

CAUSE NO. 970-335

FABIOLA GUTIERREZ DIAZ, individually and as next friend of E.V., a minor plaintiff <i>Plaintiff,</i>	§ § § § § § § § §	IN THE DISTRICT COURT 335th JUDICIAL DISTRICT BASTROP COUNTY, TEXAS
vs.		
WORLD TRADE DISTRIBUTION, INC., <i>Defendant.</i>		

**PLAINTIFF’S FIRST AMENDED PETITION, REQUEST FOR
TEMPORARY INJUNCTION, AND JURY DEMAND**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Plaintiff, FABIOLA GUTIERREZ DIAZ, individually and as next friend of E.V., a minor plaintiff, complaining of WORLD TRADE DISTRIBUTION, INC. (hereinafter referred to as “Defendant”) and would respectfully show unto this Court the following:

I. DISCOVERY CONTROL PLAN

1.1. Plaintiff intends to conduct discovery under Level III of Tex. R. Civ. P. 194.

II. PARTIES

2.1. Plaintiff FABIOLA GUTIERREZ DIAZ (also referred to as DIAZ herein) is a resident of Bastrop County, Texas. She is the mother of minor plaintiff E.V.

2.2 Defendant WORLD TRADE DISTRIBUTION, INC., (also referred to herein as WTD) is a domestic corporation, registered to and doing business regularly and continuously in the State of Texas. Defendant WTD, may be served through its registered agent: Martin, Disiere, Jefferson & Wisdom, LLP, 808 Travis, Houston, TX.

III. JURISDICTION AND VENUE

3.1 This Court has personal jurisdiction over the parties. All the parties are either individual residents of the State of Texas, have their principal place of business in Texas, have

sufficient minimum contacts with the State of Texas, and/or have purposefully availed themselves of the laws and markets of the State of Texas so as to not offend traditional notions of fair play and substantial justice.

3.2 This Court is the proper venue to hear this lawsuit pursuant to Tex. Civ. Prac. & Rem. Code § 15.002(a)(1) because the events giving rise to this lawsuit occurred in the county of suit.

3.3 As required by Tex. R. Civ. P. 47(b), Plaintiff's counsel states that the damages sought are in an amount within the jurisdictional limits of this Court. As required by Tex. R. Civ. P. 47(c), and for the purposes of complying with this section only, the amount of monetary relief currently sought is anticipated to be within Tex. R. Civ. P. 47(c)(4). Plaintiff reserves the right to change this amount as evidence develops and the amount of monetary relief actually awarded, however, will ultimately be determined by a jury. Plaintiff also seek prejudgment and post-judgment interest at the highest legal rate.

IV MISNOMER/ALTER EGO

4.1 Pursuant to Tex. R. Civ. P. 28, Plaintiff is suing any partnership, unincorporated association, private corporation, or individual whose name contains the words or who does business under or as WORLD TRADE DISTRIBUTION, INC.

4.2 In the event any parties are misnamed or are not included herein, it is Plaintiff's contention that such was a "misidentification," "misnomer," and/or such parties are/were "alter egos" of parties named herein. Alternatively, Plaintiff contends that such "corporate veils" should be pierced to hold such parties properly included in the interest of justice.

V. FACTS

5.1 Plaintiff's claim are based on the injuries cause by Defendant in a school bus crash to E.V. on October 24, 2018.

5.2 On October 24, 2018, in Cedar Creek, Bastrop County, Texas, Defendant was operating a tractor trailer westbound on SH-71 under the Motor Carrier operating authority and for the benefit of WORLD TRADE DISTRIBUTION, INC. Defendant's truck driver operated this commercial motor vehicle in the course and scope of his employment with Defendant. On or about 7:50 a.m. on October 24, 2018, while traveling through the intersection with Tucker Hill Lane in Cedar Creek, Texas, Defendant's driver collided with a school bus containing approximately 20 children from intermediate to high school age.

5.3 As Defendant's driver approached the intersection of Tucker Hill Lane with Highway 71 he did not control his speed, did not maintain control of the tractor-trailer, drove while distracted, ran a red light, and did not watch for other vehicles on the roadway.

5.4 Defendant's driver also claimed to have trouble with the brakes, which Defendant WTD is responsible for monitoring and maintaining. Defendant WTD's driver also chose not to perform an appropriate pre-trip inspection and did not report any issues with his braking system prior to this wreck, despite experiencing problems in the past. After crashing into the school bus, the WTD driver misled investigators and others about his conduct in the crash, including at least, claiming that he entered the intersection on a yellow light.

5.5 The negligence of Defendant WORLD TRADE DISTRIBUTION, INC., and WTD's driver's negligence caused the crash, as described above, with the school bus full of children, causing serious bodily to Minor Plaintiff E.V.

VI.
COUNT 1 – NEGLIGENCE OF DEFENDANT

6.1 Plaintiff incorporates the allegations contained in Paragraphs 3.1 through 5.5 as if fully set forth and stated herein.

6.2 Defendant had a duty to exercise ordinary care and operate its vehicle reasonably and prudently.

6.3 The school bus wreck described above, and the resulting injuries, medical bills, and other damages suffered by Plaintiffs, were proximately caused by the negligent conduct of Defendant, including but not limited to:

- (a) Failing to drive reasonably and prudently;
- (b) Failure to use reasonable care;
- (c) Failure to properly maintain their vehicle;
- (d) Failure of Defendant WORLD TRADE DISTRIBUTION to properly train its driver;
- (e) Failure of Defendant WORLD TRADE DISTRIBUTION to properly supervise its driver;
- (f) Defendant WORLD TRADE DISTRIBUTION negligently hiring its driver;
- (g) Failure of Defendant WORLD TRADE DISTRIBUTION to properly maintain the vehicle in a safe manner;
- (h) Failure of Defendant WORLD TRADE DISTRIBUTION to repair and maintain the vehicle;
- (i) Negligently entrusting the driver with their vehicle;
- (j) Driving too fast for the conditions;
- (k) Driving while fatigued;
- (l) Driving while distracted;
- (m) Driving without controlling your vehicle;
- (n) Running a red light; and
- (o) Choosing not to look for the presence of other vehicles or keep a proper lookout.

6.4 Each of the foregoing acts and/or omissions, taken together or individually, constitute negligence and each actually and proximately caused the collision and the injuries and damages sustained by Plaintiffs.

VII.
COUNT 2 – NEGLIGENCE *PER SE* OF DEFENDANT

7.1 Plaintiff incorporates the allegations contained in Paragraphs 3.1 through 6.4 as if fully set forth and stated herein.

7.2 In addition to other counts, Defendant's negligence described in Count 1 violated statutory law under the Federal Motor Carrier Safety Administration and Texas Transportation Code. Specifically, Defendants violated:

- a. 49 CFR § 395; by failing to comply with hours of service limitations and regulations;
- b. 49 CFR § 392.82; by using a cell phone while driving in violation of the regulation;
- c. Tex. Transp. Code § 544.007(d); by failing to stop before entering an intersection when facing a steady red signal (red light);
- d. Tex. Transp. Code § 544.007(e); by choosing to ignore the warnings provided by the steady yellow signal that movement through the intersection is being terminated and a red signal is about to be given; and
- e. Tex. Transp. Code § 544.004; by choosing to disobey a traffic-control device.

7.3 Failing to abide by the law of the state of Texas and federal law constitutes negligence per se.

7.4 The aforementioned federal regulations, listed in paragraph 7.2, are designed to protect a class of person, to which Plaintiff belongs, against the type of injury suffered by Plaintiff.

7.5 Defendants' violations of the federal regulations in paragraph 7.2 were without legal excuse.

7.6 As a direct and proximate result of Defendants' breach of duty imposed under the Texas Transportation Code and federal regulations, Plaintiff suffered actual damages.

VIII.
GROSS NEGLIGENCE

8.1 Plaintiff incorporates the allegations in Paragraph 3.1 through 7.6 as if full set forth and stated herein.

8.2 Plaintiff's injuries resulted from Defendants' gross negligence, which entitle Plaintiff to exemplary damages under Texas Civil Practices & Remedies Code, Section 41.003(a). Defendants' actions, conduct described in paragraphs 3.1 through 7.6, when viewed objectively from Defendants' standpoint at the time it occurred, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others. Defendants had actual, subjective awareness of the risk but proceeded anyway with a conscious indifference to the rights, safety, or welfare of others as described in paragraphs 3.1 through 7.6.

8.3 The wreck and the resulting injuries and damages suffered by Plaintiff were proximately caused by the grossly negligent conduct of Defendants.

IX.
RESPONDEAT SUPERIOR

9.1 At the time of the incident in question and immediately prior thereto, Defendant WORLD TRADE DISTRIBUTION's employee was acting within the course and scope of his employment for Defendant WORLD TRADE DISTRIBUTION.

At the time of the incident in question and immediately prior thereto, Defendant WORLD TRADE DISTRIBUTION's employee was engaged in the furtherance of Defendants WORLD TRADE DISTRIBUTION's business.

9.2 At the time of the incident in question and immediately prior thereto, Defendant WORLD TRADE DISTRIBUTION's employee was engaged in accomplishing a task for which Defendant WORLD TRADE DISTRIBUTION's employee was employed.

9.3 Plaintiffs invoke the doctrine of Respondeat Superior against Defendant.

X. **DAMAGES**

10.1 As a direct and proximate cause of Defendant's negligence, Plaintiff Fabiola Gutierrez Diaz, individually and as next friend of E.V., minor plaintiff, has suffered damages and personal injuries and, as provided by Texas Law, is entitled to recover for those damages. Plaintiff E.V. has suffered damages as follows:

- a. Physical pain sustained in the past;
- b. Physical pain that, in reasonable probability, Minor Plaintiff will sustain in the future;
- c. Mental anguish sustained in the past;
- d. Mental anguish that, in reasonable probability, Minor Plaintiff will sustain in the future;
- e. Physical impairment sustained in the past;
- f. Physical impairment that, in reasonable probability, Minor Plaintiff will sustain in the future;
- g. Disfigurement sustained in the past;
- h. Disfigurement that, in reasonable probability, Minor Plaintiff will sustain in the future;
- i. Loss of wage earning capacity that, in reasonable probability, Minor Plaintiff will sustain in the future; and
- j. Medical care expenses that, in reasonable probability, Minor Plaintiff will require in the future, after the age of 18.

10.2 Plaintiff Fabiola Diaz, mother of Minor Plaintiff E.V. has suffered damages as follows:

- a. Medical care expenses sustained in the past; and
- b. Medical care expenses that, in reasonable probability, Minor Plaintiff will require in the future, up to the age of 18.

10.4 Plaintiffs seek unliquidated damages and exemplary damages within the jurisdictional limits of this Court.

10.5 The damages which Plaintiffs seek are within the jurisdictional limits of this Court.

XI. JURY DEMAND

11.1 Plaintiffs demand a jury trial and has previously tendered the appropriate fee with the Original Petition.

XII. APPLICATION FOR TEMPORARY RESTRAINING ORDER

12.01 This accident occurred as a result of Defendant's negligence and gross negligence. Defendant has certain property that was involved in and/or related to the incident that needs to be preserved. Defendant's property include the tractor, trailer, electronic control monitors, telematics, on-board driver monitoring equipment, all related video and photos of the crash, all coaching events for Defendant's driver involved in this crash, cell phone(s) of its driver, or its programs and data (hereafter collectively referred to as the "evidence") involved in the collision.

12.02 Defendant has not been served. Plaintiff intends to serve the Temporary Restraining Order with the Citation.

12.03 In the experience of Plaintiff's counsel, companies typically attempt repairs, remove equipment, or sell damaged vehicles following a crash. Further, drivers in many cases have

been known to intentionally and unintentionally destroy cell phone evidence. Moreover, if they exist, telematics data typically has set period of time in which data will be destroyed, which with some software and service providers can be as short as three weeks. These actions alter the evidence permanently, and the gathering of evidence related to this action would be irreversibly hindered. Unless Defendant is prevented from the altering, destroying, erasing, changing, or modifying of the evidence, Plaintiff will be irreparably harmed. If any altering, destroying, erasing, changing, or modifying of the evidence is permitted prior to the time that Plaintiff's counsel as well as experts, if any, retained by them are able to inspect, photograph, download, and perform non-destructive examination of the evidence, valuable evidence will undoubtedly be lost or destroyed. Therefore, Defendant should be restrained and enjoined from altering, destroying, erasing, changing, or modifying of the evidence.

12.04 Plaintiff has no adequate remedy at law or otherwise for the harm or damage set forth herein. Defendant and all of his agents, employees and representatives should be restrained and enjoined from doing any act of any nature which would result in altering, destroying, erasing, changing, or modifying of the evidence, which were involved in the incident in question, until it can be inspected, documented, and tested by Plaintiff. In the event Defendant is not so restrained and enjoined, Plaintiff will suffer irreparable harm, damage and injury.

12.05 Plaintiff has requested permanent relief in the form of a cause of action, Plaintiff is likely to succeed on the merits of its lawsuit, and Plaintiff has plead that it will suffer a probable injury in the form of irreparable injury. TEX. CIV. PRAC. REM. CODE § 65.011(5).

12.08 The Plaintiff is willing to post bond for this Temporary Restraining Order. TEX. R. CIV. PROC. 684.

12.09 Although Plaintiff is not aware of any counsel for Defendant at this time, notifying the Defendant or its counsel would cause irreparable harm to the Plaintiff. Plaintiff has, however, faxed a copy of this petition and request for temporary restraining order to Defendant's registered agent, which is a law firm in Houston, Texas.

12.10 This application for a Temporary Restraining Order is supported with the below verification. TEX. R. CIV. PROC. 680, 682.

XIII.

REQUEST FOR TEMPORARY INJUNCTION

13.01 Plaintiff asks the Court to set this application for hearing and that after a hearing, to be held within 14 days of the issuance of the temporary restraining order, and, after the hearing, issue a temporary injunction against the Defendant.

IVX. PRAYER

14.1. WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants be cited according to law to appear and answer herein, and that upon final trial, Plaintiff have judgment against Defendants as follows:

- a. Plaintiff recover actual, special, and exemplary damages resulting from Defendants' negligence in an amount within the jurisdictional limits of this Court;
- b. Plaintiff recover costs of court;
- c. Plaintiff recover prejudgment and post judgment interest on all damages at the maximum legal rate;
- d. the Court GRANT Plaintiff's request for a Temporary Restraining Order, restraining Defendant and all of his agents, employees and representatives from

doing any act of any nature which would result in altering, destroying, erasing, changing, or modifying the evidence identified herein; and

- e. Plaintiff recover such other and further general and specific relief, at law and at equity to which Plaintiff may show to be justly entitled.

Respectfully submitted,

GLASHEEN, VALLES & INDERMAN, LLP
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(737) 202-3433
(512) 298-1009 Fax
Email: jon.clark@gvilaw.com

/s/ Jonathon C. Clark _____

Kevin Glasheen
State Bar No. 08001510
Jonathon (Jon) C. Clark
State Bar No. 24068683
ATTORNEY FOR PLAINTIFF

JURY DEMAND

Plaintiff hereby respectfully demands a trial by jury in this cause and has previously paid the required fee.

/s/ Jonathon C. Clark _____

Jonathon (Jon) C. Clark

VERIFICATION

STATE OF TEXAS §

COUNTY OF Travis §

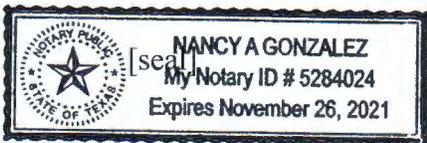
BEFORE ME, the undersigned Notary Public, on this day personally appeared Jonathon Clark, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

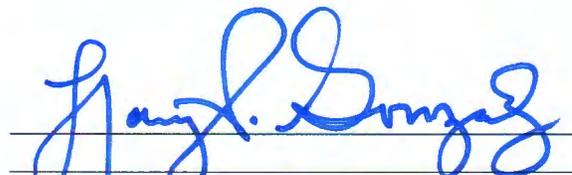
“My name is Jonathon Clark. I am capable of making this verification. I am a licensed attorney in the State of Texas. I have read PLAINTIFF’S FIRST AMENDED PETITION, REQUEST FOR TEMPORARY INJUNCTION, AND JURY DEMAND, paragraphs 12.01-12.09. The facts stated in it are within my personal knowledge and are true and correct.”



Jonathon (Jon) C. Clark

SUBSCRIBED AND SWORN TO BEFORE ME on this 29th day of October, 2018, to certify which witness my hand and seal of office.





NOTARY PUBLIC, STATE OF TEXAS