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STATE OF MINNESOTA

IN COURT OF APPEALS

MICHAEL TIERNEY  
as Trustee for the Surviving Dependant  
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 BRIEF AND APPENDIX**

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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).

**CERTIFICATE OF COMPLIANCE WITH RULE 132**  
**OF THE MINNESOTA RULES OF CIVIL APPELLATE PROCEDURE**

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## **LEGAL ISSUES**

1. Did the Trial Court err in effectively holding that the Minnesota Worker's Compensation Laws and specifically the exclusivity provision of M.S. 176.031, preempt Plaintiff's rights under the governing federal laws and specifically 49 U.S.C. 14704 and 49 U.S.C. 14707? The Trial Court held that the Minnesota Worker's Compensation Law governed over the federal laws and dismissed Plaintiff's Complaint against J.L. Carlson.
2. Did the Trial Court err in holding that Plaintiffs did not have a private personal injury cause of action under the governing federal statutes, and specifically 49 U.S.C. 14704 and 49 U.S.C. 14707? The Trial Court held that Plaintiffs did not have a private cause of action under those federal statutes and dismissed Plaintiff's Complaint.

## **STATEMENT OF THE CASE**

This matter is a wrongful death action brought by Michael T. Tierney as Trustee for the Surviving Dependent Spouse, Heirs and Next of Kin of Harlan Ficken, Decedent. Mr. Ficken was an employee of J.L. Carlson and Associates, Inc., driving semi tractors and trailers for J.L. Carlson. J.L. Carlson operated out of the facilities of Arrowhead Concrete Works, Inc. Arrowhead Concrete Works from time to time had done work on the tractors and trailers of J.L. Carlson. Alan Seline has been an employee of J.L. Carlson. Alan Seline apparently also does repair and maintenance work on J.L. Carlson tractor and trailers at his own facilities, as an independent contractor. Some discovery had not been completed, especially as regards Alan Seline.

Suit was brought against J.L. Carlson under the federal laws which Plaintiff claims enable Plaintiff to bring a direct action against J.L. Carlson under those federal laws,

notwithstanding the Minnesota Worker's Compensation Act barring suits against an employer under Minnesota common law. Arrowhead Concrete Works and Seline were sued both on the basis of violation of the federal laws and as a result of claims of negligence and other common law claims. The federal laws supporting Appellant's claims against J.L. Carlson include 49 U.S.C. 14704 and 49 U.S.C. 14707.

This Appeal is taken from an Order of the Trial Court granting a Rule 12 dismissal to J.L. Carlson and Associates, Inc., dated December 3, 2009 (Addendum, and Appendix, 163-170).

Because only J.L. Carlson was dismissed by the Court's Order of December 3, 2009, an appeal of that Order was not immediately possible. Plaintiff moved the Court for an Interim Order pursuant to M.R.C.P. 54.02, which would enter judgment as against J.L. Carlson and with an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. The Court granted this request for an Interim Order by way of its Order of February 5, 2010 (Addendum, and Appendix 171-173)

An agreement has been reached to dismiss Arrowhead Concrete. Subsequent to the filing of an appeal of this matter, a Stipulation of Dismissal dismissing Arrowhead Concrete was filed with the Court.

Alan Seline has not been dismissed from this action. Therefore, the claims against Alan Seline remain. Discovery has not been completed as regards Alan Seline. Alan Seline has not entered an Answer.

#### **STATEMENT OF FACTS**

On January 13, 2006, Harlan Ficken was operating a commercial tractor and trailer

as an employee of J. L. Carlson. Mr. Ficken was born on September 24, 1940 and therefore was 66 on the date of the accident. He had operated tractors and trailers for J.L. Carlson since 1996. J.L. Carlson is located in Duluth, Minnesota. At least as part of its work, J.L. Carlson transports bulk materials in hopper trailers. The tractors and trailers are owned by J.L. Carlson. J.L. Carlson is charged with the responsibility for repairing and maintaining its tractors and trailers. Under Federal Law, J.L. Carlson cannot delegate the legal responsibility for the repair and maintenance of its tractors and trailers, or their proper condition, or the record keeping to others. See the Affidavits and reports of William Elkin, (Appendix 123-135) and Michael Long, (Appendix 99-122) and the governing federal law. Consequently, if J.L. Carlson had other individuals or companies repair, maintain, inspect or keep records regarding its tractors and trailers, J.L. Carlson still maintains primary responsibility under federal law for those responsibilities.

On the date of the accident, Harlan Ficken was to drive his tractor and trailer from Duluth to Alma Center, Wisconsin.

Harlan Ficken most often operated a particular tractor, tractor number 102. However, on the date of the accident, he was told that his usual tractor was not safe to drive and needed repair. He therefore was given a different tractor, tractor number 103. It was not his usual tractor and he was not familiar with its condition. He was assigned trailer number 706 to haul a load of salt to Alma Center, Wisconsin. The tractor, trailer, and load of salt were very heavy.

There is every indication that Mr. Ficken operated the tractor and trailer in a proper manner on the date of the accident. There is no evidence that Mr. Ficken was told that there

was anything wrong with the tractor and trailer. There was no evidence that Mr. Ficken was aware of any defects in the tractor or trailer.

As Mr. Ficken was driving towards his destination, he traveled on Highway 121 nearing Garden Valley, Wisconsin. This was a rural two lane highway. The highway went down a long hill. The roadway then turned to the right. The speed limit coming down the hill and around the corner was 55 mph. It appears that he was traveling within the speed limit.

The evidence demonstrates that as the tractor and trailer operated by Mr. Ficken attempted to follow the highway along the corner to the right, the vehicle was unable to slow properly due to defective brakes. The vehicle was unable to properly go around the corner. The tires skidded as the vehicle went to its left into the oncoming lane. The vehicle then tipped over onto its side due also in part to the defective air suspension on the tractor. The vehicle then continued onto the area adjacent to the highway corner. There was a ditch, a pile of gravel and other things there. These caused the vehicle then to flip over onto its right side and it then came to rest. Mr. Ficken died in the accident. See the Affidavits and reports of William Elkin and Michael Long and the Wisconsin accident report. (Appendix 75-83 and 85-98)

The Wisconsin highway patrol and others associated Wisconsin officials investigated the accident. They checked the brakes on the tractor and trailer. A copy of the accident report is attached. (Appendix 75-83 and 85-98) The Wisconsin accident report indicates that several of the brakes were out of adjustment and that some were not operable at all. These defects were not caused by the accident. These defects were present in the vehicle before the accident. Further investigation also showed that the air suspension on the left rear of the

tractor did not operate properly. This would increase the tendency of the tractor and trailer to tip over to the left as the tractor and trailer would try to go around the corner to the right.

An autopsy was performed. The autopsy indicates that Mr. Ficken died in the accident, not before the accident. He died of a crushing injury to his chest sustained in the accident.

A review of the evidence therefore indicates that Mr. Ficken was unable to slow the vehicle sufficiently when going around the corner to avoid tipping over. The evidence indicates that it was the defective brakes and suspension system which prevented Mr. Ficken from sufficiently slowing the vehicle to go around the corner and that the defective brakes and suspension system therefore caused this accident and caused Mr. Ficken's death.

J.L. Carlson was responsible for the repair, maintenance, and inspection of the tractor and the trailer. It is clear that the tractor and trailer were in defective condition with defective brakes and a defective suspension system when Mr. Ficken left J.L. Carlson on his trip on the date of the accident. It was J.L. Carlson's responsibility to make sure that the tractor and trailer were in proper condition and were properly inspected before Mr. Ficken began this trip. J.L. Carlson also is responsible under federal law to maintain proper records of the repair, maintenance and inspection of the tractor and the trailer. Carlson failed to do so. Mr. Long's report details the many specific violations of the Federal Safety Regulations by J.L. Carlson, including violations of 49 C.F.R. 393, 395 and 396. (Appendix 99-122)

Plaintiff claims that J.L. Carlson's failure to properly maintain and repair and inspect and maintain proper records for the tractor and trailer are violations of federal law. Plaintiff therefore claims that J.L. Carlson is liable under federal law for Plaintiff's damages in this action.

## ARGUMENT

### I. STANDARD OF REVIEW

This appeal is taken from an Order of the Trial Court granting dismissal to Defendant J.L. Carlson.

Defendant moved for dismissal of Plaintiff's action under Rule 12.02. As a general matter, a Rule 12 Motion will be denied "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." N.S.P. Co. v. Franklin, 265 Minn. 391, 395, 122 N.W. 2d 26, 29 (1963); Northern States Power Co., v. Minnesota Metropolitan Council, 684 N.W.2d 485 (Minn. 2004).

The Northern States Power case went on further to state that "Rule 12.02 provides that such a Motion shall be treated as a Motion for Summary Judgment and disposed of as provided in Rule 56 if matters outside the pleadings are submitted to the District Court for consideration and not excluded. Northern States Power, supra, at p. 490; Faegre & Benson, LLP, v. R&R Investors, 772 N.W. 2d 846 (Minn. App. 2009) Therefore, the standard of review in the present case is the same as the standard of review for summary judgment motions. The Trial Court did consider the Affidavits submitted in connection with those Motions and did not explicitly exclude those Affidavits and attachments.

As a technical matter, Rule 12.02 provides that the defenses of lack of jurisdiction and failure to state a claim shall be made before pleading, if a further pleading is permitted. Because counterclaims, cross claims, etc., were permitted in this matter, Defendant's Motion may be technically defective.

When reviewing summary judgment decisions of the trial court, the appellate court considers “(1) whether there are any genuine issues of material fact, and (2) whether the court erred in application of the law.” State by Cooper v. French, 460 N.W.2d 2, 4 (Minn.1990). It is also the case that “all doubts and factual inferences must be resolved against the moving party.” Nord v. Herreid, 305 N.W.2d 337, 339 (Minn.1981). That case also held that the moving party has a burden of proof and the non-moving party “has the benefit of that view of the evidence which is most favorable to him.” Nord, Id. Any findings of fact in a summary judgment proceeding are not entitled to the respect which an appellate court is required to give findings made after a trial. Rathbun v. W.T. Grant Co., 300 Minn. 223, 219 N.W.2d 641 (1974). Where questions of law are raised, the court is free to conduct an independent review of the law. Henning v. Village of Prior Lake, 435 N.W.2d 627 (Minn. App. 1989); Service Oil, Inc. v. Triplett, 419 N.W.2d 502 (Minn.App. 1988). No deference need be given to the trial court’s interpretation of the law. Perfetti v. Fidelity & Cas. Co. of New York, 486 N.W.2d 440 (Minn. App. 1992); AJ Chromy Constr. Co. v. Commercial Mechanical Servs., Inc., 260 N.W.2d 579 (Minn.1977).

The Court’s Order of February 5, 2010, dismissed J.L. Carlson on the basis that the Court determined that neither 49 U.S.C. § 14704 nor 49 U.S.C. § 14707 provides for a personal injury action such as the present action. The Court further held that the federal statutes do not preempt the exclusivity provisions of the Minnesota Worker’s Compensation Act in M.S. § 176.031. The Court therefore dismissed the claims against Carlson.

In the present case the Trial Court made its decision based upon its interpretation of the law. The Trial Court determined that there was no private cause of action under the

federal statutes. The Court of Appeals therefore need not give any deference to this interpretation of the law by the Trial Court. To the extent that there are any disputes as to the facts, those facts must be construed in Appellant's favor.

## **II. DEFENDANT'S RULE 12 MOTIONS**

Defendant Carlson made Motions to Dismiss under Rule 12. Defendant claimed that the matter should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12.02(a). Defendant also moved to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(a). Both Motions should have been denied by the Trial Court.

Rule 12.02(a) deals with dismissals for lack of subject matter jurisdiction. This is a Rule based upon the pleadings. Defendant based this claim upon the defense that the Minnesota Worker's Compensation Act barred the federal action and that the federal statutes did not prevent a private cause of action.

Rule 12.02(a) involved a Motion to Dismiss for failure to state a claim upon which relief can be granted. Defendant apparently made the same defenses, claiming that the Minnesota Worker's Compensation Act barred the federal action and that there was not private cause of action under the federal law.

For reasons discussed in more detail in other sections of this Memorandum, both Motions should have been denied. This action is properly brought in the State Court. The Minnesota Worker's Compensation Act necessarily can not preempt the federal act. The federal act does provide for a private cause of action for Plaintiffs in this matter.

### **III. MINNESOTA STATUTES REGARDING THE INTERPRETATION OF STATUTES**

The Minnesota statutes regarding the construction of statutes are relevant in the present case. Although the federal law is not a state law, if a Minnesota law applies the Minnesota statutes in construing the federal statute, then these guides to construction are important.

M.S. §645.16 notes that legislative intent controls. It notes that every law shall be construed to give effect to all its provisions. It specifically provides that, “when the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” The statute goes on to describe what should be considered if the words of the law are not explicit. It is only if the words of the law are not explicit that legislative history is to be considered, along with the mischief to be remedied, etc. In the present case the federal statute is clear. It simply provides that anyone injured by a violation of the law is entitled to damages. It is not limited in any way to commercial damages.

Some of the cases have discussed the unnecessarily complex drafting of the federal law. M.S. § 645.16 provides that a law is to be construed to give effect to all of its provisions, if it can be construed in that manner. That is the same general principle as expressed in M.S. § 645.17, subd. 2. Therefore, the provision of the federal statute that provides that anyone injured by a violation of the statute is entitled to damages, shall be given its plain effect. Construing this part of the federal statute in this manner does not result in irreconcilable conflicts.

M.S. §645.17(3) also states that it is presumed that “the legislature does not intend to violate the Constitution of the United States or of this State.” Therefore, the Minnesota Workers Compensation statutes must be construed so that they do not violate the Supremacy Clause of the United States Constitution, and the cases interpreting the supremacy clause have determined that a state statute cannot affect a federal statute.

M.S. §645.17(4) also provides that when a court has construed language, the legislature in subsequent laws intends the same construction to be based upon such language. The federal statutes were changed when they were placed in their current form. However, it had previously been held, under the more restrictive federal law, that a person can recover personal injury damages for a violation of the prior laws and safety regulations. Johnson v. SOS Transport, Inc., 926 F.2d 516 (6<sup>th</sup> Cir. 1991).

Since the new law, by its terms and as expressed in its legislative history, expands the remedies available from those provided in the prior law, the new law also should permit private causes of action for personal injury.

M.S. §645.17(5) also provides that, “The legislature intends to favor the public interest as against any private interest.” That also is relevant here since the federal statutes and regulations were enacted to enhance safety. Therefore, allowing private causes of action for personal injury enhances the public interest, as against the private interest of the trucking company.

These rules of statutory construction are used strongly in favor of relying on the plain language of the statute. There is a private cause of action for Plaintiff’s damages in the present wrongful death action.

#### **IV. A. THE MINNESOTA WORKER'S COMPENSATION EXCLUSIVE REMEDY PROVISIONS ONLY GOVERN STATE LAW CLAIMS**

Plaintiffs do not disagree with Defendant that these federal statutes do not preempt the Worker's Compensation laws. That is beside the point. The real issue is, whether the Minnesota Worker's Compensation laws preempt the federal statutes. Due to federal supremacy, the Minnesota Worker's Compensation statutes do not, and can not, preempt the federal statutes, the Minnesota statutes only govern regarding Minnesota common law causes of action. Consequently, the Minnesota Worker's Compensation statutes in no way limit Plaintiff's right to bring the present action against J.L. Carlson under the federal statutes. The federal statutes would preempt the Minnesota statutes only if the statutes conflicted with the Minnesota statutes. The federal statutes do nothing to expand or limit Minnesota's common law negligence claims against J.L. Carlson. Whether the federal law preempts Minnesota Worker's Compensation law or not is not relevant. The Minnesota Worker's Compensation law does not preempt the federal law.

#### **IV. B. FEDERAL SUPREMACY**

It is an elementary principle of United States law that federal law is supreme over state law. This principle is embodied in the United States Constitution and is commonly referred to as the Supremacy Clause. U.S. Const. Art. VI, § 2. Pursuant to the authority granted in the supremacy clause, an act of Congress, constitutionally passed within the limits of congressional authority, becomes a part of the supreme law of the law. U. S. v. Gillock, 445 U.S. 360, 317, 100 S.Ct. 1185, 1192 U.S.Tenn. (1980); Kleppe v. New Mexico, 426 U.S. 529, 543, 96 S. Ct. 2285, 2293.

This principle of Supremacy is also uniformly recognized by the courts. It is recognized by both the Federal Courts and the Minnesota State Courts. See benMiriam v. Office of Personnel Management, 647 F. Supp. 84, 42 Fair Empl. Prac. Cas. (BNA) 429, 43 Empl. Prac. Dec. (CCH) ¶36993 (M.D.N.C. 1986); Belville Min. Co., Inc. v. U.S., 763 F. Supp. 1411 (S.D. Ohio 1991), aff'd in part, rev'd in part on other grounds, 999 F.2d 989 (6th Cir. 1993); U.S. v. Rodriguez, 803 F.2d 318, 21 Fed. R. Evid. Serv. (LCP) 1253 (7th Cir. 1986), cert. denied, 480 U.S. 908, 107 S. Ct. 1353, 94 L. Ed. 2d 524 (1987) (A court may take judicial notice of the United States Constitution and statutes.)

Consequently, the state law must give way when it conflicts with or frustrates federal law. Board of Public Works, City of Blue Earth, Minn. v. Wisconsin Power and Light Co., 613 F.Supp.2d 1122, 1127 (D. Minn. 2009). Consequently, if a federal cause of action exists, a state law cannot abrogate or limit the federal law. See Smith v. Lake City Nursing Home, 771 F.Supp. 985 (D. Minn.,1991) (Holding that Minnesota Worker's Compensation Act exclusive remedy provision did not preclude a claim under Section 504 of the Rehabilitation Act.); Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 110 S.Ct. 1384 (U.S. 1990) (Superseded by statute.) (Injured farm workers brought action under the Migrant and Seasonal Agricultural Worker Protection Act; the Supreme Court held that the state workers' compensation exclusivity provisions did not bar migrant workers from bringing a private right of action and noted that the AWPAs established a "private right of action for "any person aggrieved by a violation of the Act's provisions or accompanying regulations...in no way intimate that the availability of that right is affected by state workers' compensation law"); Rosa v. Cantrell, 705 F.2d 1208, 1221 (10<sup>th</sup> Cir.1982) (Holding plaintiff's acceptance of

workers' compensation benefits from employer city did not preclude recovery under §1983); Hutchings v. Erie City and County Library Bd. of Directors, 516 F.Supp. 1265, 1272 (W.D. Pa. 1981) (Pennsylvania's Workmen's Compensation Act does not, in any way, bar the plaintiff from pursuing federal claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

Consequently, the state law cannot abrogate or limit a federal law. Since a federal cause of action exists, the state law cannot abrogate or limit the federal law.

Therefore, the Minnesota Worker's Compensation Laws have no effect on Plaintiff's Federal causes of action in the present suit.

#### **IV. C. THE MINNESOTA WORKER'S COMPENSATION LAW DOES NOT PREEMPT OR BAR THIS ACTION**

Not a single Minnesota case cited by Defendant, or of which Plaintiff is aware, has held that the Minnesota Worker's Compensation Act abrogates or limits any federal statutory right to a private cause of action. Plaintiff submits that any such holding would violate the United States Constitution and the established rules on federal supremacy. The federal statute similarly does not have to state that it preempts state law in order for the federal statute to be primary. Whatever merit the Craft case has in its home state, it does not correctly state Minnesota law or Federal Supremacy law.

The parties have already discussed some of the relevant cases. The Court is already aware of the Craft case cited by Defendant, Craft v. Graebel-Oklahoma Movers, Inc., 178 P.3d 170 (Okl. 2007). This of course is a state court case, not a federal court case. That case noted the language of the Supreme Court in Freightliner Corp v. Myrick, 514 U.S. 280, 115

S. Ct. 1483, 131 L.Ed. 2d 385 (1995). The Court noted that “A federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is “impossible for a private party to comply with both state and federal requirements,” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” The State Court in Craft held that it was not impossible for a carrier to comply with the Worker’s Compensation Laws and the federal law. Plaintiff submits that is not an accurate statement in the present case. Craft held that “federal statutes do not preempt the exclusive remedy provision of Oklahoma’s Worker’s Compensation Act.” 178 P.3d 176.

The Craft analysis misses the point. It is true that the Minnesota Worker’s Compensation Act preempts other acts under Minnesota common law. Plaintiffs have not brought a common law negligence claim against Carlson. Such a claim is barred by the Minnesota Worker’s Compensation Act. However, the Craft case got it backwards. The State law cannot preempt or abrogate federal law. All of the Minnesota Worker’s Compensation cases involving employees and employers recognize this fact. Many of those cases were brought under civil rights acts or other related acts. Minnesota Courts do recognize that the Worker’s Compensation Act does preempt other common law claims against the employer, but not Minnesota statutory claims or certainly not Federal statutory claims.

If the argument of Carlson were true, then these other Minnesota cases involving federal claims and an employee would have been decided differently. Carlson argues that because the Secretary of Transportation can enforce the federal acts, that it is not necessary

to bring private action and that the Minnesota Worker's Compensation Act preempts Federal private actions.

Of course, as a matter of supremacy, the Minnesota Act cannot preempt any federal rights. In the Worker's Compensation Act cases, the federal government and state government can enforce civil rights laws and other laws. Therefore, a private cause of action is not necessary to enforce those laws since the government itself can enforce those laws. That is the argument being made by Carlson in the present case. However, whenever a private cause of action is provided under federal law, as shown in all of the Minnesota cases, the Federal cause of action is preserved even if there is Federal administrative enforcement authority.

To allow the Minnesota Worker's Compensation Act to foreclose the statutorily provided Federal private cause of action would impermissibly mean that the Minnesota Worker's Compensation Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Freightliner, supra, 514 U.S. 287.

#### **IV. D. THE MINNESOTA WORKER'S COMPENSATION ACT DOES NOT PREEMPT FEDERAL STATUTORY CAUSES OF ACTION**

The issue of preemption was considered recently by the federal court in the case of Springer v. McLane Co., Inc., 2010 WL CIV. NO. 09-1439 (February 11, 2010) (D.Minn, 2010). That case involved the claims of an employee under the Minnesota Human Rights Act, alleging pregnancy discrimination and reprisal and claims that the employer was negligent in supervising its managers and employees.

The District Court reviewed MHRA preemption cases, discussing the scope of preemption of MHRA. The Court held that the MHRA preempts common law causes of action. The Court held that Plaintiff's common law negligence claim was preempted since the factual basis and injuries would establish a violation of the MHRA and the obligations owed to the Plaintiff are the same under the common law and the MHRA.

In the Springer case, Plaintiff's claim was commenced in State Court under the MHRA. It appears that there were no federal claims which had been brought. Therefore, the case did not specifically decide where the state law claims can preempt federal law claims. However, the Springer case did hold that the MHRA only preempts common law claims, not other statutory claims. The Springer court reviewed a number of other cases discussing MHRA preemption. The cases on which the Springer case relied included Burns v. Winroc Corp. (Midwest), 565 Fed. Sup. 2d 1056 (D. Minn 1998). In that case, an employee brought discrimination claims both under federal law and under Minnesota law. There also were common law negligence claims. The Court held that the common law negligence claims were preempted by the exclusivity provision of the Minnesota Human Rights Act. However, the employee was entitled to proceed both under federal law and under Minnesota state law. The MHRA did not preempt Title VII of the federal discrimination laws.

Springer also discussed LaCanne v. AAF McQuay, Inc., 2001 WL 134 44217 (D.Minn 2007). In that case, the Plaintiff brought claims both under Title VII of the federal laws, under the MHRA and brought common law claims under negligent supervision and negligent retention. The court held that the common law claims were preempted by the

MHRA. However, Plaintiff was entitled to proceed, both under the federal Title VII claims and under the MHRA. The MHRA did nothing to effect Plaintiff's rights under Title VII.

Also cited was Pierce v. Rainbow Foods Group, Inc., 158 F. Supp. 969 (D.Minn.,2001). There were also claims brought under Title VII, MHRA and common law negligent retention and negligent supervision claims. As with the other cases, the Plaintiff was entitled to bring claims both under Title VII and under the MHRA. The common law claims were preempted by the MHRA. The same results were reached, where Plaintiff could proceed with both the federal discrimination claims and the state MHRA claims in Williams v. Thomson Corp., 2001 W.L. 1631433 (D. Minn. 2001) and Moss v. Advanced Circuits, Inc., 981 F. Supp. 1239 (D. Minn. 1997).

Defendant's arguments that federal law does not always preempt the Minnesota Worker's Compensation Act, thereby permitting Minnesota Worker's Compensation Act claims to proceed, does not mean at all that the Minnesota Worker's Compensation Act preempts or limits federal claims. In the present case, as with many other cases, Plaintiff can recover under the Minnesota Worker's Compensation Act and can also bring claims under the federal statutes. Indeed, the United States Supreme Court has held that federal and state worker's compensation systems are not mutually exclusive and that an employee can claim the most generous remedial scheme available under the state worker's compensation act or the federal Longshoremen's and Harbor Worker's Compensation Act. Sun Ship, Inc., v. Pennsylvania, 447 U.S. 715, 100 Sup. Ct. 2432, (1980).

The case of Neumann v. AT&T Communications, Inc., 376 Fed. 3d. 773 (8<sup>th</sup> Cir. 2004) (Minn. case) was a Minnesota case. That Court held that ERISA completely preempted

employee state court claims that she was retaliated against for seeking worker's compensation benefits. The Court held that the exclusive remedy provision of the Minnesota Worker's Compensation Act barred a disability discrimination claim under MHRA, the state claim. However, the Minnesota Worker's Compensation Act did not bar or limit Plaintiff's federal claims in any way.

#### **IV. E. MINNESOTA WORKER'S COMPENSATION LAW EXCLUSIVITY PROVISIONS DO NOT BAR THIS ACTION**

Minnesota Worker's Compensation statutes, and specifically M.S. 176.031 provide that the Minnesota Worker's Compensation Act is the sole remedy for an employee injured at work, with limited exceptions. There have been Worker's Compensation benefits paid as a result of Harlan Ficken's death. Future Worker's Compensation benefits are payable as a result of Harlan Ficken's death. The Minnesota Worker's Compensation Act does govern its claims under Minnesota Law. The Exclusivity Provision of the Minnesota Worker's Compensation Statute, M.S. 176.031, therefore limits any claims which Plaintiff may make against Carlson under Minnesota Law for common law negligence under Minnesota law against Carlson.

Benson v. Northwest Airlines, Inc., 561 N.W.2d 530 (Minn. App. 1997), dealt with an employee who made a federal claim under the ADA. The court held that the federal claim was not barred by the Minnesota Workers Compensation Act. Neumann v. AT&T Comm., Inc., 376 F.3rd 773 (8<sup>th</sup> Cir. 2004) (Minn.), held that federal ERISA claims were not barred by the Minnesota Workers Compensation Act. It recognized the primacy of federal law. In Gonzalez v. City of Minneapolis, 267 F.Supp.2d 1004 (Minn. 2003), the court held that

federal ADA claims were not barred by the Minnesota Workers Compensation Act. In D.W. vs. Radisson Plaza Hotel Rochester, 958 F.Supp. 1368 (Minn. 1997), the Court held only that state tort claims were barred by M.S. 176.031. No claims under federal law were barred by the Minnesota Workers Compensation Act. In Mandy v. Minn. Mining & Manufg., Inc. 940 F.Supp. 1463 (Minn. 1996), the Court recognized that only common law negligence claims would be barred by M.S. 176.031, not federal claims. Braziel v. Loram Maintenance of Way, Inc., 943 F.Supp. 1083 (Minn. 1996), held that M.S. 176.031 only precluded state law claims, and not claims under the federal statutes. Smith v. Lake City Nursing Home, 771 F.Supp. 985 (Minn. 1991), held that Minnesota Workers Compensation Act did not preclude claims under federal law. It cited several other cases noting that the Exclusive Remedy Clauses of state workers compensation statutes cannot bar claims under federal law.

Consequently, the Exclusivity Provisions of the Minnesota Worker's Compensation Act are irrelevant as regards Plaintiff's claims in the present action under federal law. The Minnesota Worker's Compensation Act does not bar Plaintiff's claims under federal law.

#### **IV. F. CIPOLLONE**

Carlson relies upon the U.S. Supreme Court case of Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). That case involved claims by a smoker and a spouse against a cigarette manufacturer. There were issues as to whether various state law claims could proceed, given the Federal Cigarette Labeling and Advertising Act. The issue present in that case was whether federal law precluded the additional state law claims based upon common law or based upon state cigarette labeling or cigarette regulation laws. That case did not involve the issue of whether state law limited the scope

of federal law. That case held that some state law claims were preempted by the scope of the federal law, but that some state law claims were not preempted and barred by the Federal Statute. That case does not support Carlson's argument that the Minnesota Worker's Compensation Act can limit the Federal Act. Indeed, that Court reaffirmed the primacy of Federal law. The only issue was how much of the state law was preempted, where state law provided additional remedies. Consequently, that case actually supports Plaintiff's position in the present case, that federal law is primary and that the federal remedies are not affected at all by the state Worker's Compensation Laws.

**V. A. PLAINTIFF IS ENTITLED TO DAMAGES PURSUANT TO 49 U.S.C. 14704 - DAMAGES FROM VIOLATIONS OF PART B**

49 U.S.C. 14704 (a)(2), as the Court is aware, provides that a "carrier . . . is liable for damages sustained by a person as a result of an act or omission of that carrier. . . in violation of this part." As noted in the case Owner/Operator Indep. Drivers Ass'n., Inc., v. New Prime, Inc., 192 F.3d 778 (8<sup>th</sup> Cir., 1999), the Court held that "the most logical reading of the language of § 14704 (a)(2) is that it authorizes private parties to sue for damages for carrier conduct 'in violation of [regulations promulgated under] this part'. And that interpretation is certainly reinforced by the legislative history of § 14704 (a)(2). The Conference Report stated that § 14704 (a)(2) "provides for private enforcement of the provisions of the Motor Carrier Act in Court . . . . The ability to seek injunctive relief from motor carrier leasing. . . violations is in addition to and does not in any way preclude the right to bring civil actions for damages of such violations" . . . For the forgoing reasons we conclude that 49 U.S.C. § 14704(a) authorizes private actions for damages and injunctive relief to remedy at least some

violations of the Motor Carrier Act and its implementing regulations. Thus, we reject the motor carrier's contention that FHWA's remedial jurisdiction is exclusive." 192 F.3d 785.

The specific language of this section is important. It speaks of "damages sustained by a person as a result of an act or omission of the carrier or broker in violation of this part." (underlining added) The reference to "this part" is significant. Title 49 of U.S.C. is divided into several subtitles. Subtitle IV deals generally with interstate transportation. Subtitle IV Part B deals with motor carriers. Therefore, the reference to "this part" necessarily refers to Title 49, Subd. 4 Part B, dealing with motor carriers. Part B has chapters 131 through chapter 149. Violations of "this part" therefore encompass all violations by motor carriers since Part B is the section that deals with motor carriers, including irrelevant regulations, registration, etc. Similarly, 49 U.S.C. 14701 speaks about investigations "under this part." That section provides that the Secretary of the Board can take action to compel compliance "with this part." It consequently is clear that reference to "this part" in 14704 provides that there is authority for a private individual to bring a private action to obtain damages for violations of Part B, dealing with all of the statutes and regulations dealing with motor carriers. Subtitle IV has three parts. Part A deals with rail. Part B deals with motor carriers, etc., Part C deals with pipeline carriers. Therefore, the reference in 14702 to "this part" means that it deals with motor carriers and not to rail and not to pipeline carriers. That makes sense in light of the decision in Marrier v. New Penn Motor Express, Inc., 140 F.Supp. 2d. 326 (D. Vt., 2001).

The Marrier case noted in part that:

"The Marriers bring their first claim under the Interstate Transportation Act, 49 U.S.C. § 13101 et seq. Specifically, they rely on 49 U.S.C. § 14101(a), which mandates that "a motor carrier shall provide safe and adequate service,

equipment, and facilities,” and 49 U.S.C. § 14704(a)(2), which provides, in relevant part, that “[a] carrier ... is liable for damages sustained by a person as a result of an act or omission of that carrier ... in violation of this part.” The Marriers assert that these two provisions, read together, create a private right of action for personal injury in the circumstances present here . . . First, the Marriers do not rely upon a “negative inference” but rather the plain meaning of the statute, which by its terms, creates a private right of action for personal injury. Second, the purposes of the ITA are not solely “economic” as New Penn asserts, but are, rather, manifold. In the “General Provisions” of Part B of the Act (the part under which the Marriers bring their claims), Congress provided that “it is the policy of the United States Government to oversee the modes of transportation and, in overseeing those modes, to promote safe, adequate, economical, and efficient transportation.” 49 U.S.C. § 13101(a)(1)(B) (emphasis added). Thus, the Court concludes that, contrary to New Penn's assertions, at least one of the purposes of the ITA was to try to ensure safety in the operation of motor carriers. Therefore, New Penn's argument that the ITA does not create a private right of action for personal injury is without merit, and its motion for summary judgment on that basis must be denied.” 140 F.Supp. 2d 326, 328-9.

14704 Subd. (a) deals with remedies for a person injured by carriers or brokers. Subd.

(a) has two separate enforcement mechanisms. They are complementary enforcement mechanisms. These are separate enforcement mechanisms. Under (a)(1) it provides that a person may bring a civil action to enforce an order of the Secretary or the Board and may bring a civil action for injunctive relief. Therefore, under (a)(1) a person may bring an action to force enforcement if the Secretary has not done so. If Carlson was right that there was no need for a private enforcement mechanism because the Secretary could enforce the law on the Secretary's own volition, then this section would not be necessary. It is clear that there is a private cause of action for violations of the statutes and regulations.

(a)(2) provides for damages for violations. This is a complementary remedy to that provided in (a)(1). (a)(2) provides that a person may recover damages from a carrier who has violated the Motor Carrier statutes and regulations. (a)(2) is not a subdivision of (a)(1). (a)(2)

provides additional remedies for those provided in (a)(1). (a)(2) does not speak of a requirement that an order of the Secretary be violated. It does not speak of violations of 14102 and 14103. It speaks of violations of “this part” which must refer to Part B, applying all of the Motor Carrier Statutes and regulations. Therefore, the analysis of Marrier, supra, was correct. This was the obvious intent of this language.

It should be noted that the present act that is the subject of this suit was enacted in December, 1995. It therefore was enacted after the 1991 case of Johnson v. S.O.S. Transport Inc., 926 F.2d 516 (6<sup>th</sup> Cir. 1991). As the Court is aware, that Court held that there was a private wrongful death action that could be brought by the survivors against a truck lessee which violated the federal laws through negligent maintenance and inspection of the truck, causing it to leave the road. If Congress had intended to overrule Johnson, it could have enacted the more current statute more restrictively. It could have excluded private causes of action for damages. Instead, the Statute specifically allowed private causes of action for damages.

Moreover, confirming the broad scope of 14704(a)(2), the official notes to that section state: “Prior Provisions. Provisions similar to those in this section were contained in section 11705 of this title. Prior to the general amendment of this subtitle by Pub.L.104-88 Sec. 102-a.” The Johnson case reviewed 11705 and 11707 and found that there was a clear right to a private of action under 49 U.S.C. 11705. Johnson noted that under the prior 49 U.S.C. 11705 there was a private right of action for persons who sustained damages as “a result of an act or omission of [a] carrier in violation of this subtitle.” 49 U.S.C. 11705 (b)(2); 49 U.S.C. 11705 (c)(1). Unfortunately, if one follows a Westlaw link from the currently reported case

of Johnson, the link is to the current 49 U.S.C. 11705, relating to rail, not relating to motor carriers. Consequently, it appears that Congress intended to continue to follow the language of the prior Statute, which in Johnson clearly allowed a private cause of action. Congress did not intend to further limit the rights of injured people. It intended to expand the rights of injured people.

Moreover, the language of 49 U.S.C. 14704 (a)(2) is subject to usual rules of construction. As stated by the Supreme Court in Connecticut National Bank v. Germain, Trustee, 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d. 391 (1992):

“In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, e.g., United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-242, 109 S. Ct. 1026. 1030-1031, 103 L.Ed.2d 290 (1989); United States v. Goldenberg, 168 U.S. 95, 102-103, 18 S.Ct. 3, 4, 42 L.Ed. 394 (1897); Oneale v. Thornton 6 Cranch 53, 68, 3 L.Ed. 150 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: “judicial inquiry is complete.” Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981); see also Ron Pair Enterprises, supra, 489 U.S., at 241, 109 S.Ct., at 1030.” 503 U.S. 254-255.

The language of 49 U.S.C. 14704 (a)(2) is clear. It is confirmed by the legislative history where Congress stated that there is a private cause of action for violations of the Motor Carrier Act, and it stated that without restrictions.

### **V.B. HALL V. ALOHA**

It should be noted that the only Minnesota case to have considered the scope of 49 U.S.C. 14704 is Hall v. Aloha Int'l Moving Serv. Inc., 2002 WL 1835469 (D. Minn. 2002). That case held that there is a private cause of action for emotional distress, personal injury

and property damage and attorney's fees from a violation of the regulations, pursuant to 49 U.S.C. 14704, 49 U.S.C. 14706 and 49 U.S.C. 14707.

This case held that there is a private cause of action under 49 U.S.C. 704 and 49 U.S.C. 17707. Aloha did not deal with a carrier who violated federal law by not properly repairing, inspecting and maintaining a tractor and trailer and by not maintaining proper records. However, the Court did recognize that there was a federal cause of action for violating those statutes and the underlying federal regulations. Carlson has not given any other governing authority in the State of Minnesota which provides otherwise. Therefore, while Aloha did not deal with the same kinds of violations or regulations as are present here, it did recognize a private cause of action for violating these laws and the underlying regulations.

Consequently, Plaintiffs are entitled to a federal cause of action in the present suit against Carlson for violation of these federal laws and their underlying regulations.

#### **V.C. 49 U.S.C. 13902 REGISTRATION REQUIREMENTS**

Carlson argues that the private enforcement rights only apply to such things as registration requirements. Carlson argues that the private enforcement rights do not apply to safety matters. However, Carlson notes that the Registration Requirements of 49 U.S.C. § 13902 are among those Registration Requirement Statutes. 49 U.S.C. 13902 (a)(1) specifically provides that a person registering must comply with the regulations, including safety regulations, imposed by the Secretary and the Board. The language is as follows:

(a) Motor Carrier Generally.

(1) In general. -Except as provided in this section, the Secretary shall register a person to provide transportation subject to

jurisdiction under subchapter 1 of chapter 135 of this title as a motor carrier if the Secretary finds that the person is willing and able to comply with-

(A) this part and the applicable regulations of the Secretary and the Board.

(B)(1) any safety regulations imposed by the Secretary.

The Statute goes on to provide that people can complain if a registrant fails to comply with the regulations. 49 U.S.C. § 13902 (a)(5) reads as follows:

Limitations on complaints. The Secretary may hear a complaint from any person concerning a registration under this subsection only on the ground that the registrant fails or will fail to comply with this part, the applicable regulations of the Secretary and the Board, the safety regulations of the Secretary, or the safety fitness or minimum financial responsibility requirements of paragraph (1) of this subsection. In the case of a registration for the transportation of household goods as a household goods carrier, the Secretary may also hear a complaint on the ground that the registrant fails or will fail to comply with the requirements of paragraph (2) of this subsection.

Consequently, even if Carlson were correct that 49 U.S.C. 14704 dealt only with registration requirements, those registration provisions under 49 U.S.C. 13902 specifically require that the carrier comply with all of the regulations of the Secretary, including safety regulations. Those are the regulations at issue in the present case where the brakes and suspension did not meet the requirements of the federal regulations, and where the violations caused this accident and caused Mr. Ficken's death. A copy of 49 U.S.C. 13902 is attached.

Similarly, 49 U.S.C. 14707 deals with private enforcement of violations of carriers of sections 13901-13904. It provides that a person injured can bring a civil action to enforce these sections. Because 49 U.S.C. 13902 specifically requires carriers to comply with all registration requirements, including compliance with all of the regulations and safety

regulations, 49 U.S.C. 14707 clearly does apply to the present action where those regulations were violated by Carlson.

The scope of 49 U.S.C. 14704 is also shown by the language of that statute that says that it applies to carriers subject to jurisdiction under Chapter 135. Chapter 135 deals with interstate transportation. It notes that the Secretary and the Board have jurisdiction over transportation of property by motor carrier between a place in one state and a place in another state. This clearly applies to this action where Carlson transported salt between Minnesota and Wisconsin.

#### **V. D. LEGISLATIVE HISTORY**

The legislative history confirms Plaintiff's interpretation. The Conference Report on rights and remedies relating to 14704 reads as follows:

“House bill. Sec 14704. Rights and Remedies of persons injured by carriers or brokers. This section provides for private enforcement of the provisions of the Motor Carrier Act in Court. This expands the current law, which only permits complaints brought under the Act to be brought before the ICC. This section provides that an injured person may bring a civil action to enforce an order of the Secretary of the Board under this part. This section also provides that complaints brought to reinforce the motor carrier leasing and lumping rules may also seek injunctive relief.

Senate amendment. Sec. 14704 (Rights and Remedies of persons injured by carriers or brokers) incorporates from 49 U.S.C. 11705 the right of an injured person to bring a civil action to enforce an order of the Secretary or the Board under Part B. It would remove any requirement that an injured person bring the complaint to the agency first.

Conference Substitute, The Conference adopts the House provision. The ability to seek injunctive relief for motor carrier leasing and lumping violations is in addition to and does not in any way preclude the right to bring civil actions for damages for such violations.”

It is clear from the Conference Report that Section 14704 provides for private enforcement for all of the provisions of the Motor Carrier Act. The note on the House bill expands that language to also provide that there can be actions brought to enforce the leasing and lumping rules. The Conference Substitute adopts the House provision in its totality. There is a note that the additional injunctive relief sought for leasing and lumping violations is in addition to and does not in any way preclude the right to bring civil actions for damages for such violations. However, this does not limit the prior language that there is prior enforcement of the provisions of the Motor Carrier Act generally. This additional sentence just clarifies that even leasing and lumping violations are subject to civil actions. Those are not the only violations subject to the right to bring civil actions.

Note that the Conference Report spoke of “private enforcement of the provisions of the Motor Carrier Act in Court.” This is a reference to the entire Act, not just part of the Act. It is not limited to registration provisions. Therefore, the legislative history specifically allows the present suit under the Act.

The current law expands those rights and not limits them. Apparently there were five other versions of the bill. See the attached first page of the report from the THOMAS service of the Library of Congress. The final bill clearly allows private actions for damages that are brought in the current law suit. It also should be noted that the definition of a “person” includes the Trustee and the Personal Representative of the person. The Legislative History confirms that Plaintiffs have a private cause of action under Federal Law.

## V.E. ENACTMENT OF REGULATIONS

As regards the regulations at issue in the present case, the instant regulations were enacted pursuant to these federal statutes. That authority is found in the following sections: Part 389 - Rule Making Procedures- Federal Motor Carrier Safety Regulations- 49 U.S.C. 113, 322, 501 et. seq., 31101 et seq., 31138, 31139, 31301 et seq., and 31502; 42 U.S.C. 4917; and 49 CFR 1.73. Part 390 - Federal Motor Carrier Safety Regulations; General Authority: 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31144, 31151, 31502, 31504; sec. 204, Pub. L. 103-311, 108 Stat. 1673, 1677; sec. 217, 229, Pub. L. 106-159, 113 Stat. 1748, 1767, 1773; and 49 C.F.R. 1.73. [72 FR 36790, July 5, 2007; 73 FR 76497 Dec. 16, 2008; 73 FR 76820 Dec. 17, 2008].

In affirming the goal of the federal statutes in providing safe transportation, see also 49 U.S.C. 13101, in its transportation policy and specifically recognizing a goal “to promote safe, adequate, economical, and efficient transportation.” 49 U.S.C. 13101 (a)(1)(B), 49 U.S.C. 13101 (a)(2)(I) states the goal to “improve and maintain a sound, safe and competitive privately owned motor carrier system.

49 U.S.C. 13103 also provides that “Except as otherwise provided this part, the remedies provided under this part are in addition to remedies existing under other law or common law.” The statute is part of Title 49, Subtitle IV, Part D, dealing with interstate transportation. Therefore the remedies under Part B dealing with motor carriers should be read expansively.

Reviewing the relevant federal statutes and regulations involves considerable time and effort. Therefore, perhaps it is not surprising that the Court in Marrier, chose to be succinct

in its analysis of the law. The Court was correct. That analysis was by a Federal Court Judge. While Carlson's attorney disparaged the thoroughness of the written explanation of the Court's analysis, that analysis is correct and it is sufficient.

49 U.S.C. 31136 deals with regulations. It goes on to provide that the Secretary of Transportation shall provide for safety regulations. It notes that, before enacting regulations, the Secretary shall consider state laws and regulations on commercial motor vehicle safety, to minimize their unnecessary preemption. Craft v. Graebel- Oklahoma Movers, Inc., 178 P.3d 170 (Okl. 2007) noted the general statute but not this particular subdivision noting that the regulations should be enacted in view of state laws on motor vehicle safety. The Worker's Compensation Laws provide for no regulations on motor vehicle safety. The Minnesota Worker's Compensation Laws are entirely separate from motor vehicle safety requirements. Therefore, there is not any implication at all that the Minnesota Worker's Compensation Laws are not preempted by these federal regulations. Moreover, the federal statute is merely a directive to the Secretary to consider state laws on motor vehicle safety. Once regulation is enacted, it necessarily preempts state law. The federal statute at the end states that it does not affect a state commercial motor safety vehicle law applicable to interstate commerce. Again, the Minnesota Worker's Compensation Act is entirely separate and does not address commercial motor vehicle safety.

49 U.S.C. 31136 then goes on to provide that the Secretary of Transportation shall prescribe regulations on commercial motor vehicle safety, including minimum safety standards for commercial motor vehicles. It specifically requires that "commercial motor vehicles are maintained, equipped, loaded and operated safely."

49 U.S.C. 31137 deals with brake maintenance regulations. It states that improved regulations shall be adopted to endure that the brakes on commercial vehicles are properly maintained and inspected by appropriate employees. This statute, and the regulations are obviously relevant in the present case.

Also noted is 49 U.S.C. § 31141. This deals only with state regulations on commercial motor vehicle safety. It does not deal with other state laws. This section allows the Secretary of Transportation to consider state regulations that may be more stringent than the federal regulations. It is clear that the Secretary of Transportation has the right to order that state regulations on motor vehicle safety are preempted. The exclusive remedy provisions of the Minnesota Worker's Compensation Act are totally separate from motor vehicle safety requirements, such as the federal laws and regulations. The Minnesota Worker's Compensation statutes have nothing to do with motor carrier safety requirements. These Minnesota laws do not affect the Federal Motor Carrier laws in any way.

#### **V. F. THE STATUTES AND REGULATIONS SPECIFICALLY ADDRESS SAFETY AND BRAKES**

49 U.S.C. 31131 states the purposes and findings. It provides that the purposes of the subchapter include "to minimize dangers to the health of operators of commercial motor vehicles and other employees who's employment directly effects motor carrier safety." It also provides that it is a goal of Congress that "it is in the interest of the public interest to enhance more commercial motor vehicle safety and thereby reduce highway fatalities, injuries, and property damage." These are similar to the goals noted in the Johnson case relating to the prior Interstate Commerce Act. Again the current U.S. Code does specifically recognize a

goal of protecting the safety of drivers. This again is consistent with a private cause of action by injured drivers.

Brakes are specifically addressed. 49 U.S.C. 31137 provides specifically for regulations relating to brakes. It is a goal to ensure that brakes and brake systems of commercial motor vehicles are maintained properly and inspected by appropriate employees. Minnesota Worker's Compensation Laws cannot preempt these federal statutes and their goals and their enforcement as provided in the U.S. Code.

49 U.S.C. 30103 deals with uniformity of regulations in relationship to other laws. It provides that states cannot enforce standards different from those provided under federal law or less restrictive than the federal statute. This confirms that the states cannot abrogate the laws under 49 U.S.C. In the preceding section, 49 U.S.C. 30101 notes that it is the goal to reduce traffic accidents and deaths and injuries resulting from traffic accidents. That certainly is an appropriate statement relevant to the present case. An attempt to preempt the enforcement provisions of these federal laws would frustrate the accomplishment of those laws.

**V. G. DEFENDANT CARLSON'S VIOLATION OF FEDERAL LAW  
ESTABLISHES PLAINTIFF'S PRIVATE CAUSE OF ACTION**

It is the position of Plaintiffs that Defendant Carlson violated statutes, federal regulations or other law. Carlson improperly performed inspections, maintenance, and repairs on the tractor and trailer involved in this fatal accident that were the cause of Harlan Ficken's death. Carlson also violated its obligations to maintain proper records of its maintenance and repair of the tractor and trailer.

Among the laws and regulations violated by J. L. Carlson is the following nonexclusive list: 49 U.S.C. 14701, et sec., 49 U.S.C. 14704 and 14707, 49 C.F.R 393.1, 49 C.F.R 393.40, 49 C.F.R 393.42, 49 C.F.R 393.48, 49 C.F.R 393.47, 49 C.F.R 393.52, 49 C.F.R 393.53, 49 C.F.R 393.201, 49 C.F.R 393.207, 49 C.F.R 395.1, 49 C.F.R 395.8, 49 C.F.R 396.1, 49 C.F.R 396.3, 49 C.F.R 396.75, 49 C.F.R 396.7, 49 C.F.R 396.9, 49 C.F.R 369.11, 49 C.F.R 396.13, 49 C.F.R 396.17, 49 C.F.R 396.19, 49 C.F.R 396.21, 49 C.F.R 396.25. There may also be violations of 49 C.F.R. 382.101 et sec and 49 C.F.R. 383.3 et sec and including 49 C.F.R. 385.2, 49 C.F.R 385.3, 49 C.F.R 385.5, 49 C.F.R 385.301, 49 C.F.R 390.1, 49 C.F.R 390.3, 49 C.F.R 390.11, 49 C.F.R 390.19, 49 C.F.R 390.35, 49 C.F.R 390.37, 49 C.F.R 391.25, 49 C.F.R 391.27, 49 C.F.R 391.31, 49 C.F.R 391.51, 49 C.F.R 392.1 et sec. There may also be other claimed violations of law including violations of other regulations. See the Affidavits and Reports of Mr. Elkin and Mr. Long.

It is provided in 49 U.S.C. 14701, etc., and governing regulations that Carlson has a non-delegable duty to inspect, maintain, repair and maintain proper records for this tractor and trailer. Carlson violated this law. The cited regulations expand the scope of this law and further detail the obligations of Carlson. Carlson violated those obligations.

There is a private cause of action for violating these federal laws. See 49 U.S.C. 14704 and U.S.C. 14707. These laws, by their terms, provide for a private cause of action.

The Courts have recognized a private cause of action for violating these federal laws. The federal district of Minnesota has considered this issue and has ruled that private cause of action does exist for violations of these federal statutes. See Hall vs. Aloha Intn'l Moving Svcs, Inc., 202 WL 1835469 (D. Minn. 2002). That case held that there was a private cause

of action for violations of 49 U.S.C. 14704 and 49 U.S.C. 14706. It also recognized the right to attorneys' fees under 49 U.S.C. 14707. The Court held that the plaintiff was not entitled to damages under 49 U.S.C. 14704 because her damages were not a result of a violation of law by the carrier. However, that is beside the point in the present case. This case recognizes a private cause of action for a violation of 49 U.S.C. 14701, et seq. 49 U.S.C. 14704 provides in subdivision a. that "a person injured because a carrier . . . does not obey an order of the secretary or the board, as applicable, under this part, except an order for payment of money, may bring a civil action to enforce that order under this subsection. The person may bring a civil action for injunctive relief for violation . . . ."

49 U.S.C. 14704, Subd. a(2) provides 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." 49 U.S.C. 14707 provides for an award of attorneys' fees when there is a violation of the Act. It also provides for civil action to enforce the law.

Hall cites the Eighth Circuit's decision in O.O.I.D.A. vs. New Prime, Inc., 192 F.3rd 778 (8<sup>th</sup> Cir. 1999). The case specifically held that there was a federal private cause of action under 49 U.S.C. 14704(a). The court concluded that 49 U.S.C. 14704(a) did authorize private actions for damages and injunctive relief to remedy at least some violations of the Motor Carrier Act and its implementing regulations. 192 F.3rd 785. The court specifically rejected the claim by the carriers that there was no private cause of action. This case is governing authority in the present case.

Other Courts as well have recognized that a private cause of action exists for violation of these federal trucking regulations. In the federal case of Marrier v. New Penn Motor

Express, Inc., 140 F.Supp.2d 326 (D. Vt. 2001), the court held that a dockworker who suffered breathing problems after being exposed to a chemical while unloading a truck, could bring a private cause of action for personal injury. 49 U.S.C. 14704. The court noted “the plain meaning of the statute, which by its terms, creates a private cause of action for personal injury.” 140 F.Supp. 329. It noted that one of the purposes of the Interstate Transportation Act was to insure safety in the operation of motor carriers. In that case, it was not even a driver who was injured. The Act applies even more specifically and clearly to the present case, where the injured person is the driver.

In Johnson v. S.O.S. Transport, Inc., 926 F.2d 516 (6<sup>th</sup> Cir. 1991) the court held that there was a private cause of action under the federal statutes. That case involved a wrongful death action under the federal statutes. That case involved a wrongful death action by a truck driver’s estate against a truck lessee. There was a claim that the lessee was negligent in the maintenance and inspection of the truck, causing it to leave the road. The court held that the driver was an intended beneficiary of the federal statute and regulations requiring the carrier provide a safe vehicle. In that case the truck left the road as it descended a mountain grade. There were claims that the vehicle’s brakes and bulkhead were deficient. The court there also noted that the regulations applying the statute were claimed to have been violated and violations of those regulations rise to the private cause of action against the carrier by the estate. The court noted that in Title 49 that Congress addressed the areas of motor carrier safety, including the safety of operators of vehicles. It noted that a stated purpose was “to minimize dangers to the health of operators of commercial vehicles.” 926 F.2d 524.

Plaintiff has therefore established prima facie claim for violation of the federal statutes. The federal statutes clearly provide for a private cause of action. Under the Supremacy clause of the United States Constitution and the governing cases, Plaintiff is entitled to make these claims against Carlson in this action.

### **V.H. CRAFT**

Carlson does not deny that the applicable regulations that apply to the brakes, etc., were enacted under the authority of the 49 U.S.C sections. Carlson does not deny that these regulations were properly enacted by the Secretary and the Board. Carlson does not deny that Carlson is required to comply with these regulations and that compliance with these regulations is a condition of its regulations.

Carlson has noted that the Craft Court had identified 39 published and unpublished opinions discussing 14704. It found that only three considered whether there was a right to bring a claim for personal injury under the federal statutes. It did not find that the other 36 cases held that there was not a right. Rather, those other 36 opinions discussed commercial rights. Therefore, it is not the case that there are 38 cases against and one case in favor of Plaintiff's position. Rather, of the cases cited regarding personal injury in Craft, there are two cases against, Schramm and Stewart, and one case in favor, Marrier. Therefore, there should be no implication that the citation of the other 36 cases in Craft implies that Plaintiff does not have a private cause of action in the present case. The Owner/Operator and Prime case held that there is a private cause of action. It is just that those other cases are commercial cases and not personal injury cases. The reasoning and interpretation of Craft is not correct and is not persuasive and should not be followed.

## V.I. REVIEW OF OTHER CASES REGARDING PRIVATE CAUSES OF ACTION UNDER THE GOVERNING FEDERAL STATUTES

The Defendant in the trial court cited, and relied upon, the case of Craft v. Graebel-Oklahoma Movers, Inc., 178 P.3d, 170 (Okl. 2007). They reviewed Craft regarding several different issues. One issue is whether there is a private cause of action for personal injury claims under the governing federal law. The Plaintiff in this action submits that the Craft case did not properly interpret the federal law. The Craft case also did not properly analyze the other private causes of action cases which it reviewed and which it interpreted as holding that there are only private causes of action under the federal statutes for commercial cases and not for personal injury cases.

The fact that those other 36 cases dealt with commercial claims does not by any means imply that § 14704 is intended to deal solely with commercial claim cases. Those other 36 cases arose as commercial claims. They are not cases that arose as personal injury cases and where the Court ruled on whether or not there were personal injury causes of action permitted. Of the cases cited in Craft, there were only 26 different sets of parties. The same parties were involved in multiple actions in 9 sets of cases. Indeed, the New Prime cases involved seven of those cases. It appears that none of those cases discussed whether there was a personal injury cause of action.

The fact that these many cases have dealt with commercial violations should not lead to any inference that section 14704 deals only with commercial violations. Indeed, one of the cases cited was KPX, LLC, v. Transgroup World Wide Logistics, Inc., 2006 WL 411181 (D. AZ 2006). That case considered the scope and intent of § 14704(a)(2). It noted that the

previously cited cases had all dealt with Truth-in-Leasing violations. KPX dealt with other violations and a claim for damages as a result of Defendant's transportation and violations enacted under 49 U.S.C. § 13506 (8). The Court noted that, although the prior case did involve Truth-in-Leasing violations, "This coincidence is no reason to correspondingly limit the private cause of action afforded in § 14704 (a)(2) to damages for Truth-in-Leasing statutes or regulations. The express language of subsection 2 includes no such limitation and the case law suggests no such distinction." 2006 WL 4011181 at p.2. The next decision in that case, issued six days later, is found at KPX, LLC, v. Transgroup World Wide Logistics, Inc., 2006 WL 411255 (D. AZ 2006). That decision considered further the intent of § 14704. It considered whether that only provided for the right of parties to sue for the enforcement of agency orders, or whether it allowed parties to sue directly for violation of regulations. It noted that the new statute expanded the prior law which only allowed complaints to be brought before the ICC. It noted the legislative history and cited some of that history, noting that "Consistent with this explanation, the committee describes § 14704 of the House Bill as 'provid[ing] for private enforcement the provisions of the Motor Carrier Act in Court. This expands the current law which only permits complaints brought under the Act to be brought before the ICC.'" The KPX case quoted Owner-Operator Driver's Ass'n v. New Prime, Inc., 192 F. 3<sup>rd</sup> 178 (8<sup>th</sup> Circuit, 1999) (at 781). That case cited H.R. REP No. 104-311, at 120-121; 1995-2 U.S.C.C.A.N. at 832-3. The KPX Court went on to note that the second sentence in § 14704(a)(1) must refer not only to violations of the statute but must also include violations of the implementing regulations. It noted that "it would be impossible for a carrier to violate the statute other than by violating rules and regulations promulgated under the statute. The

Court rejected the argument that the second provision in subsection (1)(a) was limited to orders based on the plain language of the provision and because it would make little practical sense- “a party suing to enforce an agency order is unlikely to need relief beyond enforcement of the order.” *id* at 784. 2006 WL 411255 at p. 5. It went on to conclude that the 8<sup>th</sup> Circuit Court of Appeals in Owner Operator Driver’s Ass’n v. New Prime, *supra*, concluded that 49 U.S.C. § 14704 (a) authorized private actions for injunctive relief and damages to remedy violations of the Motor Carrier Act and its implementing regulations.” 2006 WL 41125 at p. 6. The Court also went on to find that the Plaintiff was entitled to summary judgment and that Plaintiff was entitled to an award of attorney’s fees.

Other cases cited in Craft holding that a violation of the regulations authorizes a private cause of action include these cases: Rivas v. Rail Delivery Service, Inc., 423 F.3d 1079 (9<sup>th</sup> Cir. 2005), Putnam v. Olympic Transport, Inc., 2007 WL 1388202 (D.Minn. 2007), Smiley v. Smooth Operators, Inc., 2006 WL 1896357 (D. Wisc. 2006)(determined that there is a 4 year statute of limitations under 14704(a)(2) for a violation of regulations), Tillman v. Bulkmatic Transport Co., 2006 WL1793562 (N. D. Ill. 2006). There are no limitations or prohibitions, Tayssoun Transportation, Inc., v. Universal AM-CAN, LTD., 2005 WL 1185811 (SD Tex. 2005)discussed the interrelationship of Section 14704(a)(1) and 14704(a)(2). Those cases noted that Section 14704(a)(1) and 14704(a)(2) are not dependent upon each other. There were two different bills, HR 2539 and S.196 that were sent to the conference committee. The committee reorganized the proposed legislation into one section for the first time as the provisions that then became Section 14707(a)(1) and 14704(a)(2). These cases therefore hold that a private cause of action exists for violation of regulations

and not just a right to enforcement through administrative needs. Owner-Operator Independent Driver's Ass'n v. C.R. England, Inc., 325 F. Supp. 2d, 1252 (D. Utah, 2004). Owner-Operator Independent Driver's Ass'n, Inc., v. Bulkmatic Transport Co., 2004 WL 115155 (N. D. Illinois 2004) Greyhound Lines, Inc., v. Monroe Bus Corp., 309 F. Supp. 2d 104 (D.C. 2004), Fitzpatrick v. Morgan Southern, 251 F. Supp. 978 (W. District, Tenn. 2003). Owner Operator Independent Driver's Ass'n, Inc., v. New Prime, Inc., 250 F.Supp.2d 1151(W.Dist. Mo. 2001). Owner-Operator, Independent Driver's Ass'n v. Mayflower Transit, Inc., 161 F.Supp.2d., 948 (SD Ind. 2001), Owner-Operator Independent Driver's Ass'n, Inc., v. Ledar Transport, 2000 WL 33711271 (W. D. Mo. 2000), Turner v. Miller Transporters, Inc., 876 S.2d 848 (La., 2004)

It appears that the cases cited by Craft come to a consensus that there is a private cause of action for violation of regulations, as well as private causes of action to enforce order. The fact that almost all of those cases arose out of commercial transactions does not imply that the statute is limited to commercial transactions. Therefore, the only remaining real issue is whether the federal statutes permit a private cause of action for personal injury claims as well as commercial claims. As noted in Marrier, supra, the clear language of the statute permits claims for damages and does not have any limits. A number of the cases cited in Craft also come to the same conclusion, that the language of the statute is clear, all encompassing and does not have limits on the kinds of claims to which it applies.

Other cases discussing the lack of limits on the kinds of claims to which the statutes apply include: Owner-Operator Independent Driver's Ass'n, Inc., v. New Prime, Inc., 192 F.3d 778 (8<sup>th</sup> Cir. 1999), Owner-Operator Independent Driver's Ass'n, Inc., v. C.R. England,

Inc., 508 F.Supp. 2d 972 (D. Utah 2007), Owner-Operators Independent Drivers Ass'n, Inc. v. Mayflower Transit, Inc., 2006 WL 1547084 (S. D. Ind., 2006) Solheim v. Earl E. Foss Trucking, Inc., 2005 WL 4708180 (D. Mt. 2005)

Craft says that the legislative history establishes that the federal laws were only intended to apply to commercial transactions. However, Craft does not have any cites to the legislative history. Indeed, it appears that none of the cases have found any legislative history which is that the federal legislation is limited to commercial claims and does not establish private causes of action for non commercial claims such as personal injury claims.

Consequently, the plain language of the statute is not limited to commercial cases. The plain language of the statute allows recovery of any damages resulting from a violation of the statutes or the regulations enacted thereunder. There is nothing pointed out in the cases changing this conclusion. There is nothing in the legislative history of which appellants are aware which changes this conclusion that the plain language of the statute allows the present private causes of action under the federal statutes for this wrongful death claim.

#### **V.J. SCHRAMM**

The cases of Stewart v. Mitchell Trans., 241 F.Supp. 2d, 216 (D. Kan. 2002) and Schramm v. Foster, 341 F.Supp. 2d 536 (D. MD. 2004) were previously cited by Carlson.

The Court in Schramm, supra., provided very little discussion of legislative history for the background for its interpretation of 14704 (a)(2). Moreover, the Court held that, even if that section applied, that the Plaintiff did not have a right to recover, because the alleged wrongdoer was not the employer of the driver. That is a crucial difference with the current case, where Carlson clearly was the employer of Harlan Ficken. Again, Plaintiff submits that

Owner/Operator, Johnson, Marrier and the clear language of the various statutes and regulations provide for a private cause of action in the present case. The private cause of action cannot be preempted by the Minnesota Worker's Compensation Act.

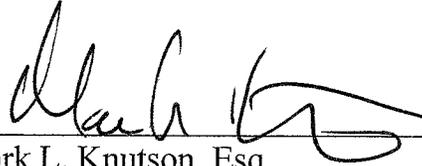
## VI. CONCLUSION

Appellant submits that the Court of Appeals should reverse the Trial Court and allow this matter to proceed into Trial. The Court of Appeals should reverse the Trial Court on the issue of Federal Preemption of Minnesota Worker's Compensation Law. The Minnesota Worker's Compensation Law's bar against Minnesota common law negligence claims made against an employer does not effect Plaintiff's ability to sue the employer under the governing federal statutes. Due to Federal Supremacy, the Minnesota Worker's Compensation Act does not effect the Federal Law claims in any way. Federal Law does not have to preempt Minnesota law. Whether or not Federal Law preempts Minnesota law, Minnesota law does not limit Plaintiff's claims under Federal law due to Federal Supremacy.

The Court of Appeals should reverse the Trial Court on the issue of Plaintiff's private cause of action claims under 49 U.S.C. 14704 and 49 U.S.C. 14707. 49 U.S.C. 14704(a)(2) allows Plaintiff to claim damages for violation of the relevant federal laws. The regulations enacted under those laws which are relevant here, are regulations dealing with safety. Violation of these regulation is within the scope of the claims which can be brought under 49 U.S.C. 14704. The case cited by the Trial Court, Craft, supra, is not well reasoned and the cases cited in Craft in support of its position in fact do not support the conclusions reached by the Craft Court. This Court should follow the reasoning of Marrier, supra, and Hall v. Aloha, supra.

Appellant therefore submits that the Trial Court should be reversed on both grounds and that this case should proceed to trial against J.L. Carlson on the basis of Plaintiff's federal court claims.

Dated this 21 day of April, 2010.



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