10 A. Correct.

11 Q. Okay. And the tires on the Yale, were those  
12 tires -- if you know -- tires that were supposed to be  
13 used on concrete or pavement as opposed to dirt or gravel?

14 A. I'm not sure.

15 Q. Do you remember the tires on those Yales having  
16 -- that they were essentially -- I wouldn't call them  
17 bald, but they had no tread on them? If you remember.

18 A. I don't remember the exact tires, no.

19 Q. Okay. So you're using a forklift that weighs  
20 thousands of pounds; correct? On this incident, right?

21 A. I'm assuming. Yes.

22 Q. And you're towing a fifth wheel trailer that  
23 weighs perhaps 10,000 pounds, up a ramp into a warehouse  
24 when this incident occurs; correct?

25 A. Correct.

1 Q. Okay. And you -- you're, of course, familiar  
2 with the use of forklifts and (inaudible)?

3 A. Yes.

4 Q. In fact, the attachments to the forklifts that  
5 we've been talking about in this case, would you tell me  
6 how those came about, how they came to be.

7 A. Originally when I purchased Pete's, we used farm  
8 tractors to move the trailers; then upgrading from a farm  
9 tractor, we moved into a Massey-Ferguson-type tractor.  
10 From there, we used pickup trucks for a few years, then we  
11 came upon a -- an old forklift that I made an attachment  
12 for to move the trailers, because of tightness of the  
13 trailers and the easier maneuverability of the trailers at  
14 the dealership.

15 Finding that that worked so well - it was  
16 an older one - we upgraded to a newer model that could be  
17 used year round with a cab on it, heated, which went into  
18 a Toyota full-blown forklift with a special cab; and we  
19 built an attachment similar to the same one we had, we  
20 probably used in the early '80s, and it always worked  
21 well.

22 Then we built a new facility in  
23 approximately '84-ish [sic], and we ended up purchasing  
24 two more forklifts to move the trailers -- the amount of  
25 trailers we had in this warehouse. We actually physically

1 moved lots of trailers in this one warehouse, and  
2 unfortunately one forklift was not -- not enough, so we  
3 ended up purchasing two more forklifts to move the  
4 trailers around this facility over on a back street over  
5 in Williston.

6 Q: Thank you.

7 THE COURT: Can I interrupt?

8 Can you pull your chair forward at all,  
9 because that -- that microphone will pick your voice up  
10 better if you -- and do try to speak up.

11 MR. LYNCH: And your Honor, if I could  
12 just --

13 Steve, you're standing right in our way.

14 THE COURT: Slide one way or the other.

15 MR. BREDICE: Is this better, Chris?

16 MR. LYNCH: No.

17 MR. BREDICE: All right.

18 MR. LYNCH: That -- that -- keeping a  
19 little left would be good. Thank you. Now we can see --

20 THE COURT: Okay.

21 MR. LYNCH: -- the witness. Thank you very  
22 much.

23 Q. Would you just describe in words for the jury --  
24 well, first of all, that's called a slide-on plate?

25 A. Yes.

1 Q. Would you describe verbally for the jury what --  
2 what the slide-on plate -- what a typical slide-on plate  
3 is like.

4 A. The plate is designed with two long bars and a  
5 bar across the end, and there's a hole in the center of  
6 the plate that goes across the front, a three-inch hole,  
7 and what it does is it -- you drive the forklift up to  
8 this attachment and then you lift it up, and then there's  
9 a chain binder that locks it on to the front of the  
10 forklift.

11 Originally, we used a different system. On  
12 the first one, we used a pin; we used to drop a pin down  
13 through the forks to hold it on. And finding out from the  
14 local forklift company that was illegal to drill a hole in  
15 the fork, we then changed it to a binder method, so there  
16 wouldn't be no holes in the fork.

17 Basically, you just drive up to it, lift it  
18 up a little bit, latch the chain binder on it, and then  
19 it's operable. At the -- at the other end, there's a  
20 receiver tube, like a receiver tube on the back of a  
21 pickup truck, and you slide a two-inch ball in there so  
22 you can walk up to any camper and just lift the camper up  
23 six inches off the ground and tow them around very, very  
24 easily.

25 The attachment was designed to go out the

1 right amount of distance so when you turned, you could  
2 actually turn the 90 degrees the forklift had -- actually,  
3 even more than 90 degrees, to move the trailers where you  
4 wanted them positioned.

5           So that's how the attachments came about.  
6 We had one of them for a long, long, long time, and then  
7 when we purchased the other two forklifts, we built two  
8 more. An earlier stage for the first one, and then when  
9 we went to the chain binder; we just redesigned one a  
10 little bit and made a slot in it, instead of having a  
11 chain around it.

12           Q. Did you -- did you provide one of these slide-on  
13 plates for us use in this case?

14           A. I don't know if I provided it. I told you where  
15 it was.

16           Q. All right. And we -- well, we obtained it with  
17 your knowledge?

18           A. Yes.

19           Q. And is this that?

20           A. Yes.

21           THE COURT: What exhibit are you showing?

22           MR. BREDICE: I -- I'm -- well, I'm showing  
23 him Defendant's Exhibit A.

24           THE COURT: A? Thank you.

25           MR. BREDICE: And your Honor, with that, I

1 A. Yes.

2 Q. What was the primary use of these forklifts at  
3 Pete's RV main headquarters in the time period -- a couple  
4 of years -- the couple few years before Chris's accident?

5 A. The forklifts were always used to move trailers.

6 Q. Was there another use that they were sometimes  
7 put to?

8 A. Well, the morning when we had our deliveries, we  
9 used -- we took the attachment off. That's why it was a  
10 quick attachment, so we could unload our freight that  
11 would come in.

12 Q. A quick attachment so that you could do what?

13 A. Unload the freight off the back of trucks.

14 Q. And then do what?

15 A. And then put the -- the -- the stuff away in the  
16 shop, and then bring it back out and put the attachment  
17 back on.

18 Q. Would the attach- -- how quickly after that use  
19 of pallets would the forklift attachment typically be put  
20 on?

21 A. Usually, immediately.

22 Q. Immediately?

23 A. Yes.

24 Q. Where was -- where was the forklift typically  
25 kept when it -- I'm sorry. You said the morning

1 deliveries, what time?

2 A. Well, we normally have our deliveries around  
3 7:30 to 8 o'clock in the morning.

4 Q. But these are the big trucks with the pallet  
5 goods?

6 A. Yes.

7 Q. Okay. And what -- getting back to my question.  
8 When the forklift was not in active use, was -- where --  
9 was it kept in a particular place at Pete's?

10 A. It was kept behind the building in a designated  
11 lot -- marked yellow place that said -- it either said  
12 fork truck or forklift on it.

13 Q. When you say in the back of the building, prior  
14 to the renovation, what part of the building was that?

15 A. Facing the rear of the building, there was four  
16 doors -- four large garage doors and a man door on your  
17 left, and it was to the left of the man door.

18 Q. And that -- that -- those large doors and the  
19 man door led in to what?

20 A. Into the service department.

21 Q. I'm going to show you Plaintiff's 11F -- I'm  
22 sorry, Stipulated 11F.

23 This is for me? Thank you.

24 MR. LYNCH: Well, actually, (inaudible).

25 THE COURT: I'm sorry. Was it 11 or 11

1 something?

2 MR. BREDICE: 11F.

3 THE COURT: Eff. Thank you.

4 MR. BREDICE: Stip 11F.

5 Q. This is a document that I'm going to go through,  
6 and it comes from Sentry Insurance, and I want you to look  
7 down at the bottom of the document, and there's a question  
8 there, "Is there a person responsible" -- this was about  
9 Pete's, correct?

10 THE COURT: I'm sorry. You need to speak  
11 up.

12 A. Yes.

13 Q. And it says down there, "Is there a person  
14 responsible for safety?" and the answer is yes, and  
15 it's -- what is the name of that person?

16 A. Terry Shepard.

17 Q. Okay. And -- now, there -- there was -- there  
18 was a time when Pete's began to use a warehouse over on  
19 Shunpike Road, and I'm going to ask you what that  
20 warehouse was being used for.

21 A. Before we had it, they made CDs in there.

22 Q. And what happened -- and what did you use it  
23 for?

24 A. We used it for temporary housing of all our RVs  
25 while we were having the new facility built.

1 Q. Well, let me -- let me ask you another question.  
2 In the slope of the road, or the slope of the ramp,  
3 were -- were they comparable; was one steeper than the  
4 other?

5 A. I would say they were pretty close to the same.

6 Q. Okay. Now, did you walk to the propane tank  
7 with Mr. Smith?

8 A. Yes.

9 Q. Where did you walk from?

10 A. From the service department.

11 Q. Okay.

12 THE COURT: Speak up, please.

13 A. From the service department.

14 THE COURT: Just remember, pretend you're  
15 teaching a class and the people in the jury are the  
16 students, and they all have to hear you in the back, okay?

17 THE WITNESS: Okay.

18 Q. Would you -- all right.

19 A. From the rear of the building to the propane  
20 station.

21 Q. From the service department to the propane  
22 station? Would you draw on this map with this blue magic  
23 marker on Stipulated 29 the path you took? Okay.

24 And then you stood there with Mr. Smith?

25 A. I stood there with Mr. Smith, and that's where

1 he wanted the post, and eventually we put the post in,  
2 yes.

3 Q. Okay. Did you -- where did you go from here  
4 with Mr. Smith?

5 A. I don't recall.

6 Q. Okay. And during this time, were there RVs  
7 parked in the --

8 A. Oh, yeah. There's always lots of RVs around.

9 Q. Now, this -- this was an April inspection?

10 A. I don't recall.

11 Q. If -- let me ask you this: From a --  
12 hypothetically, is April a busy month at Pete's RV, in  
13 terms of moving RVs on the lot?

14 A. It's really one of our busiest months, yes.

15 Q. And in a busy month you would be using -- would  
16 you be using the forklift to move RVs around the lot?

17 A. Yes.

18 Q. How -- on -- on -- with what kind of frequency  
19 during a typical day?

20 A. There would probably be somebody on the forklift  
21 almost all the time all day.

22 Q. Okay. And again, when -- when they were not on  
23 it, what would be the -- the status of the attachment?

24 A. If they weren't on the delivery -- unloading a  
25 truck, then the attachment would be on it.

1 Do you -- did you know that Mr. Smith was  
2 coming on the day that he came?

3 A. I don't recall.

4 Q. Did you -- do you recall whether you ever wanted  
5 to know if he was going to come ahead of time?

6 A. No.

7 Q. Do you recall if the opposite was true?

8 A. I -- I didn't handle that part of -- of the --  
9 of the dealership. That was handled by a partner.

10 Q. Did you do anything different on the day that  
11 Mr. Smith was there versus any other day that Pete's was  
12 in operation?

13 A. No.

14 MR. BREDICE: What -- what number is that?

15 THE COURT RECORDER: 11C.

16 MR. BREDICE: Yup.

17 Q. Let me show you what's been marked as Stipulated  
18 11C. And Mr. Shepard, is this a document you recognize?

19 A. Yes.

20 Q. You've seen that before?

21 A. Yes.

22 Q. In fact, is -- is your handwriting on that  
23 document?

24 A. Yes.

25 Q. Would you tell the jury what that document is?

1 A. It's a letter from Mr. Smith telling us some  
2 safety issues that we had to correct at the dealership.

3 MR. BREDICE: Do you need to see this?

4 MR. LYNCH: You can go ahead.

5 Q. All right. Terry, taking a look at 11C, can you  
6 just read us the first paragraph?

7 (Transcriber's note: Without documents for  
8 reference, quoted material appears as read, and quotation  
9 marks were placed in the best judgment of the  
10 transcriber.)

11 A. "This letter is to confirm my recent visit which  
12 was completed in connection with your insurance coverage  
13 provided by Sentry Insurance. These calls are made to  
14 assist you with your ongoing safety activity, but I'd like  
15 to thank you for your time and courteous extension to me  
16 during your visit -- during my visit."

17 Q. And would you -- would you mind reading that  
18 second paragraph as well.

19 A. "During this visit, the claims and information  
20 was delivered and reviewed; I also gathered some general  
21 information on your operation, and conducted a safe -- a  
22 hazardous surveillance survey. A review of the claims  
23 informations indicated the following:"

24 Q. Okay. And what are those -- oh, that's a  
25 history of the prior place. Okay.

1 Now let's turn to page two of the letter;

2 you have that?

3 A. Yes.

4 Q. What -- what does page two consist of?

5 A. Of the -- the recommendations that he would like  
6 us to take care of.

7 Q. So he conveyed to you in this letter certain  
8 safety recommendations; is that right?

9 A. Yes.

10 Q. And -- now, how many of them are there?

11 A. Five.

12 Q. And by the way, would you -- do you see the word  
13 "Important" up at the top of the page?

14 A. Yes.

15 Q. In fact, above that, what does it say?

16 A. "The following recommendations are offered to  
17 assist you in controlling your losses."

18 Q. And what's -- and then it says "Important."

19 A. Important.

20 Q. And then what does it say after that?

21 A. "Important recommendations identify an operation  
22 or physical deficiency with moderate injury or loss  
23 potential and a recommended improvement."

24 Q. What's the first one?

25 A. "Propane -- LP propane fuel station. The tank

1 should be protected by two additional posts to prevent  
2 vehicles from running into them. The post -- the bedpost  
3 should be straightened or replaced. In addition, a fence  
4 should be installed around the fill station to prevent  
5 tampering."

6 Q. And is there -- do you recognize your  
7 handwriting adjacent to that recommendation?

8 A. Yes.

9 Q. What -- and what are -- what are the words you  
10 wrote there saying?

11 A. "In progress."

12 Q. Okay. Now, there's another recommendation below  
13 that?

14 A. Yes.

15 Q. All right. And just briefly -- just des- -- you  
16 can just describe that in general terms. What does it  
17 pertain to?

18 A. Driving.

19 Q. Over the road?

20 A. Yes.

21 Q. And it wants you to develop a written, vehicle-  
22 safety policy, fair enough?

23 A. Yes.

24 Q. Now, you have some handwriting next to that,  
25 too?

1 A. This says yes. What we did is we went online to  
2 their website and did the training for that -- with the  
3 employees that had any connection with the driving.

4 Q. The next recommendation, also, generally, what  
5 does that pertain to?

6 A. Driving again.

7 Q. And again, what kind of driving, over -- over  
8 the road?

9 A. Vehicle -- vehicle driving; over the road, yes.

10 Q. And what's -- what's the handwriting next to  
11 that say?

12 A. It says yes.

13 Q. And what does that mean?

14 A. Well, what happens is -- is David would give me  
15 this here, then I would make my comments on it, give it  
16 back to him, and I assumed he would get back with it to  
17 Sentry Insurance.

18 Q. Okay. So aside from the time that you met with  
19 Gary Smith about the propane filling station, was David  
20 the go-between between you and Sentry and you and  
21 Mr. Smith?

22 A. Say that again.

23 Q. Dave would hand you the stuff -- the safety  
24 related stuff from Sentry --

25 A. Yes.

1 Q. -- to take care of?

2 A. Yes.

3 Q. And what would you do?

4 A. I would take care of it.

5 Q. And then what?

6 A. Report back to David that it was taken care of.

7 Q. Okay. Now we have another recommendation below  
8 that; what's that generally pertain to?

9 A. Sexual harassment.

10 Q. And what's the -- what is the -- is that your  
11 handwriting next to that?

12 A. Yes.

13 Q. And what does it say?

14 A. It says yes.

15 Q. And what does that mean?

16 A. That means we watched the video on sexual  
17 harassment, and -- from Sentry.

18 Q. Then -- then the next one is about what?

19 A. Theft and vandalism.

20 Q. And what are you -- did you write next to that  
21 one too?

22 A. Yes.

23 Q. And that's your handwriting?

24 A. Yes.

25 Q. And what does it say?

1 A. In progress.

2 Q. And what does that mean?

3 A. It means that I was coming up with some kind of  
4 a plan, I assume, to take care of it.

5 Q. Now, do you recall ever getting any information  
6 from Sentry about going online to do safety training?

7 A. Yes.

8 Q. What -- what is your recollection of that?

9 A. Mr. Smith visited with me; he said that they had  
10 all kinds of online training. I had just taken over  
11 the -- the service area for the dealership, so he gave me  
12 a special code, and I could go on the internet. And we  
13 conducted classes on Wednesday mornings, and did them  
14 online, and then took a test online when we got done.

15 Q. So you -- you did --

16 UNIDENTIFIED MALE SPEAKER: Are you all  
17 set?

18 MR. BREDICE: Yeah.

19 THE COURT: And -- can I just interrupt?  
20 It's just a little after noon, so it -- if this is a good  
21 time, or if you want to finish up on something, but let's  
22 break shortly.

23 MR. BREDICE: No, this is a fine time.

24 THE COURT: Okay.

25 All righty. So folks, we'll take our lunch

1 Q. And the coemployees?

2 A. Excuse me?

3 Q. And the co- -- and his coemployees?

4 A. They all liked him.

5 Q. What kind of a personality did Chris have?

6 A. Upbeat.

7 Q. Upbeat?

8 A. Yeah.

9 Q. Now, we know that -- we all know that Chris had  
10 a -- had his accident on -- on June 15, 2004, where were  
11 you when you first learned of that?

12 A. At the RV dealership on Williston Road.

13 Q. Did you take any action in response to the news  
14 of the accident?

15 A. Bob Monty called me, and he said that Chris had  
16 had an accident with the forklift and to bring the other  
17 forklift over, so I did.

18 Q. All right. What was the thinking behind  
19 bringing the other -- the Toyota?

20 A. Yes.

21 Q. What was the thinking behind that?

22 A. Lifting the other forklift off.

23 Q. Let me show you -- let me show you a document  
24 that's been marked as Plaintiff's Exhibit 53. I'm going  
25 to ask if you recognize this document.

1 Q. Did you -- did you use a skid-steer loader, too?

2 A. Yes.

3 Q. Did any of these -- what -- what -- over what  
4 period of time did you try these different things?

5 A. Basically, immediately -- immediately  
6 afterwards.

7 Q. And -- and -- and then you took some -- did it  
8 take some time for you to experiment with them, and then  
9 make a determination about how effective they were?

10 A. Yes. Some of them took weeks to get there. The  
11 truck we had to bring from the Midwest up there to try  
12 that using that, and then we had to get it fixed up,  
13 and -- so it took us a matter of time, yes.

14 Q. And so you went -- did you go through all of  
15 these different methods one at a time to try and find a  
16 good replacement?

17 A. Yes.

18 Q. Now -- and did you eventually find a workable,  
19 more or less -- you know what, I should ask one thing.

20 Did -- did there come a time where -- when  
21 you ever asked Toyota to approve the attachment that you  
22 had made for that forklift?

23 A. Yes.

24 Q. And what did they say?

25 A. Sent us a letter back saying they wouldn't

1 approve it.

2 Q. They wouldn't what?

3 A. Would not approve it.

4 Q. Now, did you find a -- a -- a permanent solution  
5 to the problem?

6 A. We found a -- a piece of equipment that could be  
7 used that was legal to use; a very, very, very slow --  
8 and so we purchased that piece of equipment, which didn't  
9 work out, and then we ended up going to tractors.

10 Q. Okay. Now, when did you -- do you know when you  
11 purchased the -- the fir- -- and that would be the Kubota  
12 tractor?

13 A. We have a Ku- -- yeah. We purchased a Kubota  
14 tractor.

15 Q. Do you know when that would have been?

16 A. It was before the accident.

17 Q. Okay. Well, did you buy one -- did you ever buy  
18 one after the accident to replace a forklift?

19 A. We bought two.

20 Q. Okay. Let me show you something and ask if you  
21 can tell me when you bought that first one.

22 MR. LYNCH: Okay. Can I just see that?  
23 I'm sorry. I don't know what you're talking about.

24 THE COURT: And what exhibit number was  
25 that?

1 different things?

2 MR. BREDICE: Yes.

3 THE COURT: So what's 48?

4 MR. BREDICE: We haven't gotten there yet.

5 We're --

6 THE COURT: There's a different agreement?

7 MR. BREDICE: There's a slightly different

8 document..

9 THE COURT: Okay.

10 Q. Terry, you talked a moment ago about this urgent

11 recommendation from Sentry Safety Sciences?

12 A. Yes.

13 Q. Let me ask you, if you had gotten that letter

14 before the accident, would you have continued using the

15 Toyota with the unlawful attachment to move RVs?

16 MR. LYNCH: Objection, your Honor, it calls

17 for pure speculation on behalf of Mr. Shepard.

18 THE COURT: I'm sorry.

19 Could you repeat the question?

20 Q. Would you have heeded that warning?

21 THE COURT: Ah.

22 MR. LYNCH: Objection to that question,

23 also. It calls for pure speculation on behalf of

24 Mr. Shepard as to what he might have done.

25 THE COURT: Overruled, based on our earlier

1 conversation.

2 MR. BREDICE: Okay.

3 Q. Mr. Shepard?

4 A. Yes, I would have stopped.

5 Q. I'm sorry.

6 A. Yes, I would have stopped.

7 Q. Would you -- if you had gotten that  
8 recommendation before the accident, would you have bought  
9 the Yales, the Yale forklifts?

10 A. I don't know what you're asking me.

11 Q. Well, you had the -- you said you would have  
12 stopped using the Toyota with the attachments to move RVs,  
13 right?

14 A. Yes.

15 Q. Is the same true for the Yales?

16 A. Yes.

17 Q. In -- in other words, would you -- and so my  
18 question is: Had you been warned prior to the accident,  
19 prior to the time you bought the Yales, would it have  
20 occurred to you to go out and buy two other forklifts?

21 MR. LYNCH: Objection, your Honor, more  
22 speculation.

23 THE COURT: Same ruling.

24 A. No.

25 Q. And would you have, in fact, fabricated towing

1 attachments for them?

2 MR. LYNCH: Objection; more speculation.

3 THE COURT: Same ruling.

4 A. No.

5 MR. BREDICE: I have no further questions  
6 for this witness.

7 THE COURT: Okay.

8 Mr. Lynch, would you like a break before we  
9 move into yours, or --

10 MR. LYNCH: Whatever would be most  
11 convenient for the --

12 THE COURT: I'm betting it's not going to  
13 be really short, huh?

14 MR. LYNCH: -- Court; I'm sure. Pardon me?

15 THE COURT: I bet it's not really short, is  
16 it?

17 MR. LYNCH: No. I don't think so.

18 THE COURT: All right. So ladies and  
19 gentlemen, why don't we take a 10, 15-minute recess now.  
20 Rosaire is not here at the moment, but if one of you  
21 wouldn't mind helping your fellow juror out, you can all  
22 head into the jury room, and I will step out as well.

23 (A recess was called.)

24 THE COURT OFFICER: Please be seated.

25 THE COURT: Mr. Lynch, the floor is yours.

1 when Gary Smith visited your properties in '02 and '03,  
2 correct?

3 A. '02 for sure.

4 Q. Okay. Well, you testified earlier that you  
5 didn't build the attachments for the Yales until after you  
6 bought the Yales, right?

7 A. Yes.

8 Q. Okay. Here's the bill of sale for the Yales,  
9 because we were having trouble remembering; it's Stip 9.

10 What's the date when you purchased the  
11 Yales?

12 A. March 11, 2004.

13 Q. Okay. So these Yales were purchased on March  
14 11, 2004, and after you purchased the Yales, as you've  
15 testified, you built the attachments for it, correct?

16 A. Correct.

17 Q. Okay. So Gary Smith visited your properties,  
18 prior to this accident, in April of '02 and October of  
19 '03, correct?

20 A. Correct.

21 Q. So these attachments for these Yales did not  
22 exist bef- -- when he visited your properties, prior to  
23 Mr. Murphy's accident, true?

24 A. True, but we revamped this one here between 2002  
25 and 2003; that's what I was trying to tell you.

1 of Northern Lift Trucks knew what you guys were doing?

2 A. Absolutely; 100 percent.

3 Q. During the training that Mr. Rosati provided to  
4 you guys -- now, he's the Toyota dealer, right?

5 A. Yes.

6 Q. He's the forklift guy, right?

7 A. Yes, sir.

8 Q. Sells them, correct?

9 A. Yes, sir.

10 Q. Expert in them, correct?

11 A. Hopefully.

12 Q. Okay.

13 A. Obviously not.

14 Q. So if anybody should know anything about  
15 forklifts, it's Mr. Rosati, isn't it?

16 A. I would have thought so.

17 Q. And would you have thought that Mr. Rosati, the  
18 forklift expert, would have known about OSHA?

19 A. I would have thought so.

20 Q. Did Mr. Rosati ever tell you anything with  
21 regard to your attachment and OSHA regulations; anything  
22 like that?

23 A. He knew about it, but never told us that we  
24 were -- had a problem with that.

25 Q. Okay. So he knew about the OSHA regulations,

1 and he never --

2 A. Oh, I don't know.

3 Q. -- told you --

4 A. I don't know if he knew about the OSHA  
5 regulations; he knew about the attachment.

6 Q. Okay. As part of the training courses that  
7 Mr. Rosati ran for your people, did -- did you go out in  
8 the yard and put the attachment on and tow trailers  
9 around?

10 A. I don't recall 100 percent, so I can't guess.  
11 It's a 50-50 call. I can't tell 100 percent.

12 Q. Okay. So Mr. Rosati, the Toy- -- the Toyota-  
13 forklift-expert guy, he comes out to your premises and --  
14 after he sells you this forklift in July of 2000, and he  
15 trains all your people, and he knows all about your  
16 attachment, knows all about what you're doing with it,  
17 maybe even helps train your people as to how to use it,  
18 and he doesn't say anything to you about whether this  
19 attachment needs manufacturer's approval, whether it  
20 violates OSHA, whether it's unstable, anything of that?

21 A. We ordered the tractor with the -- under the --  
22 knowing that we were moving trailers with it.

23 Q. If Mr. Rosati had told you that this attachment  
24 violated OSHA, would you have used it?

25 A. Absolutely not.

1 Q. If Mr. Rosati had told you that this attachment  
2 needed manufacturer's approval before you could use it,  
3 would you have used it?

4 A. I would have not used it.

5 Q. If Mr. Rosati had told you that this attachment  
6 affected the capacity ratings and the stability of the  
7 forklift creating a potentially dangerous if not deadly  
8 situation, would you have used it?

9 A. No. He specified the machine that we needed.

10 Q. Isn't it true, sir, that you have no  
11 recollection of ever saying anything to Gary Smith with  
12 regard to this Toyota forklift that Pete's used, you have  
13 no memory of any --

14 A. No, sir.

15 Q. It's also fair to say that you have no memory of  
16 ever mentioning to Mr. Smith that Pete's used this tow  
17 attachment with its forklifts to tow RVs; you -- you have  
18 no memory of ever having that conversation with Mr. Smith,  
19 correct?

20 A. Correct.

21 Q. Okay. And isn't it also true, sir, that you do  
22 not know as a fact whether or not the tow attachment was  
23 on the Toyota forklift during any of the times that  
24 Mr. Smith was at Pete's?

25 A. I do not know that.

1 facilities.

2 (A recess was called.)

3 THE COURT OFFICER: Please be seated.

4 THE COURT: All right.

5 Mr. Lynch.

6 MR. LYNCH: Thank you, your Honor.

7 Q. Mr. Shepard, just to be absolutely clear on one  
8 thing, the only forklift that Pete's RV had when Gary  
9 Smith visited was the Toyota? He visited in 2002 and  
10 2003, and you bought the Yales in '04.

11 A. Yes.

12 Q. Okay. And so the only attachments that existed  
13 when Gary Smith visited was the one we saw on the Toyota,  
14 because you hadn't made the Yales yet, correct?

15 A. Yes.

16 Q. Okay. So all that discussion earlier, just -- I  
17 just want to make sure the jury didn't get confused, but  
18 all the discussion of chains and chain binders and all of  
19 that stuff, that did not have to do with that Toyota  
20 attachment that was there at the time Smith visited, that  
21 all came into play with the Yale attachments after,  
22 correct?

23 A. Correct.

24 Q. Okay. There's been some testimony so far about  
25 there being some, what I would call tip-ups at Pete's,

1 employers responsibility and duty to be aware of the OSHA  
2 requirements and regulations and to comply with them?" and  
3 your answer was?

4 A. Yes.

5 Q. And then you were asked, "No doubt about that,  
6 knew it before Mr. Murphy's accident?" and your answer  
7 was?

8 A. Yes.

9 Q. Mr. Shepard, hopefully, a few just last  
10 questions, if we can run through them quickly, about some  
11 of your knowledge about forklifts before Mr. Murphy's  
12 accident.

13 Prior to the accident, sir, you knew that  
14 forklifts had capacity limits for loads, correct?

15 A. Yes.

16 Q. You knew that -- that the Toyota had a 6,000  
17 pound lifting capacity at a 24-inch load center, did you  
18 know that?

19 A. No.

20 Q. Did you know it had a 6,000 pound lifting  
21 capacity?

22 A. Yes.

23 Q. And did you know that the Yale had a 3500 pound  
24 lifting capacity?

25 A. Yes.

1 Q. Okay. So almost half, or almost less than half  
2 of the Toyota, correct?

3 A. Yes. Yes.

4 Q. Okay. And you knew before the accident that a  
5 forklift would have problems if you tried to lift  
6 something with it that was above its lift capacity, you  
7 knew that?

8 A. Yup.

9 Q. Okay. The forklift would not be able to lift  
10 it, and if you lifted it, it would tip forward, right?

11 A. Yes.

12 Q. You knew that before the accident from your own  
13 experience, but it happened to you and others and you'd  
14 seen all that before, correct?

15 A. Yes.

16 Q. Okay. Is it fair to say that you knew prior to  
17 the accident that the shape of a load for a forklift,  
18 whether it be rectangular or circular, oblong or something  
19 else, that the shape of a load would affect the ability of  
20 the forklift to lift the load?

21 MR. BREDICE: Objection, your Honor,  
22 relevance in terms of this particular witness's knowledge  
23 and perceptions.

24 THE COURT: Overruled. You can answer,  
25 sir.

1 than give you a warning is to not renew your insurance.

2 So you want to go down there?

3 THE COURT: I don't think they're the same.

4 MR. BREDICE: (Inaudible).

5 THE COURT: I'll allow the question.

6 MR. BREDICE: Okay.

7 THE COURT: Just be careful how you ask it.

8 MR. BREDICE: And it doesn't (inaudible).

9 THE COURT: No. Unless you mess it up.

10 (The bench conference ended.)

11 THE COURT: Rosaire, can you shut the door,

12 please.

13 BY MR. BREDICE:

14 Q. You rode the Toyota -- the Yale forklift?

15 A. Excuse me?

16 Q. You -- you rode the Yale forklift?

17 A. Yes.

18 Q. You rode the Toyota forklift?

19 A. Yes.

20 Q. Your brother-in-law rode both of those

21 forklifts?

22 A. I'm assuming so, yes.

23 Q. Did your son ride both of those forklifts?

24 A. Yes. All the time.

25 Q. Did your ne- -- did your nephew ride some of

1 those forklifts?

2 A. Yes.

3 Q. There was a discussion of -- let me show you  
4 something else, Stipulated 11F, if you can -- we discussed  
5 that earlier, Terry? When we discussed, is there a person  
6 responsible for safety? Yes, Terry Shepard, present.

7 Can you read the jury the next question and  
8 answer.

9 A. "Is there an appropriate safety program?" Yes.

10 Q. And this is a Sentry document; is that right?

11 A. Yes.

12 Q. And this is prior to the accident, isn't it?

13 A. Yes.

14 Q. So at the time of the accident, Sentry did not  
15 have the impression -- or prior to the accident, that your  
16 safety programs at Pete's were -- were -- were deficient,  
17 did they?

18 A. No.

19 Q. We talked about the Kubota tractor. The  
20 defendant showed you Defendant's T18, what is that?

21 A. Kubota tractor.

22 Q. What kind of document?

23 A. Credit -- it's the lease.

24 Q. And what's the date of the lease?

25 A. 9/16/2005.

1 (The bench conference ended.)

2 BY MR. BREDICE:

3 Q. Let me -- let me rephrase this question, Terry.  
4 Has Sentry given you a warning, would you  
5 have heeded it?

6 A. Absolutely.

7 Q. And if you had heeded a timely warning, would  
8 Chris Murphy ever have been in a position to use a  
9 forklift with an attachment to tow an RV down the ramp on  
10 June 15, 2004?

11 MR. LYNCH: Objection, your Honor, same  
12 speculation.

13 MR. BREDICE: Your Honor, it goes to the  
14 issue of failure to heed.

15 THE COURT: I understand. It's the  
16 phrasing I'm having trouble with.

17 MR. BREDICE: May I rephrase --

18 THE COURT: Overruled. Overruled.  
19 You can answer the question.

20 MR. BREDICE: Thank you.

21 A. No.

22 Q. Thank you.

23 THE COURT: Mr. Lynch, anything else,  
24 briefly?

25 / / / / / / / / / / / / /

1           A. There are some templates that we use. For example,  
2 introductory paragraphs, closing paragraphs, and then I would,  
3 you know, just fill in the rest, you know, with comments  
4 basically summarizing my visit, discussions, recommendations.

5           Q. What is the purpose of your visits?

6           A. Well, to assist the insured. To assist them with  
7 their safety program. It's really a value added service that  
8 we provide for our customers.

9           Q. When you say assist the customers, to assist them in  
10 what regard?

11          A. To assist them with their safety program.

12          Q. To promote employ safety?

13          A. Yes.

14          Q. So the purpose of your visits would be to help the  
15 employer protect the safety of their employees.

16          A. Well, we assist them with that, you know. We  
17 emphasize that we're there strictly as advisory in nature.  
18 It's a consultation visit, you know. It's -- it's not  
19 mandatory.

20          Q. But the purpose is to improve the safety of the  
21 employees at the businesses that Sentry insures.

22          A. Sure. We try to do that. Absolutely.

23          Q. Okay. And is this what your accounts are given to  
24 understand as well, that that is why you're on their premises,  
25 to help improve safety?

1 A. Yes.

2 Q. Okay. In your training are you -- does that cover  
3 OSHA regulations and standards?

4 A. I've had training on the OSHA standards, yes.

5 Q. Tell me what the general nature of that training was.

6 A. As I recall it was about a week long training program  
7 at our home office going over the federal register and the  
8 OSHA regulations.

9 Q. Sounds like a lot of fun.

10 A. Yeah. Lots of coffee.

11 Q. Yeah. Did you cover any other regulations in your  
12 training in a similar way?

13 A. ANSI standards and FPA codes.

14 Q. Any others?

15 A. Not that I can think of.

16 Q. ASME codes or standards?

17 A. Well, not specifically. I know we've covered it at  
18 times, but --

19 Q. When you visited Pete's RV in April of 2002 did  
20 you -- were you aware of standards that would have prohibited  
21 the use of an unapproved attachment to a forklift?

22 A. Yes.

23 Q. Tell me what you would have known at that time about  
24 those standards.

25 A. Well, if we run into a situation where we see an

1 attachment on a forklift we would talk about it with the  
2 customer, and I would ask them if they, you know, received  
3 written permission from the manufacturer, and, also, if they  
4 received a tag or a nameplate to permit the use of that  
5 attachment.

6 Q. And why would you make that inquiry?

7 A. Because it has the potential to be unsafe, and, you  
8 know, affect the balance and the performance of the forklift,  
9 which can cause it to tip over.

10 Q. I know that you've -- you mentioned that you didn't  
11 save the notes that you took --

12 A. Uh-huh.

13 Q. -- in your earlier visits to Pete's, but you  
14 mentioned that there was some sort of form that you used to  
15 write your notes on.

16 A. Uh-huh. Yes.

17 Q. Could you describe that form in a little more detail  
18 for me?

19 A. The form is a -- it's a loss control form, and it  
20 would have, you know, questions and blanks, and then we fill  
21 in the blanks and that would be our form.

22 For example, you know, describe the operations, you  
23 know. Be a section on workers' comp if there were, you know,  
24 a number of employees and things like that.

25 Q. Do you recall -- I'm sorry.

1 Q. All right. Did it occur to you that part of a  
2 business of what Pete's was doing would involve moving fifth  
3 wheels?

4 A. Yes.

5 Q. What, if any, belief did you have or assumption did  
6 you make concerning how fifth wheels would have been moved at  
7 Pete's as of your April, 2002 visits?

8 A. Using their pickup trucks.

9 Q. Did you see any indication during the visit that  
10 that's, in fact, what they were doing?

11 A. Again, I don't recall specifically, but, you know,  
12 typically at other RV dealers, you know, they have their  
13 pickup trucks -- their pickup truck with tow hitches.

14 Q. So it would have been your assumption at the time of  
15 your April, 2002 visit to Pete's that they would have been  
16 using the pickup trucks to move the fifth wheels.

17 A. Yes.

18 Q. Do you know if you took any steps to verify that  
19 assumption?

20 A. Again, I don't recall.

21 Q. You do not recall taking any steps then?

22 A. Yes.

23 Q. Okay. So it's true that you don't recall taking  
24 steps to verify the assumption that the pickup trucks were  
25 used by Pete's to move fifth wheels in April of 2002.

1 A. Yes.

2 Q. Did you have any indication or belief as to what the  
3 forklift that you'd seen at your visit in April of 2002 was  
4 being used for at Pete's?

5 A. Material handling. Moving material on pallets.

6 Q. Did you know this for a fact or was that an  
7 assumption?

8 A. Well, I mean, it's -- I assume that's what it was  
9 for.

10 Q. Okay. Now, once again, prior to this accident you  
11 had another round of communication with Pete's. Is that  
12 right?

13 A. Yes.

14 Q. When would that have been approximately?

15 A. 2003.

16 Q. And is that based on your having -- your knowledge of  
17 that fact, is that based on your recollection or your having  
18 reviewed materials in preparation for today's deposition?

19 A. Reviewed materials.

20 Q. And that would have been, again, and when in 2003?  
21 October or August?

22 A. I'll have to check the report. October 21, 2003.

23 Q. Did that -- was that report generated after a site  
24 visit to Pete's?

25 A. Yes.

1           A. I'm not sure why the call was generated, but it was  
2 generated to go out there. I know we did add the workers'  
3 comp, so I think that was one -- one reason to go out to, you  
4 know, take a look at the workers' comp and also to provide  
5 them with some additional education materials.

6           Q. When you say you added the workers' comp are you  
7 saying that when you first went there it was not part of a  
8 worker's comp loss prevention visit?

9           A. My first visit we did not have the worker's comp,  
10 yeah.

11          Q. But the second visit you did?

12          A. Yes.

13          Q. Who was insuring Pete's for workers' comp as of the  
14 time of your first visit of April, 2002?

15          A. I don't know.

16          Q. But it was not Sentry?

17          A. That's correct.

18          Q. The visit in October, '03, what was it? Partly  
19 motivated by the awareness of the renovation project?

20          A. I believe that was part of the reason as well.

21          Q. Why would a renovation project be part of the reason  
22 that you would take a return visit to Pete's?

23          A. Well, because the building premises itself could be  
24 modified. They could increase the building size, which they  
25 did, and we'd want to make sure that there's adequate coverage

1 for that for, you know, for the policyholder. Also want to  
2 make sure that there's adequate controls, you know, at the  
3 jobsite, you know, to protect the customers or even employees  
4 from getting injured on the job.

5 Q. What was your knowledge at the time of the scope of  
6 this project?

7 A. Just what I have documented in the report, that they  
8 were going to renovate the building and expand the building.

9 Q. Did you have a sense whether they were going to be  
10 able to continue operating in the building as well during this  
11 expansion process in all respects or would they need to have  
12 offsite facilities during the expansion project to accommodate  
13 their operations?

14 A. I'm assuming that they were staying there since I  
15 don't have any documentation that they were doing something  
16 different.

17 Q. If, when you had been conducting your initial loss  
18 prevention or hazard surveillance visit to Pete's in April of  
19 2002, if, at that point, you had had knowledge about the  
20 forklift and the attachment and the way it was being used,  
21 what would you have done, if anything?

22 A. 2002?

23 Q. Yes.

24 A. Well, again, I would have asked if they received  
25 anything in writing from the manufacturer approving that

1 attachment.

2 Q. And if they said that the answer to that question was  
3 no what would you have done then?

4 A. I would have made a recommendation for them to do so  
5 or to discontinue using that attachment.

6 Q. For what reason?

7 A. Well, it's a potential safety hazard.

8 Q. In your visit to Pete's after this accident do you  
9 recall whether any documents were reviewed on premises?

10 A. I don't recall. I don't believe so. I just --

11 Q. If I were to ask you the same question concerning  
12 whether any documents were copied or removed from Pete's what  
13 would your answer be?

14 A. I don't believe so.

15 Q. Okay. Knowing what you know today, would you do  
16 anything differently or would you have done anything  
17 differently in your first visit to Pete's in April of 2002?

18 A. No.

19 Q. Why not?

20 A. What I did was what I've been trained to do, and  
21 we're strictly advisory in nature, and I provided the, you  
22 know, the services that we provide to the customer.

23 Q. Okay. In order to assist us all in staying literally  
24 on the same page when we're going through the documents that  
25 we're going to go through what I've done is I've stamped them

1 would suggest that it's referred to underwriting if there's a  
2 reason. But your testimony is that it's always referred to  
3 underwriting no matter what.

4 A. To the best of my knowledge underwriting gets a copy  
5 of our reports, yes.

6 Q. What does -- what is a PAP discrepancy A or an  
7 application discrepancy A? What does the A mean?

8 A. Well this says it means the question is sole  
9 occupant, and I put no. One of the owners' sons has an office  
10 on the second floor for Travel-Rite RV Central (sic). This is  
11 a totally separate business. It has nothing to do with Pete's  
12 RV, so we would consider that to be a multiple occupancy as  
13 opposed to a sole occupant.

14 Q. Gotcha. Thank you. In performing your activities in  
15 relation to your April, 2002 visit to Pete's did you ever take  
16 any steps to address the issue of certification of the  
17 employees for forklift operation?

18 A. I probably asked the question are your drivers  
19 certified, because that's what I typically do.

20 Q. But you're not sure.

21 A. I -- can I recall specifically asking the question?  
22 No. But it, as a general rule it's a question I ask. If I  
23 see a forklift that's one of the questions I ask, are the  
24 drivers certified?

25 Q. While we're at it, what are -- what other questions

1 look around the dealership, see if we had any issues  
2 that might be a potential safety problem or claim,  
3 future claim for the company.

4 Q. Let me ask you to describe the -- the general  
5 visit. You -- you mentioned that you started off in  
6 your office and had a conversation for about 10 minutes.

7 A. Yes. Typically, he would come through the  
8 front door, be met by one of our receptionists and she  
9 would call me and I'd come down and -- and greet him in  
10 the front showroom. And then we'd go up to my office  
11 and we'd sit and talk for a few minutes and then we'd --  
12 we'd do a walk-around the dealership, and typically end  
13 up back in my office for a few minutes.

14 Q. Okay. So how many minutes would you spend  
15 back in your office, about?

16 A. Probably, again, not more than 10 minutes or  
17 so.

18 Q. So 10 minutes in the office at the beginning  
19 and 10 minutes at the end.

20 A. Yes. Pretty much.

21 Q. And the rest would have been the tour of the  
22 business?

23 A. Yeah. Walking around, looking at the  
24 dealership.

25 Q. Now, I want you to take a look at this, Dave.

1 A. Um hum.

2 Q. And tell me if you can identify that?

3 MR. LYNCH: Would you just note the --

4 MR. BREDICE: I'm sorry. That is  
5 stipulated 29.

6 MR. LYNCH: That's the map?

7 MR. BREDICE: Yes.

8 THE WITNESS: Yeah, it looks like a  
9 map of our dealership prior to the construction. The  
10 old -- the old facility.

11 MR. BREDICE: Okay.

12 THE WITNESS: Prior to -- I would say  
13 prior to 2003.

14 MR. BREDICE: Your Honor, may I ask  
15 the witness approach?

16 THE COURT: You may. Just be sure to  
17 keep your voice up when you're down there.

18 THE WITNESS: Okay.

19 THE COURT: Okay?

20 MR. LYNCH: Come over here so I can  
21 see.

22 THE COURT: Yes. Feel free to move  
23 around, folks.

24 BY MR. BREDICE:

25 Q. Dave, I'm going to ask you to make some marks

1 on this. But before you do, taking a look at stipulated  
2 29, along the bottom of the exhibit is -- is a road.

3 What is that road?

4 A. That's US 2, Williston Road, South Burlington.

5 Q. Can you show the jury where the entrance of  
6 Pete's -- to Pete's RV property is?

7 A. The driveway was right located directly in  
8 front of the building.

9 Q. And by the way, when we -- we have a -- we  
10 have here an existing building and there's something  
11 here. Is that the -- is that -- is this whole thing  
12 existing building?

13 A. Well, actually, this was parts area with  
14 upstairs offices above it. This was the shop. That's  
15 the shop area. This actually I think was a concrete  
16 slab that was outside. This -- this is the building  
17 itself and that's our parking area outside the building.

18 Q. Why don't we -- I'd like to have you start by  
19 showing us where -- where your office is and where you  
20 went from there. If you use this pen to trace it out.

21 A. Okay. My office was on the second floor and  
22 was located right here.

23 Q. You're drawing a square there.

24 A. Yes.

25 Q. Okay. And out of the door you go to where

1 next?

2 A. The door -- there was a hallway here  
3 (inaudible). You go out through the hallway, down the  
4 stairs and then you go into the showroom. We'd walk  
5 around the showroom.

6 Q. (Inaudible.)

7 A. Yes. Walk around the showroom. We'd go into  
8 the parts store which was underneath the second floor.  
9 We'd walk through the parts store and then we'd go into  
10 a door into the shop so that we had four bays. We'd  
11 walk around the shop and we'd usually go out the side  
12 door, which is in this corner. We'd walk out over by  
13 the propane station. And typically, we'd go up on the  
14 hill. We had a building, an old garage on the hill.  
15 We'd walk up towards that area and then back down.

16 Q. Can you -- can you continue the line?

17 A. And back down probably through the shop, back  
18 to this area, upstairs and then end up back in my  
19 office.

20 Q. At this time, was there a particular  
21 designated location where the forklift was parked?

22 A. When it wasn't used, there was an area over  
23 here that they used to -- they had it highlighted with  
24 yellow striping. That's where they -- they typically  
25 wanted it parked.

1 Q. And that's -- and you've -- you've marked that  
2 in the form of a box.

3 A. Yes. This is --

4 Q. Around a -- around a "Z."

5 A. It was a square that was right on this side  
6 (inaudible).

7 Q. Yellow lines?

8 A. Yellow lines.

9 Q. Okay. And would you just put your initials  
10 near the green line for us?

11 THE COURT: You guys both need to  
12 speak up.

13 (WHEREUPON, a pause in the proceedings took place.)

14 THE COURT: He's not going to let you  
15 use those things anymore, if you mess up his stuff.

16 BY MR. BREDICE:

17 Q. Dave, I'm going to -- you've got Plaintiff's  
18 64 on the -- on the screen and I'm going to show you a  
19 printout of it.

20 A. Okay.

21 Q. And I'm going to ask if you could identify the  
22 forklift, please.

23 A. Yes. It's the orange Toyota. It looks like  
24 it's behind the first bay to the left.

25 Q. And this is the forklift you were talking

1 about that was present at the time of Gary Smith's April  
2 of 2002 inspection?

3 A. Yes.

4 Q. And that's the forklift that was typically  
5 parked in the lines -- the yellow-lined space that you  
6 indicated on stipulated 22 the sketch, site plan?

7 A. Yes.

8 Q. If -- if that -- let me -- let me ask you  
9 this. In Plaintiff's 62 --

10 MR. LYNCH: Is that -- didn't you just  
11 say 64?

12 MR. BREDICE: That's what I'm  
13 checking. Sixty-four. I'm sorry.

14 THE WITNESS: Oh, okay.

15 BY MR. BREDICE:

16 Q. Plaintiff's 64. Where is the (inaudible)  
17 parked in relation to the yellow-lined area?

18 A. Well, it's actually to the right. The yellow-  
19 line area was on -- near the side of the building, not  
20 in front of the bay.

21 Q. Would it have been --

22 A. That area is tore up in this picture now.

23 Q. Right. Where -- where would that area have  
24 been?

25 A. It would have been just to the left of this

1 door.

2 Q. To the left of the --

3 A. White --

4 Q. -- (inaudible) door?

5 A. Right.

6 Q. Which is to the left of the -- (inaudible) bay

7 door?

8 A. Yes.

9 Q. So right there?

10 A. Right.

11 Q. So if -- if -- if the forklift were in the

12 service area, would you expect it to be parked in that

13 spot?

14 A. Usually, if it wasn't being used. That's

15 typically where it was.

16 Q. More probable than not?

17 A. Yes.

18 MR. LYNCH: Your Honor, could we

19 approach for a moment?

20 THE COURT: Absolutely.

21 (WHEREUPON, a bench conference commenced.)

22 THE COURT: Yes, Mr. Lynch?

23 MR. LYNCH: I don't think asking a

24 fact witness if something is more probable than not is

25 an appropriate question and I'd like it to stop. That's

1 MR. LYNCH: That's 12A. Oh, gotcha.

2 Yeah. I got it.

3 BY MR. BREDICE:

4 Q. First of all, this is the letter from Safety  
5 Sciences.

6 A. Yes. It is.

7 Q. Okay. Did this letter give you an idea or an  
8 understanding of what the purpose of Mr. Smith's visit  
9 was?

10 A. Yes. It did.

11 Q. And what did you take away from that as its  
12 purpose?

13 A. Well, obviously, number one was loss control  
14 because we had had some -- some claims in '99 and 2000  
15 that he wanted to discuss. And then there were the  
16 items that he offered to assist us in controlling losses  
17 that he had written down five -- yeah, five -- five  
18 different items.

19 Q. Safety was an overriding purpose of this?

20 MR. LYNCH: Objection. Leading.

21 THE COURT: Sustained.

22 BY MR. BREDICE:

23 Q. What -- what was the overriding purpose of  
24 this?

25 MR. LYNCH: Already established.

1 BY MR. BREDICE:

2 Q. Of this exercise?

3 A. I think the purpose was to control losses for  
4 the -- for the insurance company and to provide safety  
5 for -- for my employees and ourselves.

6 Q. Thank you. There are a number of  
7 recommendations on this letter? Jody, could you scroll  
8 down a little bit to the -- did you take these  
9 recommendations seriously?

10 MR. LYNCH: Objection. Leading.

11 THE COURT: Sustained.

12 BY MR. BREDICE:

13 Q. How did you view these recommendations?

14 A. Well, we -- we thought they were important.  
15 We -- we would discuss them, Terry and I, and talk about  
16 what we -- what we thought our approach should be, how  
17 we should handle them.

18 Q. And what -- what approach did you take and how  
19 did you handle them?

20 A. Well, typically, we would -- we would agree  
21 that these items needed attention, whatever the -- you  
22 know, whichever ones we were talking about, and Terry  
23 would typically be the one who would resolve the issues,  
24 whatever they were, to try and make the insurance  
25 company happy and fix whatever deficit safety issue we

1 may have.

2 Q. Did you rely on Sentry to -- to provide safety  
3 consultation that would make Pete's a safer workplace?

4 MR. LYNCH: Objection. Leading.

5 MR. BREDICE: That's a yes or no  
6 question.

7 MR. LYNCH: That's a leading question.

8 THE COURT: Okay. Let's not argue,  
9 gentlemen. Sustained.

10 BY MR. BREDICE:

11 Q. What, if any, degree of reliance did this  
12 letter create in your mind on Sentry's safety expertise?

13 MR. LYNCH: Objection. No foundation.

14 THE COURT: Overruled. You can  
15 answer.

16 THE WITNESS: Well, you know, I was an  
17 RV dealer. We didn't know about a lot of these things  
18 and, you know, we relied on them to tell us what we  
19 should fix, things that we weren't doing right, what  
20 kind of equipment. I can remember we had to replace a  
21 grinding wheel because it didn't have a -- a shield on  
22 it. And that was a safety issue. And we -- we did  
23 that. We took it out of the shop. We said, you know,  
24 it's an issue. So, you know, we took whatever they told  
25 us they -- whatever they found, we took to heart and we

1     tried to -- tried to resolve it.

2           Q.    This -- this letter of April 16, 2002, does it  
3     contain any -- any mention of forklifts?

4           A.    Not -- not that I can see.

5           Q.    And yet, at the time of the inspection, you  
6     were using the Toyota with the attachment. Is that --  
7     that's a fair statement. There's no dispute about that.

8                   MR. LYNCH:  Objection, Your Honor.

9                   THE COURT:  Sustained.

10                  MR. BREDICE:  I don't -- I don't mean  
11     using. I mean, that -- that -- I'm sorry.

12                  THE COURT:  Just try again.

13                  MR. BREDICE:  I'm going to withdraw  
14     that. We all know what the issue is.

15     BY MR. BREDICE:

16           Q.    If this letter had contained a warning about  
17     that practice and that process and that equipment, would  
18     you have listened to that warning?

19                   MR. LYNCH:  Objection, Your Honor.

20     Pure speculation on behalf of the witness.

21                   THE COURT:  Overruled.

22                  THE WITNESS:  I mean, yeah. We would  
23     have listened. We would have talked about it.

24     BY MR. BREDICE:

25           Q.    Would you have taken the forklift out of

1 Q. Let me ask you if you would have, with that  
2 information, would you have bought the Yale forklifts  
3 and modified them for use as tow vehicles?

4 MR. LYNCH: Objection. Leading. Pure  
5 speculation.

6 THE COURT: Overruled.

7 THE WITNESS: Would you ask that  
8 question again?

9 MR. BREDICE: Right.

10 BY MR. BREDICE:

11 Q. If you'd been warned about the dangers of the  
12 forklift with the attachments to RVs in 2002, would you  
13 have then gone ahead and bought the Yale forklifts, two  
14 more forklifts, and made two more attachments for use  
15 for the same purpose that was -- that was consented as  
16 being unlawful and dangerous.

17 MR. LYNCH: Same objection for the  
18 record.

19 THE COURT: Same ruling.

20 THE WITNESS: I would say no. We  
21 probably would have looked at another method.

22 BY MR. BREDICE:

23 Q. And taken those -- and taken that system out  
24 of service.

25 MR. LYNCH: Same objection.

1 THE COURT: Well, sustained based on  
2 how that's phrased.

3 MR. BREDICE: All right.

4 BY MR. BREDICE:

5 Q. Did you -- did you use to ride that forklift?

6 A. Yes.

7 Q. Which ones?

8 A. Both.

9 Q. And your brother-in-law rode -- did your  
10 brother-in-law used to ride them?

11 A. Yes.

12 Q. Did your son used to ride them?

13 A. Yes.

14 Q. Did your nephew use to ride them?

15 A. Yes.

16 Q. Had you been warned, would you have continued  
17 to ride them?

18 MR. LYNCH: Objection. Speculation.

19 THE COURT: Overruled.

20 THE WITNESS: Probably not.

21 BY MR. BREDICE:

22 Q. Now, did there come a time when Mr. Smith made  
23 a second visit to Pete's. Is that right?

24 A. Yes.

25 Q. And that would have been in October of 2003?

1 says completed, Your Honor.

2 THE WITNESS: It says -- it says  
3 completed.

4 THE COURT: Thank you.

5 BY MR. BREDICE:

6 Q. Now you've got a new recommendation urgent,  
7 and it's right -- right here. Would you take a look at  
8 that. Can you read that out loud, please?

9 A. "The following urgent recommendations identify  
10 conditions or practices which present a high probability  
11 of serious injury or loss and require immediately  
12 attention and corrective action."

13 Q. Now, with a warning like that, would that have  
14 alerted you to the dangers of the forklift system that  
15 you had in place at that time?

16 MR. LYNCH: Objection. Speculation.  
17 Leading.

18 THE COURT: Overruled.

19 THE WITNESS: Yes.

20 BY MR. BREDICE:

21 Q. Would you have heeded that warning?

22 MR. LYNCH: Objection. Speculation.  
23 Leading.

24 THE COURT: Overruled.

25 THE WITNESS: I -- I believe so.

1 BY MR. BREDICE:

2 Q. And if you had heeded that warning, would the  
3 Yale with attachments have been in operation in 2004?

4 MR. LYNCH: Objection. Speculation.  
5 Leading. Continued Monday morning quarterbacking.

6 THE COURT: What rule is that last  
7 one? Overruled.

8 THE WITNESS: Well, we probably  
9 wouldn't have used them.

10 BY MR. BREDICE:

11 Q. And in that case, would Chris Murphy have been  
12 on a forklift at the top of a ramp on June 15th, 2004,  
13 towing an RV?

14 MR. LYNCH: Same objections, Your  
15 Honor.

16 THE COURT: Overruled.

17 THE WITNESS: No.

18 BY MR. BREDICE:

19 Q. Now, in connection with this July 8th  
20 letter -- can we go back to stip 12A? You received some  
21 materials that were included with that letter. Do  
22 you -- can you read that from over there or should I  
23 bring you this?

24 A. It's just really -- I think it's because of  
25 the angle.

1 Q. The one you kept, you used just to move parts  
2 (inaudible)?

3 A. That's -- that's all we used it for. Yes.

4 Q. Now, the difference between the Toyota and the  
5 Yale, what -- what were the differences that you were  
6 aware of?

7 A. Well, the Toyota was a much larger forklift.  
8 It was -- number one, it was a dual wheel; whereas, the  
9 Yale was single wheels. It had much larger capacity for  
10 lifting. I don't know exactly -- I'd have to look to  
11 tell you exactly what the capacities were, but it was a  
12 much bigger -- it had an enclosed cab. It was heated.

13 Q. So to the extent that you used a forklift with  
14 an attachment to tow RVs between the accident and the  
15 abatement date, it was only the Toyota and not the Yale?

16 A. That's correct.

17 Q. I see.

18 MR. BREDICE: Thank you, Dave.

19 THE COURT: Mr. Lynch?

20 MR. LYNCH: Want to just keep going

21 or --

22 THE COURT: Is the jury okay? Do you  
23 need a break? Anybody need a break?

24 MR. LYNCH: Want to keep going? Okay.

25 THE COURT: No one wants a break?

1 deposition, at the very beginning of the deposition, the  
2 first time you're ever asked under oath about this  
3 issue. Correct?

4 A. I believe so.

5 THE COURT: Try to keep your voice up,  
6 sir.

7 THE WITNESS: Oh. I'm sorry.

8 MR. LYNCH: Okay.

9 BY MR. LYNCH:

10 Q. So on page six, line 12, the question is:  
11 "Prior to the day that Chris Murphy died, did you have  
12 any inkling that the forklift with the attachment as  
13 used to tow and move fifth wheel vehicles was a  
14 dangerous situation?" And your answer was?

15 A. "No."

16 Q. "Did you have any inkling that it was in  
17 violation of federal safety regulations as configured  
18 and used in that manner?" And your answer was?

19 A. No.

20 Q. "Did you know of the forklift -- of the  
21 federal regulations that pertain to the use of  
22 attachments on forklifts?" And your answer was?

23 A. I did not.

24 Q. And then the question was, "If you had  
25 awareness of that information, would you have left that

1 yelling in here. Am I yelling at everyone?

2 THE COURT: I think everyone can hear  
3 you just fine.

4 MR. LYNCH: Okay. Because --

5 THE COURT: But that's a good thing.  
6 That's a good thing in this room.

7 MR. LYNCH: -- you've told -- I've  
8 been -- I've been told like three times to keep my voice  
9 up, but I feel like I'm hollering at everybody.

10 THE COURT: No. We need it here.

11 BY MR. LYNCH:

12 Q. Mr. McGinnis, isn't it true, sir, that there  
13 was no particular place to keep the attachment when it  
14 was not in use at Pete's?

15 A. Yeah. It was usually left wherever they took  
16 it off.

17 Q. Okay. So that it -- it could have been  
18 anywhere?

19 A. Well, it was typically in that area because,  
20 if someone were going to use the forklift for non-moving  
21 RVs, it was heavy. They would have pulled the pan and  
22 drove the forklift out from under it. It was too heavy  
23 for -- for one person to pull off. They would have  
24 backed the forklift out from under it.

25 Q. Oh. Okay.

123

1 A. So it would have been typically left wherever  
2 they -- they unhooked it.

3 Q. Okay. So if -- if -- if that's the case, then  
4 when you're with that man door and that forklift down  
5 here around the corner facing that way, if people would  
6 go to get on it, they would unhook it and just drop it  
7 right there around the corner over there.

8 A. Right. You could -- you could put the forks  
9 in such a position that you could just back it off from  
10 it and it would stay right there.

11 Q. Okay. And again, we haven't established this  
12 with you, but the -- the -- the -- well, can we put up  
13 the Toyota picture with the forklift attachment on it?  
14 I don't think we've shown that to Mr. McGinnis.

15 A. No.

16 UNIDENTIFIED SPEAKER: Do you mean the  
17 Gary Smith (inaudible)?

18 MR. LYNCH: Yes. The after accident  
19 ones.

20 UNIDENTIFIED SPEAKER: That was 13,  
21 right?

22 MR. LYNCH: I think so. Yes. Yes.  
23 Can you click one more?

24 BY MR. LYNCH:

25 Q. Mr. McGinnis, these are some pictures that

1 A. I don't recall if -- if that's what was said.

2 Q. Okay. So even after this accident has  
3 occurred with use of a forklift with a homemade  
4 attachment from Pete's and Mr. Murphy has died in the  
5 accident, at this post-accident meeting, you continued  
6 to believe and express to the people from Sentry that  
7 you felt that there was nothing wrong with the  
8 attachment and that it was safe?

9 A. We did believe that. Yes.

10 Q. You and Terry Shepard?

11 A. I believe so.

12 Q. But for the fact that there was an OSHA  
13 violation for you to continue to use the attachment  
14 which would subject you to fines, okay, if there were no  
15 such OSHA violation that would subject you to fines  
16 after this accident, it would be fair to say, if you had  
17 your choice, you would have continued to use your  
18 forklift with that attachment to tow RVs around your  
19 property?

20 A. On the Toyota? Yeah. I felt it was safe.

21 Q. Okay. So the -- the problem here for you guys  
22 is not the -- the safety issue so much with the Toyota  
23 or the forklift with the attachments because you thought  
24 it was safe, but the problem is that you didn't want to  
25 get fined again by VOSHA. Right?

1 Q. Okay. Were you aware of it prior to Mr.  
2 Murphy's accident?

3 A. I am not sure. I don't --

4 Q. Did that ever happen to you?

5 A. Yes. It has.

6 Q. Did it happen to you prior to Mr. Murphy's  
7 accident?

8 A. I can't remember when. Probably. Because we  
9 never drove the Yale after that.

10 Q. Okay.

11 A. So, yes.

12 Q. Never happened to you on the Toyota?

13 A. Never.

14 Q. Okay. So prior to Mr. Murphy's accident, you  
15 personally had one of those experiences using the Yale  
16 with the attachment, towing a big unit and the wheels  
17 came off the ground?

18 A. Yes, sir.

19 Q. What did you do?

20 A. I lowered the boom.

21 Q. Okay. And did you have any concerns about  
22 that or did you think that was just normal -- normal  
23 everyday happening with the -- with the forklift?

24 A. I mean, yeah, it's -- obviously, we were  
25 trying to move something that was too large for that

1 the final say on safety issues?

2 A. Terry.

3 Q. And on the forklift.

4 A. Terry.

5 Q. Your responsibilities were primarily what?

6 A. Financial. I handled the financing of  
7 equipment and assets.

8 Q. You talked about your visit with Gary Smith  
9 and there was a discussion of about how long it took.

10 Do you recall that?

11 A. About how long it took to do --

12 Q. No. Do you recall a discussion about how long  
13 it took to -- how long he was there for.

14 A. Oh, yes. Okay.

15 Q. I'm going to show you a stipulated 10(b). I  
16 want you to take a look at this. This is -- I'm going  
17 to represent -- for purposes of the record, this is a  
18 log of Mr. Smith's activities on April 3rd, 2002, the  
19 date of your visit with him. He says onsite time.  
20 What's is amount of time?

21 A. Two -- two hours.

22 Q. And let's turn to this date. What is that  
23 date?

24 A. 10-21 of '03.

25 Q. And Mr. Smith's onsite time at that date was?

1 it was on the lot somewhere?

2 MR. LYNCH: Objection. Leading.

3 THE COURT: Sustained.

4 BY MR. BREDICE:

5 Q. Well, what do you think the -- what do you  
6 think the likely status of the forklift was during Mr.  
7 Smith's inspection?

8 A. I mean, it would have been -- it was in the  
9 April visit. It's one of our busier months. It would  
10 have been moving units, I would assume. But, you know,  
11 I -- I don't really recall, so I can't say for certain.

12 Q. You can't say for certain, but knowing what  
13 you know about your business and about the operations,  
14 did you think --

15 MR. LYNCH: Objection. Asking for a  
16 guess or speculation.

17 MR. BREDICE: Your Honor, I -- I  
18 haven't finished the question.

19 BY MR. BREDICE:

20 Q. Do you think it's probable that it was being  
21 used in that way?

22 MR. LYNCH: Objection. Improper  
23 question.

24 THE COURT: One at a -- one at a time,  
25 please, everybody. Overruled.

1 THE WITNESS: I -- I believe it's most  
2 likely it was moving units somewhere.

3 BY MR. BREDICE:

4 Q. On the property?

5 A. On the property.

6 Q. And yet we know he saw the forklift. Correct?

7 Let me ask you this. You say that you -- even after  
8 this accident, you continued to feel the Toyota was  
9 safe. Did you still feel the same way about the Yale  
10 after this accident?

11 A. No. I did not.

12 Q. What did you feel about the Yale after this  
13 accident?

14 A. I -- I felt it was too small. That we  
15 shouldn't -- shouldn't use it.

16 Q. But Sentry visited before you bought the  
17 Yales, didn't they? Did they not or did they?

18 A. Yes.

19 Q. And they did not warn you? Is that true or  
20 not?

21 A. They -- excuse me? Would you repeat that?

22 Q. They did not warn you about the forklift.

23 A. No. We -- I don't believe we ever talked  
24 about the forklift.

25 Q. And then you went and bought the Yales

1 thinking they were safe. Is that fair?

2 A. Yeah. I don't think we would have bought them  
3 if we didn't think they were safe.

4 Q. We talked about -- and my last point -- we  
5 talked about the -- you talked with Attorney Lynch about  
6 the Kubota tractor in relation to post-abatement. After  
7 that May 31st, 2005 date. Correct?

8 A. Right.

9 Q. All right. Let's look at that portion of the  
10 depo. The October 20, 2009, depo, where you had that  
11 discussion. I'm going to read the questions. You read  
12 the answers.

13 MR. LYNCH: Page?

14 MR. BREDICE: Seventy.

15 BY MR. BREDICE:

16 Q. "Okay. The next document we have here is  
17 from -- well, you got to go through those. Yeah. Go to  
18 the Kubota document."

19 A. "This one?"

20 Q. "Yeah."

21 A. "Okay."

22 Q. "The next document we have here has to do with  
23 your company's purchase of the Kubota tractor."

24 A. "Yes."

25 Q. "And it appears from this document that the

1 be servicing within the RVs. Moving in something like a  
2 refrigerator that -- that wasn't exactly palletized. All  
3 kinds of maintenance procedures where you would use a boom,  
4 for example, or you might tie something onto the forks to --  
5 to move it around.

6 Q. Again, not to say that was going on at Pete's, but  
7 that would be a question that you would want to answer;  
8 whether there were off label uses of the forklift?

9 A. That's correct. That's what --

10 MR. LYNCH: Can I just -- can I just interrupt for a  
11 second in terms of not leading.

12 THE COURT: Sustained.

13 BY MR. BREDICE:

14 Q. I want to talk with you about the issue of  
15 causation. What is your opinion on -- on the issue of  
16 causation between the inspection and Mr. Murphy's death?

17 A. Well, based on the evidence that I've reviewed --  
18 and bearing in mind that I was not hired to do a full and  
19 complete accident reconstruction of this particular  
20 accident -- based on the evidence I have reviewed, and the  
21 information I have had, the pictures that I've been -- I've  
22 seen, and the testimony, I think the only reasonable  
23 conclusion I can make is that -- that, absent the use of this  
24 appliance -- unapprovable appliance on the forklift -- the  
25 narrow-wheel-base Yale forklift, that the incident would not

1 have occurred, and the fatality to Mr. Murphy would not have  
2 occurred.

3 Q. And what is it about the attachment that leads you  
4 to that conclusion?

5 A. Well, it's the dynamics of the incident itself, and  
6 the fact that the attachment did not allow a good, solid  
7 connection between the forklift and the trailer that was being  
8 pulled.

9 Q. What sort of a solid connection are you referring  
10 to?

11 A. Well, the typical solid connection that would be  
12 made by an actual SAE approved fifth-wheel-hitch device.  
13 And, of course, that and it's connection with -- with the  
14 kingpin of the towed trailer.

15 Q. What feature of a SAE -- and by that you mean the  
16 Society of Automotive Engineers?

17 A. That's correct.

18 Q. What feature of a SAE-approved coupling mechanism  
19 are you specifically referring to?

20 A. Oh, there's a number of them. First, the -- the  
21 fifth wheel hitch has a large bearing plate on its surface.  
22 It's just like the big ones on -- on -- on semi trucks, except  
23 it's a little smaller because the loads involved are -- are  
24 lighter.

25 Also, the -- the fifth wheel connector has a locking

1 trailer.

2 Thirdly, that Mr. Smith's warning would reasonably  
3 have put Pete's on notice to stop the use of the unapprovable  
4 appliance and, therefore, would have been -- would have  
5 prevented the fatality.

6 And finally, that, as shown by Pete's efforts to  
7 simply obtain approval for the use of their --

8 MR. LYNCH: Objection, Your Honor.

9 A. -- device --

10 MR. LYNCH: Objection.

11 THE COURT: Hold on.

12 MR. LYNCH: You're not supposed to be talking.

13 THE COURT: Hold on.

14 THE WITNESS: Okay.

15 (Bench conference on the record)

16 MR. LYNCH: He -- he was told before that this guy  
17 isn't going to try to offer an expert opinion that Pete's  
18 would have followed a recommendation.

19 MR. BREDICE: Right. Right. (Indiscernible.)

20 MR. LYNCH: That's what he's about to do. That's  
21 entirely improper.

22 MR. BREDICE: I'll cut it off.

23 THE COURT: Okay.

24 MR. BREDICE: Okay?

25 THE COURT: All right.

1 downhill a little bit?

2 A. That's correct.

3 Q. With regard to Gary Smith's two inspections, sir,  
4 would it be fair to say that the -- the issues you have with  
5 his two inspections have to do with things which you believe  
6 he did not do?

7 A. That's correct.

8 Q. Okay. Would it also be fair to say that you believe  
9 that, as far as his two inspections, you believe that he did  
10 not do those same things on each inspection; correct?

11 A. That's correct.

12 Q. Okay. Now, can a loss prevention inspection --  
13 inspector make any assumptions?

14 A. I expect that he could.

15 Q. Can a loss inspection -- loss prevention inspector  
16 make reasonable assumptions in the performance of their job?

17 A. Yes.

18 Q. Okay. And if a loss prevention inspector makes  
19 reasonable assumptions in the performance of their job, are  
20 they performing their job within the standard of care that you  
21 believe exists for a loss prevention inspector?

22 A. Yes.

23 Q. So if I understand you correctly, you believe that  
24 Mr. Smith, in this instance, should have asked more questions  
25 about the forklift; correct?

1 A. He should have informed himself about the use.

2 Q. That's a yes or no answer.

3 A. Yes.

4 Q. Okay. Now, let me ask you this question, sir: Mr.  
5 Smith made some assumptions about the pickup truck that he  
6 said he saw. Should he have asked Pete's what they were using  
7 their pickup trucks for?

8 A. No, I don't believe so.

9 Q. Okay. Mr. Smith saw in the service department an  
10 oxygen -- an acetylene tank which I believe is used for  
11 welding; correct?

12 A. Welding and cutting.

13 Q. Okay. Seeing that tank there, should Mr. Smith have  
14 asked the people at Pete's RV, "What are you using that for?"

15 A. No, I don't believe so.

16 Q. Okay. So Mr. Smith observed lots of power tools in  
17 the service department at Pete's. He doesn't specify them,  
18 but he says a number of them; correct?

19 A. Yes.

20 Q. Okay. Should Mr. Smith have gone to each and every  
21 power tool with somebody from Pete's RV and said, "What do you  
22 use that for?"

23 A. No, I don't believe that was necessary.

24 Q. Isn't a loss inspector entitled to assume that an  
25 insured -- when they see a device, when they see a piece of

1 equipment, aren't they entitled to assume that the person is  
2 using it in a lawful manner?

3 A. To a point.

4 Q. Okay. So if I go out to Pete's and I see a  
5 lawnmower there, am I entitled to assume that they're using it  
6 to cut the lawn? Or do I have to ask him if they're using it  
7 to trim their hair?

8 A. I don't think you have to ask them if they need to  
9 trim their hair, but I've head of them being used as hedge  
10 trimmers.

11 Q. So I'm supposed to ask are you using this -- I see a  
12 lawnmower just sitting there, the grass looks cut. Am I  
13 supposed to ask him, "Hey, are you guys also using that thing  
14 to trim a hedge?" Am I supposed to ask him that?

15 A. No, but you should ask if the operator --

16 Q. Excuse me.

17 A. -- is trained.

18 Q. That's a yes or no question.

19 A. I answered you no.

20 Q. Thank you.

21 MR. LYNCH: Almost finished here.

22 THE COURT: Great. Now, if you could just stop  
23 hitting that microphone.

24 MR. LYNCH: I know. I'm trying to.

25 BY MR. LYNCH:

1 purpose?

2 A. You would have to ask the customer.

3 Q. But as far as Sentry is concerned, it doesn't inform  
4 the customer of that?

5 A. Well, we do ask pointed questions like, "Please  
6 describe your operations." And it's pretty obvious we're  
7 taking notes. And it's pretty obvious, "Please describe the  
8 controls you have in place for auto driving," and we take  
9 notes.

10 Q. But if the insured thinks that there's something --  
11 that there's a business purpose for Sentry in doing that, it  
12 would be because they have understood that independently, but  
13 not because Sentry has informed them of it, correct?

14 A. I don't understand the question.

15 Q. As far as the insured knows, what is -- what it is  
16 receiving is a safety consultation visit?

17 A. That would be correct.

18 Q. Okay. And in fact, Sentry wants to, in its own  
19 words, sell safety services to its insured, correct?

20 A. Well, in effect, we all are in the business that we  
21 have to sell our service and what we do. In training new  
22 safety consultants, I have to indicate that you have to sell  
23 yourself and that the customer has to become confident in that  
24 what you are telling them has a specific business purpose and  
25 it is helpful to them. And so in that context, correct.

1 Q. Okay. And one of the things that you do is to, in  
2 this context of selling, you're selling these dealers  
3 solutions to avoid common exposures in their industry?

4 A. Correct. We do not project ourselves as a  
5 regulatory compliance. You should have routine driver  
6 meetings on safety because it is a good business practice to  
7 do this and you will avoid accidents. I want my consultants  
8 to sell that idea, that there is a business benefit to this,  
9 as opposed to saying, "You must do this because it is the law;  
10 it is the regulation."

11 Q. Ah-huh.

12 A. So what we're trying to say there is that you want  
13 to sell the idea that working safely is good business  
14 practice.

15 Q. So it would be fair to state, then, as appears in  
16 the casualty LC service manual, in selling the service, there  
17 is an additional value to helping our customer understand the  
18 degree of our expertise in establishing a basis of trust. I  
19 think that is just another way of phrasing what you just said.

20 A. Correct.

21 Q. It's a company policy.

22 A. I would not disagree with that.

23 Q. And there has to be some account taken of the  
24 different risks and realities and practices across various  
25 different dealers that Sentry would seek to insure, correct?

1 A. Well, there are differences but, frankly, there are  
2 a lot of similarities.

3 Q. So we are, in subsection 2 of Deposition Exhibit 7,  
4 and we're going to look at page 3-117.

5 A. "Sentry At Your Service"?

6 Q. Yes. You were identifying that? Can you do that  
7 again for me?

8 A. I recognize this as a photocopy of a policy brochure  
9 that is identified as, "Sentry At Your Service."

10 Q. When you say "policy brochure," what does that mean?

11 A. This is -- in some states, this is included in the  
12 policy. And in some states, this is a stand-alone handout  
13 piece used by our producers.

14 Q. It's a sales brochure?

15 A. It is a sales and marketing brochure that is used by  
16 our producers to enhance this particular Web site, which is  
17 our service and training Web site.

18 Q. And it states, as you mentioned, "Sentry At Your  
19 Service."

20 A. Yes.

21 Q. "When you become a Sentry policyholder, you'll enjoy  
22 the convenience of having information at your fingertips  
23 through our on-line resource, Sentry At Your Service," right?

24 A. Yes.

25 Q. You talked about that earlier, right?

1 A. Yes.

2 Q. It states that: "Sentry At Your Service is designed  
3 to help you protect and manage your business by providing  
4 access to solutions to help avoid common exposures in your  
5 industry."

6 A. Correct. That's what it states.

7 Q. Okay. And this is also reflected -- whoops. Okay.

8 A. And this is also reflected in the exhibit of the  
9 2002 letter to the customer from Gary Smith. He also  
10 mentioned and encouraged the use of this Web site with the  
11 customer.

12 Q. Yes. Okay. And in order to deliver on this  
13 promise, Sentry would have to have some -- well, actually, a  
14 considerable understanding of the common exposures in the  
15 industry that is targeted by this marketing brochure, correct?

16 A. Yes.

17 Q. Which would dovetail with the work of the safety  
18 consultant, is that right?

19 A. I don't understand the question "dovetail."

20 Q. Sentry is providing the benefit of its expertise and  
21 various exposures specific to different industries through  
22 several sources, one of which would be Sentry At Your Service.

23 A. Yes.

24 Q. Another one of which would be safety consultants and  
25 the reports and recommendations that are provided to the

1 insured.

2 A. That's correct.

3 Q. Okay. It might be easier in this discussion about  
4 the company's policies concerning the generation of these  
5 surveys if we were to look at the LC service guides and  
6 procedures.

7 A. Okay.

8 Q. And I'm going to have you take a look at, within  
9 Deposition Exhibit 7 here, subsection 8.

10 A. Okay.

11 Q. Are you with me so far?

12 A. Yes.

13 Q. Page 3-42.

14 A. Got it.

15 Q. Okay. When it says -- in the middle of that page it  
16 says, "surveys."

17 A. Yes.

18 Q. And it says, "Every pre-survey, first survey, and  
19 resurvey should accomplish the following: evaluation of the  
20 loss potential, and a decision on the desirability of the  
21 risk, an analysis of the substandard features of the risk with  
22 appropriate recommendations for the elimination of those  
23 features." Are those, basically, the marching orders for the  
24 safety consultants?

25 A. That would be direction, general direction for the

1 consultant.

2 Q. Okay. On the next page, I think there is another  
3 formulation of the same idea. That would be page 3-43 in  
4 section 8 of Deposition Exhibit 7. It says, "Primary service  
5 objectives; analyzing and evaluating the loss potential of the  
6 risk and risk improvement through loss control activity." Did  
7 I read that right?

8 A. That's correct.

9 Q. Okay. And it goes on to say: "By achieving these  
10 specific objectives, you will fulfill policy 2.5 to support  
11 selection and retention of business through risk selection.  
12 And assist in accomplishing policy 2.2, to solicit, accept and  
13 retain accounts that can be written at rates likely to produce  
14 an underwriting profit." Correct?

15 A. Correct.

16 Q. Now, in executing this assignment of producing a  
17 first survey, are the loss -- are the safety consultants  
18 provided with specific format by Sentry?

19 A. Yes.

20 Q. All right. I'm going to ask you to turn to page --  
21 in section 2 of Exhibit 7, to turn to page 3-71. Got it?

22 A. Got it.

23 Q. Why don't you identify this for us?

24 A. Okay. This is a survey report completed by Gary  
25 Smith, and the survey date is identified as April 3rd, 2002.

1       A.   Okay.  With an RV dealership, you would want to  
2 evaluate what are their franchise; RVs and motor homes.  You  
3 would want to evaluate are they sales only?  You would want to  
4 know if they're sales only or service only.  If they are  
5 involved in service, what is the involvement in training of  
6 their technicians, because there is completed operations  
7 coverage there, and how do they secure the RVs out in the lot?  
8 How do they handle, then, customer involvement with driving  
9 and utilizing the RVs?  And then the big exposure is then the  
10 delivery to the customer of the RVs.

11       Q.   How about materials handling?

12       A.   Materials handling, if they have a forklift, is the  
13 individual certified to utilize that forklift.  In their  
14 delivery of materials that comes in by semi or flatbed, how is  
15 that handled?  Is the forklift suitable for the capacity of  
16 the load?  And then the delivery into the parts department?

17       Q.   How would you determine if the forklift is suitable  
18 for the -- in terms of capacity for handling the load?

19       A.   You would have to look at the name plate date on  
20 that unit.

21       Q.   How would you know what the load is?

22       A.   Well, you would have to ask, "What is the typical  
23 load?"  If they suddenly now are unloading air conditioning  
24 units that weigh a lot, it is very possible that they could  
25 exceed that.

1 Q. So you would want to ask what the forklifts are  
2 being used for so you could determine their capacity.

3 A. Yes.

4 Q. Whether that capacity has been exceeded.

5 A. Well, you would want to make that observation. Is  
6 it material and what is the material in the warehouse?

7 Q. Generally speaking, you would look around the  
8 operation and you'd have to ask yourself and find out how the  
9 materials in that operation are moved around within the  
10 facility.

11 A. Is it manual handling or the forklift is used for  
12 loading and unloading semis.

13 Q. What is the forklift used for would be a question  
14 you'd want to know?

15 A. If it's not obvious.

16 Q. Okay. So the answer to that is yes?

17 A. Yes.

18 Q. Okay. So it would be absolutely wrong to say Sentry  
19 does not train its safety consultants to ask questions to get  
20 a full picture of what's going on at each risk?

21 A. We ask questions at risk.

22 Q. And Sentry trains its safety consultants to ask  
23 questions at risks?

24 A. We train them to ask questions.

25 Q. And the goal is to get a complete picture of what is

1 going on at the risk, correct?

2 A. As much as we can observe or has been told to us.

3 Q. By virtue of your questions?

4 A. That is correct.

5 Q. And what is going to be told is going to be based on  
6 your questions, correct?

7 A. Obviously. Obviously.

8 Q. And that is another aspect in which questions  
9 pertain to skill, because it's not just whether you integrate  
10 the questions conversationally, but it's also what questions  
11 you're asking.

12 A. Obviously.

13 Q. And therefore, what information you're getting in  
14 return.

15 A. Correct.

16 Q. And therefore, what hazards the safety consultant  
17 becomes aware of, correct? I need you to verbalize that.

18 A. What was the question?

19 Q. Could you read it back? The question at line 5  
20 through line 6, page 80, was read back by the court reporter.

21 A. By observation and by questions, we become aware of  
22 hazards and controls.

23 Q. And then, in turn, with that information, you can  
24 then make the safety recommendations that should be made for  
25 each risk.

1 A. Correct. We base that on observations and  
2 information provided to us.

3 Q. Okay. Including answers to the questions you asked,  
4 correct?

5 A. That would be correct.

6 Q. Did you ever tell the safety consultants in their  
7 training that it's okay to make assumptions if you don't have  
8 information?

9 A. That's a slippery slope. Do you ever? Official  
10 response is no, don't make assumptions.

11 Q. And unofficially?

12 A. I've already answered the question.

13 Q. The S-3 program improves upon the days of the blue  
14 file by forcing the inspector through a more detailed  
15 analysis. Would that be safe to say?

16 A. Well, let's just say that, since, as time passes, we  
17 become more educated and we provided more detail to our  
18 reports, more is expected of my employees. More is expected  
19 of me than there was ten years ago. That's just the nature of  
20 the business.

21 Q. In the current S-3 environment, do safety  
22 consultants at RV dealers get asked if they're using  
23 attachment on the forklifts?

24 A. That's not a specific request.

25 Q. Okay. Why not?

1 stipulate to what the tongue weight was (indiscernible).

2 MR. BREDICE: Okay. Well, I thought there was an  
3 objection.

4 MR. LYNCH: It is what it is.

5 THE COURT: Somebody tell us then.

6 BY MR. BREDICE:

7 Q. Would you agree with me that the tongue weight of this  
8 trailer was 1,340 pounds?

9 THE COURT: Or do you stipulate to that?

10 MR. LYNCH: I'll stipulate to it. That's what it  
11 is.

12 MR. BREDICE: Okay. Thanks. Then I'm -- that's all  
13 I wanted to establish. Thank you very much, sir.

14 THE WITNESS: Okay.

15 MR. LYNCH: I didn't realize that's what we were  
16 doing.

17 MR. BREDICE: I'm all set. Thank you.

18 THE COURT: Anything else?

19 MR. LYNCH: No. Thank you very much, Mr. Belanger.  
20 I appreciate your time, sir.

21 THE COURT: So leave what's not yours and take what  
22 you came with.

23 MR. LYNCH: This is mine. I did give you his  
24 (indiscernible).

25 THE WITNESS: Is there any reason for me to stay any

1 Q. What was your role in the Ragosta case?

2 A. I was an expert in fork trucks.

3 Q. For?

4 A. The plaintiff. And --

5 Q. And tell us what was being done with a fork truck in  
6 the Ragosta case.

7 A. Sir, I've been doing this for forty years, and in  
8 forty years, this is the only time I've heard of somebody  
9 pulling around an RV with a fork truck --

10 MR. BREDICE: (Indiscernible) Your Honor --

11 A. -- and it's the only time that I've heard of somebody  
12 trying to lift a heavy device with two fork trucks --

13 Q. (Indiscernible) --

14 A. -- as was the Ragosta case where people tried to lift  
15 a press brake which weighed about three tons with one fork  
16 truck on this side, one fork truck on this side. The press  
17 brake is about two feet in diam -- two feet wide, ten feet  
18 long and about eight feet high, so you can see it's not very  
19 stable, and they tried to lift it up on either end with a fork  
20 truck on either end.

21 Q. And that was not a fork truck's intended use, was it?

22 A. It is not a fork truck's intended use.

23 Q. Now, you're aware that RV dealers have to park RV's in  
24 tight spaces?

25 A. Not necessarily. They do, but not necessarily. It's

1 their choice that they put the RV's right up close to each  
2 other, next to each other --

3 Q. That's the --

4 A. -- but it's their choice to do that.

5 Q. And -- but that is an industry practice?

6 A. It is an industry practice. They -- yes.

7 Q. And when you go to an RV dealership, an inspector  
8 knows that because of that, pickup trucks aren't the only  
9 method the dealership is going to use to park RV's on its lot,  
10 right?

11 A. Correct.

12 Q. And so someone with knowledge of the RV industry would  
13 know that they would need something besides a pickup truck and  
14 a fifth-wheel to move RV's around on their lot, right?

15 A. They may, yes.

16 Q. Now, you have said -- rather, let me ask you this.  
17 Your inspection should take place during work activity,  
18 correct?

19 A. Correct.

20 Q. And that's because that way, the inspector can  
21 identify hazardous processes that might be in use at the risk,  
22 correct?

23 A. Correct.

24 Q. You didn't do an accident reconstruction in this case,  
25 correct?

1 you?

2 A. Well, do we need more?

3 Q. Okay. And in fact, this forklift was going backwards,  
4 wasn't it, when it tipped?

5 A. It was supposed to be, yes.

6 Q. Right. That was safe -- that was -- standard  
7 procedure is to go backwards?

8 A. Well, standard procedure, sir, when you are operating  
9 a fork truck for its intended purpose.

10 Q. Okay. Thank you. A safety inspector should  
11 familiarize himself with the processes used at the risk he's  
12 inspecting, correct?

13 A. Correct.

14 Q. Materials handling in industry is the number one  
15 producer of accidents, correct?

16 A. Well, yes, but you have to -- there's a caveat there,  
17 sir. Manual materials handling is the number one producer.  
18 By that, I mean lifting things manually. We get a lot of back  
19 injuries, shoulder injuries, elbow injuries. Materials  
20 handling from a fork truck standpoint is not a large accident  
21 producer in industry. Manual materials handling is.

22 Q. The safety of people on the premises is a top priority  
23 as regards the activities of an insurance loss prevention  
24 inspector, correct?

25 A. Correct.

1 Q. And the safety of employees in the context of a  
2 worker's compensation inspection is the top priority, correct?

3 A. While the inspector is there, yes. It also should be  
4 the top priority of the -- of the employer, Pete's RV.

5 Q. Sloppy inspections endanger lives, correct?

6 A. It could, yes.

7 Q. Safety inspectors know there are lapses in safety  
8 protocol on the part of the employers, correct?

9 A. Correct.

10 MR. BREDICE: Thank you.

11 THE WITNESS: Thank you, sir.

12 THE COURT: Mr. Lynch?

13 REDIRECT EXAMINATION

14 BY MR. LYNCH:

15 Q. Mr. Dodge, Attorney Bredice asked you if but for the  
16 attachment, this accident wouldn't have occurred? I think he  
17 asked you that?

18 A. He did, yes.

19 Q. Okay. But for Terry Shepard designing and  
20 manufacturing this attachment, would this accident have  
21 occurred?

22 A. Well, that's exactly where the attachment came from,  
23 sir. But for the attachment, the attachment came from the  
24 managers at Pete's RV, Mr. Terry Shepard.

25 Q. So but for Terry Shepard's actions, this accident

1 that they come in here now and things were new. Yet, they  
2 never did anything over the course of a couple of years since  
3 they gave their sworn deposition testimony, until they arrived  
4 here in court, to correct any of these alleged mistakes.

5 I thought it was right up in front here. Oh, it is  
6 right up in front here.

7 Remember Mr. McGinnis. And again, this is the survey  
8 of the property before the renovation. Remember Mr. David  
9 McGinnis' testimony. By the way, at David McGinnis'  
10 deposition, he never talked about any of these walk-arounds  
11 that he supposedly did with Gary Smith in anywhere near the  
12 detail that he showed up here in court and discussed with you.

13 But you know, he shows up in court and he tells you  
14 this story about what they did in some detail, which he'd  
15 never shared with anyone before. But anyway, his -- he tells  
16 you about an inspection. And during the inspection he  
17 describes a pretty thorough survey of a property by an  
18 insurance loss surveyor who's there for a limited amount of  
19 time in a limited purpose.

20 And he also -- you know, I think, much to the  
21 surprise, perhaps, of plaintiffs' counsel, he also indicated  
22 that this forklift -- and again, the testimony at trial is  
23 there was a designated spot. That was never the testimony  
24 before. But to the extent that there's a designated spot, he  
25 testified that the designated spot was over here around the

1 department consists of one oxygen acetylene unit, one  
2 forklift, and numerous power and hand tools. He also then  
3 talks about vehicles are used primarily within a fifty-mile  
4 radius to deliver service RVs, but there are four to six long  
5 trips a year. He then comments about the LP gas tank that's  
6 not protected. Okay? He talks about all of those things.

7 This is a good -- this is a good survey. This is a  
8 good inspection within the context of what this man is out  
9 there to do. There's nothing wrong with this inspection.  
10 There's nothing lacking from this inspection.

11 One of the major issues with RV dealers is the use of  
12 their pickup trucks and other vehicles when they drive around  
13 with RVs and trailers. They have car accidents. They have  
14 truck accidents. They have problems. So Mr. Smith spotted  
15 that. He commented on their use of their vehicles and the  
16 long trips that they take.

17 Another thing that he saw was he saw this problem  
18 with this LP gas tank. And you know, again, that is an  
19 incredibly, potentially serious problem. If a trailer coming  
20 around that corner ran into that LP gas tank, it could blow up  
21 the whole yard.

22 So after this he made recommendations. Again, he's  
23 there for about an hour. He walks around the place. He makes  
24 five substantive, solid recommendations to the people at  
25 Pete's RV, to help them with safety and to control their

1 distance you go out to get a percentage. So for example, if  
2 you go out -- like I put down there at the bottom a ten  
3 percent slope is equal to a ten foot drop over a one hundred  
4 foot distance. So seven percent slope would be a seven foot  
5 drop if you went out one hundred feet. But it's measuring  
6 those in different places.

7 I then continued down to ten, twenty and all that we see  
8 down here, list out to a hundred feet, which was almost all  
9 the way across the asphalt. Measured the slopes in percent.  
10 And as you can see, until we get out between forty and fifty  
11 feet, that's where the ramp steepness really is in that first  
12 fifty feet. And then it begins to flatten out. A bigger  
13 number in percent means a steeper slope.

14 Q. So it looks like your highest number in percent here  
15 is 9.6?

16 A. Right.

17 Q. Can you try to tell the ladies and gentlemen of the  
18 jury what that means in layman's terms?

19 A. Well, I'm not sure about Vermont, but I know where I  
20 live that when you go through the mountains and the freeways  
21 and the highways and so on, a six percent slope is a pretty  
22 steep slope, and that's usually where they have big signs that  
23 say there's a six percent slope ahead. Trucks need to slow  
24 down and take caution at that angle.

25 So a nine percent slope is half again as steep as a six

1 percent slope. Six percent is about as steep as you will see  
2 on any public highway. You might see steeper than that on a  
3 side street or so on. But on major highways, six percent is a  
4 pretty steep grade. This is a relatively steep ramp going up  
5 into this facility.

6 Q. And is it fair to say -- you did these measurements,  
7 right --

8 A. Yes.

9 Q. -- with an inclinometer and a tape measure, correct?

10 A. Yes.

11 Q. Is it fair to say that those measurements are more  
12 accurate than perhaps a photograph, which tends to flatten  
13 things out?

14 A. Well, a pho --

15 MR. BREDICE: Objection, Your Honor. I'm not sure  
16 that that's within this expert's area.

17 THE COURT: Sustained. Leading.

18 Q. Can you explain which is a better way of representing  
19 the slope --

20 MR. BREDICE: Objection.

21 Q. -- either measuring it or taking pictures of it?

22 MR. BREDICE: Objection, Your Honor. We're talking  
23 about his opinion on photographs, photography, depth of field,  
24 that sort of thing.

25 THE COURT: Sustained without more foundation.

1 THE COURT: Mr. Bredice?

2 MR. BREDICE: They did increase the risk of the harm.  
3 By failing to give the warning they left Pete's in a position  
4 to continue using the same procedure.

5 THE COURT: But how is that an increase? It just  
6 left them doing exactly what they were doing.

7 MR. BREDICE: Because was resulted -- what resulted  
8 was they transferred the same procedure from the Toyota, which  
9 was bigger and had more capacity, in ignorance of the issues  
10 that we just talked about, over to the Yales, which did make  
11 it more dangerous. The Yale being smaller and more subject to  
12 destabilization.

13 I think the experts have all said that all that.

14 THE COURT: Why isn't that good enough?

15 MR. LYNCH: Well, Sentry did not do anything that  
16 increased the risk of harm, Pete's did after Smith had left,  
17 never saw it, never was there, had any reason to know about  
18 it. So they didn't do anything to increase the risk of harm.

19 The risk of harm when Smith showed up there that day  
20 was the same after he left. You know, that Pete's goes out  
21 and does twenty million other things --

22 THE COURT: Okay, but if -- you know, if I'm sitting  
23 in this chair and you know it's a dangerous chair and you  
24 don't tell me that, and so then we buy twenty for everybody  
25 else in the courtroom, and you fall over in one of those new

1 chairs and break your back, haven't we increased the risk by  
2 getting more of those chairs because we didn't know there was  
3 problem?

4 MR. LYNCH: Well, Your Honor, I mean, the chain of  
5 causation gets more and more and more and more and more and  
6 more tenuous.

7 THE COURT: Well, that may be true. But there's at  
8 least an argument there, isn't there? Which is all he needs  
9 for now.

10 MR. LYNCH: Well, Your Honor, I don't think there's  
11 any evidence that anything that Gary Smith did increased the  
12 risk of harm in this case.

13 THE COURT: Okay. Well, again, I think it's for the  
14 jury to consider.

15 MR. LYNCH: Also, Your Honor, one of the other  
16 elements of the Restatement is that either Pete's or Murphy  
17 had to rely upon anything done by Sentry. And Mr. Shepard --  
18 none of the people from Pete's testified about that. Mr.  
19 Shepard didn't say anything about it in his testimony. And I  
20 don't believe that David McGinnis gave any reliable testimony  
21 on that.

22 So I don't think there's been any testimony or  
23 evidence put into this case that --

24 THE COURT: No reliable testimony on reliance?

25 MR. LYNCH: Pardon me? Yes.

1 Q. Good morning. Would you please remind the jury who  
2 you are and what you do?

3 A. Sure. My name is Louis Cooper, and I work for Pete's  
4 RV as a salesman.

5 Q. And how long have you worked for Pete's, once again,  
6 just to remind the jury?

7 A. About twelve years.

8 Q. Okay. Have you ever, during the course of your  
9 working at Pete's RV, had a chance to observe the forklift  
10 while it as being serviced by Northern Lift Truck at any time  
11 before Mr. Murphy's accident?

12 MR. LYNCH: Objection, leading.

13 THE COURT: Overruled.

14 MR. BREDICE: He could answer it yes or no -- thank  
15 you.

16 A. Yes.

17 Q. Where was the attachment when you watched Northern  
18 Lift Truck work on the forklift?

19 A. On the forks themselves.  
20  
21  
22  
23  
24  
25

1

2 Q. Have you ever had a chance -- have you ever been  
3 asked by Petę's to take any action after an insurance  
4 workplace safety inspection in the '02/'03 time period?

5 A. Yes, we have.

6 Q. What was it that you were asked to do?

7 A. Well, usually what would happen is after the  
8 inspector left, there'd be a list of things he recommended  
9 that we correct, so Dave would give us the list and we'd make  
10 all the corrections.

11 Q. Immediately?

12 A. It was within a day or two, yeah.

13 MR. BREDICE: Thank you very much. That's all I  
14 have.

15 THE COURT: Mr. Lynch?

16 MR. LYNCH: Your Honor, may we approach?

17 THE COURT: You may.

18 (Bench conference on the record with Mr. Bredice and Mr.  
19 Lynch.)

20 THE COURT: Yes?

21 MR. LYNCH: That went well beyond what you had ruled  
22 that he could question him about.

23 THE COURT: How so?

24 MR. LYNCH: Because he questioned him about -- he was  
25 only going to question him about the Northern Lift Truck

1 THE CLERK: You may be seated.

2 THE COURT: Welcome back, ladies and gentlemen. Same  
3 question as usual: anything happen at lunch I need to know  
4 about?

5 Okay. So we are at this point ready for the closing  
6 arguments from the lawyers, and then I will read you my final  
7 instructions. We'll begin with Mr. Bredice for the plaintiff.

8 MR. BREDICE: Thank you, Your Honor.

9 Good afternoon. Two weeks ago I stood right about  
10 here and gave you our opening statement. I talked about what  
11 we said the facts would show. That was a promise. The facts  
12 have borne out what we said they would be. Now to the case.

13 The first thing that we have to prove is the  
14 existence of a duty. You've heard and seen a disclaimer from  
15 the insurance policy. However, the Court will instruct you  
16 that the terms of those contracts do not alone define the duty  
17 that Sentry owed to Mr. Murphy. You may consider the language  
18 in the insurance policies and the loss prevention reports in  
19 deciding whether a duty existed, and the breadth and scope of  
20 that duty. You may also consider other evidence in this case,  
21 including the course of conduct involved.

22 Taking a look at this course of conduct. Hazard  
23 surveillance survey: this is what Sentry sold to Pete's. The  
24 definition of hazard is source of danger. Surveillance is  
25 close watch kept over someone or some thing. Survey --

1 MR. LYNCH: Your Honor, could I just ask what the  
2 basis of this chart is?

3 THE COURT: I can't actually see it, so why don't you  
4 show me.

5 MR. BREDICE: Merriam Webster.

6 MR. LYNCH: Those are definitions out the dictionary?

7 THE COURT: Definitions from the dictionary.

8 MR. LYNCH: Okay.

9 THE COURT: You okay with that?

10 MR. LYNCH: I just I didn't know what that was.

11 THE COURT: Yeah.

12 MR. BREDICE: Survey, to view or consider  
13 comprehensively.

14 You remember Gary Smith's (ph.) card, you remember  
15 the language of the letters. They specifically say that it's  
16 to assist you -- meaning Pete's -- in your safety program.  
17 You saw the fine print on the letters that talk about  
18 conditions and exposures at the site at the time of the  
19 inspection. You heard Gary Smith and Dale Marzinski (ph.) --  
20 or you heard and read that they knew the purpose of these  
21 visits was to promote safety at Pete's, and that that's what  
22 they told Pete's. They also deliberately cultivated Pete's  
23 confidence in their services and in their expertise. These  
24 facts take us outside the disclaimer.

25 Despite what it says in the disclaimer, Sentry

1 affirmatively undertook to provide an advisory service --  
2 advisory, to give advice -- for the purpose of safety, held  
3 itself out as having special expertise, made an appointment to  
4 do a safety consultation and hazard surveillance survey, told  
5 the employer that it was helping it with its safety activities  
6 and made specific recommendations.

7 Gary Smith did not go to Pete's and say I'm here to  
8 check things out for the underwriting department for Sentry's  
9 own benefit and not yours, I'm going to make a lot of  
10 assumptions, I don't know anything about the RV industry, and  
11 don't expect me to really mean it when I inspect your  
12 operations and make safety recommendations. They presented  
13 this as a bona fide hazard surveillance survey: the  
14 disclaimer is null. You have the power to make it go away.  
15 Sentry assumed a duty to help Pete's provide a safe workplace.

16 The second thing we have to show you is what that  
17 duty was. It's also known as the standard of care. The Court  
18 will tell you that if you find that Sentry undertook a duty to  
19 provide safety services to Pete's RV then Sentry was required  
20 to exercise reasonable care in doing so in the first  
21 inspection. And in the second inspection they're liable if  
22 they were grossly negligent, which is an extreme departure  
23 from reasonable care.

24 You can think of these concepts as rules of the road.  
25 Both liability experts -- ours, Mr. Jay Preston (ph.), theirs,

1 process, the same attachment -- or the same type of  
2 attachment, the same people, the same violation and the same  
3 hazard, but on smaller machines. For this reason, as Jay  
4 Preston said, Sentry's failure to warn increase a danger that  
5 was already existing. If that's what you find, Sentry is  
6 liable.

7 Another alternative is that you may find Sentry is  
8 liable because it -- as I mentioned earlier, by virtue of its  
9 course of conduct, by stepping forward and affirmatively  
10 offering loss-prevention services, by saying we're here to  
11 help you with safety. If they assumed by doing that a part of  
12 Pete's duty to provide a safe workplace, there's another  
13 basis. And that's exactly what happened in this case.

14 They brought themself -- they stepped forward, gave an  
15 advisory service, held themselves out as having special  
16 expertise, made an appointment to do a safety consultation,  
17 told the employer it was helping it with its safety  
18 activities, and made specific safety recommendations. In this  
19 way they took over part of Pete's duty, assumed it -- part of  
20 it -- to provide a safe workplace.

21 Thirdly, you may find Sentry liable if Pete's relied  
22 on Sentry's actions, and because of that reliance Pete's chose  
23 not to take precautions or make changes against the risk of  
24 harm. Again, that's exactly what happened here in this case.  
25 By getting Pete's to trust and rely on their safety expertise

1 and then overlooking the unsafe equipment during the  
2 inspection, Sentry left Pete's to continue using the same  
3 process in the belief that there was nothing wrong with it.  
4 Sentry had the superior expertise, a better understanding of  
5 the risk, and specific knowledge about the VOSHA provision.  
6 Pete's lacked these things, but believed Sentry when it talked  
7 about its safety sciences and safety services program.  
8 There's a third basis to find that the breach of the duty  
9 caused the harm in this case.

10 And when you get to question number 4 you can check  
11 yes: "were the actions or omissions of Gary Smith the legal  
12 cause of Chris Murphy's death?". And so Sentry resorts to yet  
13 another strategy; claim Pete's would not have obeyed a warning  
14 if one had been given. First, there's no defense to speculate  
15 about whether an employer would have heeded a safety warning  
16 where none is given. With that in mind, let's take a look at  
17 the evidence.

18 The only thing that Sentry can point to is its own  
19 salesman's claim that in July of 2008 Terry Shepherd gave the  
20 impression that Pete's needed to keep using the Toyota, but  
21 that was when Pete's -- this is three weeks after the  
22 accident. That was when Pete's was still trying to get  
23 approval for the attachment. They immediately did what it was  
24 they were told they were supposed to do: go out and try to  
25 get this attachment approved. They followed Sentry's advice.