

2/6/2004

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
Civil Action No. 02-01159A

MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, )  
HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD )  
AND NEXT FRIEND, REBECCA RHODES, )

Plaintiffs, )

v. )

CARLO ZALEWSKI, DRIVER LOGISTICS, PENSKE TRUCK )  
LEASING CORP., and BUILDING MATERIALS CORP. OF )  
AMERICA d/b/a GAF MATERIALS CORP., )

Defendants, )

v. )

TOWN OF MEDWAY, and JERRY MACMILLIAN'S )  
PROFESSIONAL TREE SERVICE, )

Third-Party Defendants. )

**THIRD AMENDED  
COMPLAINT**

**INTRODUCTION**

This action arises out of a motor vehicle accident on January 9, 2002. Plaintiff, Marcia Rhodes was stopped on Route 109 in Medway, Massachusetts when she was struck from behind by a truck driven by, and under the control of, the Defendants. As a result, Ms. Rhodes has suffered great damages for personal injury and property damages, as she was hospitalized for three months and remains permanently paralyzed. In addition, Harold Rhodes and Rebecca Rhodes have lost the consortium of their wife and mother, respectively.

## PARTIES

1. The plaintiffs, Marcia, Harold and Rebecca Rhodes are all individuals who reside at 11 Janock Road, Milford, Massachusetts.

2. The plaintiff, Harold Rhodes, has been married to Marcia Rhodes since April 16, 1983.

3. The plaintiff, Rebecca Rhodes, is the 14-year old daughter of Marcia Rhodes.

4. The defendant, Carlo Zalewski is an individual residing at 50 Beacon Light Avenue, Keansburg, New Jersey. On January 9, 2002, Carlo Zalewski was employed by Defendant Driver Logistics.

5. The defendant, Driver Logistics, upon information and belief, is incorporated in Kentucky with a usual place of business at 134 Main Street, West Springfield, Massachusetts. Driver Logistics is a professional driver leasing and transportation management company. Upon information and belief, Driver Logistics leased Defendant Zalewski's services to GAF Materials Corp.

6. The defendant, Building Materials Corp. of America d/b/a GAF Materials Corp. ("GAF"), is a company incorporated in Delaware, with its world headquarters in Wayne, New Jersey, and a usual place of business at 60 Curve Street, Millis, Massachusetts.

7. Defendant GAF, upon information and belief, directed Defendant Zalewski's daily driving activities.

8. Defendant GAF leased the tractor-trailer that Defendant Zalewski was driving on January 9, 2002 from Penske Truck Leasing Corp.

9. The defendant, Penske Truck Leasing Corp. ("Penske"), is incorporated in Delaware, with a usual place of business at 1800 Hylton Road, Pennsauken, New Jersey.

10. Defendant Penske is the registered owner of the tractor-trailer that Carlo Zalewski was driving on January 9, 2002. Upon information and belief, Defendant Penske leased the tractor-trailer to Defendant GAF.

### **THE ACCIDENT**

11. At approximately 1:12 p.m., on January 9, 2002, Marcia Rhodes was driving a Toyota Corolla Eastbound on Route 109 in Medway, Massachusetts.

12. On or about the same time, because of the tree removal or stump-grinding work on or beside the road, a Medway Police officer stopped traffic from the Eastbound lane in order for traffic from the Westbound lane to safely pass.

13. Ms. Rhodes, at the direction of said officer, stopped her car in the Eastbound lane of Route 109 at or near the intersection of Trotter Drive, and waited for further direction.

14. On or about the same time, Defendant Zalewski was also travelling Eastbound on Route 109. He was driving an 18-wheel tractor-trailer.

15. Defendant Zalewski failed to stop behind Marcia Rhodes, and drove into Marcia Rhodes' car, causing it to be violently pushed across the lane and into the wooded area on the side of Route 109.

16. The collision caused the car to careen into the woods and sustain substantial and total damage prior to coming to rest in the wooded area lining the southern boundary of Route 109.

17. Ms. Rhodes' car crumpled upon impact and she had to be removed from the vehicle with the "Jaws of Life" by the Medway Fire Department.

18. Ms. Rhodes was initially transported to Milford Hospital in Milford, Massachusetts and was subsequently transferred to the University of Massachusetts Medical Center because of the severity of her injuries.

19. Ms. Rhodes sustained, among other injuries, 7 broken ribs, injuries to her lungs and a burst fracture to section T12 of her spinal cord.

20. Ms. Rhodes remained hospitalized for three months and will be paralyzed for the rest of her life.

**COUNT I**  
**(G.L. c. 228, § 1 – Negligence)**  
**(Carlo Zalewski)**

21. Plaintiff Marcia Rhodes repeats and realleges the allegations in paragraphs 1 through 20 above.

22. Defendant Zalewski owed Marcia Rhodes a duty to use reasonable care in operating the tractor-trailer on Route 109 on the afternoon of January 9, 2002.

23. Zalewski's failure to observe the road or otherwise stop as he approached Ms. Rhodes' car represent breaches of his duty of care.

24. Defendant Zalewski caused and is directly liable for the injuries to Marcia Rhodes as a direct and proximate result his negligence.

25. Plaintiff Marcia Rhodes has suffered and will continue to suffer damages as the result of Defendant Zalewski's negligence.

**COUNT II**  
**(G.L. c. 228, § 1 – Negligence)**  
**(Driver Logistics )**

26. Plaintiff Marcia Rhodes repeats and realleges the allegations in paragraphs 1 through 25 above.

27. Defendant Zalewski was acting within the scope of his employment at the time of the accident.

28. Defendant Driver Logistics is liable for the injuries to Marcia Rhodes as a direct and proximate result of the negligence of its employee, Defendant Zalewski.

**COUNT III**  
**(G.L. c. 228, § 1 – Negligence)**  
**(GAF Materials Corp.)**

29. Plaintiff Marcia Rhodes repeats and realleges the allegations in paragraphs 1 through 28 above.

30. GAF is an interstate motor carrier under the Interstate Commerce Act, 49 U.S.C. § 13102(12).

31. Pursuant to the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 14102, the Federal Motor Carrier Safety Regulations, 49 C.F.R. § 376.12, and the lease between GAF and Penske, GAF is responsible for the operation of the tractor-trailer leased from Penske and driven by Zalewski.

32. Pursuant to the applicable regulations and the lease, GAF is Defendant Zalewski's statutory employer.

33. As Zalewski's statutory employer, GAF is vicariously liable for the negligence of Defendant Zalewski.

34. The plaintiffs have suffered and will continue to suffer damages as the result of defendant's negligence.

**COUNT IV**  
**(Negligence in Exercising Control of Independent Contractor)**  
**(GAF Materials Corp./Penske Truck Leasing Corp.)**

35. The plaintiffs repeat and reallege the allegations in paragraphs 1 through 34 above.

36. The defendants' conduct in exercising control over the contractors with whom they entrusted operation of an 18-wheel tractor trailer was negligent.

37. The defendants, GAF Materials Corp. and Penske Truck Leasing Corp. caused and are liable for the injuries to Marcia Rhodes as a direct and proximate result of their failure to use reasonable care in exercise of control over the manner in which the tractor-trailer was operated.

38. The plaintiffs have suffered and will continue to suffer damages as the result of defendant's negligence.

**COUNT V**  
**(G.L. c. 231 § 85A – Owner's Responsibility for Operation of Motor Vehicle)**  
**(Penske Truck Leasing Corp.)**

39. The plaintiffs repeat and reallege the allegations in paragraphs 1 through 38 above.

40. Defendant Penske is the registered owner of the tractor-trailer that smashed into Ms. Rhodes' car.

41. Defendant Penske is legally responsible for the conduct of the driver of the tractor trailer, Defendant Zalewski, and liable for the injuries to Marcia Rhodes as a direct and proximate result of the manner in which it allowed the tractor-trailer to be operated.

42. Plaintiffs have suffered and will continue to suffer damages as the result of Defendant Penske's conduct.

**COUNT VI**

**(Negligence – Failure to Maintain/Repair - Penske Truck Leasing Corp.)**

43. The plaintiffs repeat and reallege the allegations in paragraphs 1 through 42 above.

44. Defendant Penske is the registered owner of the tractor-trailer that smashed into Ms. Rhodes' car.

45. Defendant Penske was solely responsible for maintaining and repairing both the tractor and trailer under a preventative maintenance program.

46. Penske owed a duty to the driving public, including Mrs. Rhodes, to maintain the tractor-trailer in a manner that allowed for its safe operation.

47. Defendant Penske breached this duty by failing to maintain and repair the brakes of the tractor-trailer. The driver, defendant Zalewski, identified the brakes as suffering from a defect or failure at the time of the accident. The Massachusetts State Police Commercial Vehicle Enforcement Unit examined the tractor-trailer and concluded that the right brake on axle number 5 was inoperable at the time of the accident, and issued a citation for this violation.

48. Penske's breach of its duty was a contributing factor in causing both the accident, and the severity of Mrs. Rhodes' injuries.

49. Plaintiffs have suffered and will continue to suffer damages as the result of Defendant Penske's negligence.

**COUNT VII**

**(Harold Rhodes - all defendants)**

**(Loss of Consortium)**

50. Plaintiff Harold Rhodes repeats and realleges the allegations in paragraphs 1 through 49 above.

51. The defendants' conduct was negligent and caused the life-altering injuries suffered by Marcia Rhodes.

52. Harold Rhodes is entitled to recover damages from each of the defendants because he has suffered the loss of the services, protection, care, assistance, society, companionship, comfort, guidance, and advice of Marcia Rhodes as a result of her injuries.

**COUNT VIII**  
**(Rebecca Rhodes - all defendants)**  
**(Loss of Consortium)**

53. Plaintiff Rebecca Rhodes, through her father, Harold Rhodes, repeats and realleges the allegations in paragraphs 1 through 52 above.

54. The conduct of the defendants was negligent and caused life-altering injuries suffered by Marcia Rhodes.

55. Rebecca Rhodes, through her father Harold Rhodes, is entitled to recover damages from each of the defendants because she has suffered the loss of parental society, services, protection, care, assistance, psychological and economic dependence, comfort, guidance, and advice of her mother, Marcia Rhodes, as a result of her injuries.

**DEMAND FOR RELIEF**

WHEREFORE, the plaintiffs, Marcia, Harold and Rebecca Rhodes respectfully request that this Court:

1. Enter judgment in favor of plaintiff Marcia Rhodes under Counts I - VI for damages suffered by her, including but not limited to pain and suffering, medical costs, lost earning capacity and damage to her vehicle, in an amount to be proven at trial;
2. Enter judgment in favor of plaintiffs Harold Rhodes and Rebecca Rhodes under Counts VII - VIII for damages suffered by them, in an amount to be proven at trial; and
3. Enter such other and further relief as is just and reasonable.



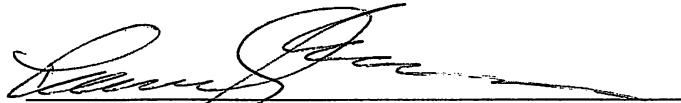
**DEMAND FOR JURY TRIAL**

The plaintiffs hereby demand a jury trial on all such triable issues pursuant to Mass. R.

Civ. P. 38(b).

MARCIA RHODES, HAROLD RHODES,  
INDIVIDUALLY, HAROLD RHODES,  
ON BEHALF OF HIS MINOR CHILD  
AND NEXT FRIEND, REBECCA RHODES,

By their attorneys,



M. Frederick Pritzker (BBO #406940)  
Margaret M. Pinkham (BBO #561920)  
Carlotta M. Patten (BBO #641035)  
Daniel J. Brown (BBO #654459)  
BROWN RUDNICK BERLACK ISRAELS LLP  
One Financial Center  
Boston, MA 02111  
(617) 856-8200

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