

NO. 03-05-379

1 RANDY HUGHES, Individually) IN THE DISTRICT COURT
2 and as Personal Representative)
for the ESTATE OF SHILOH)
3 HUGHES; CLINT ROYSE,)
Individually and as Personal)
4 Representative for the ESTATE)
OF AFTON HUGHES ROYSE; and as)
5 Next Friend of JAGR ROYSE;)
WILLIE WATKINS; Individually)
6 and as Personal Representative)
for the ESTATE OF JOYCE)
7 WATKINS; SHIRLEY RITCHEY;)
CAROLYN LARGENT; BETTY GENTRY)
8 and JOHNNY WATKINS)
Plaintiffs,)
9)
VS.) OF WISE COUNTY, TEXAS
10)
TXI TRANSPORTATION COMPANY;)
11 AURELIO MELENDEZ; and RICARDO)
REYNA RODRIGUEZ)
12 VS.)
WILLIE WATKINS, Individually)
13 and as Personal Representative)
for the ESTATE OF KIMBERLY)
14 WATKINS HUGHES) 271st JUDICIAL DISTRICT

15 *****
16 MOTION TO COMPEL
17 *****

18
19 On the 12th day of April, 2004, the following
20 proceedings came on to be heard in the above-entitled and
21 numbered cause before the Honorable John H. Fostel, Judge
22 presiding, held in Decatur, Wise County, Texas:

23
24 Proceedings reported by Computerized Stenographic
25 Method.

A P P E A R A N C E S

FOR THE PLAINTIFFS:

BY: MR. MICHAEL A. SIMPSON
SBOT No: 18403650
MR. DERRICK S. BOYD
SBOT No: 00790350
MR. G. ALAN POWERS
SBOT No: 24005089
P.O. Box 685
SIMPSON, BOYD & POWERS, PLLC
P.O. Box 957
Decatur, Texas
Telephone: (940) 627-8308
Fax: (940) 683-3122

FOR THE DEFENDANTS:

MR. MARK STRADLEY
STRADLEY & WRIGHT
Abrams Centre, 9330 LBJ Freeway, Suite 1400
Dallas, Texas 75243

MR. CHARLES W. HURD (Not Present)
MS. ALISON WEBSTER (Not Present)
FULBRIGHT & JAWORSKI, L.L.P.
1031 McKinney
Houston, Texas 77010-3095

MR. MICHAEL C. STEINDORF
FULBRIGHT & JAWORSKI, L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201-2784

SEWELL & FORBIS
BY: CHRISTOPHER M. FORBIS
SBOT No.: 07223900
P.O. Box 534
Decatur, Texas 76234
Telephone: (940) 627-2143
Fax: (940) 627-6147

MILLER & BROWN, LLP
By: MR. KAI HECKER (Not Present)
400 South Ervay Street
Dallas, Texas 75201-5513

1 CHRONOLOGICAL INDEX

2

3 VOLUME 1 OF 15
4 MASTER INDEX

5

6 VOLUME 2 OF 15
7 SECOND SCHEDULING CONFERENCE, MOTIONS
8 January 29, 2004

9

(No witnesses/no exhibits)

10

11 VOLUME 3 OF 15
12 MOTION TO COMPEL
13 April 12, 2004

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1 P R O C E E D I N G S

2 (Proceedings were had on the
3 12th day of April, 2004.)

4 THE COURT: Do you need announcements?

5 THE COURT REPORTER: Please.

6 THE COURT: Beginning on my left.

7 MR. STEINDORF: Mike Steindorf for the
8 Defendants, your Honor.

9 MR. STRADLEY: Mark Stradley for the Defendants,
10 your Honor.

11 MR. FORBIS: Chris Forbis for Defendants, your
12 Honor.

13 MR. BOYD: Your Honor, Derrick Boyd for the
14 Plaintiffs.

15 MR. POWERS: Alan Powers for the Hughes,
16 Watkins, Royse families.

17 MR. SIMPSON: Mike Simpson for the Hughes,
18 Watkins, Royse families.

19 THE COURT: What do we have? Motion to compel?

20 MR. POWERS: Yes, your Honor.

21 THE COURT: Whose motion is it?

22 MR. BOYD: It's our motion, your Honor.

23 MR. STRADLEY: Well, there -- there are actually
24 two.

25 THE COURT: Well, you've got one and --

1 MR. STRADLEY: We -- We do, but I think we've
2 reached an agreement on my part. Whenever the time is
3 appropriate we can put --

4 MR. BOYD: Why don't we do the agreements off
5 the top.

6 THE COURT: Let's do the agreement before you
7 all get into a big fight over depositions.

8 MR. BOYD: Yes. It's my understanding that we
9 have reached an agreement concerning -- Defendants wanted to
10 redepose Clint Royse and Randy Hughes concerning cellular
11 telephone bills, and we've agreed as long as it's limited to
12 that one issue, that they can retake that deposition.

13 And the Defendants have agreed to make their
14 expert John Painter available for an additional one hour of
15 deposition, time limit of one hour. Is that the agreement?

16 MR. STRADLEY: That's correct with the caveat --

17 I mean, the cellular telephone bills is what
18 caused the motion to be filed, and I'd like to not limit it just
19 to bills themselves, but I'd like to talk about the calls that
20 are shown on there, whose number is whose, and fully explore the
21 area of cellular phone usage on that day.

22 MR. BOYD: We have no problem --

23 THE COURT: Do you think the problem is your
24 cellular connection?

25 (Laughter)

1 THE COURT: All right. Is that straight?

2 MR. BOYD: I think that's straight, your Honor.

3 THE COURT: All right.

4 MR. BOYD: The second agreement was there had
5 been some discovery responses --

6 We had a previous motion to compel. The Court
7 had ruled on some discovery responses. We got a supplemental
8 response that had supplemental responses at the bottom, but it
9 continued to maintain the objections in the body of the
10 response.

11 I think Mr. Stradley agreed he is going to
12 resubmit those without the objections that have been overruled,
13 so we have a clean answer.

14 MR. STRADLEY: And just so the record is clear,
15 we're not withdrawing the objections, but since the Court has
16 already ruled on those and overruled those objections, I will
17 remove the objections from the body of the response.

18 MR. BOYD: Yeah. All we want, your Honor, is a
19 clean answer that doesn't have the objections in it.

20 THE COURT: All right.

21 MR. BOYD: And also, you were --

22 There has been some discussion about the
23 original of the tape of the interview that the driver of the TXI
24 truck gave at the scene. I think the representation is being
25 made, and I'm going to let you make the representation, that it

1 is the only one that's been produced; correct?

2 MR. STRADLEY: Correct.

3 There was a recorded statement taken of our
4 driver Ricardo Rodriguez. There was some question about whether
5 there were two statements, because he testified in his
6 deposition that he thought he gave it in Spanish with this tape,
7 most of it was in English.

8 And it's my representation, that is the only
9 recorded statement that we have or that we know of.

10 MR. BOYD: That's fine, your Honor.

11 THE COURT: Is Mr. Simpson going to interpret
12 that for you in Spanish?

13 MR. BOYD: The English one or the Spanish one?

14 THE COURT: I hear he's quite good at that.

15 MR. POWERS: Your Honor, Plaintiffs did file
16 three motions to compel. And the one issue runs through all
17 three of these.

18 In each of these motions to compel we're
19 compelling the Defendants to produce records for the driver,
20 Mr. Rodriguez, from the time of the accident to the present.

21 These logs are supposed to be kept pursuant to
22 the regulations, and we're just asking if we could have the
23 logs. I believe we asked for fuel tickets, payroll stubs,
24 anything to show his activity working for these individuals,
25 Mr. Melendez and TXI for the period of -- following the accident

1 through the present.

2 MR. STRADLEY: And your Honor, our position is
3 that, first off, that's way overbroad, because we're talking
4 about 17 months of records from the day of the accident up until
5 today.

6 And Federal regulations require the log books to
7 only be kept for six months. And at this point it would -- it
8 is overbroad. We don't even know how far back we can go with
9 those records.

10 But the bigger issue, your Honor, is they are
11 attempting to get into post-accident conduct, which does not
12 appear to be discoverable. We have admitted that this man was
13 driving, and in the course and scope of his employment with
14 Melendez Trucking, and Melendez Trucking was in the course and
15 scope of its lease with TXI, so they've got whatever respondeat
16 superior they need, vicarious liability they need, and I don't
17 know the purpose of getting into post-accident conduct,
18 especially 17 months worth of record, and what-have-you.

19 MR. BOYD: Your Honor, here is an example of why
20 we need this.

21 This accident occurred December 17 of 2002.
22 Ricardo Rodriguez was deposed November 19th of 2003. At the
23 deposition he testified he was an illegal alien. He had used
24 false --

25 He never had a Social Security number. He used

1 a false Social Security number to obtain his driver's license.

2 The next day we deposed John Kennemer, the
3 safety man at TXI. His testimony was: We didn't know that.
4 That's the first time we learned that.

5 I anticipate the argument we're going to hear at
6 trial is, had he known that, once -- once all this comes out, we
7 certainly wouldn't have let him drive.

8 If they have let him drive since that day, that
9 evidence certainly would be relevant, or at least reasonably
10 calculated to be relevant as to refute the argument that they're
11 going to make, and that's why at this time what we're talking
12 about is discoverability, so we would ask that the records be
13 produced.

14 We can take up relevance at the pretrial hearing
15 if they have -- want to assert any additional arguments as to
16 that.

17 MR. STRADLEY: If I may, your Honor, very
18 briefly.

19 First, I -- I object to the usage of the term
20 "illegal alien," because there has been no determination as to
21 his legal status.

22 Secondly, I understand we're talking about
23 discoverability, and not relevancy at this point, but we're
24 three weeks from trial and they want 17 months of documents to
25 try to establish post-accident conduct they believe that they

1 can somehow get into -- to show that their original theory
2 pre-accident was valid.

3 They've got all the discovery they need
4 pre-accident. I don't know why they would need this.

5 It's above and beyond anything that they have
6 pleaded or that has been discovered so far, and I just don't see
7 the -- the point in having it.

8 THE COURT: Anything further?

9 All right. I'm going to grant their motion to
10 compel, and simultaneously grant a motion in limine as to this
11 subject matter and listen to it at trial.

12 MR. STRADLEY: As to the subject matter of?

13 THE COURT: In other words, I want to see what
14 the relevance is before any of this evidence is introduced.

15 I'm going to go ahead and give you a limine on
16 it. Produce it --

17 MR. BOYD: You want us to approach.

18 THE COURT: I could see remotely why it could be
19 interesting and lead to discoverable -- I mean, and lead to
20 something that's relevant, but at any rate, that's the ruling at
21 this time.

22 MR. POWERS: Your Honor, we also filed a motion
23 to compel Defendants' response to Plaintiffs' requests for
24 admissions. It's three separate motions to compel for three
25 Defendants, your Honor.

1 Some of the requests, again, are kind of like
2 what we had in our earlier motion. They're dealing with whether
3 or not Mr. Rodriguez was driving for TXI, Mr. Melendez, in the
4 months following this accident.

5 And there's objections lodged and none of these
6 requests for admissions have been admitted or denied.

7 Further, there's a request for TXI to admit or
8 deny whether or not they confirmed the Social Security, whether
9 or not they checked the Social Security number.

10 Again, your Honor, there has been a bunch of
11 objections and no response.

12 As far as Mr. Rodriguez, we request that he
13 admit the use of a false Social Security number that wasn't
14 issued by the Social Security agency, various requests of that
15 nature, that -- and again were not admitted or denied, but were
16 objected to.

17 And further, again, with Mr. Melendez -- again
18 Rodriguez driving since the date of the accident, there were
19 various requests that, again, were objected to and not admitted
20 or denied.

21 We would ask, your Honor, that these objections
22 be overruled, and Defendants respond to these or in an
23 alternative, your Honor, that these requests for admissions be
24 deemed admitted pursuant to Rule 215-4A.

25 MR. STRADLEY: Your Honor, it's much the same

1 argument, but with an additional factor here.

2 If they are asking about Social Security
3 numbers, it seems to me that is completely and totally
4 calculated to just impeach him on a collateral matter.

5 There is no issue that involves use of a Social
6 Security number that would require that to be disclosed. I
7 think he has a valid commercial driver's license. I think
8 they're trying to argue that in some of the paperwork he may
9 have used a false Social Security number.

10 Again, the license itself is valid, and it's
11 still valid to this day, and to discover something that is
12 purely impeachment on a collateral matter, we believe is -- is
13 overbroad and should not be permitted.

14 And, of course, we still have the same basic
15 underlying issues, and that is this is trying to get into
16 post-accident conduct, when they should be focusing on
17 pre-accident conduct.

18 MR. BOYD: The only thing I would add, your
19 Honor, is Section 522 of the Transportation Code lists the five
20 requirements to get a CDL. One of them is that you have a valid
21 Social Security number.

22 If he didn't have one, I don't know how his
23 driver's license can be valid if he used a fake Social Security
24 number to get one. That's certainly relevant as to
25 Mr. Rodriguez, himself, as a driver, plus TXI's qualification of

1 him as a driver. I think they just need to admit or deny it and
2 let us go on.

3 MR. STRADLEY: Very briefly, your Honor.

4 That -- That would be impeachment of the Texas
5 Department of Transportation, or DPS, rather than who issues the
6 license. That would not be appropriate discovery as to this man
7 whose license admittedly is valid, and was valid at the time of
8 the accident, and is valid now.

9 It seems to me they are trying to figure why DPS
10 issued this license without checking the Social Security number,
11 or without appropriately checking it, and that's -- that's
12 discovery that shouldn't even go to us, your Honor. It should
13 go to DPS.

14 MR. BOYD: Well, it would go to him as to why he
15 used a false Social Security number. If he lied about his age
16 to get a driver's license, why wouldn't that be relevant. I
17 mean, you can't fault the DPS when they -- when they file
18 something --

19 THE COURT: So are you saying it would go to his
20 credibility?

21 MR. BOYD: That would be exactly it, your Honor,
22 as well as his qualifications as a driver.

23 THE COURT: I'm going to grant their motion to
24 compel, Counsel.

25 What else?

1 MR. POWERS: That is it, your Honor.

2 MR. STRADLEY: I believe that covers it, your
3 Honor.

4 THE COURT: Go in peace.

5 Thank you.

6 MR. STRADLEY: Your Honor, so the record is
7 clear, can we have a time limit to do this? I know on these
8 records that they're talking about, 17 months of records, and I
9 don't know how long it's going to take us --

10 I don't even know what we've got.

11 THE COURT: How many? On one driver? 17 months
12 on one driver?

13 MR. BOYD: They've got the file, your Honor, on
14 this driver.

15 THE COURT: And how long ago did they ask for
16 it?

17 MR. POWERS: Your Honor, the requests were made
18 months ago -- February was the --

19 THE COURT: 2004?

20 MR. BOYD: Yes, your Honor.

21 MR. POWERS: Yes, your Honor.

22 THE COURT: When can you produce them,
23 Mr. Stradley?

24 MR. STRADLEY: We're due to be back in here two
25 weeks from tomorrow. If I could have it done by then, then if

1 there was an issue that came up -- that came up, it could be
2 addressed by then.

3 I just don't want to be on a -- too short a
4 leash. I've got a vacation letter on file and leaving town
5 Wednesday next week.

6 THE COURT: Where are you going?

7 MR. STRADLEY: San Francisco, TADC meeting, your
8 Honor.

9 (Discussion off the record.)

10 THE COURT: You all have got a hearing on the
11 26th?

12 MR. BOYD: 27th is our pretrial, your Honor.

13 THE COURT: 27th is your pretrial?

14 MR. BOYD: Yes, your Honor.

15 THE COURT: All right. And is that a Monday?

16 MR. STRADLEY: Tuesday.

17 THE COURT: That is a Tuesday.

18 THE COURT: Have them by Friday the 23rd.

19 MR. BOYD: Your Honor, just one caveat.

20 Obviously, if we get them and we would be
21 permitted, I guess, to supplement our exhibit list since it has
22 got to be on file seven days before the pretrial, so if we were
23 going to add anything to our -- to our exhibit list, would that
24 be correct?

25 THE COURT: Unless he produced it early.

1 MR. BOYD: Okay. If, like, we get it 4:30
2 Saturday --

3 THE COURT: If he went home and gave it to you
4 like tomorrow or something --

5 MR. BOYD: We'll get it on the exhibit list.

6 THE COURT: -- you need to do it on time.

7 MR. BOYD: Certainly.

8 MR. STRADLEY: Your Honor, and just so the
9 record is clear, a clarification. Our objections to the various
10 requests for production that formed the basis of the motion to
11 compel and our objections to the various requests for admissions
12 that form the basis of the motion to compel, are those all
13 overruled?

14 THE COURT: Yes.

15 Anything else?

16 MR. STRADLEY: Thank you, your Honor.

17 MR. BOYD: Thank you, your Honor.

18 -----

19 (END OF PROCEEDINGS)

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25

1 STATE OF TEXAS)

2 COUNTY OF WISE)

3 I, Jeffery M. Goodwyn, Official Court Reporter in and
4 for the 271st District Court of Wise County, State of Texas, do
5 hereby certify that the above and foregoing contains a true and
6 correct transcription of all portions of evidence and other
7 proceedings requested in writing by counsel for the parties to
8 be included in this volume of the Reporter's Record, in the
9 above-styled and numbered cause, all of which occurred in open
10 court or in chambers and were reported by me.

11 I further certify that this Reporter's Record of the
12 proceedings truly and correctly reflects the exhibits, if any,
13 offered by the respective parties.

14 *I further certify that the total cost for the preparation of
15 this Reporter's Record is \$ _____ and was paid/will be paid
16 by _____.

17 WITNESS MY OFFICIAL HAND this the _____ day of
18 _____, _____.

19
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22 _____
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23 Official Court Reporter, 271st District Court
Wise County, Texas
24 Post Office Box 623
Decatur, Texas 76234
25 (940)627-3200