

COPY

February 6, 2004

VIA FIRST CLASS MAIL

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RE: Marcia Rhodes, Harold Rhodes, et al. v. Carlo Zalewski, et al.
Norfolk Superior Court, Civil Action No.: 02-01159

Dear Counsel:

Pursuant to Superior Court Rule 9A(a), enclosed please find *Plaintiffs' Motion to Amend Complaint* and attachments.

In accordance with Rule 9A, this motion has not yet been filed with the Court.

Please be advised that in the event you intend to oppose this motion, under Superior Court Rule 9A(b) you are required to serve on this office an original and a copy of the opposition and the other documents you intend to submit in accordance with Superior Court Rule 9A(a)(2) within the times therein provided.


If you have any questions, please feel free to call me.



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Very truly yours,

BROWN RUDNICK BERLACK ISRAELS LLP

By: 
Daniel J. Brown

Enc.

cc: M. Frederick Pritzker, Esq.
Margaret M. Pinkham, Esq.

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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.)

PLAINTIFFS' MOTION TO AMEND COMPLAINT

In accordance with Mass. R. Civ. P. 15(a), the plaintiffs seek leave to amend and file a Third Amended Complaint to assert a claim for negligence based on vicarious liability against the defendant Building Materials Corp. of America d/b/a GAF Materials Corp. ("GAF"). In support of this motion, the plaintiffs state as follows:

1. On or about July 12, 2002, plaintiffs filed the Complaint in this matter seeking damages from defendants for the catastrophic injuries suffered by Marcia Rhodes on January 9, 2002, when the tractor-trailer driven by defendant Carlo Zalewski crashed into the back of her car.
2. Zalewski was driving a tractor-trailer owned by Penske Truck Leasing Corp. ("Penske") but leased to GAF. GAF was "providing motor vehicle transportation for compensation," and was therefore, a motor carrier under the Interstate

Commerce Act. 49 U.S.C. § 13102(12) (1997); see 30(b)(6) Deposition of Building Materials Corp. of America d/b/a GAF Materials Corp. by Carlo Melia, p. 82, l. 6-8, p. 84, l. 3-4, attached hereto as Exhibit A.

3. As a motor carrier, GAF is subject to the Federal Motor Carrier Safety Regulations, 49 C.F.R. Part 376 ("FMCSR"). Pursuant to the FMCSR, lease agreements for vehicles must:

[P]rovide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee *shall assume complete responsibility for the operation of the equipment for the duration of the lease.*"

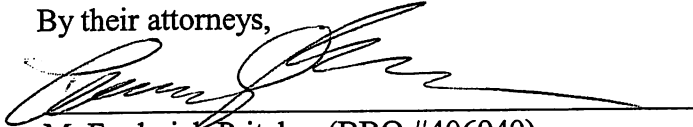
49 C.F.R. § 376.12(c)(1) (emphasis added).

4. This regulation creates a statutory relationship between the motor carrier, GAF, and the driver, Zalewski, whereby GAF is vicariously liable for Zalewski's negligence. E.g., Planet Ins. Co. v. Transport Indem. Co., 823 F.2d 285, 288 (9th Cir. 1987) (affirming district court's determination that motor carrier's insurer was responsible for losses because driver was motor carrier's statutory employee); Simmons v. King, 478 F.2d 857, 866 (5th Cir. 1973) (reversing judgment in motor carrier's favor on ground that lease provision and regulations created statutory relationship between motor carrier and driver whereby motor carrier would be vicariously liable for driver's negligence); Graham v. Malone Freight Lines, Inc., 948 F. Supp. 1124, 1132-33 (1996) (discussing the statutory employment doctrine which makes carrier-lessee liable for accidents while lease is in effect), clarified on reconsideration, 43 F. Supp. 2d 77, aff'd, 314 F.3d 7 (1999).
5. This Court should grant the plaintiffs' motion because leave to amend "shall be freely given when justice so requires." Mass. R. Civ. P. 15(a). Justice so requires in this case because plaintiffs should be allowed to put defendants on notice of the applicable statutes and statutory employment doctrine that make GAF vicariously liable for Zalewski's negligence. Allowing this amendment will further serve to avoid any potential claim that consideration of the statutory employment doctrine should be precluded based on lack of notice.
6. No party to this case will be prejudiced by allowing this motion because no further discovery will be required by the vicarious liability claim. Because there will be no prejudice to the defendants, there is no reason that the amendment should not be allowed.

WHEREFORE, the plaintiffs respectfully request that the Court allow this Motion to Amend as justice so requires. Attached hereto as Exhibit B is the proposed Third Amended Complaint and demand for jury trial.

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

By their attorneys,



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DATED: February 6, 2004

CERTIFICATE OF SERVICE

Counsel for plaintiffs hereby certifies that a copy of the foregoing Motion to Amend Complaint, with attachment, was served via first class mail to the following counsel this 6th day of February, 2004:

By First Class Mail

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