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Establishing permissive use key to death-case recovery

The pickup truck driven by a drunken illegal immigrant struck a parked car and spun it into two people attending a party on Snead Road in South Richmond.

Joseph Owens pushed a friend out of the way before the vehicle hit and killed him and Kathryn Jones.

The driver, Carmen Alejandro Garcia-Hernandez, attempted to flee on foot, but others at the party detained him until police arrived. The wreck occurred about 11:20 p.m. on May 24, 2008, a Saturday.

Ronald J. Biringier, owner of the construction company that owned the truck, reported the next day that Garcia-Hernandez had taken the truck without authorization on the previous Friday.

Charles H. Cuthbert Jr., the Petersburg attorney who represented Owens' family, and Craig B. Davis and Walter H. Emroch, the Richmond lawyers who represented Jones' family, had a clear case of liability against Garcia-Hernandez.

"But liability that's a slam dunk gets you nowhere if you don't have permission" for Garcia-Hernandez to use the truck, Cuthbert said. If permission could be established, the corporation had \$6 million in insurance coverage.

The existence of such permission was fiercely contested in wrongful death actions on behalf of each family and a declaratory judgment action the attorneys for the estates filed against the insurer, Erie Insurance Exchange, to get a ruling on the issue of permission.

All three cases were the subject of a 13-hour mediation conducted by Richmond attorney Michael E. Harman. At the end of the session, Erie agreed to pay \$1 million to each of the estates.

Craig said Garcia-Hernandez did not talk to the estates' attorneys about the circumstances of the wreck because he was charged with voluntary manslaughter and was sentenced in December to 10 years in prison. He also faces deportation when he completes the sentence.



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But he told the attorneys that he was a foreman for the company, which had about 40 employees at the time of the crash, and had permission to use the truck. His possession of a cell phone, credit card and fleet gas card in the company's name buttressed his account.

He also "had an amazing recall for detail" about cell phone conversations with Biringier and other transactions in the time before the crash, Craig said.

Cell phone and credit card records supported his recollection and "he could refute and rebut everything" Biringier said about the lack of permission, Craig added. Garcia-Hernandez also directed the attorneys to other immigrants who provided valuable information about the way the company operated.

The attorneys had hoped to use a federal immigration conviction to establish a motive for Biringier to deny that he had given Garcia-Hernandez permission to use the truck.

The business owner was indicted in March 2008 on a charge of transporting illegal immigrants to Fort Lee two months earlier. The attorneys asserted that Biringier falsely denied giving Garcia-Hernandez per-

mission to use the truck because he feared a second immigration charge while the first one was still pending.

But when the attorneys sought documents and other information related to the original charge, they found that the case had been sealed and the record of the charge had been removed from the court's database.

The only record of the criminal charge are documents related to a motion by Davis to unseal the criminal file.

The documents seek a ruling by U.S. Magistrate Judge Dennis W. Dohnal that Biringier "may not use the Court's sealing of his criminal file as a shield or affirmative basis to avoid and/or evade providing answers to written discovery and answering questions in deposition" about his knowledge of the immigration status of Garcia-Hernandez and other company employees.

The U.S. attorney's office objected to unsealing the file, and Dohnal disposed of Davis' request with a sealed order on May 6.

Cuthbert and Davis said the order prevents them from disclosing its substance.

Davis said the gathering on Snead Road was a group of current or former Southside Virginia residents who were participating in a softball tournament that weekend.

Jones, 44, moved to Richmond from South Hill and lived on Hey Road. She worked as a security guard and her beneficiaries are a 17-year-old daughter and a 26-year-old son.

The 40-year-old Owens lived in Alberta in Brunswick County. His beneficiaries are a 19-year-old son and a 20-year-old daughter.

The son wrote and recorded a rap song, "Love My Father," shortly after the father's death.

The damages presentation at the mediation was limited to the introduction of the son and daughter and a music video of the song synchronized with photographs, mementos and other images depicting Owens and his children's relationship with him.

Permissive use alleged in fatal crash involving immigrant

Type of action: Wrongful death - drunken driving, permissive use

Injuries alleged: Death

Name of case: Estate of Joseph Owens v. Garcia-Hernandez and R.J. Biringier Construction Co. Inc.; estate of Kathryn L. Jones v. Garcia-Hernandez and R.J. Biringier Construction Co. Inc.

Court: Richmond Circuit Court

Case No.: CL08-4298

Tried before: Mediation

Name of mediator: Michael E. Harman

Verdict or Settlement: Settlement

Amount: \$1,000,000 for each estate

Date: Mediation on June 1, 2009; court approval of settlement on Oct. 2, 2009

Plaintiff's attorneys: Craig B. Davis and Walter H. Emroch, Richmond, for Owens' estate; Charles H. Cuthbert Jr., Petersburg, for Jones' estate

Experts: Dr. Alphonse Poklis, toxicologist; Asha R. Kays, audio/visual presentation; Scott Suddarth and Tom Bowman, investigators

Insurance carrier: Erie Insurance Exchange

\$1,000,000 Settlement for each of two estates

On May 24, 2008, an intoxicated illegal immigrant operating a pickup truck owned by his employer struck a parked car that was propelled into a yard where a Memorial Day weekend party was in progress.

Joseph Owens pushed two of his friends out of the path of the vehicle, but it struck and killed him and Kathryn Jones, another person at the party.

The driver attempted to flee but was detained by others at the party until police arrived. He had a blood alcohol content of 0.18 percent, and he was subsequently sentenced to 10 years in prison after pleading guilty to two counts of vehicular manslaughter.

Twenty-four hours after the accident, the defendant's employer reported to the Powhatan Sheriff's Department that the vehicle had been stolen. The employer was out on bond after being indicted earlier in the year for transporting and employing illegal aliens.

Wrongful death actions were commenced on behalf of both decedents. Erie Insurance Exchange contended that the driver was operating the vehicle without permission and denied coverage. The employer testified in his deposition that the defendant was a simple laborer who only

occasionally drove the vehicle at work.

However, investigation revealed that the defendant was actually a foreman who had been issued a cell phone, Visa card and fleet gas card in the business's name and was regularly allowed to drive company-owned vehicles at work and at home despite the employer's knowledge that he was an illegal alien without a valid driver's license.

The driver recounted specific conversations with the employer prior to the accident in which he was given permission to use the vehicle over the holiday weekend because his own vehicle was broken down in the employer's parking lot. Cell phone records corroborated the existence, duration and telephone numbers of each of these calls.

In a declaratory judgment action, counsel for both decedents took the position that the driver had no motive to lie about permission because he would be deported after serving his 10-year jail sentence.

Plaintiffs' attorneys contended that the employer had fabricated his claim that the vehicle had been stolen to avoid violating the terms of his bond on the pending immigration charges and potentially exposing himself to additional charges. This theory was supported by the employer's firing of the four other illegal aliens on the driver's crew the first work day following the holiday weekend.

The employer testified that he had never fired the employees, they simply stopped coming to work because the defendant had been their only transportation, and he would welcome them back. A former foreman, who earlier had supported the employer's account, testified that the employer told him to "get rid of them" when these employees found a ride to work that first day back.

Settlements were reached in both cases following a 13-hour mediation conducted by Mike Harman less than two weeks prior to the trial in the declaratory judgment action.

Jones' statutory beneficiaries were a 17-year-old daughter and a 26-year-old son.

Owens' statutory beneficiaries were 19-year-old son and 20-year-old daughter. An aspiring musician and rapper, the Owens' son wrote and recorded a rap song entitled "Love My Father" shortly after his death.

With the help of Asha Kays of Amicus Visual Solutions, a music video was created synchronizing multiple photographs, mementos and other damages evidence with the lyrics.

The damages presentation for Owens' estate at the mediation was limited to a brief introduction of the two beneficiaries and then showing the video. The decedent's many family members present were deeply moved by the video and each requested a copy.

[09-T-152]