



BALANCING THE SCALES
OF JUSTICE

ASSOCIATION OF TRIAL LAWYERS OF AMERICA

**2006 NATIONAL STUDENT TRIAL
ADVOCACY COMPETITION**

OFFICIAL RULES

And

FACT PATTERN

Endowed by Baldwin & Baldwin, L.L.P.

Important Dates

Requests for fact pattern clarification due: January 2, 2006

Final list of students on team due: February 6, 2006

Students must be members of ATLA by: February 6, 2006

Regional competitions: March 2 -5, 2006

(some regions may vary)

Final competition: March 30 – April 2, 2006, Miami, FL

The competition fact pattern is copyrighted by the Association of Trial Lawyers of America (ATLA) and may not be used for purposes other than its intended use without the express written consent of ATLA.

Please note!

All information regarding the 2006 National Mock Trial Competition is also available on ATLA's Web site, at www.atla.org, and will be updated frequently.

All questions and correspondence should be addressed to:

Sondra D. Stephenson, Esq., Manager, Law Student and Minority Programs
Association of Trial Lawyers of America
1050 31st Street, N.W.
Washington, D.C. 20007
sondra.stephenson@atlahq.org
202-944-2828 or 800-424-2725, ext. 372
FAX: 202-298-6849 www.atla.org

GENERAL INFORMATION

One of ATLA's goals is to inspire excellence in trial advocacy through training and education for both law students and practicing attorneys. One way ATLA accomplishes this goal is by sponsoring a national student mock trial competition. This is an exceptional opportunity for law students to develop and practice their trial advocacy skills before distinguished members of the bar and bench.

Because the purpose of this competition is to give law students the opportunity to develop their trial skills, the actual merits of the plaintiff's case and the defense presented are irrelevant to this purpose. **The competition is not to be decided on the merits of the plaintiff's or defendant's case.**

Requests for Clarification

Any requests for clarification about the rules or fact pattern must be made in writing no later than January 2, 2006 to Sondra D. Stephenson, Esq., Manager, Law Student and Minority Programs, at the address on page 1. Each school is limited to asking no more than five (5) questions. Questions will be answered in writing and placed in the mail to all teams by January 31, 2006.

Rule Violations and Filing of Complaints

A violation of any of the rules governing the National Student Trial Advocacy Competition shall subject the violators to penalty or disqualification.

If a team has a dispute, the team coach should bring the problem/complaint to the regional coordinator's attention immediately. The regional coordinator will review the complaint and make a ruling which shall be binding for the respective rounds of competition. Decisions regarding any or all aspects of the competition will be made in keeping with the rules and objectives of the program.

A team may file a formal complaint with ATLA by putting in writing the nature of the complaint and the surrounding circumstances. All complaints should be sent to Sondra D. Stephenson, Esq., Manager, Law Student and Minority Programs, at the address on page 1. Complaints must be submitted in writing no later than seven (7) days following the last day of the competition. Complaints will be brought to the Law Schools Committee for consideration and final resolution.

LAW SCHOOL & STUDENT ELIGIBILITY

The competition is open to all law schools nationwide. A law school may enter up to two teams. Each team shall be comprised of four law students. A school's selection method of its trial team(s) is left for the school to determine. However, for a student to be eligible, he or she must be enrolled for a J.D. degree and be a student member of ATLA.

Students who graduate in December, 2005, are eligible to participate only if the competition counts toward their credits for graduation and they will not be admitted to practice prior to March, 2006.

Each student participant must be an ATLA student member by February 6, 2006, in order to participate.

REGISTRATION PROCEDURES

Refund Policy

Requests for a refund of a school's registration fee must be made in writing before November 14, 2005. It is inevitable that a few teams drop out of the competition in the months leading up to the regionals. Teams placed on the waiting list because the competition is full will be contacted for participation in the order that their registrations were received. Teams on the waiting list will also be issued a refund check if it is determined that the team will not be competing. Additionally, schools that registered two teams, but are only able to enter one team because the competition is full, will receive a refund of the registration fee for the second team.

ATLA Student Membership

Student team members must be ATLA members by February 6, 2006, in order to participate. Please call ATLA's member hotline at 800-424-2727 to determine whether students on the team are current members and that their memberships will be active at the time of the competition. ATLA Student membership dues are \$15. To become a member or to renew a membership, you may complete an application online at <http://www.atla.org/lawstudents> or call ATLA's member hotline at 800-424-2727 and join over the phone. Students should indicate that they are Student Trial Advocacy Competition participants.

Student and Coach Registration

ATLA needs to know the names of the participating students and coach for each team. Each team must complete a team registration form and return it to ATLA by February 6, 2006. Please be sure to include the complete mailing address, date of birth and graduation date for each student on the team registration form. This information is required to process the team registration.

Student Substitution Policy

Substitution of team members after February 6, 2006, is not permitted except in the case of personal emergencies. Requests for substitution after the February 6, 2006, deadline must be made in writing with an explanation of why the substitution is needed and sent to Sondra Stephenson at ATLA for consideration.

REGIONAL AND FINAL COMPETITION ASSIGNMENTS

Entering teams will be assigned to one of fourteen regional competitions based on geographical convenience **to the extent possible**. Teams from the same law school will be assigned to the same region. Regional competition dates may vary due to courthouse availability. Teams will be notified of any date changes when regional assignments are made.

A coach or an advisor must accompany each team to the regional and the final competitions. This does not have to be the same person for both the regional and the final competition.

The winning team from each regional competition will advance to the National Final Competition in Miami, FL, March 30 – April 2, 2006. One team from each region will be declared the Regional Winner.

Travel expenses for the regional and final competitions are the responsibility of the participants. Teams competing in past competitions have obtained funds from law school deans and alumni associations, members of the local legal community, state and local trial associations, and ATLA law school chapters.

COMPETITION FORMAT

There will be no trial brief writing competition. Each team will consist of four law students. Two students will be advocates and two students will play the witnesses for their side in each round. Advocates and witnesses may change their roles from round to round but roles must remain consistent throughout each individual trial.

In the regional competitions:

- each team will compete in three qualifying rounds
- the top four teams from the qualifying rounds will advance to a single elimination semi-final round
- the top two teams from the semi-final round will compete to determine which one team will advance to the National Finals

In the final competition:

- each team will compete in three qualifying rounds
- the top eight teams from the qualifying rounds will advance to a single elimination quarter-final round
- the top four teams from the quarter-final round will advance to a single elimination semi-final round
- the top two teams from the semi-final round will advance to a single elimination final round

Regional Team Pairings in Qualifying Rounds

Pairing of teams in the qualifying rounds will be at random and conducted during the coaches' meeting prior to each competition. Each team will represent both plaintiff and defendant in the first two rounds. No two teams shall compete against each other more than once in the qualifying rounds. Teams from the same school will not compete against each other during any of the rounds of the regional competition or in the qualifying rounds of the national final competitions.

Team Rankings in All Other Rounds

In the semi-final round, the first ranked team will meet the fourth-ranked team, and the second-ranked team will meet the third-ranked team.

Regional semi-final round (Normal pairings: 1 v. 4; 2 v. 3)

Situation 1: Teams ranked 1 and 4 are from the same school

New pairings: 1 v. 3; 2 v. 4

Situation 2: Teams ranked 2 and 3 are from the same school
New pairings: 1 v. 3; 2 v. 4

The ranking of teams to determine the semi-finalists and finalists will be determined by the following factors (in this order):

1. Win/Loss record
2. Number of winning votes
3. Number of total points awarded to the team

If there are an odd number of teams competing at a regional competition, one team in each round will receive a "bye" chosen by lot. For ranking purposes, a bye will count as a win with 3 winning votes and the points will be determined by averaging the points from the team's other two qualifying rounds.

NATIONAL FINALS: quarter-final round (Normal pairings: 1 v. 8; 2 v. 7; 3 v. 6; 4 v. 5)

Situation 1: Teams ranked 1 and 8 are from the same school
New pairings: 1 v. 7; 2 v. 8; 3 v. 6; 4 v. 5

Situation 2: Teams ranked 2 and 7 are from the same school
New pairings: 1 v. 7; 2 v. 8; 3 v. 6; 4 v. 5

Situation 3: Teams ranked 3 and 6 are from the same school
New pairings: 1 v. 8; 2 v. 7; 3 v. 5; 4 v. 6

Situation 4: Teams ranked 4 and 5 are from the same school
New pairings: 1 v. 8; 2 v. 7; 3 v. 5; 4 v. 6

National semi-final round (Normal pairings: 1 v. 4; 2 v. 3)

Situation 1: Teams ranked 1 and 4 are from the same school
New pairings: 1 v. 3; 2 v. 4

Situation 2: Teams ranked 2 and 3 are from the same school
New pairings: 1 v. 3; 2 v. 4

If teams from the same school are matched to compete based on rank in the semi-final and final rounds of a regional competition, regional hosts will re-pair teams according to the following scenarios:

Determination of Team Representation

If the four national and regional semi-final teams have already met in the qualifying rounds, they will represent different sides from the previous confrontation. If they have not yet met, each team will take the side they represented only once in qualifying rounds. If matched teams represented the same side only once, the winner of a coin toss will choose sides.

The national finals semi-final teams will represent a different side than in the quarter-final round. If matched teams represented the same side in the quarter-final round, the winner of a coin toss will choose sides. The two national final teams will represent a different side than in the semi-final round. If matched teams represented the same side in the semi-final round, the winner of a coin toss will choose sides.

THE TRIAL

The competition involves the trial of a civil lawsuit. The same fact pattern will be provided to all participants for use in both the regional and final competitions.

The Federal Rules of Evidence (FRE) and Federal Rules of Civil Procedure shall control. Only these rules, and the law provided in the fact pattern, shall be used in argument. Specifically, no statutory, regulatory or case law shall be cited except for what is provided in the fact pattern. Students may argue the comments or advisory notes to the Federal Rules of Evidence but may not cite the cases contained therein. No written briefs or motions, trial notebooks or other written materials should be presented to the court.

No pre-trial motions of any kind are allowed. Directed verdict arguments and objections are allowed.

The trial will consist of the following phases by each team in this order:

- Opening Statement
- Direct examination of lay witness and re-direct examination (if any)
- Cross-examination of lay witnesses (no re-cross-examination)
- Direct examination of expert witness and re-direct examination (if any)
- Cross-examination of expert witness (no re-cross-examination)
- Summation

Team members acting as advocates must participate in three of the six phases of the trial. Opening statement and summation may not be done by the same person. Each team must be prepared to argue both sides of the case. Pairing in the qualifying rounds will be at random, with each team representing both plaintiff and defendant at least once in the three rounds.

Except in the final round, the courtrooms will be off-limits to all team members, coaches, friends, and family members who are not associated with either team competing, unless their team has already been eliminated from the competition. There is to be no coaching of the team by anyone during a round, including any recesses or breaks. If a team is found to be violating this rule, the regional coordinator may choose to disqualify the team from the remainder of the competition.

Teams may videotape their trials only during the competition, so long as no additional lighting is employed, and it does not interfere with the trial. In case of a dispute in this regard, the regional coordinator shall have discretion. Since this matter is bifurcated, and the jury will only consider the issues of liability, there will be no evidence presented on the issues of damages. There are no third party actions pending.

Timing of the trial

- Each team will have 80 minutes to complete its argument.
- The time limit will be strictly enforced, although it is not necessary that all time allotted be used.
- There will be no time limits for specific aspects of the trial.
- Time on cross-examination is charged against the team conducting the cross-examination.
- Time will be stopped for objections and responses to objections.
- Performance at trial will be evaluated by a panel of judges and attorneys, one of whom will preside over the trial as Judge, making rulings as necessary, and the remainder (up to three) of whom will act as the jury.

Facts outside the Record

Teams must confine their presentation to the facts given in the fact pattern and inferences which may reasonably be drawn therefrom (“the Record”) and any matters judicially noticeable under Rule 201 of the Federal Rules of Evidence. An “inference” is not any fact you might wish to be true; rather, it is a fact that is likely to be true, given the other facts in the case. Except during closing argument, no objection shall be made that the opposing team is “going outside the Record,” and any breach of the rule shall be addressed instead by means of impeachment. Witnesses must admit, if asked, and if true, that the facts they have testified to are not in their deposition or otherwise in the record. Witnesses may not qualify this admission in a misleading way by saying, for example, that they were not asked about these facts during their deposition, or that the facts were contained in some other portion of the deposition, which was omitted from the record. The answer should simply be: “No, I did not say that in my deposition.” The judges will be instructed concerning the significance of this form of impeachment in the mock trial context, and they are likely to account for unfair additions to the record (i.e., inferences which may not reasonably be drawn from the record or matters not judicially noticeable under FRE Rule 201) in their scoring of the witness’ team.

WITNESSES

Every effort has been made to make the parties and witnesses to this case gender neutral. In some instances the language would have been too awkward. You may use either sex or the appropriate pronouns for any witness.

Assume that all the witnesses have seen the exhibits and depositions. Witnesses know only the facts contained in the background information, exhibits and depositions. Assume all depositions are signed and sworn. The same attorney conducting direct examination of a witness shall also conduct any redirect examination. Witnesses may not be re-called.

"The Rule" of sequestration of witnesses will not be invoked during any trial.

JURY INSTRUCTIONS

Assume that the instructions provided in the fact pattern are the only instructions to be given and are not subject to motion or modification. They are the only statements of the applicable

substantive law. No additional instructions may be tendered. There is no need to number the jury instructions as they do not need to be referred to by number.

EXHIBITS

The use of demonstrative evidence is limited to that which is provided in the fact pattern. Participants are free to enlarge any diagram, statement, exhibit or portion of the fact pattern, only if substantially identical.

Counsel and witnesses may draw or make simple charts and drawings in court for the purpose of illustrating the direct or cross-examination of argument. They may not be prepared in advance. However, no demonstrative evidence outside the given facts may be "created" for the purpose of this competition. Participants should clear all demonstrative evidence with the regional coordinator at the coaches' meeting preceding the rounds of competition.

All exhibits are authentic and genuine, and assume that they have been authenticated for trial purposes.

SCORING CRITERIA

Performance at trial will be evaluated by a jury made up of a panel of three judges and/or attorneys. Each member of the jury may award up to five points in each phase of trial for both the plaintiff and defendant. A sample score sheet is attached for your review.

In the event a jury member awards the same number of points to the plaintiff and defendant, he/she will award one point to either plaintiff or defendant for effectiveness of objections and/or overall case presentation in order to break the tie. Judges have been instructed not to score teams on the merits of the case.

The ranking of teams to determine the quarter-finalists after the qualifying rounds will be determined by the following factors (in this order):

1. Win/Loss record after three rounds
2. Number of winning votes after three rounds
3. Number of total points awarded to the team after three rounds

After the rankings for the semi-final round in the regional and the quarter-final round in the final are determined, cumulative scores will be disregarded in determining rankings of subsequent rounds. Only the scores of the subsequent round will be used to determine rankings.

If there are an odd number of teams competing at a regional competition, one team in each round will receive a "bye" chosen by lot. For ranking purposes, a bye will count as a win with 3 winning votes and the points will be determined by averaging the points from the team's other two qualifying rounds.

The following criteria for scoring trial performances are set forth to assist both judges and student advocates. Judges are not limited to these criteria and may consider other aspects of strategy, technique, etc., which they view as important.

OPENING STATEMENT

Did Counsel...

1. Generally confine statement to outlining the evidence that would be presented?
2. Clearly present counsel's theory of the case?
3. Persuasively present counsel's theory of the case?
4. Personalize self and client?
5. Allow opposing attorney to make argument during opening statement?
6. Make unnecessary objections?

EXAMINATION OF WITNESSES

Did Counsel...

1. Ask questions that generated a minimum of valid objections?
2. Make/fail to make objections with tactical or substantial merit?
3. Respond appropriately to objections made?
4. Know the rules of evidence and express that knowledge clearly?
5. Develop rapport with the witness?
6. Maintain appropriate general attitude and demeanor?
7. Address court and others appropriately?
8. Demonstrate awareness of ethical considerations?

Did direct examiner...

9. Unnecessarily use leading questions?
10. Develop testimony in an interesting and coherent fashion?
11. Follow up on witness' answers?
12. Present the witness in the most favorable light?

Did cross-examiner...

13. Appropriately use leading questions?
14. Control witness?
15. Follow up on answers and elicit helpful testimony?
16. Use impeachment opportunities?

CLOSING ARGUMENT

Did Counsel...

1. Present a cohesive theory of the case pulling all the positive arguments together?
2. Deal effectively with the weakness in counsel's own case?
3. Make an argument that was persuasive?
4. Have an effective style of presentation?
5. Utilize the law effectively in the argument?

6. Inappropriately interrupt the argument of the opposing counsel?
7. Was the rebuttal properly confined to rebuttal matters?
8. Was the rebuttal effective in countering the opponent's speech?

ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mission

Seek justice for all ...

*Preserve the constitutional rights
to trial by jury...*

Prevent injury from occurring...

*Champion the cause of those who deserve redress
for injury to person or property...*

*Promote the public good through concerted efforts to
secure safe products, a safe workplace, a clean
environment, and quality health care...*

*Further the rule of law and the civil justice system,
and protect the rights of the accused...*

*Inspire excellence in advocacy through
training and education*

Encourage cooperation among members...

*Advance the common law and the finest
traditions of jurisprudence...*

*Uphold the honor and dignity of the legal
profession and the highest standards of
ethical conduct and integrity.*

About Trial Lawyers

Trial lawyers represent people who have been injured, discriminated against, or harmed in other ways through the negligence of others. As a trial lawyer, your clients might include:

- A child paralyzed after being struck by a drunk driver
- A young woman unable to have children because of a medical mistake
- A minority denied a promotion due to racial discrimination
- An elderly man mistreated in a nursing home
- A community whose water was made toxic by a local manufacturer

In addition to working for the plaintiff, trial lawyers also sometimes handle criminal defense cases.

About ATLA

The world's largest trial bar, ATLA has 60,000 members and offers many resources that you won't get in your law school classroom. ATLA provides networking and education to its members. ATLA also fights tort "reform" to assure that people have the right to a jury trial.

ATLA Law Student Benefits

Mentor Program—You'll be paired with an experienced trial lawyer who will share valuable guidance.

Student Newsletters—You'll receive *From Classroom to Courtroom*, the ATLA Law Student newsletter that brings you professional advice as well as news about upcoming law student events.

Student Chapters—A Network of Your Own—Chapter programs concentrate on areas of law that most interest your group. ATLA works closely with the chapters, providing lecturers and program ideas.

Law School Ambassador Program—ATLA member "ambassadors" give talks at various law schools to give students a true view of what it's really like to be a trial lawyer.

You'll receive a Free Legal Seminar Audiotape When You Join—Take your choice from a comprehensive list of legal topics.

Law Student Information Web Page—With www.atla.org/lawstudents, you can conduct research and participate in the ATLA Law Student list server.

ATLA's Authoritative Legal Publications—Stay up-to-date with your free subscriptions to

TRIAL, ATLA's award-winning monthly magazine, and *Law Reporter*, a case-reference journal.

ATLA's Annual Student Mock Trial Competition —You'll be eligible for ATLA's annual Student Mock Trial Competition, the nation's premier mock trial competition.

Network with Top Trial Lawyers—ATLA's Annual and Winter Conventions cover every aspect of trial law—all at an 85% discount for Law Student members.

Scholarships—ATLA offers several scholarships to Law Student Members.

How to Join

The yearly dues are only \$15. Call ATLA at 800-424-2725 ext. 372 or 434, or visit www.atla.org/lawstudents.

ATLA Student Membership Application

ATLA Member Benefits

If you're not an ATLA student join now for only \$15 and enjoy all these benefits:

- \$ Award-winning legal publications to keep you up to date C *TRIAL*, ATLA=s magazine, and *From Classroom to Courtroom*, ATLA=s law student newsletter
- \$ Mentor programs C pair you with an experienced trial lawyer to share advice and guidance
- \$ ATLA conventions C provide networking and educational opportunities
- \$ www.atla.org C participate in active legal forums and access ATLA=s resources on the Internet
- \$ Trial lawyer seminars C law students may attend for *free*
- \$ Student Trial Advocacy Competition C participate in the nation=s premier mock trial competition
- \$ Scholarships C ATLA offers several for law students
- \$ Law School Ambassador Program C ATLA member Aambassadors@ give talks at various law schools to give students a true view of what it=s really like to be a trial lawyer
- \$ ATLA Membership e-directory, for networking, finding a mentor, etc.

Name _____

Address _____

City/State/ZIP _____

Home Telephone _____

Law School Name _____

Work Telephone _____ Fax _____

E-mail _____

Date of Birth _____

Expected Graduation Date _____

Payment information:

A check is enclosed (payable to ATLA) for \$15

Charge \$15 to my:
 _____ MasterCard _____ Visa
 _____ American Express

Card # _____ Exp. Date _____

Name (if different on card) _____

Signature _____

\$15 Annual National Dues for ATLA Law Student Membership

Dues cover 12 full months of membership and include one-year member subscriptions to *TRIAL* magazine (\$40) and *Law Reporter* (\$75). Membership dues payments to the Association of Trial Lawyers of America (ATLA) are not tax deductible as ordinary and necessary business expenses subject to restrictions imposed as a result of the Association=s lobbying activities. The

Association of Trial Lawyers of America estimates that the non-deductible portion of your 2005-2006 ATLA dues is the portion which is allocable for lobbying and is 20%.

To join ATLA:

Mail this form to: ATLA Membership, P.O.
Box 3717

Washington, DC 20027-0217

or **Fax** with credit card information to: 202-
298-6849

Questions? Call 800-424-2725, ext. 372

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COURT DOCUMENTS

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF NEW FLORA, IN AND
FOR PLANTATION COUNTY. CIVIL
ACTION

CASE NO.: 2005 CA 004360 AB

GERRY COOK,

Plaintiff,

vs.

CHIPPER PROPERTIES, INC.

Defendant.

COMPLAINT FOR DAMAGES

COMES NOW Plaintiff, GERRY COOK, by and through undersigned counsel and sues
Defendant CHIPPER PROPERTIES, INC. (hereinafter “CHIPPER”) and alleges as follows:

GENERAL ALLEGATIONS

1. This is an action for damages, which exceeds FIFTEEN THOUSAND (\$15,000.00)
DOLLARS, exclusive of costs and interest.
2. At all times material hereto, Plaintiff, GERRY COOK, was and is a resident of
Plantation County, New Flora.
3. At all times material hereto Defendant CHIPPER was and is a New Flora corporation
authorized to and doing business in Plantation County, New Flora with its principal
place of business at 900 10th Street, Plantation County, New Flora.
4. At all times material hereto, Defendant CHIPPER owned and maintained a Jet 3-ton
hoist (model #3RS-3-10) (serial #G293403003) (hereinafter referred to as “JET
HOIST”) which is the subject of this litigation.

5. At all times material hereto, Absolute Dewatering leased and/or rented a building under the possession, care and control of Defendant CHIPPER located at 900 10th Street, Plantation County, New Flora.
6. At all times material hereto, Absolute Dewatering leased and/or rented from Defendant CHIPPER, the JET HOIST which is the subject of this litigation.
7. At all times material hereto, Plaintiff GERRY COOK was within the course and scope of employment with Absolute Dewatering located in Plantation County, New Flora.
8. At all times material hereto, Plaintiff GERRY COOK was an invitee on the premises of Defendant CHIPPER.
9. At all times material hereto Plaintiff, GERRY COOK, had the consent and permission of Absolute Dewatering to operate and otherwise utilize the JET HOIST.
10. On or about December 12, 2004 Plaintiff, GERRY COOK, was operating the JET HOIST in a manner that was intended and/or reasonably foreseeable by Defendant when suddenly and without warning the JET HOIST broke dropping a 3,500 pound pump.
11. As a direct and proximate result of the JET PUMP breaking and falling, the Plaintiff sustained serious bodily injury.
12. That on one or more occasions prior to December 12, 2004 Defendant CHIPPER retained the services of Hoist Handling, Inc. for the purpose of repairing and/or maintaining the JET HOIST.
13. At all times material hereto, Defendant CHIPPER leased

and/or rented the JET HOIST without conducting proper testing adequate enough to determine whether the JET HOIST would fail as it did under the same and similar intended, foreseeable circumstances.

14. At all times material hereto, Defendant CHIPPER retained control and was responsible for the maintenance of the JET HOIST.
15. That at all times material hereto subsequent to December 12, 2004 the broken portion of the JET HOIST has been under the exclusive care, custody and control of Defendant CHIPPER.

COUNT I – NEGLIGENCE OF CHIPPER

16. Plaintiff re-alleges and incorporates the General Allegations, paragraphs 1-15, as though the same were set forth fully herein.
17. Defendant owed Plaintiff a duty to exercise reasonable care in the repair, refurbishing, inspection, maintenance and testing of the JET HOIST.
18. Defendant had a duty to maintain the premises in a reasonably safe condition.
19. That the aforementioned duties of care on the part of Defendant were non-delegable.
20. Defendant breached the aforementioned duties of care in one or more of the following ways:
 - a. Failed to detect the dangers and problems inherent in the JET HOIST;

- b. Failed to refurbish, repair, and inspect the JET HOIST and place it in a condition that would provide for its safe use;
 - c. Failed to warn plaintiff that the JET HOIST was in a dangerous condition;
 - d. Failed to choose a maintenance and repair company who possesses the knowledge, skill, experience and available equipment which a reasonable man would realize that such a company must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others;
 - e. Failed to exercise reasonable care under all the relevant surrounding circumstances.
21. Defendant's negligence was the direct and proximate cause of the failure, which caused the JET HOIST to break.
22. Defendant's negligence was the direct and proximate cause of the Plaintiff's injuries.
23. That as a direct and proximate result of the negligence and carelessness of Defendant as hereinabove alleged, the Plaintiff was permanently injured, suffered bodily injury and resulting pain and suffering, disfigurement and scarring, mental anguish, loss of capacity for the enjoyment of life, expense of medical care and treatment, loss of earnings, loss of ability to earn money, and aggravation of a previously existing condition. The losses are either permanent or continuing, and Plaintiff will suffer the losses in the future.

WHEREFORE the Plaintiff, GERRY COOK demands judgment for damages against Defendant for compensatory damages which are in excess of FIFTEEN THOUSAND DOLLARS (\$15,000.00), together with costs of this action, and Plaintiff further demands trial by jury in this cause.

LAVAL, BLUE, RONE & MULLIS, P.A.
750 South Dixie Highway
Bocaire, New Flora 30002

NEW FLORA BAR NO.: 957175 SHANE D. MULLIS

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF NEW FLORA, IN
AND FOR PLANTATION COUNTY.
CIVIL ACTION

CASE NO.: 2005 CA 004360 AB

GERRY COOK,

Plaintiff,

vs.

CHIPPER PROPERTIES, INC.

Defendant.

_____ /

ANSWER AND AFFIRMATIVE DEFENSES

COMES NOW Defendant, CHIPPER PROPERTIES, INC. by and through undersigned counsel and answers Plaintiff's Complaint as follows:

GENERAL ALLEGATIONS

1. Admitted to the extent that Plaintiff has properly pled the jurisdiction of this Court, denied to the extent that Plaintiff has suffered damages which exceed FIFTEEN THOUSAND (\$15,000.00) DOLLARS, exclusive of costs and interest.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.

8. Admitted.
9. Without knowledge, therefore denied.
10. Denied.
11. Denied.
12. Denied.
13. Denied.
14. Denied.
15. Denied.

COUNT I – NEGLIGENCE OF CHIPPER

16. Admitted or denied as more specifically stated above.
17. Denied.
18. Denied.
19. Denied.
20. Denied.
21. Denied.
22. Denied.
23. Denied

AFFIRMATIVE DEFENSES

1. As for its First Affirmative Defense, Defendant avers that
at all times material hereto, the sole and proximate cause of

the Plaintiffs' alleged damage was Plaintiff's own negligence. In the alternative, Plaintiff was comparatively negligent in causing any damage which might have been sustained, thereby reducing Plaintiff's recovery by the percentage of Plaintiff's own negligence.

2. As for its Second Affirmative Defense, Defendant avers that any dangerous condition that caused Plaintiff's alleged injuries was open and obvious, therefore no duty to warn existed.
3. As for its Third Affirmative Defense, Defendant avers that the sole and proximate cause of Plaintiff's injuries was the negligence of third parties not under the control of Defendant. More specifically, Defendant avers that Hoist Handling, Inc. was negligent in the repair and maintenance of the subject JET HOIST.

Hodgkins and Small, P.A.
210 South Marion Highway
Bocaire, New Flora 31003

JAMES SMALL
NEW FLORA BAR NO.: 852389

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF NEW FLORA, IN AND
FOR PLANTATION COUNTY. CIVIL ACTION

CASE NO.: 2005 CA 004360 AB

GERRY COOK,

Plaintiff,

vs.

CHIPPER PROPERTIES, INC.

Defendant.

_____ /

PRE-TRIAL ORDER

The Court hereby enters this Pre-trial Order for the purpose of simplification and clarification of the issues to be tried.

IT IS HEREBY ORDERED as follows:

1. The trial shall be conducted in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence.
2. The Plaintiff and Defendant shall be represented by teams consisting of two trial attorneys, each of whom shall conduct one direct examination, one cross examination, and either an opening statement or closing argument.
3. Plaintiff must call Gerry Cook and Logan Stein as witnesses. Defendant must call Leigh Flounders and Rian Green. No other witnesses shall be permitted to give testimony. No rebuttal witnesses will be permitted.

4. Male and female pronouns, names, etc. are interchangeable. Each side shall have a total of 80 minutes for opening statement, direct and cross examination, closing argument, and argument of motions and objections.
5. Questions about the rules or the facts in this case must be in writing and received by ATLA no later than 5:00 p.m., EST, on January 2, 2006. Facsimile transmissions are permissible.
6. Any document appended to the background information or annexed to the deposition of a witness may be enlarged and used at trial. No other documents or objects may be used by counsel as real or demonstrative evidence, except that a blackboard or similar item may be used by counsel during trial provided the writing had not been prepared in advance of trial. Blackboards, easels, chalkboards, overhead projectors, etc., will not be provided by ATLA or the regional hosts.
7. No trial briefs are to be submitted.
8. Jurisdiction and venue are proper in this Court.
9. The controlling law is set forth in the attached selected jury instructions. These selected jury instructions may be referred to in closing argument.
10. The case will be bifurcated with separate trials on liability and damages. This portion of the trial will decide the issue of liability alone. The issue of damages shall be determined at a later date. No evidence of the amount of damages shall be admitted in this trial of liability.
11. Leigh Flounders and Logan Stein are accepted by this Court as experts and may render expert opinions upon a proper foundation having first been laid. Experts may testify about and use anything contained in the exhibits and documents attached to this package.
12. The Background Information is correct and factual. Both parties have stipulated as such for any purpose, including Motions for Directed Verdict.
13. All witnesses have read and are familiar with the deposition testimony, statements and the information contained within the Exhibits.
14. Each party is required to follow the Outline for Trial.
15. The Statute of Limitations defense is not available to the Defendant.

SO ORDERED this 1st day of December, 2005

Honorable Samuel D. Moon
U.S. Circuit Judge

DEPOSITIONS

CIRCUIT COURT OF THE 5TH JUDICIAL
CIRCUIT, IN AND FOR PLANTATION
COUNTY, NEW FLORA

2

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CIVIL DIVISION

4

CASE NO.: 2005 CA 004360 AB

5 GERRY COOK,

6 Plaintiff,

7 VS.

8 CHIPPER PROPERTIES, INC.

9 Defendant.

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2255 Santa Rosa Road
Wednesday, June 23, 2005
12:50 p.m. - 1:15 p.m.

15

16

Deposition of Gerry Cook

18

Q. Can I get you to state your name for the record?

19

A. Gerry Cook

20

Q. Are you married?

21

A. Yes, I've been married for 9 years. I have two
22 children.

23

Q. Please describe your educational background.

24

A. I graduated high school in Banver, Massachusetts.
25 After high school I went to the local community
26 college for about two years.

27

Q. Did you earn a degree?

28

A. No. I left college and went to work for Detroit
29 Diesel.

30 Q. What was your job position with Detroit Diesel?
31 A. I was a field mechanic. I repaired and maintained
32 pumps.

33 Q. What kind of pumps?
34 A. Dewatering pumps. They take water from the
35 ground so you can put a foundation on it.

36 Q. How did you learn the mechanic industry or
field?
37 A. Just from being young, all the way up. Picked it
up
38 as I went along.

39 Q. How long did you work for Detroit Diesel?
40 A. About five years and then I moved here to
41 Plantation County.

42 Q. Did you have a job when you moved here to
43 Plantation County?
44 A. Yes, I had a job lined up with Absolute
Dewatering.
45 I had done some subcontractor work for Absolute
46 Dewatering back in Banver and I knew they did a
47 lot of work in Plantation so when we decided to
48 move I called them and sure enough they had a
position.

49 Q. What position did you hold while you worked for
50 Absolute Dewatering?
51 A. Same as with Detroit, I was a field mechanic.

52 Q. Who was your direct supervisor at Absolute
53 Dewatering?
54 A. I would say Dan Marple and Sandy Freeze.

55 Q. How many other field mechanics did they have?
56 A. One other field mechanic and three in the garage,
I
57 think.

58 Q. What is the difference between a field mechanic
and a
59 mechanic?
60 A. One works out in the field all of the time and the

61 other works in the shop all of the time.

62 Q. So you were out working on the pumps in the
field?

63 A. Yes.

64 Q. Did you have situations where you worked on the
pumps
65 back at the garage?
66 A. Yes, if I was unable to repair them in the field or
67 they just needed maintenance. Maintenance was
done
68 back at the garage.

69 Q. While you were working for Absolute
Dewatering, how
70 often did that occur, that you couldn't do the
repair
71 in the field?
72 A. All the time, probably at least once per week.

73 Q. On the day of this incident, was there any other
74 Absolute Dewatering employees with you?
75 A. No.

76 Q. Were there any other Absolute Dewatering
employees
77 that worked in the garage at anytime?
78 A. Yeah. There was Pat Seal who was a truck driver
and
79 then there was Sam Roche who was in sales.

80 Q. I believe you stated that on December 12, 2004
was
81 the last day you worked, correct?
82 A. Yes.

83 Q. Was that directly due to this accident?
84 A. Yes.

85 Q. Have you tried to work since December 12,
2004?
86 A. Yes, I tried delivering parts for Discount Auto. I
87 lasted six weeks, couldn't do it. I just couldn't
88 deal with the pain.

89 Q. How much were you earning when you stopped
90 working
91 for Absolute?
92 A. \$41,000 per year. Plus I had health insurance and
some other fringe benefits like cell phone and
gas.

93 Q. The jet hoist you were using the day you got hurt,
94 was it owned by Chipper Properties?
95 A. Yes.

96 Q. How was it that you were using a jet hoist owned
97 by
98 Chipper Properties?
99 A. My employer, Absolute Dewatering, rented the
garage
from Chipper Properties.

100 Q. Were you involved at all in the lease?
101 A. No.

102 Q. When did you first start using the garage and the
103 hoist?
104 A. February of 2004.

105 Q. Do you know whether Chipper or Absolute did
106 any sort
107 of safety testing on the hoist before you started
108 working there?
109 A. I don't know if Chipper did, I would think they
110 would
111 have to be safe because they were leasing it to
Absolute. I don't think Absolute did but I can't
say
for sure.

112 Q. Is that where you worked everyday?
113 A. Yeah, until December.

114 Q. The hoist you were using on the day you got hurt,
115 was
116 that the same hoist that was there in February?
A. Yeah, it was the same one.

117 Q. Prior to this incident, had you ever experienced
any

118 problems with this hoist?
119 A. Yes.

120 Q. What kind of problems?
121 A. It wouldn't work properly, at all.

122 Q. What do you mean by it wouldn't work properly?
123 A. It wouldn't go up

124 Q. Did you know why it wouldn't work properly?
125 A. Not at the time, I was told later though that the
126 chain was installed improperly.

127 Q. Who told you that?
128 A. An inspector that was hired by Chipper
 Properties
129 after I got hurt. I think the name was something
130 like Bounders or Flounders, something like that.
 The
131 inspector came out and inspected the jet hoist and
132 told me that the chain had been improperly
 installed
133 which caused the block to break.

134 Q. Did you speak with the inspector?
135 A. Yes, the inspector came to see me. The inspector
136 asked me what happened, showed me pictures.
 I'd say
137 this was about a month or so after the accident. I
138 called the inspector again and asked for the
 report.
139 The inspector wouldn't give it to me. I was
 angry
140 because the inspector had seemed to care when
 we
141 first talked and now the inspector was very
142 standoffish. That's about when I hired my
 lawyer.

143 Q. Let me go back for a minute, you told me you
 had had
144 problems with the hoist before the accident when
 it
145 wouldn't work properly.
146 A. Yeah.

147 Q. When did these problems start?
148 A. From day one.

149 Q. What did you experience?
150 A. If I'm not mistaken, once I think it was electrical.
151 The other times, it would jump. When you put
weight
152 on it and it was having one of its bad days, it
would
153 jolt. When you'd hit the electrical button, as the
154 pump was being lifted, rather than going smooth,
it
155 would jump or jolt.

156 Q. What did you do to address these problems?
157 A. Told Rian, the owner of Chipper Properties.

158 Q. And did they do anything?
159 A. Yeah, they used a company called Hoist
Handling to
160 fix it. They would usually come late because
they'd
161 come from about one hour or so south of the
garage.

162 Q. Were you ever present when Hoist Handling
came?
163 A. Once or twice, but I didn't pay much attention.

164 Q. When Hoist Handling would come out and work
on the
165 hoist, would it work?
166 A. For a short time and then the same thing would happen
167 again.

168 Q. Do you know how many times between February and
169 December Hoist Handling came out?
170 A. I'd say about four times.

171 Q. Did you ever speak to anyone at Hoist Handling about
172 a weight test?
173 A. Not that I remember. Wait, oh yeah. The second guy
174 that came said something about wanting to do a weight
175 test. I mentioned it to Rian at Chipper and to my
176 supervisor.

- 177 Q. Do you know whether a weight test was ever done
178 before your accident?
179 A. I don't know.
- 180 Q. Did Sam ever operate the hoist?
181 A. No.
- 182 Q. What about Pat?
183 A. Yeah, in fact Pat once told me that the pump got
184 stuck halfway in between and Pat couldn't get it on
185 the truck so it had to stay where it was for the
186 night. I'm pretty sure that was about a month or so
187 my accident.
- 188 Q. Did you notify anyone at your work that you were
189 having these problems?
190 A. I remember telling my supervisor. Basically when it
191 happened I told Chipper Properties and they handled
192 it. I remember my supervisor telling me "we're not
193 going to pay for it, tell Chipper" and that's what I
194 did.
- 194 Q. Was there anyone else at the garage on a daily
basis?
195 A. Yeah, Rian Green, the owner of Chipper
Properties.
196 Chipper had their office on the second floor.
- 197 Q. Tell me what happened generally on the date of
the
198 accident and then I'll ask you more specific
199 questions.
200 A. I brought about two pumps in on a truck. Put
them on
201 the floor. Connected up the hoist. Hit the button.
202 It's electric. Picked up one of the pumps. Got it
203 about waist high, thigh high. It's on an eye beam
204 above. You have to push it to move it. When I
went
205 to push it, it came down.
- 206 Q. Was this the first time you'd used the hoist that
207 day?
208 A. Yes.
- 209 Q. Why were you going to push the pump?

210 A. I was going to push it along the eye beam over to
211 where the chassis was. Lower it on to the chassis
so
212 I could move it around as I need to, to do work
on
213 it.

214 Q. Did you have any indication that the pump was
going
215 to fall?
216 A. No, nothing.

217 Q. Did the hoist come down?
218 A. The chain did but the block was still attached.
219 There was a piece of the hook from the block that
220 came down. I put it on top of the pump.

221 Q. Do you know what caused the hoist to fail?
222 A. I do now.

223 Q. What do you now know to have happened?
224 A. The block broke.

225 Q. How is it that you go about attaching one of these
226 pumps to this hoist?
227 A. It has what we call a lifting vail. That's an eye
228 with a hook. You attach the pump to that.

229 Q. Did you know how much that pump weighed that
you were
230 lifting that day?
231 A. 3,500 pounds.

232 Q. Do you know what the weight limit on this hoist
was?
233 A. 6000 pounds.

234 Q. How did you get the pumps from the yard to the
235 warehouse?
236 A. With a forklift.

237 Q. Have you ever been formally trained in the use of
a
238 forklift?
239 A. No. I've used various kinds of forklifts
throughout

240 the years.

241 Q. How did you move the pumps with the forklift?

242 A. The pumps were on pallets. You'd simply slide
the
243 runners under the pallets and pick it up. You'd
then
244 slide the pallet off right underneath the hoist.
245 Then you lift the pump with the hoist and set it
on
246 big frame with wheels. It has two wheels so you
can
247 move it around the warehouse.

248 Q. Were you ever given any formal training on how
to use
249 the jet hoist?

250 A. No, it was pretty simple. You attach the hook
and
251 push a button, not much to be trained about.

252 Q. I have no further questions.

CIRCUIT COURT OF THE 5TH JUDICIAL
CIRCUIT, IN AND
FOR PLANTATION COUNTY, NEW FLORA

2

3

CIVIL DIVISION

4

CASE NO.: 2005 CA 004360 AB

5 GERRY COOK,

6 Plaintiff,

7 VS.

8 CHIPPER PROPERTIES, INC.

9 Defendant.

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2255 Santa Rosa Road
Thursday, June 24, 2005
10:50 a.m. - 1:15 p.m.

13

14

15

16

Deposition of Logan Stein

17 Q. Please tell us your name and business address.

18 A. Logan Stein. My address is 13421 S.W. 18th
19 Street,
Plantation County.

20 Q. Please describe your background, education and
21 training.

22 A. Sure, I graduated with an associate degree in
23 mechanical engineering from Ohio College of
Applied
24 Science in 1983. I then got my B.S. in
engineering
25 from the University of Cincinnati in 1990. I'm a
26 registered metallurgical engineer. I've taken
27 special courses over the years in fracture

28 mechanics,
design of experiments and high temperature
materials.

29 Q. What about your work experience.

30 A. I started to work for Q.C. Labs about two years or so
31 after I graduated from Ohio College. I work
32 primarily in the commercial testing lab. In that
33 capacity I am responsible for quality assurance for
34 companies such as Boeing, General Electric, Pratt &
35 Whitney and others. I also practice as a forensic
36 engineer and expert witness. I've worked for
37 individual companies, law firms, insurance
38 companies
and various federal agencies. I've testified in
39 both
state and federal courts. I've examined products
40 that range from small household appliances to
41 aircraft and large vessels.

42 Q. Where did you work in the two years after
graduation
43 before you started to work for Q.C. Labs?

44 A. I worked for General Electric. I was responsible
for
45 evaluating the corrosion and mechanical
properties of
46 ferrous and non-ferrous alloys. In the second
year,
47 I was involved with fracture mechanics and
failure
48 analysis of engine components. Included were
effects
49 metal joining, microstructure, metal integrity and
50 non-conventional machining techniques have on
51 mechanical properties.

52 Q. Have you ever been hired by the law firm that
53 represents Gerry Cook?

54 A. Yes. I would estimate that I've done work with
this
55 particular law firm about 4 or 5 times over the
last
56 ten years.

57 Q. What were you retained to do in this case?

58 A. I was asked to examine the jet hoist that failed

59 and
determine why the hoist failed.

60 Q. Have you reached any opinions in this case?
61 A. Yes, I have. I determined that the hoist failed due
62 to unequal loading. I surmise that there may have
63 been a crack in the pin that contributed to the
64 failure but that pin has never been produced so I
can
65 not say with any degree of certainty that that is
the
66 case.

67 Q. How did you reach your opinion?
68 A. I personally inspected the hoist, more specifically
69 the block. I went to the scene of the accident and
70 observed the mechanics of the hoist. I reviewed
the
71 plaintiff's deposition as well as the depositions of
72 the Hoist Handling employee.

73 Q. What makes you think that the hoist failed due to
an
74 unequal loading?
75 A. If you look at the break, you can see it's a clean
76 break. What that means is that there is no
corrosion
77 which would be indicative of a failure over time.
78 The angle of the break leads one to the
conclusion
79 that it was due to an unequal load. The unequal
load
80 could very well have been caused by the chain
being
81 twisted. Now, the reason why I think that the pin
82 must have been cracked is that it appears as
though
83 the chain had been twisted for some time. You'd
84 expect that if the initial site of the overload was
85 on the block that there would have been some
86 corrosion. But there's not. That's why I think
that
87 the twisted chain was causing an unequal load to
the
88 pin that was cracking over time. My opinion is
that

89 the pin failed which caused a tremendous unequal
load
90 on the day of this accident which resulted in the
91 ultimate failure.

92 Q. Was there anything that the Plaintiff did that
caused
93 or contributed to the failure?

94 A. No, based upon the use of the hoist that would be
95 almost impossible.

96 Q. Are you saying that there was nothing the
Plaintiff
97 could have done to contribute to this failure?

98 A. Well, anything is possible. Sure, if the Plaintiff
99 overloaded the hoist, that would be improper. Or,
100 something ridiculous like the Plaintiff was
swinging
101 the pump which would be almost impossible.

102 Q. Do you know how the chain came to be twisted?

103 A. That would have had to have been done by
someone when
104 the hoist was first installed or if it had ever been
105 taken down and put back up. The chain runs the
106 entire length of the hoist from the ground the
107 ceiling and along the beam. As the owner of the
108 hoist, you have an obligation to make sure that it's
109 installed properly and maintained properly.

110 Q. Do you have any reason to believe that the hoist
was
111 not maintained properly?

112 A. Sure. I do know from reviewing the documents
that
113 Chipper had actual notice that the chain was twisted
114 and I don't see that they did anything to correct
the
115 problem.

116 Q. If the plaintiff didn't overload the hoist, why
would
117 it suddenly fail?

118 A. A hoist that has been stressed beyond the yield
point
119 of one of its components can fail later, even at less

120 then the rated load capacity. Even when used
121 properly, a load can swing ever so slightly. Such
122 friction can cause fatigue in the hook neck. Such
123 fatigue wouldn't be noticed by the user because it
124 would be hidden. What happens is a fatigue
crack
125 propagates in the upper part of the hook neck that is
126 usually hidden inside the pulley block. So, in
127 reality, these types of hook block assemblies have
a
128 somewhat limited life. That's why it's
imperative
129 that the owner of hoist carry out special
assessments
130 to ascertain the true life expectancy of any
131 particular hook block component. The only way
to do
132 that is to really understand how the hoist is being
133 used.

134 Q. What do you mean when you say special assessments?

135 A. If a hoist has an unknown history of use, as in this
136 case. I say that because it appears as though the
137 owner of the hoist rents its garage and hoist to a
138 variety of people and doesn't really use the hoist
139 for its operation. If it has an unknown history, I
140 would recommend the hoist undergo a tear down
141 inspection prior to being placed into service. A
142 tear down inspection should include complete
143 disassembly of the hoist, thorough cleaning and
144 inspection of all parts. All worn, cracked, pitted,
145 corroded or distorted parts must be replaced. All
146 hooks and blocks should be inspected using
Magnetic
147 Particle Inspection using black light to reveal
148 hidden fatigue cracks.

149 Q. Do you believe that this particular hoist should
have

150 had end stops?

151 A. No, I wouldn't. Contrary to what some would
say, end
152 stops on girders or beams shouldn't be used to
stop
153 horizontal movement. While end-stops are
usually

154 sturdy enough to stop the load, the sudden, jolting
155 stop can stress every component of the hoist.

156 Q. Do you have any other opinions?

157 A. Yes. I think that the owner of the hoist has an
158 affirmative obligation to post warnings. For
159 example, I always recommend the following
warning be
160 posted within eye sight of the user:

!WARNING!

Any time a hoist exhibits erratic operation and/or
unusual noise, the hoist must be taken out of
service until it is inspected and serviced by
a qualified technician. Continued operation of a
hoist with a defect in a critical component may
lead to loss of load control, property damage,
serious injury or death

161 Q. You didn't see any such warning?

162 A. No, nothing.

163 Q. Anything else?

164 A. I would add that while at the location I noticed
that
165 the installation of the actual hoist itself would be
166 called "sloppy" at best. The power cord hung
from
167 the ceiling and went out a window. The safety
latch
168 was missing.

169 Q. Did either of these things cause or contribute to
the

170 failure?

171 A. Directly, I'd have to say no.

172 Q. Thank you, I have nothing further.

1
2 CIRCUIT COURT OF THE 5TH
 JUDICIAL CIRCUIT, IN AND FOR
 PLANTATION COUNTY, NEW FLORA

3 CIVIL DIVISION

4 CASE NO.: 2005 CA 00004360 AB

5 GERRY COOK,

6 Plaintiff,

7 VS.

8 CHIPPER PROPERTIES, INC.

9 Defendant.

10
11

12 2255 Santa Rosa Road
13 Wednesday, August 20, 2005
14
15

16 Deposition of Leigh Flounders

17 Q. Please tell us your name and business address.

18 A. Leigh Flounders. My address is 7988 Dayton
 Road,
 Suite H, West Chester, Wisconsin.

19 Q. Let's start by discussing your background. Tell
 us a

20 little bit about your educational background.

21 A. I received my B.A. in Psychology from the
 University
22 of Wisconsin in 1970. I then went on and earned
 my
23 Masters degree in Industrial Psychology,
 Ergonomics,

24 from Wisconsin in 1972. While studying for my
25 Masters, I worked as a research assistant teaching
26 undergraduate students about feedback factors as
they
27 relate to safety and health. We used computers
and
28 closed circuit television to simulate man-machine
29 interactions which were monitored to reduce
stress
30 and strain.

31 Q. Did you go right into the workfield after
graduation?

32 A. Yes. I went to work for the State. I evaluated
33 their safety and health programs in comparison to
34 OSHA requirements. I conducted training
seminars for
35 state officials emphasizing Federal requirements.
I
36 was there until 1973 when I went into the private
37 sector. I took a position as a Safety Consultant
for

38 Safety First Incorporated in Maryland. I
specialized
39 in ergonomics to reduce losses caused by
repetitive
40 trauma. I made recommendations for compliance
and
41 improved safety and health managements. I
continued
42 with Safety First until 1993 when I went to work
for
43 one of the largest construction contractors in the
44 nation. I was the primary safety manager for
over
45 300 construction sites. I began to develop a
46 specialty in the area of cranes. I created
programs
47 and procedures to minimize losses through
injury. I
48 worked for GM Construction for about five years.
I
49 left there as I saw an opportunity for me to start
my
50 own company. I am the President and chief

51 consultant
for Crane Safety, Inc.

52 Q. What does Crane Safety, Inc. do?
53 A. We investigate injuries involving cranes and
54 rigging,
55 road construction accidents, falls, and gas and oil
56 wells. We work for the private sector, but that
usually involves work for very large companies
57 that
58 want us to conduct safety seminars for their
59 operators. We also do a lot of investigative work
60 for insurance companies investigating fraudulent
injury claims.

61 Q. Have you ever been hired by the law firm that
62 represents Chipper Properties?
63 A. No, I don't believe so. Matter of fact, I
64 remember
65 the lawyer telling me that my firm was found
when one
66 of the paralegals was searching the Web and she
67 saw
68 our website and the litigation support part of our
69 website caught her attention. I remember that
because I'm always interested to know how
people
learn about us.

70 Q. What were you retained to do in this case?
71 A. I was asked to evaluate an alleged accident
72 involving
a Jet Hoist.

73 Q. Did you visit the site?
74 A. Yes. I went there a few months ago. I found that
75 the 3-ton capacity Jet Electrical Chain Hoist had
the
76 hook block replaced since the accident. Other
77 things
78 I noted were that the incoming power cord for the
hoist was improperly installed. The cord is
looped
79 to and through a hole in the wall. This hole has a
80 clamp through the hold, but there was no
grommet or

81 other method to keep the wire from chaffing. I
also
82 found that the cord is not connected to a
disconnect
83 that is “readily accessible and within view” of the
84 area being serviced as is required by OSHA. The
85 disconnect is located in the loft area that is only
86 accessible through the upper level offices. There
is
87 no disconnect that I could find for the hoist/crane
89 at the lower level.

90 Q. Did you note anything else?

91 A. I also noted that the monorail beam that runs
along
92 the ceiling did not have the required end stops as
93 are required by state and federal codes and
94 standards. The problem I saw was that whoever
95 initially installed the system and the chain hoist
96 did not provide for a lift system to allow for a
97 proper daily inspection from ground level.

98 Q. These things that you told us you noted, do you
have
99 an opinion as to whether or not they caused or
100 contributed to the ultimate failure?

101 A. In and of themselves, no. But, based upon what I
saw
102 it would appear that the required inspections of the
103 equipment were either not being performed or were
104 performed incorrectly. It is the responsibility of
105 the operator to perform a visual and operational
106 inspection of the equipment before it is used. I
107 would add that it is also the responsibility of the
108 users employer to properly train the employees to
109 perform daily inspections.

110 Q. Based upon your inspection, did you find
anything
111 that in your opinion caused or contributed to the
112 failure?

113 A. Yes. I could see that the center (dead end) chain
114 has a twist between the pocket wheel and the
hook
115 block. The chain has to be straight to prevent
116 extreme stresses from being placed on the chain

and
117 the hoist components. I also noted that the chain
118 being used to attach the load to the hoist is what
we
119 call an “illegal sling.” The chain markings
120 indicated that the chain was a Peerless Grade 70
121 chain that had Grade 80 grab hooks on its end. It
122 was also missing the required sling tag. All sling
123 chains must be Grade 80 or 100 and must have a
sling
124 tag per OSHA Standards. More importantly, it
125 appeared to me as though the sling was being
used in
126 an incorrect manner. Someone had wrapped the
chain
127 around the hoist hook several times. A proper
sling
128 would have a ring of the proper size to fit the
hoist
129 hook. Only the ring would be placed on the hoist
130 hook. Damage to both the old and new hoist
hooks
131 indicates improper use.

132 Q. Do you know who improperly modified the
attachment of
133 the load chain to the hoist hook block?
134 A. Yes, I was told that it was the servicing company.
I
135 think their name is Hoist Handling.

136 Q. Did you interview anyone from Hoist Handling?
137 A. No.

138 Q. Have you reached any final opinions that you
intend
139 to offer at trial if called to testify?
140 A. Sure. It seems obvious to me that the cause of
this
141 failure was improper use. I saw damage that
included
142 stretching of the hoist beyond the legal 10%
stretch
143 limitation. The stretching of the hoist hook was
144 most likely caused from tip loading (placing the
load

145 towards the tip of the hook). The stretching
and/or
146 tip loading could have been caused by improper
147 rigging or stresses from an improperly connected
148 sling. There was additional damage to one side
of
149 the hook block, just below the crack, which
indicates
150 that there was a stretch riser created at some point
151 in time by some type of improper use.

152 Q. Do you know who provided the sling for use?
153 A. No, I don't. I would say that had the Plaintiff
been
154 properly trained by the Plaintiff's employer then
the
155 Plaintiff would have been able to avoid this
accident
156 by identifying the twisted chain and improper
sling.
157 If you trace everything back to the root cause,
human
158 error is the most common cause of hoist accident
like
159 this. People try to lift too much or they don't
have
160 the load balanced. It's not enough to know how
to
161 make a hoist go up and down by pushing buttons. You
162 have to know how to operate it properly.
Operators
163 must be trained in the operation of the crane or
164 hoist they will be using. They should know the
165 maximum lift capacity of the unit and be trained
in
166 how to inspect and maintain it. Training should
167 emphasize the safety and overload features of the
168 equipment they will be using, including slip
169 clutches, top hook load limit devices, braking
170 mechanisms and wear gauges such as "quick
check"
171 marks on lift hooks and chains.

172 Q. Can you say that the fault does not lie with the
173 manufacturer?
174 A. I would say that based upon my previous

175 experience
176 and the fact that this hoist was rated for 6000
177 pounds, that there is at least a 95% chance that
178 the
179 equipment was not faulty at the time that it was
180 installed, and damage from improper use has led
up to
the failure.

181 Q. Do you have any other opinions?

182 A. Well, I will say this. I did notice when I was out
183 there doing my inspection well after the accident
184 occurred that there was damage to the cart that
the
185 Absolute Dewatering was putting the pumps on.
A leg
186 was cracked and could have collapsed at any
time,
187 causing another accident. Just further indication
188 that Absolute Dewatering doesn't place great
emphasis
189 on safety.

190 Q. Nothing further.

2 CIRCUIT COURT OF THE 5TH
JUDICIAL CIRCUIT, IN AND FOR
PLANTATION COUNTY, NEW FLORA

3 CIVIL DIVISION

4 CASE NO.: 2005 CA 004360 AB

5 GERRY COOK,

6 Plaintiff,

7 VS.

8 CHIPPER PROPERTIES, INC.

9 Defendant.

10

11

12

2255 Santa Rosa Road
Tuesday, May 10, 2005
3:00 p.m. – 4:20 p.m.

13

14

15

16

Deposition of Rian Green

17 Q. Please tell me your full name?

18 A. Rian Green.

19 Q. Are you the owner of Chipper Properties?

20 A. Yes.

21 Q. What is Chipper Properties?

22 A. It's a corporation I use that owns and manages a
23 couple of properties.

24 Q. Is one of those properties a garage in Plantation
25 County on 10th Street?

26 A. Yes.

27 Q. Back in December 2004 did you lease that garage
to

28 Absolute Dewatering?
29 A. Yes. I think I initially leased the property to
30 Absolute Dewatering in February of that year.

31 Q. Did you and Absolute enter into a lease for that
32 property?
33 A. Yes, of course.

34 Q. I'm handing you what we've had marked as
35 Exhibit A to
36 your deposition, do you recognize it?
37 A. Yes, it's the lease I had with Absolute.

37 Q. Who drafted the lease?
38 A. Gosh, I don't know. We've been using this lease
39 for
40 quite awhile. I use the same form for the
41 different
42 properties I have. I just change the address, rent
43 and stuff like that.

42 Q. Before Absolute moved into the garage, did you
43 have
44 the hoist tested or serviced?
45 A. I really don't recall. The company that leased it
46 before Absolute would have done that. I don't
47 typically do that. I mean if there was a problem
48 with the hoist and no one was renting it, I'd call a
49 repair company.

49 Q. Did you ever have the hoist weight tested?
50 A. No, why would I do that? I mean the
51 manufacturer
52 would have done that before I bought it. Again, I
53 tell anyone I lease it to that they are responsible
54 for it and that they should have it tested to make
55 sure it does what they want it to do.

55 Q. Did the plaintiff ever tell you that there were
56 problems with the jet hoist?
57 A. As I recall, Gerry told me on a couple of
58 occasions
59 that the hoist wasn't working right. One time, the
60 electrical system wasn't working and I recall
61 another
62 time when the hoist wasn't lifting right.

61 Q. What did you do when Gerry told you this?
62 A. I called Hoist Handling as they've done work for
me
63 on this hoist in the past.

64 Q. Why did you do that?
65 A. I did it as a courtesy for Absolute Dewatering
66 because they didn't have anybody to call and they
67 didn't have a supervisor there on a daily basis.
68 There were some days when no one was at the
garage.
69 I dealt with their home offices.

70 Q. Did you pay for the repairs?
71 A. I'm not sure, I hope not because it wasn't my
72 responsibility. I would think that if I did, I would
73 have then submitted it to Absolute for
reimbursement.

74 Q. Why do you say it wasn't your responsibility?
75 A. Because I leased the garage and the hoist to
Absolute
76 Dewatering and as a part of the lease they were
77 responsible for maintenance.

78 Q. Were you at the garage the day Gerry had the
79 accident?
80 A. Yes. I was in the office. Gerry came up to the
81 office and told me that the hoist broke and a
pump
82 dropped.

83 Q. Did Gerry appear injured to you?
84 A. No, not really. If I recall, Gerry worked another
85 couple of hours and then I don't recall seeing
Gerry
86 again. I did hear that Gerry had been in a fight in
87 a bar the night before.

88 Q. Who told you that?
89 A. I think it was Sam that mentioned something like
that
90 to me.

91 Q. Do you know where the fight was or with who?

92 A. No, that's all I heard.

93 Q. Have you spoken with Gerry since December, 2004?

94 A. No.

95 Q. Did you ever observe Gerry work the hoist?

96 A. No. I came in a door from a stairway on the outside

97 so unless I had a reason to go into the garage, I

98 wouldn't see anyone.

99 Q. I'm handing you what we've marked as Exhibit B to

100 your deposition, do you recognize this?

101 A. Yeah, it's an invoice from Hoist Handling dated March

102 17, 2004.

103 Q. Do you know what this invoice was for?

104 A. Well, looking at it, it appears to be the invoice for

105 the work that was done when there was an electrical

106 issue with the hoist. As you can see, they had to

107 install a new 2 button control and power cable.

108 Q. Do you know why you and your company are listed in

109 the "Bill To" section?

110 A. I would guess because they had an established

111 relationship with us so they simply used that

112 information. I don't really know.

113 Q. Did you pay this invoice?

114 A. Yes. When going through my records following a

115 request you made, I found a check made payable to

116 Hoist Handling on, I think it was, on 4/30/2004.

117 Q. Did the hoist work after Hoist Handling came out in

118 March, 2004?

119 A. I assume so because no one complained.

120 Q. I'm handing you what we've marked as Exhibit C
to
121 your deposition. Do you know what this is?
122 A. I can only tell you by looking at it what it is.
123 It's an invoice from Hoist Handling dated
December
124 22, 2004 for the replacement of the hook block
125 assembly.

126 Q. Did you pay this invoice?
127 A. No, it was billed directly to Absolute Dewatering.

128 Q. Were you there when Hoist Handling came out to
129 replace the hook block assembly?
130 A. Yes. I spoke to the worker and he told me that
131 someone must have forced a load. He showed
me how
132 the block was busted from the side.

133 Q. Is this your signature on the bottom of the
invoice?
134 A. Yes. I signed it for Absolute Dewatering because
135 there was no one there when Hoist Handling
came out
136 and they require someone sign it, I guess to prove
137 they did the work if anyone questioned them.

138 Q. You see this invoice dated April 21, 2004, we'll
mark
139 this as Exhibit D.
140 A. Yeah.

141 Q. This invoice is directed to Chipper Properties,
142 right?
143 A. Yes.

144 Q. What was this invoice for?
145 A. I guess the hoist wasn't working.

146 Q. Do you recognize the signature at the bottom of
the
147 invoice?
148 A. Yes, that's Gerry's.

149 Q. Were you ever told prior to December of 2004
that the

150 chain was twisted on the jet hoist?
151 A. I really don't remember that specifically.

152 Q. Let me show you a Hoist Handling invoice dated
153 February 11, 2004. I guess this would be Exhibit
E.
154 A. I see it.

155 Q. Do you see in the upper right section under
156 "Description" that it states "3 part chain twisted".
157 A. I see that.

158 Q. Does that refresh your recollection?
159 A. No, not really.

160 Q. Did you order a new chain to be hung?
161 A. Not that I recall.
162 Q. You didn't order a new chain and then cancel the
163 order?
164 A. I really don't remember that.

165 Q. Did you ever see Gerry misuse the hoist?
166 A. I really couldn't say that. I never really watched
167 Gerry work.

168 Q. Thank you. I have no other questions.

STATEMENTS

STATEMENT OF RALPH ALVAREZ

My name is Ralph Alvarez and I work for Hoist Handling. I've worked for Hoist for eight years. I'm a lead technician. Prior to Hoist Handling, I worked for my dad for 10 years. My dad and I worked in commercial and industrial electrical. I've never had any sort of formal training, just on the job training. I was convicted of a felony when I was 17 years old. It was for possession of drugs. I didn't go to jail, I was given probation. I've never been in trouble since.

I performed work on the jet hoist in question on two occasions. The first time I did work on the jet hoist was on February 9, 2004. As I recall, there was an electrical problem with the hoist. There was no power to the hoist. I found the problem was with the phase monitor and hooked it up. I didn't do an inspection as I was only there to troubleshoot but I did notice that the chain was twisted.

The second time I did work on the jet hoist was on February 12, 2004. I replaced the hook block assembly. I looked at the broken hook block and it looked like it had been jammed, like they had hit the block and cracked it. The hook block should hang vertical and it looked to me like it was kind of sideways. The customer came down from the office upstairs and told me that an employee had been using it and broke it. I didn't speak with anyone else.

STATEMENT OF SANDY FREEZE

My name is Sandy Freeze. I work for Absolute Dewatering. I was Gerry Cook's supervisor in 2004. I executed the lease on behalf of Absolute Dewatering with Chipper Properties. It was my understanding that Chipper Properties was responsible for repairs to the hoist. Absolute was of course responsible to maintain it in good working order. Absolute never paid for any repairs to the jet hoist until after Gerry's accident. Absolute Dewatering paid for the replacement of the hook block assembly. However, one-half of the total cost was deducted from the rent payment to Chipper Properties. We paid one-half because Chipper Properties claimed that pursuant to the lease agreement, Absolute Dewatering was responsible to pay for the hook block. We negotiated a resolution that provided that we'd pay half and they'd pay half. After the hook block was replaced, there weren't any other repairs that I'm aware of.

Gerry called me on the day of the accident. Gerry told me what happened and I suggested Gerry go to the hospital. I think Gerry went home instead and then went to the hospital the next day.

EXHIBITS

BUSINESS LEASE AGREEMENT

THIS LEASE AGREEMENT ("Lease") is made as of August 22, 2005 ("Effective Date"), by and between CHIPPER PROPERTIES, INC., ("Landlord"), and ABSOLUTE DEWATERING, INC., ("Tenant").

WHEREAS, Landlord has agreed to lease to Tenant, pursuant to the provisions of this Lease, 900 10th Street, Plantation County, New Flora, the entire ground floor and approximately 50% of the northern yard (hereinafter referred to as "the Premises").

NOW, THEREFORE, the Landlord and Tenant, for and in consideration of the mutual covenants, agreements and undertakings herein contained, and in further consideration of payments herein mentioned, made and to be made, due by these presents, mutually covenant and agree as follows:

1. **Agreement to Lease for Term.** Landlord hereby leases to Tenant, and Tenant hereby takes and leases from Landlord, the Premises for a term beginning on February 1, 2004 (the "Commencement Date") and expiring at the end of the day, January 31, 2006 ("Original Term"). Upon expiration of the Original Term, the lease will automatically renew for a Subsequent Term of sixty (60) days. If Tenant wishes for this Lease not to automatically renew for the Subsequent Term, Tenant must give Landlord written Notice of Intent to Vacate the Premises before the end of the day, sixty (60) days prior to the end of the Original Term. If Tenant fails to timely give said Notice of Intent to Vacate the Premises, the lease will automatically renew at the end of the Original Term for a period of sixty days. Thereafter, the Lease will continuously and repeatedly renew for sixty (60) day Terms until Tenant furnishes a Notice of Intent to Vacate Premises to Landlord. Any Notice of Intent to Vacate the Premises shall serve to terminate this Lease at the end of the day, sixty (60) days after Landlord receives the Notice. Tenant agrees to be responsible for all Rent through the end of the sixtieth (60th) day following receipt of the Notice of Intent to Vacate Premises by Landlord. Likewise, Landlord may terminate this lease upon providing sixty (60) day written Notice of Intent to Terminate to Tenant. Tenant agrees to be responsible for all Rent through the end of the sixtieth (60th) day following receipt of the Notice of Intent to Terminate by Tenant. All Notices given must comply with the Notice provisions of this Lease.

2. **Rent.**

a. February 1, 2004 through termination of the Lease, and for all subsequent renewal Terms, \$3,021.00 plus New Flora State Tax. Tenant understands that this Rental amount is Gross as described in normal Rental Agreements.

b. Except as otherwise expressly provided in this Lease, commencing on February 1, 2004 and continuing throughout the term of this Lease, Tenant shall pay to Landlord, as rent, in accordance with the schedule set forth below as part of this subsection. Unless Landlord instructs Tenant otherwise in writing, Tenant shall make such payments in advance on the 1st day of each month on which rent is required to be

paid by Tenant. Tenant shall make such payments without notice, demand, abatement, deduction, counterclaim, or setoff.

SCHEDULE OF PAYMENTS:

Rent Due upon signing this lease:	\$3,021.00 plus New Flora State Tax
Security Deposit due upon signing this lease	\$3,021.00 plus New Flora State Tax
Due each month thereafter:	\$3,021.00 plus New Flora State Tax

c. The late payment provisions of this Lease shall apply to any payments that are deemed hereunder to be rent and that arrive later than the last day on which rent may be paid by Tenant under this Lease without incurring a late payment penalty or other charge of any kind under this Lease.

d. Tenant agrees to pay a late charge of \$750.00 on all late payments. Tenant further agrees that the late charge imposed is fair and reasonable, complies with all laws, regulations and statutes, and constitutes an agreement between Landlord and Tenant as to the amount such late payment would cost Landlord in the event a late payment was made by Tenant to Landlord. Tenant further agrees that the late charges assessed pursuant to this Lease are not interest, and the late charges assessed do not constitute a lender or borrower/creditor relationship between Landlord and Tenant, and may be treated by Landlord as additional Rent owed by Tenant.

e. If the term of this Lease begins or ends on any day other than the first day of a calendar month, then all amounts to be paid by Tenant to Landlord under this Lease for the resulting fractions of a full calendar month shall be prorated on a per diem basis.

f. Except as otherwise expressly provided in this Lease, all payments to be made by Tenant pursuant to this Lease shall be made in United States legal tender, payable to, and addressed and delivered to, Chipper Properties, Inc., 900 10th Street, Plantation County, New Flora.

3. **Use of Premises.** Tenant shall use the Premises for the following purposes: Repair and maintenance of pump equipment, maintenance and storage of Tenant's vehicles and related equipment and materials, no other uses permitted.

4. **Condition of Premises and Improvement Work.** Tenant takes the Premises in "as is" condition, and Landlord does not warrant or make any representation concerning the adequacy or sufficiency for Tenant's present or future purposes of the Premises, the Building, any improvements in or to the Premises or the Building, any common areas in or appurtenant to the Building, any equipment, facilities, fixtures, or furnishings in the Premises or the Building, or the real estate of which the aforementioned items constitute a part. Tenant shall be responsible, at its sole expense, for any improvement work that it may require on or relating to the Premises, including

without limitation the construction of walls in or entrances to the Premises. Tenant may not undertake any improvement work on or relating to the Premises, including without limitation any construction activities, except in compliance with this Lease, and Tenant shall in each instance perform such work only after having obtained both of the individual prior written consent of Landlord to all plans, drawings, and specifications relating to such work. Landlord may withhold approval of Improvement Work by Tenant for any reason.

5. **Maintenance of Premises.** Tenant shall, at its sole expense, keep the Premises and the equipment, facilities, fixtures, and furniture therein neat, clean, and in as good condition and repair as when Tenant first was granted access to the Premises, reasonable wear and tear excepted. Except as otherwise expressly provided in this Lease,

6. **Insurance.** Tenant shall, at its sole expense, obtain and maintain insurance policies, issued by insurers acceptable to Landlord and authorized to do business in the State of New Florida, which provide insurance coverage in the amount of \$500,000.00. Tenant shall name Landlord as additionally named insureds under all such policies. Such policies shall be primary and non-contributing with any insurance maintained by Landlord and shall provide that they shall not be canceled or modified without thirty (30) days' prior written notice to Landlord. A certificate of the insurer evidencing the existence and amount of each of such required insurance policies shall be delivered by Tenant to Landlord before the date on which Tenant is first given access to or possession of the Premises, and thereafter within twenty (20) days after any written request from Landlord. With respect to each of such required insurance policies, Tenant shall provide Landlord with proof of renewal or qualified replacement insurance policies at least ten (10) days before termination of the insurance policy that was previously in effect. All of such insurance policies shall be maintained throughout the term of this Agreement.

7. **Compliance with Laws.** Tenant shall use the Premises only in a manner that is in compliance with all of the requirements with respect to the Premises which are imposed or issued by (a) governmental authorities that have jurisdiction over the Premises, and/or (b) insurance companies that have issued insurance policies covering the Premises and/or persons using or anticipated to use the Premises. Tenant shall indemnify Landlord against, and hold Landlord harmless from, any damage, loss, claim, liability, or expense, including without limitation reasonable attorneys' fees, arising out of Tenant's failure to comply with this section.

8. **No Waste or Nuisance.** Tenant shall not commit or suffer to be committed any waste upon the Premises or any nuisance or other action which may disturb the quiet enjoyment of any other tenant or occupant in the Building.

9. **Hazardous Waste.** Tenant's use of the Premises shall not involve or result in the use, generation, manufacturing, transportation, storage, handling, or disposal of, or the performance of any activity in connection with, any "hazardous substance" or "hazardous waste", as these terms are defined under federal, state, and local laws and

regulations, of types or in quantities that (a) are not permitted under applicable laws and regulations, or (b) would, under such laws and regulations, subject Landlord or the Premises to any claim or liability, including without limitation any damages, penalties, or fines, or any liens on the Premises or the Building or any part thereof. Tenant shall indemnify Landlord against, and hold Landlord harmless from, any damage, loss, claim, liability, or expense, including without limitation reasonable attorneys' fees, arising out of any claim or charge made by federal, state, or local government entities or private parties concerning violations and/or alleged violations of such laws and regulations or any related applicable court orders or common law which were caused or alleged to be caused by Tenant or its officers, employees, contractors, agents, or invitees in connection with the use of the Premises by such party or parties.

10. **Abandonment.** It is agreed between the parties hereto that if the leased Premises shall be abandoned or deserted, or if Tenant shall fail to perform any of the covenants or conditions of this Lease on Tenants part to be performed, or if this Lease or the terms thereof is transferred or assigned to any person, firm, officer or corporation other than Tenant, then, and in any of such events, this Lease, at Landlord's option, shall expire and end, immediately upon Landlord learning of such act, condition or default, and Tenant hereby agrees immediately to then quit and surrender the leased Premises to Landlord, but this shall not impair or affect Landlord's right to maintain summary proceedings for the recovery of the possession in all cases provided for by law. If the terms of this Lease shall be so terminated Landlord may immediately or any time thereafter re-enter or repossess the Leased Premises and remove all persons and property there from without being liable for trespass or damages.

11. **Landlord's Right of Entry.** Landlord reserves the right to enter the Premises during regular business hours from time to time to determine whether Tenant is in compliance with this Lease. Tenant shall indemnify Landlord against, and hold Landlord harmless from, any damage, loss, claim, liability, or expense, including without limitation reasonable attorneys' fees, arising out of the delay or inability of Landlord in gaining such entry to the Premises which resulted from the actions of Tenant or the functioning or malfunctioning of any equipment or other property installed on the Premises by Tenant, including without limitation any security system. Tenant releases Landlord and its officers, employees, contractors, agents, and invitees from any claim or liability for injury to persons (including without limitation death) or property damage arising out of the functioning or malfunctioning of any equipment or other property installed on the Premises by Tenant.

12. **Subleasing, Assignment, or Transfer.** Tenant shall not have the right to sublease, assign, or transfer the Premises or any portion thereof, and shall not suffer or permit the Premises or any portion thereof to be subleased, assigned, or transferred by operation of law or otherwise.

13. **Covenant of Quiet Enjoyment.** Landlord covenants that for so long as Tenant makes timely payment of the (defined rent/charge terms) due under this Lease and timely performs all of Tenant's other obligations under this Lease, Tenant may peaceably

and quietly have, hold, and enjoy the Premises throughout the term (until and unless terminated) of this Lease, subject to the other provisions of this Lease

14. **Surrender of Premises.** Unless otherwise instructed by Landlord at least thirty (30) days prior to the termination of this Lease, Tenant shall at its own expense and before the end of the term hereof (a) remove all fixtures, equipment, partitions, and other improvements to the Premises which can be removed without materially damaging the Premises, (b) remove all alterations and improvements to the Premises which were not consented to by Landlord (as the case may be) as required under this Lease and the Standard Lease, (c) remove all alterations and improvements to the Premises as requested by Landlord (as the case may be) at the time that any plans for such work are approved by same, provided that such request shall not unreasonably be made, (d) repair all damage resulting from the initial installation or subsequent removal of the items specified in the three preceding clauses, and close all floor, ceiling, and roof openings, (e) restore any alterations or improvements to the Premises made by Landlord which were in existence on the Commencement Date to the condition in which such alterations or improvements existed on the Commencement Date, reasonable wear and tear excepted, and (f) restore and surrender the Premises to Landlord in as good condition and repair as the Premises were in at the beginning of the term of this Lease, reasonable wear and tear excepted. All property of Tenant remaining on the Premises after the termination of the term hereof shall be deemed to have been abandoned by Tenant, provided, however, that if any such property so remains on the Premises and the removal of such property would impose an expense on Landlord, then, at Landlord's election, Landlord shall be entitled, but not obligated, to remove such property on behalf of and for the account of Tenant, in which case all expenses so incurred by Landlord in connection therewith shall be paid by Tenant to Landlord, as additional rent hereunder, immediately upon Landlord's demand therefore.

15. **Force Majeure.** This Lease and the obligation hereunder of Tenant to pay Rent and to perform under all other provisions of this Lease shall in no way be affected, impaired, or excused because Landlord is unable to fulfill any of the obligations that, under this Lease, are expressly or implicitly to be performed by Landlord if Landlord is delayed or prevented from so doing by reason of accident, inclement weather, fire, flood, strike, other labor dispute, war, act of God, act of government, or any other cause beyond the control of Landlord (such events being collectively referred to herein as a "Force Majeure").

16. **Security Deposit.** The security deposit is to be held by Landlord during the term of this Lease (including any extensions) as security for Tenant's performance of its obligations hereunder, including without limitation the surrender of possession of the Premises to Landlord as herein provided, which Security Deposit shall be returned to Tenant at the termination of this Lease provided that there has been no default in Tenant's performance of its obligations under this Lease. In no instance shall the amount of the Security Deposit be considered a measure of liquidated damages. All or any part of the Security Deposit may be applied by Landlord in total or partial satisfaction of any obligation or default hereunder by Tenant. The application of all or any part of the

Security Deposit to any obligation or default of Tenant under this Lease shall not deprive Landlord of, or constitute a waiver by Landlord of, any other rights or remedies to which Landlord may be entitled. Should any part of the Security Deposit be utilized by Landlord to cure Tenant's default, Tenant shall replenish said Security Deposit to its original amount within three (3) days of notification by Landlord.

17. **Successors and Assigns.** This Lease shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns, heirs, and legal representatives, provided, however, that this provision shall not operate to permit any subleasing, assignment, mortgage, lien, charge, or other transfer or encumbrance that is contrary to the provisions of this Lease.

18. **Time of the Essence.** Time is of the essence of each provision of this Sublease.

19. **Interpretation of Indemnifications.** Except as otherwise expressly provided in this Lease, any obligations of Tenant to indemnify and hold harmless another party pursuant to the provisions of this Lease shall be deemed and interpreted to be obligations in favor of both Tenant and Landlord and their respective successors and assigns.

20. **Notices.** Unless otherwise expressly provided in this Lease, any notice, demand, approval, or other communication required or permitted to be given hereunder shall be in writing and be deemed to have been sufficiently given for all purposes hereunder if hand delivered with written proof of delivery, mailed by U.S. Postal Service certified or registered mail with postage prepaid and return receipt requested, or sent via a reputable commercial overnight delivery service with shipment prepaid and written proof of delivery, and addressed to the parties at the addresses for each of them that are specified below, which addresses may be changed by the giving of notice as provided in this section:

If to Landlord: Chipper Properties, Inc.
900 10th Street
Plantation County, New Florida

If to Tenant: Absolute Dewatering
1243 SW Orange Avenue
Plantation County, New Florida

21. **Waiver.** No waiver by any party of a breach of any provision of this Lease, and no failure by any party to exercise any right or remedy relating to a breach of any provision of this Lease, shall (a) constitute a waiver or relinquishment for the future of such provision, (b) constitute a waiver of or consent to any subsequent breach of such provision, or (c) bar any right or remedy of such party relating to any such subsequent breach. The exercise by any party of any right or election under this Lease shall not

preclude such party from exercising any other right or election that it may have under this Lease.

22. **Invalid Provisions.** If any provision of this Lease, or the application of such provision to any party or circumstance, is found by a court of competent jurisdiction to be invalid or unenforceable, (a) the remainder of this Lease shall not be affected and shall remain in full force and effect, (b) such invalid provision or application shall be deemed to be stricken from this Lease, and (c) the parties shall use good faith efforts to preserve the intent of this Lease by substituting a reasonably comparable provision for the benefit of the party or parties that the invalid or unenforceable provision was intended to benefit.

23. **Entire Agreement.** This Lease constitutes the entire agreement between the parties as to the subject matter hereof and supersedes all prior agreements as the subject matter hereof. No statement, representation, promise, or inducement as to the subject matter hereof which is not included in this Lease shall be binding upon the parties. This Lease may not be amended, revised, extended, or otherwise modified except by a written instrument signed by duly authorized representatives of Landlord and Tenant.

24. **Governing Law.** This Sublease shall be governed by and construed in accordance with the laws of New Florida, except for the portion of such laws having to do with conflicts of laws.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals this _____ day of _____, 2004.

Signed, Sealed and Delivered
in the Presence of:

(As to Landlord)

LANDLORD:

By: _____

(Printed) _____

Its: _____

TENANT:

By: _____

(As to Tenant)

(Printed) _____

Its: _____

PHOTOGRAPHS

The following photographs were taken at the site when the experts for both sides conducted their inspections. It is stipulated that the photographs are authentic and admissible.

Picture #242: The original hook block – side view showing cracks in the upper portion of the block. Hook is stretched beyond 15%. Safety latch is missing.

Picture #247: The original hoist hook block showing the opposite side of the damaged area and the area where the broken ear occurred.

Picture #250: The original hoist hook block as viewed from the top. The upper part of the picture shows the dead end attachment for the center chain, the upper portions tube-like area has a pin running through the two ears of the lower hook block assembly when assembled. This pin and tube assembly allows for a pivoting action. Also visible is the guide assembly showing that the assembly has been damaged by a twisting action of the hook block. A twisting action of the hook block can occur if the chain is installed in a twisted condition.

Picture #267: The original hoist with a new hoist hook block as it appeared on the day of inspection. The picture depicts a “sling chain”. The chain is knotted or wrapped around the hoist hook assembly. The placement of a ring at the top connecting the hook to the sling chain would assure that the load is in a straight line.

Picture #280: The full length of the hoist from ceiling downward. The hoist is attached to the ceiling by a beam/track.

JURY INSTRUCTIONS

JURY INSTRUCTION NUMBER 1

NEGLIGENCE

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist of either doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

You must decide whether Defendant, Chipper Properties failed to use reasonable care in the in the detection, repair, refurbishing, inspection, maintenance and testing of the JET HOIST.

If you find any such negligence, you must then decide if the negligent act or failure to act was the direct and proximate cause of the Plaintiff's injuries.

JURY INSTRUCTION NUMBER 2

NEGLIGENCE - CAUSATION

Negligence is a legal cause of loss, injury or damage if it directly, and in natural and continuous sequence, produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred.

In order to be regarded as the legal cause of loss, injury or damage, negligence need not be the only cause. Negligence may be a legal cause of loss, injury or damage even though it operates in combination with the act of another or some other cause occurring after the negligence occurs if such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such loss, injury or damage or the resulting loss, injury or damage was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it.

JURY INSTRUCTION NUMBER 3

If the greater weight of the evidence does not support the claim of GERRY COOK, your verdict should be for CHIPPER PROPERTIES, INC.

However, if the greater weight of the evidence does support the claim of GERRY COOK, then you shall consider the defense raised by CHIPPER PROPERTIES, INC.

On the defense, the issue for your determination is whether CHIPPER PROPERTIES, INC. was negligent and, if so, whether such negligence was a contributing legal cause of the injury or damage complained of.

If the greater weight of the evidence does not support the defense of CHIPPER PROPERTIES, INC., then your verdict should be for GERRY COOK.

If however, the greater weight of the evidence shows that both GERRY COOK and CHIPPER PROPERTIES, INC. were negligent and that the negligence of each contributed as a legal cause of injury sustained by GERRY COOK, you should determine and write on the verdict form what percentage of the total negligence of both parties to this action is chargeable to each.

JURY INSTRUCTION 4

GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence of the case.