

## STATE OF MINNESOTA

## IN COURT OF APPEALS

MICHAEL TIERNEY  
as Trustee for the Surviving Dependent  
Spouse, Heirs and Next-of-Kin  
of HARLAN FICKEN, Decedent,

Appellant,

v.

ARROWHEAD CONCRETE WORKS,  
INC., J.L. CARLSON AND  
ASSOCIATES, INC., and  
ALAN SELINE,

Respondent.

TRIAL COURT FILE NO:  
69DU-CV-09-153

APPELLATE COURT CASE NO:  
A10-557

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**APPELLANT'S REPLY BRIEF AND APPENDIX**

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Mark L. Knutson, Esq.  
Attorney Reg. No. 57149  
Dryer Storaasli Knutson &  
Pommerville, LTD  
202 W. Superior Street, Ste. 200  
Duluth, Minnesota 55802  
Telephone: 218/727-8451  
Facsimile: 218/727-6081

Attorneys for Appellant

Deborah C. Eckland  
Attorney Reg. No. 201881  
Goetz & Eckland P.A.  
Exposition Hall at Riverplace  
43 Main Street S.E., Ste. 505  
Minneapolis, Minnesota 55414  
Telephone: 612/874-1552  
Facsimile: 612/331-2473

Attorneys for Respondent

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## INTRODUCTION

Plaintiff and Appellant submit this reply Memorandum in response to the Memorandum submitted by J.L. Carlson in this appeal. The Plaintiff will not labor to repeat the authority cited in Plaintiff's primary Memorandum. If Plaintiff does not address authority cited in Respondent's Memorandum, that is not an indication that Plaintiff agrees with Respondent's arguments.

Plaintiff and Appellant submit that the Trial Court's Order should be reversed. Plaintiff should be allowed to proceed with the claims against J.L. Carlson, based upon violations of federal law. Such claims are authorized by federal law and are not barred by the state Worker's Compensation Act. The Federal Supremacy Clause and governing case law prevent the Minnesota Worker's Compensation Act Exclusivity Provision contained in M.S. 176.031 from barring federal causes of action. Moreover, to allow the Minnesota Worker's Compensation Act to bar the federal cause of action would impermissibly interfere with the goals of the federal law and its enforcement.

## STATEMENT OF FACTS

The Statement of Facts set forth in Appellant's Brief will not be repeated in detail. While Respondent does not admit the allegations in Plaintiff's Complaint, Respondent acknowledges that Plaintiff has plead violations of federal law, specifically 49 U.S.C. § 101, et sec, including 49 U.S.C. § 14704 and 49 U.S.C. §14707. Appellant acknowledges that Plaintiff has claimed negligence on the part of Respondent in the nature of defective brakes and suspension of the tractor and trailer which caused Harlan Ficken's death.

Plaintiff's expert, Michael Long, identifies violations of the federal statutes and regulations enacted under 49 U.S.C. Subtitle IV, Interstate Transportation, Part B, dealing with Motor Carriers. See Appellant's Brief Appendix 99-122 and especially 111-118. He identified those defects and violations of statutes and regulations as the cause of the accident and Harlan Ficken's death.

Appellant's expert, William Elkin, also identifies defects in the tractor and the trailer which caused the accident and Harlan Ficken's death. He also says that J.L. Carlson violated federal law. See Appellant's Brief Appendix 123-135.

Plaintiff therefore claims that violations of federal statutes and regulations enacted under 49 U.S.C. Subtitle IV, Part B, dealing with Motor Carriers, were the proximate cause of Harlan Ficken's death. Therefore, Plaintiff claims that Respondent is liable to Plaintiffs for their damages under a private cause of action brought under 49 U.S.C. § 14704 and § 14707.

### ARGUMENT

#### I.

**THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT, HOLDING IN ERROR THAT NEITHER 49 U.S.C. 14704, NOR 49 U.S.C. 14707, CREATE A PRIVATE CAUSE OF ACTION FOR PLAINTIFF'S DAMAGES. THE LANGUAGE OF 49 U.S.C. 14704 AND 49 U.S.C. 14707 IS NOT AMBIGUOUS AND ESTABLISHES A PRIVATE CAUSE OF ACTION FOR PLAINTIFF'S DAMAGES IN THE PRESENT CASE.**

Respondent claims that 49 U.S.C. § 14704 and 49 U.S.C. § 14707 were ambiguous and did not clearly allow Plaintiff's private cause of action. Appellant will not reiterate the cases previously cited regarding the interpretation of statutes. These two statutes are clear and unambiguous and establish Plaintiff's right to bring these claims.

The structure of 49 U.S.C. Subtitle IV is important in reviewing the statute. The structure is stated below. 49 U.S.C. Subtitle IV has three subdivisions. Part B deals with Motor Carriers. Section 14704 and Section 14707 are part of Part B. Therefore, the statement in 14704 that a carrier "is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part" necessarily refers to violations of Part B. There is no other "part" to which that refers. This Statute therefore provides a private cause of action for any person sustaining damages a result of violation of Part B. Part B includes authorizations for regulations in 49 U.S.C. 31101,

31138, 31139, 31301, 13301, 13902, 31133, 31136, 31144, 31151, 311502, 311504, etc. Part B includes findings that the Statutes were enacted in part to ensure safety, including the safety of drivers. 49 U.S.C. 13101.

The language of 49 U.S.C. § 14704 is therefore clear. It provides a broad right of persons injured as a result of violations of Part B, including its violations of its regulations, to bring a claim for damages. 49 U.S.C. § 14704 does not limit the definition of “person.” 49 U.S.C. § 14704 does not limit the definition of “damages.” The Statute could hardly be more clear. The structure of 49 U.S.C. Subtitle IV is as follows:

49 U.S.C. CHAPTER 147 - ENFORCEMENT; REMEDIES 01/05/2009  
TITLE 49 - TRANSPORTATION  
SUBTITLE IV - INTERSTATE TRANSPORTATION  
PART B - MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND  
FREIGHT FORWARDERS  
CHAPTER 147 -ENFORCEMENT; INVESTIGATIONS; RIGHTS;  
REMEDIES

- 14701. General authority.
- 14702. Enforcement by the regulatory authority.
- 14703. Enforcement by the Attorney General.
- 14704. Rights and remedies of persons injured by carriers or brokers.
- 14705. Limitation on actions by and against carriers.
- 14706. Liability of carriers under receipts and bills of lading.
- 14707. Private enforcement of registration requirement.
- 14708. Dispute settlement program for household goods carriers.
- 14709. Tariff reconciliation rules for motor carriers of property.
- 14710. Enforcement of Federal laws and regulations with respect to transportation of household goods.
- 14711. Enforcement by State Attorney General.

49 U.S.C. § 14707 is similarly clear. It provides that a person may bring a civil action to enforce a violation of §§ 13901-13904 or 13906. As noted in the prior Memorandum, these sections require registrations. Registration requires compliance with the regulations, including safety

regulations. 49 U.S.C. 13902(a)(1) and 13902(a)(5). Violation of the regulations therefore establishes a violation of 49 U.S.C. § 14707. The case law previously cited establishes that this is the case. The purpose of the Act is to assure the safety of drivers and others. The only way provided by the statutes to do so is for the carriers to comply with the regulations regarding brakes and other vehicle requirements as well as requirements regarding record keeping, hours of driving and the other requirements that help assure the safety of drivers and others. Merely being a registered carrier does nothing by itself to accomplish the goals of the statutes and regulations of assuring safety. The Respondent agrees that a violation of regulations establishes a cause of action. See page 10 of Appellant's brief. The only dispute that Respondent has with Plaintiff is that Defendant claims that a violation of regulations that only leads to commercial damage is the only allowed cause of action. Respondent claims that damages to individuals, not in the nature of commercial damages, are not recoverable. There is absolutely nothing in the language of the statute that establishes this. Respondent has failed to cite anything in the Congressional History which leads to this conclusion.

It is provided in 49 U.S.C. § 30103 that the states can not abrogate the federal statutes such as 49 U.S.C. Subtitle IV Part B, dealing with the present interstate trucking statutes and regulations. This is consistent with the conclusion reached in Byrne v. Board of Education, School District of West Allis-West Milwaukee, 53 F.E.P. Cases, 551, 1989 WL 120646 (E.D. Wisc. 1989) on supremacy grounds and the language of the statutes reviewed there. The text of 49 U.S.C. 30103 specifically deals with Preemption and provides that these statutes preempt state laws that are less restrictive than the federal laws. That language is as follows:

Sec. 30103. Relationship to Other Laws

1. UNIFORMITY OF REGULATIONS The Secretary of Transportation may not prescribe a safety regulation related to a motor vehicle subject to Subchapter II of Chapter 105 of this title that differs from a motor vehicle safety standard prescribed

under this chapter. However, the Secretary may prescribe, for a motor vehicle operated by a carrier subject to Subchapter II of Chapter 105, a safety regulation that imposes a higher standard of performance after manufacture than that required by an applicable standard in effect at the time of manufacture.

## 2. PREEMPTION

1. When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this Chapter.

2. A State may enforce a standard that is identical to a standard prescribed under this Chapter.

## 3. ANTITRUST LAWS This Chapter does not:

1. exempt from the antitrust laws conduct that is unlawful under those laws; or

2. prohibit under the antitrust laws conduct that is lawful under those laws.

4. WARRANTY OBLIGATIONS AND ADDITIONAL LEGAL RIGHTS AND REMEDIES Sections 30117(b), 30118-30121, 30166(f), and 30167(a) and (b) of this title do not establish or affect a warranty obligation under a law of the United States or a State. A remedy under those sections and sections 30161 and 30162 of this title is in addition to other rights and remedies under other laws of the United States or a State.

5. COMMON LAW LIABILITY Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

Respondent is correct that the prior I.C.C. did not have apparent jurisdiction over personal injury claims. The current legislation dramatically rewrote the prior legislation. It eliminated the ICC. It opened for private enforcement what previously were duties of the ICC. However, it did not only abolish the ICC and make those same violations the only subjects for private enforcement. The new

legislation dramatically rewrote the prior legislation and established many new rights and remedies and also established new obligations of carriers and new regulations which they must follow. There has not been anything cited in the Congressional History, nor the language of the statutes, which established that the new statutes apply only to private enforcement of commercial claims. If Congress so intended, it could have stated so. If Congress had so intended, it presumably would have been explicitly stated repeatedly in the Congressional History. That does not appear to be the case.

Instead, as previously noted, it was the Congressional intent that the prior statutes be significantly broadened. KPX, LLC v. Transgroup World Wide Logistics, Inc., 2006 WL 411255 (D. AZ 2006).

Appellant therefore submits that the language of the statute is clear. There is nothing in the statutes which limits Plaintiff to commercial damages. Consequently, Appellant submits that the arguments to the contrary noted by Respondent are not well founded and that the decision in Craft v. Groebel- Oklahoma Movers, Inc., 178 P.3d 170 (Okla. 2007) is in error. The clearer and unlimited statements in the statutes that a "person" may recover "damages" resulting from the violation of the regulations is not ambiguous. No further definition is required.

It has come to Plaintiff's attention that there is a very current California case dealing with this issue. See Amerigas Propane, LP, v. Landstar Ranger, Inc., 2010 WL 1966517 (Cal. App. 4 Dist., 2010). That case was decided on May 18, 2010. The history of the case is somewhat convoluted since the original Plaintiff was an employee under state law who was injured while off loading gas tanks from a tractor and trailer. The Plaintiff settled with Amerigas. Amerigas then sued the motor carrier, Landstar. Because Amerigas sued Landstar for contribution, Amerigas sued in the shoes of the original Plaintiffs, the Kings. California Court held that 49 U.S.C. § 14704 did create a private cause of action in Kings and Amerigas for Landstar's violation of regulations under the Federal

Motor Carrier's Act, 49 U.S.C. 14101, et sec, and the regulations promulgated under the Act, FMCSR. Because the California Court did not have to decide whether the state Worker's Compensation Laws were preempted by the federal laws, it did not determine that issue. See footnote 3. The California Court held that the federal law applied to both employees and to independent contractors and that both were entitled to the protection of the Act. While deciding that issue, the California Court held that there was a clear right to recover under 49 U.S.C. § 14704 for this personal injury claim. A copy of this case is attached.

Respondent did not raise any new authority in its Memorandum. Appellant supports that this Court should follow Marrier v. New Penn Motor Express, Inc., 140 F.Supp. 2d. 326 (D. Vt., 2001).

Both parties have discussed the case of Hall v. Aloha Int'l Moving Service, Inc., 2002 WL 1835469 (D. Minn. 2002). Respondent notes that the carrier was registered. Although the carrier was registered, Plaintiff claimed a violation of regulations. The Court therefore explicitly allowed damages for a violation of the regulations, even if the carrier was registered. Plaintiff's sole remedy was not to force the carrier to get registered. Indeed, among the damages permitted in the Hall case were emotional distress personal injury damages. While the Hall decision may not be binding upon this Court, it is by a respected Federal Court Judge for the District of Minnesota. The Hall case also belies Respondent's argument that it is only the Marrier case which recognizes a claim for personal injury to be valid under the federal law. It would be incongruous indeed if a Plaintiff can claim emotional distress damages for personal injury as a result of the violation of the commercial regulations which were violated in Hall, but not wrongful death damages resulting from a husband and father who was killed as a violation of the brake regulations. His heirs and next of kin are

entitled to recover damages as a result of their losses. Appellant therefore submits that Appellant should be able to proceed with the federal claims against Respondent J.L. Carlson.

The arguments regarding Craft v. Groebel-Oklahoma Movers, Inc., 178 P. 3d 170 (Okla. 2007) have already been addressed. The cases on which Craft relied do not hold that only commercial damages are actionable. They do establish that there is a private cause of action for violation of trucking regulations.

**II.**  
**THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT AND HOLDING THAT THE MINNESOTA WORKER'S COMPENSATION ACT EXCLUSIVITY PROVISION, M.S. 176.031, PREEMPTS AND PRECLUDES PLAINTIFF'S CLAIMS FOR DAMAGES UNDER THE PRIVATE CAUSE OF ACTION PROVISIONS OF 49 U.S.C. § 14704 AND § 14707.**

The Respondent discusses a number of Federal cases which were brought despite state Worker's Compensation laws. The Respondent notes that with those other cases, there is a federal statute which "expressly creates a Federal cause of action...." See Respondent's Brief on page 21 discussing Rosa vs. Cantrell. In the present case as well, there is a federal statute which quite expressly creates a federal cause of action for violation of 49 U.S.C. IV, Part B.

The issue of whether the Minnesota Worker's Compensation Act Exclusive Remedy Provision precluded federal claims was specifically considered by Minnesota District Court in Smith v. Lake City Nursing Home, 771 F.Supp. 985 (D. Minn. 1991). That case involved a licenced Practical Nurse who brought an action against the city and nursing home and other Defendants. The nurse alleged disability discrimination under the Rehabilitation Act. The Defendants moved for summary judgements. As part of that, the Defendants claimed that the Minnesota Worker's Compensation Act Exclusive Remedy Provision precluded the employee's claims under the Federal Rehabilitation Act, 29 U.S.C. § 794. The Federal Court specifically addressed that issue. The Federal

Court noted that the Civil Rights Act of 1964 provided that the statute did not operate to the exclusion of state laws, nor did the Act invalidate any provision of state law unless that provision is inconsistent with the purposes of the Act. 771 F.Supp. 986. The Court went on then to note that the Court of Appeals for the 8<sup>th</sup> Circuit had noted that “Congress intended the Federal Anti-Discrimination System to defer to state systems where possible.” *id* at 987. The Court noted that the Wisconsin Courts had also considered that issue where an employer argued that the Wisconsin Worker’s Compensation Act precluded liability under the Federal Statute 504. Byrne v. Board of Education, School District of West Allis-West Milwaukee, 53 F.E.P. Cases, 551, 1989 WL 120646 (E.D. Wisc. 1989). The Court noted that Defendants tried to distinguish the Wisconsin case by noting that Minnesota provided more relief for injured workers than did Wisconsin. The Court then went on to note that several cases had held that the Exclusive Remedy Clauses of Worker’s Compensation statutes can not bar claims under federal civil rights laws. It also noted that the federal Civil Rights Statutes were designed to supplement rather than supplant existing laws. The Court went on to hold that on these principles, the federal remedy for disability discrimination can not be limited by a state Worker’s Compensation Act. Although the Minnesota WCA provides some relief for discrimination against an injured employee, Section 504 of the Rehabilitation Act creates a supplemental remedy for disability discrimination. 711 F.Supp. 987. The Court therefore specifically addressed the present issue and held that the Supremacy Clause and the federal legislation precluded the state Worker’s Compensation Act from barring the federal claims. That was true despite statements in the federal laws that they did not intend to preempt state laws that were not inconsistent with the federal law. The present federal laws have similar statements.

In the Wisconsin case cited in Smith, the case of Byrne v. Board of Educ., School Dist. of West Allis- West Milwaukee, *supra*, the Court specifically considered whether the State Worker’s

Compensation Act barred Federal Claims. The Court held that “the operation of the Wisconsin Worker’s Compensation Act is inconsistent with federal law and therefore violates the Supremacy Clause; the state’s Exclusivity Clause may not be applied to as to bar the Plaintiff’s federal claims . . . although the Wisconsin legislature does not have the authority to subordinate federal civil rights statutes to the state worker’s compensation law, it certainly has the authority to subordinate civil rights laws.” 1989 WL 120646 at page 2. The Byrne Court cited several other cases in support of its conclusion that the Supremacy Clause prevented State Worker’s Compensation Laws from limiting federal remedies. Those other cases also support claimant’s position in the present case.

In the present case as well, although the Minnesota Worker’s Compensation Act does provide some remedies to Decedent’s family, allowing the Minnesota Worker’s Compensation Act to bar federal claims would interfere with enforcement of the federal laws. Plaintiff’s remedies are severely limited under the Minnesota Worker’s Compensation laws. The recoveries may potentially be substantially less than under the federal laws which allow recovery of all damages. The federal laws and regulations are entitled to enforcement and they specifically allow persons injured through violation of the laws and regulations to recover whatever damages they have from whatever injuries they have.

Defendant addresses the case of Benson v. Northwest Airlines, Inc., 561 N.W.2d 530 (Minn. App. 1997). The Defendant appropriately notes that it was not the state court which dismissed the federal ADA claims. The state court held that the Minnesota Worker’s Compensation Act barred claims under the Minnesota State Human Rights Act. That is consistent with other cases that state law can limit state law. The point raised by Plaintiff was that the federal claims were not dismissed on the basis of the Minnesota Worker’s Compensation Act. If the Minnesota Worker’s Compensation Act barred the federal claims under the ADA, then that should have been mentioned

by the Court. That issue did not have to be reached by the State Court. The State Court noted that it was the Federal Court that dismissed the ADA claim.

The Benson case went to the 8<sup>th</sup> Circuit. See Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8<sup>th</sup> Cir. 1995) That case held that Benson's ADA claim was valid. It also held that the claim was not preempted by the Railway Labor Act. The Court reversed the District Court and held that Benson could proceed with his ADA claims. The 8<sup>th</sup> Circuit decision was issued on August 15, 1995. It appears that the 8<sup>th</sup> Circuit Court of Appeals did not address the specific issue of whether the ADA claims were barred by the Minnesota Worker's Compensation Act. The Court noted that "Neither party appealed the District Court's decision to remand Benson's state law claims to State Court. Accordingly, we did not address this issue." 62 F.3d 1115 at footnote 6. The Federal Court did discuss whether the ADA claims were preempted by the Federal Railway Labor Act. The Court held that because Benson sought to enforce a federal statutory right, that the ADA claims were preserved and were not preempted by the Railway Labor Act. Consequently, the 8<sup>th</sup> Circuit Court of Appeals allowed the ADA claims to proceed in Federal Court without any bar by the Minnesota Worker's Compensation Act. The Court of Appeals did specifically note Benson's claims for personal injury, including permanent problems with his left arm and shoulder. If Benson's personal injury claims under the ADA were barred by the Minnesota Worker's Compensation Act, the Federal Court surely would have dismissed on that basis. The State Court was entitled to dismiss only the State Court claims. Northwest obviously was aware of the Worker's Compensation exclusivity issues. Those issues were specifically addressed in the State Court decision.

Upon remand to the Federal District Court, a trial was held in Benson v. Northwest Airlines, 1997 WL 22897 (D. Minn. 1997). The Plaintiff prevailed. In the trial on Plaintiff's ADA claim, the jury awarded Benson on his ADA claim, \$75,000 in compensatory damages and \$2,542,000 in

punitive damages. Norwest challenged the verdict. The Court affirmed the compensatory damages awarded but reduced the punitive damages to \$225,000. That was the statutory maximum. The Court also ended up awarding Benson past wage loss of \$90,356.92, and front pay of an additional \$90,000.00 if Benson was not reinstated. The Court also awarded Benson attorney's fees and costs. Consequently, in Benson, the Plaintiff's federal law claims proceeded all the way to trial and judgment and were not barred by the Minnesota Worker's Compensation Laws exclusivity provisions.

The Respondent also briefly discusses the case of Braziel v. Loram Maint. of Way, Inc., 943 F.Supp. 1083 (D. Minn. 1996). That Court properly limited its holding regarding the scope of the Minnesota Worker's Compensation Act's Exclusivity Provisions, to a finding that the Minnesota State Law claims under the MHRA were barred. It appears that it was a proper analysis of the law for the Federal Court to not discuss the Worker's Compensation Act's bar of federal claims, since the state law can not and does not bar the federal claims. It would have been much simpler for the Federal Court to hold that the Minnesota Worker's Compensation Act barred all the federal claims if that were the case. Instead, the Federal Court reviewed the merits of each of Plaintiff's federal claims. The Federal Court recognized that the federal claims had to be reviewed upon their merits, and not on the basis of Minnesota Worker's Compensation Act exclusivity. The Federal Court dismissed Plaintiff's federal claims on the basis that the employee had not established the factual basis for being able to proceed with those federal claims. Braziel is therefore perfectly consistent with the other cases holding that Minnesota Worker's Compensation Act does not bar federal claims.

Many other cases were cited in Plaintiff's original Memorandum. That discussion will not be reiterated here. The cases are absolutely consistent in holding that a variety of claims under

federal law are not barred by the Minnesota Worker's Compensation Act and can not be barred by this state law. The Supremacy Clause requires this finding.

Respondent claims that Plaintiffs have no valid state law claims due to the Minnesota Worker's Compensation Exclusivity Provisions found in M.S. 176.031. Plaintiffs certainly are aware of that provision. That law only grants exemption from the Worker's Compensation Exclusivity requirements in very limited circumstances, such as where an employer intentionally causes injury to an employee. Plaintiffs do not claim that J.L. Carlson intentionally injured Harlan Ficken within the meaning of the governing cases. J.L. Carlson was negligent and violated federal law in not properly maintaining the tractor and trailer, maintaining records, etc. Therefore, Plaintiff is not making claims against J.L. Carlson as Mr. Ficken's employer under Minnesota common law. Plaintiff's claims against J.L. Carlson are made under the governing federal law, including 49 U.S.C. § 14704 and 49 U.S.C. § 14707 and the other federal statutes and regulations establishing J.L. Carlson's obligations regarding the maintenance and repair of the tractor and trailer, maintenance records, and other associated obligations of the employer.

The Wisconsin District Court in Byrne, supra, discussed the scope of § 504 of the Rehabilitation Act. It noted the broad range of persons who should be subject to its protections. It noted that, if the State Worker's Compensation Exclusivity laws applied to bar the federal causes of action, that there would be two classes of persons. One would be subject to the federal laws and would be able to recover the full remedies available under the law. The other group would include those who were employees and they would only have Worker's Compensation Law recoveries. Moreover, the federal law would be subject to variations in each of the states, depending on their Worker's Compensation Laws. Therefore, application of the state worker's compensation exclusivity provisions was inconsistent with the goals and proper enforcement of the federal laws. The same

inequities and lack of uniformity of application of the federal laws would apply in the present case, if Respondent's arguments were accepted. As noted in the Byrne case at 1989 WL 120646 at page 3 and as appropriate to note here;

With this kind of backdrop to Congress' purpose and absent an express indication to the contrary, it is difficult to imply an intent to subordinate a federal legislative scheme to the vagaries of state worker's compensation laws. If the court were to adopt the position urged by the defendant, there would be two categories of handicapped employees of federally assisted employees in Wisconsin: those protected by federal anti-discrimination law and those subject to the exclusivity clause of the state worker's compensation statute. The two groups would be differentiated only by the point of origin of their handicaps; those whose handicap originated from an on-the-job injury and those whose handicap originates elsewhere. The first group would be limited to the remedy of 12 months back wages and the second group would have broad remedies at law and equity. Under the Defendant's approach, § 504 would be subject to variations in each of the remaining 49 states.

Congress granted civil rights protection to the handicapped, a result that would be seriously diminished if the board's concept were adopted by the court. The operation of the Wisconsin Worker's Compensation Act is inconsistent with federal law and therefore violates the supremacy clause; the states exclusivity clause may not be applied to as to bar the plaintiff's federal claims. See, e.g., *Rosa v. Cantrell*, 705 F.2d 1208, 1221 (10th Cir.1982); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 418 (9th Cir.1983); *Hutchings Erie City*, 516 F.Supp. 1265, 1272 (W.D.Pa.1981); *Eagle-Picher Industries, Inc. v. United States*, 657 F.Supp. 803, 805 n. 4 (E.D.Pa.1987), rev'd on other grounds, 846 F.2d 888 (3rd Cir.1988); *Alabama NAACP v. Wallace*, 269 F.Supp. 346 (M.D.Ala.1967): cf. *Tellis v. United States Fidelity and Guaranty Co.*, 625 F.Supp. 92, 95 (N.D.Ill.1985).

Those comments apply in the present case as well. The Minnesota Worker's Compensation Laws do not bar Plaintiff's federal claims.

Respondent discussed preemption. However, Respondent misses the point of federal preemption. Federal preemption means that a state can not enact legislation on that topic, if the legislation has completely preempted that field. *Ciplone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). If federal law does not preempt the field, then states can enact other legislation which is not inconsistent with the federal legislation. In no case cited by Respondent has a state law preempted the federal legislation and limited the federal rights and abrogated the federal statutes.

The Respondent discusses the cases previously cited by Appellant and which acknowledge that federal causes of action are not preempted by the Minnesota Worker's Compensation Exclusivity Provisions. The Respondent claimed that the governing federal statutes specifically authorize a private cause of action and therefore preempt state law. Federal statutes such as 42 U.S.C. § 1983 establish private causes of action, but make no reference to preemption and make no reference to state law or worker's compensation exclusivity provisions. 42 U.S.C. § 1983 gives rights to a "person" who may be "injured." It does not define the nature of the injury. It does not define the person. The current federal statutes in the present case are no more specific regarding who may sue or the nature of the injuries. 42 U.S.C. § 1983. The discrimination statute has been broadly interpreted to permit claims for a variety of injuries, including reverse discrimination. Minnesota has enacted its own Minnesota Human Rights Act. While the Minnesota Worker's Compensation Act precludes personal injury claims under the Minnesota Human Rights Act, it does not preclude claims under the federal discrimination acts.

It should be noted that Plaintiffs will not have a windfall if they are able to continue this suit against J.L. Carlson under federal law, and if they prevail. Worker's Compensation benefits have been paid. Those benefits for a wrongful death are very modest indeed. Pursuant to M.S. 176.111, Subd. 5, the minimum payments made in the case of the death of worker are \$60,000.00. Where there is a spouse, and no dependent child, as is the case here, the spouse receives 50% of the weekly wage for ten years. M.S. 176.111, Subd. 6. However, this is subject to adjustments as provided in M.S. 176.645 and it is also subject to adjustment by coordination with governmental survivor benefits, pursuant to M.S. 176.111, Subd. 21.

If Plaintiffs prevail against J.L. Carlson, Carlson will be given a credit for the amount of Worker's Compensation benefits paid pursuant to the statutory formula. If Plaintiff does not prevail

against Carlson, then Carlson is in the same situation as if there was only Worker's Compensation and there was no federal cause of action.

The tradeoff made in Minnesota for Worker's Compensation is that benefits are received regardless of fault, but the benefits are very limited. Plaintiff has a claim against J.L. Carlson under federal law only if Carlson was at fault. Because of the credit for Worker's Compensation paid, if Carlson is found at fault and has to pay damages, Carlson would be in the same situation as if Mr. Ficken had not been an employee, but had sued Carlson under the federal statutes and had established fault. As noted in Byrne, supra, the reasons of fulfilling the goals of the federal statutes and consistency of application of the statutes, there is no reason why an employee should be treated differently than a non-employee. The federal statutes specifically are designed in part to assure the safety of drivers. 49 U.S.C. § 13101. There is nothing at all in the federal statutes which is limited to non-employees. All of the regulations regarding brakes, records, driving hours, etc., apply to employees and non-employees. 49 U.S.C. 30103 also expressly preempts state law.

49 U.S.C. § 13103 also provides that "Except as otherwise provided in this part, the remedies provided under this part are in addition to remedies existing under another law or common law." These federal remedies are not limited by state law and expressly preempt state law.

J.L. Carlson paid Worker's Compensation premiums in order to limit Plaintiff's recovery for claims under Minnesota common law. The premiums could not have been paid based upon Plaintiff's waiver of all other claims under all federal law. Those claims were preserved by federal law. There are a multitude of possible federal claims. J.L. Carlson should not get the benefit of protection from all federal law claims in the present case, any more than it would be entitled to protection from federal ADA claims, Rehabilitation Act claims, Civil Rights claims or other federal claims which clearly are not precluded. If Plaintiff's federal claims against J.L. Carlson are not

cause of action, both for commercial damages, and for personal injury damages. There is nothing in those statutes which limit the damages and remedies to only persons with claims for commercial damages and not for personal injury. Plaintiff is therefore should be able to bring this action to recover damages under the federal law.

The Minnesota Worker's Compensation Exclusivity Provisions contained in M.S. 176.031 do not govern the present case and Plaintiff's claims. Plaintiff is not making a common law negligence claim against J.L. Carlson which would be subject to M.S. 176.031. The Federal Supremacy Clause and governing case law provide that this Minnesota State law does not limit Plaintiff's rights under the Federal Statutes. See also 49 U.S.C. 30101, PREEMPTION.

Plaintiff and Appellant therefore submit that the Order of the Trial Court should be reversed. This matter should be remanded to the Trial Court for trial against J.L. Carlson on Plaintiff's federal claims. The trial would also be held on Plaintiff's claims against the other remaining Defendant, Alan Seline. Mr. Seline is not involved in this appeal and the claims against Mr. Seline made by Plaintiff were not affected by the Court's Order dismissing J.L. Carlson.

Dated this 1st day of June, 2010.

Drafted by:



Mark L. Knutson, Atty Reg #57149  
DRYER STORAASLI KNUTSON  
& POMMERVILLE, LTD.  
202 W. Superior Street, Suite 200  
Duluth, Minnesota 55802-1960  
(218) 727-8451 Office  
(218) 727-6081 Fax

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