

NO. 10-06597-CV

PAMELA MACKEY ACKER,

Plaintiff,

v.

TOM TONGUE GROCERY EMPIRE,
INC.,

Defendant.

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IN THE 999th DISTRICT COURT

IN AND FOR TRAVIS COUNTY

STATE OF LONE STAR

Prepared by:

**Marvin W. Jones
Sprouse Shrader Smith P.C.
701 S. Taylor, Suite 500
Amarillo, TX 79101**

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This case file was commissioned by the Texas Young Lawyers Association and was prepared by Marvin W. Jones for the 2012 National Trial Competition

STATEMENT OF THE CASE

This is a premises liability case filed by the widow of Rodney Acker against Tom Tongue Grocery Empire, Inc. Mr. Acker was an employee of Need A Fix Roofing Company. Mr. Acker was killed when he fell through a skylight on the roof of the grocery business.

Witnesses will include:

1. Pamela Mackey Acker, the plaintiff and widow of decedent Rodney Acker.
2. Stevie Walker, an expert witness who will testify on behalf of the plaintiff.
3. Jordan Pennington, the defendant and owner of Tom Tongue Grocery Empire, Inc., the premises where the incident occurred.
4. Cory Harbour, an expert witness who will testify on behalf of the defendant.

In addition, there will be deposition testimony from a witness, Tim Williams, who is unavailable to testify at trial.

<p>PAMELA MACKEY ACKER,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p>v.</p> <p>TOM TONGUE GROCERY EMPIRE, INC.,</p> <p style="text-align: center;"><i>Defendant.</i></p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p>IN THE 999th DISTRICT COURT</p> <p>IN AND FOR TRAVIS COUNTY</p> <p>STATE OF LONE STAR</p>
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PLAINTIFF’S ORIGINAL COMPLAINT

TO THE HONORABLE COURT:

COMES NOW, Plaintiff PAMELA MACKEY ACKER and files this Original Complaint against Defendant TOM TONGUE GROCERY EMPIRE, INC., and for cause of action against said Defendant shows the Court as follows:

I.
PARTIES, JURISDICTION AND VENUE

1. This is an action for damages within the jurisdictional limits of this Court.
2. Pamela Mackey Acker has been a resident of Travis County, Lone Star since 1985. Plaintiff was the wife of Rodney Acker, deceased, to whom she was married at the time of his death on February 17, 2010.
3. Tom Tongue Grocery Empire, Inc. is a Delaware corporation with its principal place of business in Travis County, Lone Star. Said Defendant may be served with citation in this matter by serving its president, Taylor Pennington, at its corporate headquarters located at 7466 La Clave Secreta, Armadillo, Lone Star.
4. Venue is proper in Travis County, Lone Star because the accident that is the subject of Plaintiff’s Original Complaint occurred in Travis County, Lone Star.

Additionally, Defendant's principal place of business is located in Travis County, Lone Star. Finally, Plaintiff resides and practices law in Travis County, Lone Star.

II.
FACTUAL BACKGROUND

5. On February 17, 2010, Rodney Acker was working as a laborer for Need A Fix Roofing Company on premises belonging to Tom Tongue Grocery Empire, Inc. located at 1492 Merchant Market in Armadillo, Lone Star. While performing his work on the roof of the premises, Acker fell through a skylight located on the roof.
6. The fall and resulting sudden stop on a concrete floor 25 feet below the skylight resulted in Rodney Acker's death.
7. The roof of the premises belonging to Defendant was virtually flat with skylights located at very close intervals. The skylights on Defendant's roof did not have rails surrounding them, nor did they have screens or other devices shielding them from persons who might be in proximity.
8. The roof of the premises belonging to Defendant had no guardrails at or near the edges to prevent persons such as Rodney Acker from falling to the paved surfaces below.
9. The roof of the premises belonging to Defendant was covered with gravel over tar paper. The tar paper was held in place by two foot long boards nailed or otherwise fastened at varying intervals along the roof surface.

10. On information and belief, Rodney Acker tripped over a board fastened to the roof and fell on, against and through an adjacent skylight, falling to his death to the concrete floor 25 feet below.

III.
PREMISES LIABILITY

11. Plaintiff incorporates by reference the allegations of paragraphs 1 through 10 as if fully restated herein.
12. Under the law of Lone Star, Defendant owed the same duties to the employees of an independent contractor as it would to business invitees. Defendant violated the duties it owed to Rodney Acker, an employee of an independent contractor performing work, labor and services on the premises belonging to Defendant.
13. The premises belonging to Defendant were unreasonably dangerous for the following reasons:
 - a. There were no guardrails or other barriers at or near the edge of the roof;
 - b. There were no guardrails or other barriers at or near the skylights;
 - c. There were boards fastened to the roof at random intervals, presenting a trip hazard to anyone working on the roof;
 - d. There were skylights at very close intervals over the entire area of the roof, which skylights were old, deteriorated and no longer able to withstand their designed loading; and
 - e. The skylights on the roof were not protected by screens or other devices reasonably available that would prevent persons from coming into contact with the actual skylight surfaces.

14. Defendant knew or should have known of the dangers present on its roof, but failed to warn the decedent of those dangers.
15. Defendant knew or should have known of the dangers present on its roof, but failed to take steps to remedy those dangers and make the premises safe for persons such as decedent who were reasonably anticipated to be working on the roof.
16. The failure of Defendant to discharge the duties it owed to Rodney Acker were the proximate cause of his death.

IV.
DAMAGES

17. Plaintiff was married to Rodney Acker at the time of his unnecessary death. As a result of his death, she has suffered mental anguish, loss of consortium, loss of care, comfort and support and loss of his future earnings.

V.
JURY DEMAND

18. Plaintiff hereby requests trial by jury.

VI.
PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Defendant be cited to appear and answer herein, and that upon final hearing the Plaintiff have judgment for damages, pre-judgment and post-judgment interest as allowed by law, costs of suit and such other and further relief, at law or in equity, to which Plaintiff may be justly entitled.

Respectfully Submitted,

GRUNDY & SUPLEE, P.C.
1864 Poison Spring
P.O. Box 41864
Armadillo, Lone Star 76706
(361) 305-6400 (Telephone)
(361) 757-6400 (Facsimile)

By: /s/ Dennis Suplee
Dennis Suplee
State Bar No. 00045896

Attorneys for Pamela Mackey Acker

PAMELA MACKEY ACKER,

Plaintiff,

v.

TOM TONGUE GROCERY EMPIRE,
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IN THE 999th DISTRICT COURT

IN AND FOR TRAVIS COUNTY

STATE OF LONE STAR

DEFENDANT’S ORIGINAL ANSWER

TO THE HONORABLE COURT:

COMES NOW Tom Tongue Grocery Empire, Inc., by and through its undersigned counsel and files its Defendant’s Original Answer, showing the Court as follows:

**I.
ANSWER**

1. Defendant admits the allegations in paragraph 1.
2. On information and belief, Defendant admits the allegations in paragraph 2.
3. Defendant admits the allegations in paragraph 3.
4. Defendant admits that its principal place of business is located in Travis County, Lone Star and that the accident referenced in Plaintiff’s Complaint occurred in Travis County. Defendant has insufficient information to either admit or deny the remaining allegations in paragraph 4 of Plaintiff’s Complaint, and Defendant therefore denies the remaining allegations in paragraph 4.
5. Defendant denies the allegations in paragraph 5.
6. Defendant denies the allegations in paragraph 6.

7. Defendant denies the allegations in paragraph 7.
8. Defendant denies the allegations in paragraph 8.
9. Defendant denies the allegations in paragraph 9.
10. Defendant denies the allegations in paragraph 10.
11. Defendant realleges its answers to paragraphs 1 through 10 as if fully set forth herein.
12. Defendant denies the allegations in paragraph 12.
13. Defendant denies the allegations in paragraph 13.
14. Defendant denies the allegations in paragraph 14.
15. Defendant denies the allegations in paragraph 15.
16. Defendant denies the allegations in paragraph 16.
17. Defendant denies the allegations in paragraph 17.
18. To the extent necessary, Defendant denies all the remaining allegations in the Complaint.

II.
AFFIRMATIVE DEFENSES

19. Without waiver of the foregoing but in addition thereto, Defendant affirmatively pleads that the accident at issue was caused in whole or in part by the negligence of Rodney Acker's employer, Need A Fix Roofing in the following respects:
 - a. Failing to properly train Acker regarding working on, at or near elevated areas;
 - b. Failing to properly supervise Acker; and/or
 - c. Failing to recognize objective indications that Acker might deliberately cause or attempt to cause his own death.

20. Without waiver of the foregoing but in addition thereto, Defendant affirmatively pleads that the accident at issue was caused in whole or in part by the conduct of Rodney Acker in the following respects:
- a. Failing to keep a proper lookout for any hazards that might have been present in the area in which he was working;
 - b. Negligently standing, bouncing or jumping on the surface of the skylight in question; and/or
 - c. Standing, bouncing or jumping on the surface of the skylight in question in order to deliberately cause it to fail.
21. Pursuant to Lone Star Civil Remedies Code Section 69.082, Defendant designates Need A Fix Roofing as a responsible third party and requests the Court to submit to the jury the issue of its fault and the percentage by which such fault caused or contributed to cause the accident in question.

III.
PRAYER

WHEREFORE, Defendant requests that upon final trial that Defendant have judgment that Plaintiff take nothing by her suit, that Defendant be discharged from any and all liability, that Defendant recover court costs and for such other and further relief, at law or in equity, general or special, to which Defendant may show itself justly entitled.

Respectfully submitted,

LAW OFFICES OF CHARLES RICHARD
150 E. Middle Way
P.O. Box 15008
Armadillo, Lone Star 76707
(512) 831-7364
(512) 832-2628 FAX

By: /s/ [electronically signed and filed]
Charles "Chuck" Richard
State Bar No. 1588324

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendant's Original Answer has been served by certified mail, return receipt requested, to Dennis Suplee on this 1st day of September, 2010.

By: /s/ [electronically signed]
Charles "Chuck" Richard

WITNESS AND EXHIBIT LIST

WITNESSES:

PLAINTIFF:

1. Pamela Mackey Acker (must be female)
2. Stevie Walker (may be male or female)

DEFENDANT:

1. Jordan Pennington (may be male or female)
2. Cory Harbour (may be male or female)

EXHIBITS:

1. OSHA Citation (Tom Tongue)
2. Twitter Message
3. OSHA Citation (Need A Fix Roofing)
4. Lab Report
5. Photograph of Roof
6. Photograph of New Skylight
7. Manufacturer's Information Sheet
8. Invoice for Skylights
9. Invoice for New Skylights
10. Personnel File of Cory Harbour
11. Photograph of Rodney Acker and Friend
12. Photograph of Store Front

STIPULATIONS AS TO EVIDENTIARY MATTERS
Procedural Matters

1. Federal Rules of Civil Procedure and Federal Rules of Evidence apply.
2. All witnesses called to testify who have identified the parties, other individuals, or tangible evidence in depositions or prior testimony can and will, if asked, identify the same at trial.
3. Each witness who testified previously or gave a deposition agreed under oath at the outset of his or her testimony to give a full and complete description of all material events that occurred and to correct the transcript of such deposition or testimony for inaccuracies and completeness before signing the transcript.
4. All depositions and transcripts of testimony, including the deposition of Tim Williams, were signed under oath.
5. For this competition, no team is permitted to attempt to impeach a witness by arguing to the jury that a signature appearing on a deposition or other transcript does not comport with signatures or initials located on an exhibit.
6. Other than what is supplied in the problem itself, there is nothing exceptional or unusual about the background information of any of the witnesses that would bolster or detract from their credibility.
7. This competition does not permit a listed witness, while testifying, to "invent" an individual not mentioned in this problem and have testimony or evidence offered to the court or jury from that "invented" individual.
8. "Beyond the record" shall not be entertained as an objection. Rather, teams shall use cross-examination as to inferences from material facts pursuant to

National Rules VII(4)(C) and (D) and VIII(5). Any party wishing to file a complaint concerning a violation of this rule shall use the procedure found in rule VIII(4).

9. The Plaintiff and the Defendant must call the two witnesses listed as that party's witnesses on the witness list.

10. All exhibits in the file are authentic. In addition, each exhibit contained in the file is the original of that document unless otherwise noted on the exhibit or as established by the evidence.

11. It is stipulated that no one shall attempt to contact the problem drafter about this problem before the conclusion of the 2012 National Trial Competition Final Round. Contact with the competition officials concerning this problem must be pursuant to the rules of the competition.

12. 2012 is the year in which this case comes to trial.

13. Presentation and argument on pretrial motions shall be limited to a total time of sixteen minutes divided equally between the parties as follows: (1) the Plaintiff shall have four minutes to present any pretrial motions; (2) the Defendant shall have four minutes to respond to the Plaintiff's motion(s); (3) the Defendant shall have four minutes to present any pretrial motions; and (4) the Plaintiff shall have four minutes to respond to the Defendant's motion(s).

14. This competition permits teams to argue additional case law and other relevant authority to support the team's argument on motions and evidentiary issues. However, no additions or deletions are permitted to the provided jury instructions or to the jury verdict form.

15. Motions to dismiss have been filed and denied; no further motions to dismiss will be entertained.

16. The trial has been bifurcated such that the only issue being tried in this competition is liability; the question of damages will not be submitted in this phase of the proceedings.

Substantive Matters

1. Tim Williams is unavailable to testify at trial because he is outside the jurisdiction and not subject to subpoena. His deposition was taken in accordance with Fed. R. Civ. P. 30, and counsel for all parties were in attendance and had an opportunity to examine the witnesses. His deposition has been signed and duly filed, and may be used at trial as provided in Fed. R. Civ. P. 32.

2. Lone Star Civil Remedies Code Section 69.082 provides as follows:

DESIGNATION OF RESPONSIBLE THIRD PARTY. (a) A defendant may seek to designate a person as a responsible third party by filing a motion for leave to designate that person as a responsible third party. The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.

(b) By granting a motion for leave to designate a person as a responsible third party, the person named in the motion is designated as a responsible third party for purposes of this chapter without further action by the court or any party.

(c) The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:

- (1) each claimant;
- (2) each defendant;
- (3) each responsible third party who has been designated under this Section.

3. The Court granted Defendant's motion to designate Need A Fix Roofing, Inc. as a responsible third party. Therefore, Need A Fix Roofing, Inc. was properly designated as a responsible third party pursuant to Lone Star Civil Remedies Code Section 69.082.

4. 29 CFR Section 1910.12 provides as follows:

1910.12(a) "Standards." The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

5. 29 CFR Section 1910.23 provides as follows:

1910.23(a)(4) Every skylight floor opening and hole shall be guarded by a standard skylight cover or a fixed standard railing on all exposed sides.

1910.23(e)(8) Skylight screens shall be of such construction and mounting that they are capable of withstanding a load of at least 200 pounds applied perpendicularly at any one area on the screen. They shall also be of such construction and mounting that under ordinary loads or impacts, they will not deflect downward sufficiently to break the glass below them. The construction shall be of grillwork with openings not more than 4 inches long or of slatwork with openings not more than 2 inches wide with length unrestricted.

6. 29 CFR Section 1926.501 provides as follows:

1926.501(a)(2) The employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.

1926.501(b)(4)(i) Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

1926.501(b)(4)(ii) Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes by covers.

7. The Lone Star versions of the above sections of the CFRs shall control for purposes of this competition.

8. Plaintiff's motion to deem violations, if any, of the foregoing OSHA regulations to be negligence per se has been denied by the Court and no further motions in that respect will be entertained.

9. Lone Star Civil Remedies Code Section 410.009 provides as follows:

LIABILITY OF PREMISES OWNERS TO INVITEES. (a) The owner, lessee, tenant or other occupier of real property owes a duty to invitees, including business invitees, to warn of hidden or concealed dangers on the premises or to make such premises safe.

(b) The term "hidden or concealed dangers" as used in this Section includes circumstances or situations that are not immediately observable by persons exercising ordinary care, and circumstances and situations which, although immediately observable, present a greater risk of harm than ordinarily associated with the same or similar circumstances and situations due to latent defects known to the owner, lessee, tenant or other occupier and not known to an invitee.

(c) The duties owed to an invitee by an owner, lessee, tenant or other occupier of real property are also owed to contractors, subcontractors and the employees of contractors and subcontractors.

**DEPOSITION OF PAMELA MACKEY ACKER
FEBRUARY 4, 2011**

1 Q: Can you state your full name, please.

2 A: Yes, my name is Pamela Mackey Acker, and I am the widow of the love of my life,
3 Rodney Acker.

4 Q: How long were you married to Rodney Acker?

5 A: We were married eighteen glorious months. And four days.

6 Q: Was this your first marriage?

7 A: Not really.

8 Q: Had you been married previously?

9 A: Yes, I had been married once previously, and Rodney had been married three times
10 previously. But he said many times that this marriage was the one he had been waiting
11 for all of his life and that we would stay together forever.

12 Q: And did you agree with that assessment?

13 A: I have never loved anyone like Rodney.

14 Q: During his lifetime, what did Mr. Acker do?

15 A: Mr. Acker worked for Need A Fix Roofing as a laborer.

16 Q: And what if anything do you do?

17 A: Oh, I'm a big time criminal defense lawyer here in the state of Lone Star.

18 Q: How did you meet Mr. Acker?

19 A: Well, I was defending Rodney in connection with a dog fighting ring he had gotten mixed
20 up in.

21 Q: Did Mr. Acker ever talk to you about his work?

22 A: Yes, he talked about his work all the time.

23 Q: Why did he talk to you so much about his work?
24
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**DEPOSITION OF PAMELA MACKEY ACKER
FEBRUARY 4, 2011**

1 A: Frankly, he talked to me about his work in the context of an attorney-client relationship.
2 He was seeking my advice as his attorney rather than his wife. He wanted to know what
3 he could do about some of the work conditions in which he was forced to work.

4 Q: What kinds of things was he telling you about his work?

5 A: Well, he was unhappy because the folks at Need A Fix Roofing had no safety program.
6 They had no training. They had no concept of safety training. It was just a bunch of
7 good ol' boys who were running a very sloppy shop.

8 Q: Did he ever mention the job at Tom Tongue Grocery Empire?

9 A: Yes, he was particularly concerned about that job. He thought working on that roof was
10 very unsafe because there were no guardrails around the edge of the roof. Worse, the guy
11 who was the maintenance supervisor for the grocery store was always up there telling
12 them what to do and demanding that they work harder and longer hours even when they
13 were fatigued.

14 Q: Did he tell you anything else about this maintenance supervisor?

15 A: Yes, he said the maintenance supervisor, a guy named John Ward, ordered him to work
16 very close to the edge of the roof without any kind of personal protective equipment like
17 a safety belt. Ward also made him climb a ladder up to the roof carrying really heavy
18 loads, much too heavy for safety.

19 Q: Did he ever mention the skylights that were on the roof?

20 A: No, he never said a word about any skylights on the roof.

21 Q: Did you ever go inspect the premises at Tom Tongue?

22 A: Yes, I thought it was important to see what Rodney was experiencing in order to properly
23 represent him.

24 Q: When did you go there?

25 A: I went late one night, when I figured no one would try to stop me.

**DEPOSITION OF PAMELA MACKEY ACKER
FEBRUARY 4, 2011**

1 Q: Did you see anyone there?

2 A: Yes, there happened to be a security person there.

3 Q: Did you speak with this security person?

4 A: Yes, the security person, a guy named Chris Jensen, came over and spoke with me for
5 quite awhile. I asked him about the safety conditions around the premises.

6 Q: What, if anything at all, did Mr. Jensen say about the conditions out there?

7 A: He said that the roof area was just a disaster waiting to happen.

8 Q: Did he say why he thought that?

9 A: He said that he had been up there once, and the skylights were so thick that you couldn't
10 walk around up there without stumbling into them.

11 Q: Did he say whether he had any trouble walking around up there?

12 A: He said he realized before he even took a step that he was too drunk to maneuver that
13 minefield, so he climbed back down.

14 Q: Did you go look for yourself?

15 A: No, I had heard enough at that point and I was ready to advise my client.

16 Q: What was your advice to Rodney regarding the working conditions at Need A Fix?

17 A: I told him he ought to quit there and go ring bells for the Salvation Army.

18 Q: Why that specific advice?

19 A: Because he had such a supple wrist. It's what made him good at roofing.

20 Q: What do you recall about his demeanor the day he fell through the skylight at Tom
21 Tongue?

22 A: He seemed just fine. He didn't seem to have a care in the world. As he left for work, he
23 gave me a peck on the cheek and said that he thought this would be one of his best days.

24 Q: Can you identify Exhibit 1?
25

**DEPOSITION OF PAMELA MACKEY ACKER
FEBRUARY 4, 2011**

1 A: This is an OSHA citation that Rodney found laying around in a restroom at Tom Tongue
2 while he was working there. He thought it was important so he picked it up and kept it.

3 Q: What is this OSHA citation for?

4 A: This citation says that Tom Tongue failed to properly train its employees in safety
5 measures.

6 Q: Do you use a Twitter account?

7 A: Only for business purposes.

8 Q: Can you identify Exhibit 2?

9 A: It appears to be a print out of a message that supposedly came from my Twitter account.

10 Q: Does this appear to have come from your Twitter account?

11 A: Well, it appears to come from my account, I'll grant you that.

12 Q: And do you know a person named Ed Kronk?

13 A: Yes, I know Ed. Ed is a client of mine.

14 Q: Is this a business message?

15 A: Yeah, my business. And I resent you trying to get in my business.

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**DEPOSITION OF STEVIE WALKER
AUGUST 18, 2011**

1 Q: Please state your name for the record.

2 A: My name is Stevie Walker.

3 Q: What do you do for a living?

4 A: I'm a safety consultant.

5 Q: Tell us something about your educational background, please.

6 A: I graduated from high school in Happy, Lone Star. I then went to Flower Mound
7 University over in Flower Mound and got a Bachelor of Arts in Biometrics. I then went
8 to Dangerfield State University, where I received a Masters degree in Civil Engineering.

9 Q: What did you do after you received your education?

10 A: I went to work for the Occupational Safety and Health Administration, or OSHA, in their
11 regional office out of Austin, where I worked for approximately for twelve years.

12 Q: What kind of work were you doing for OSHA for twelve years?

13 A: I was doing safety inspections and accident investigations.

14 Q: What's involved in doing a safety inspection?

15 A: We would go into a business, sometimes announced and sometimes not, and we would
16 start looking for safety hazards, things that violate OSHA standards. If we found
17 violations, we could do anything from simply sitting down with the owner and talking
18 about it, to issuing citations, to even shutting the business down entirely.

19 Q: During your twelve years with OSHA, did you ever have occasion to examine the roof of
20 a business for safety violations?

21 A: Because a roof is not ordinarily a work area per se, we did not usually inspect a roof on a
22 routine safety inspection. And so I never actually inspected the roof of a business for
23 safety violations, except for this one. I was still working for OSHA when this accident
24 happened, and I actually did the post-accident inspection.

25 Q: When did you leave OSHA?

**DEPOSITION OF STEVIE WALKER
AUGUST 18, 2011**

1 A: Right after this investigation. I handed my notes and all over to the next inspector, and
2 the new inspector was the one who wrote the citation here.

3 Q: Why did you stop working at OSHA?

4 A: I was tired of watching other folks make the big bucks as consultants when they really
5 knew very little. Very little. So I became a consultant.

6 Q: Did my firm employ you to take a look at the accident involving Mr. Acker and render
7 opinions about that accident?

8 A: Yes, you said you would pay me to do it, and I said I'd be happy to receive that pay.
9 That's what I'm in the business of doing.

10 Q: What did you review in connection with working this case?

11 A: I reviewed all of the depositions that have been taken except the Defendant's expert,
12 which has not been taken yet. I also reviewed my notes on the OSHA investigation and
13 I've reviewed photographs of the roof. Additionally, I went back to the grocery store and
14 again inspected the roof. I also reviewed a laboratory report from some testing done on
15 one of the skylights from the roof.

16 Q: What is Exhibit 3?

17 A: It is the OSHA citation issued against Need A Fix Roofing in relation to this accident.

18 Q: Based upon your years of experience, your education and training, your prior and recent
19 investigations, and your review of the materials that have been provided to you in
20 connection with this case, have you formed opinions and conclusions regarding the
21 accident that took Mr. Acker's life?

22 A: Yes, I have formed the following opinions: First, that entire roof area was just one big
23 OSHA violation. I've never seen such a dangerous place. There is nowhere on that roof
24 that is safe. Second, I believe that the owner of the building should have erected
25 guardrails or barriers of some kind around each of the skylights on the roof while the

**DEPOSITION OF STEVIE WALKER
AUGUST 18, 2011**

1 roofing work was being done in order to protect against this kind of accident. Third, I
2 believe the owner of the building should have warned Mr. Acker and his coworkers about
3 the fact that the skylights were there, and further should have warned them the skylights
4 were in such poor condition that they would not hold anywhere near their rated capacity.

5 Q: Let's take up your first opinion. Why do you believe the entire roof was one big OSHA
6 violation?

7 A: Although this was a flat roof, and therefore did not present any kind of slope hazard, the
8 roof itself was simply littered with boards that had been nailed down to hold the tar paper
9 down. There were probably two hundred boards up there, every one of them was a 2x4x8
10 dimensionally. Every one of those boards was a trip hazard.

11 Q: Were the workers from the roofing company supposed to be removing those boards in
12 order to put down a new roofing material?

13 A: Yes, they had probably taken 25 or so of the boards off when this accident occurred.

14 Q: What else was it about the roof that made it dangerous?

15 A: Well, there was no rail around the edge of the roof to keep people from falling off the
16 edge. Here you've had all of these little boards that would trip you, and no guardrail to
17 catch you if you were close to the edge. The whole thing was incredibly dangerous. In
18 addition to that, you had all those skylights up there, and you could either trip on those
19 skylights or you could fall through them, as Mr. Acker did. These things were just
20 everywhere up there, and only stuck up maybe 6 or 8 inches above the roof. You could
21 easily overlook them they were so low.

22 Q: Your second opinion is that the building owner should have erected guardrails or barriers
23 around the skylights to make them safe during roofing work. What is that based on?

24 A: It's just based on common sense. It's also based on the legal notion that the building
25 owner has a duty to make hazards like that safe or warn about them.

**DEPOSITION OF STEVIE WALKER
AUGUST 18, 2011**

1 Q: And that brings us to your third opinion, which is that the owner should have warned
2 about the hazards. What is that opinion based on?

3 A: Again, it is based on good common sense. You have a hazard like that up there, you need
4 to either make it safe or give explicit warnings about it.

5 Q: As between erecting barriers and giving a warning, do you have an opinion as to which
6 would be preferable?

7 A: Absolutely, building barriers. You can give a warning once, and it's forgotten shortly
8 after that. Worse than that, when workers work around a terrible hazard like this for
9 several days, they tend to get inured to the danger, and they have to be warned over and
10 over and over to make it stick. If you build barriers, you don't have to tell them at all.

11 Q: You also mentioned in your opinion the skylights were cracked or crazed in such a way
12 that they wouldn't withstand their rated load; what's the basis for that opinion?

13 A: First, just visually, you can see that they are weathered out and cracked or crazed. That's
14 just obvious when you look at them. Second, I can look at the laboratory tests, shown in
15 Exhibit 4, and see that they skylights have been weakened by this cracking or crazing.

16 Q: Other than the items you have mentioned specifically, did you find any OSHA violations
17 in connection with this accident?

18 A: Yes, I think there were three very specific violations. First, there was a violation of
19 Section 1910.23(a)(4) because there was no protection for openings in the roof, which by
20 the way also implicates Section 1926.501(b)(4). Second, there was a violation of Section
21 1926.501(a)(1) because there was no fall protection system in place, and there were
22 unprotected edges and surfaces all over the place, including the edge of the roof itself.
23 And of course, that applies here through Section 1910.12(a). And third, uh, uh, what's
24 the third one? Uh, sorry. Oops.

**DEPOSITION OF STEVIE WALKER
AUGUST 18, 2011**

1 Q: Well, let me just ask, in your opinion, whether this accident could have been avoided if
2 certain common, ordinary safety precautions had been followed?

3 A: Of course it could have. Every accident is avoidable. This one is no exception.

4 Q: Can you identify Exhibit 4?

5 A: Yes, this is the lab report where the skylights were tested to see what kind of weight load
6 they would withstand without breaking. As you can see, the similar skylight taken from
7 that roof was tested by this laboratory and it failed at a weight load of 150 pounds. The
8 skylights are supposed to be rated for 600 pounds. That means this skylight was only at
9 25% percent of its strength.

10 Q: In your opinion, would it make a difference in weight bearing capacity as to how the
11 weight is applied to the skylight?

12 A: Yes, a material like this will withstand a much heavier load if that load is applied steadily
13 or uniformly. It will bear up under a lot less weight if that weight is applied suddenly or
14 sharply.

15 Q: Can you identify Exhibit 5?

16 A: Yes, that is a photograph of the roof showing all of the skylights that were there, before
17 they got the gravel back down, which is part of what poor dead Rodney was supposed to
18 be doing.

19 Q: And finally, can you identify Exhibit 6?

20 A: Yes, that's a picture of a new skylight. There were several of these put up on the grocery
21 store roof after the accident.

22 Q: Why were new skylights put in up there?

23 A: Well, one was broken by Acker and one was taken out for testing. Oh, and I remembered
24 the third OSHA violation up there. Section 1910.23(e)(8), because the skylight couldn't
25 bear 200 pounds applied perpendicularly.

**DEPOSITION OF JORDAN PENNINGTON
JUNE 16, 2011**

1 Q: Tell us your name please.

2 A: My name is Jordan Pennington.

3 Q: What is your occupation or profession?

4 A: I am the owner of Tom Tongue Grocery Empire, a grocery business here in Armadillo.

5 Q: How long have you owned that business?

6 A: I inherited the business ten years ago, and I have run it ever since.

7 Q: Who did you inherit the business from?

8 A: I inherited the business from my uncle, Rufus Pennington. May he rest in peace.

9 Q: What is your background for running a business like this?

10 A: Well, after I graduated from Armadillo High School, I went to Yale and graduated in six
11 or seven years. I then came back to Lone Star and attended University of Lone Star at
12 Austin, where I received a Masters in Business Administration. That's an MBA for the
13 folks in Oxlip.

14 Q: What was your undergraduate major?

15 A: Mostly snoozin' and boozin', but technically lunar music theory.

16 Q: Before taking over Tom Tongue, had you had any experience in the grocery business?

17 A: No, but how hard is it to run a business anyway? Really doesn't matter if you're
18 peddling steaks or peddling BS like you lawyers do, it's all the same business principles.

19 Q: When you took over the business, what kind of shape was it in financially?

20 A: It was pretty stretched, it had been mismanaged some, there was quite a bit of debt on the
21 books.

22 Q: How's the business done since that time?

23 A: I've been able to turn around the profits pretty good. With a business like that, you've
24 got to concentrate on getting the revenues up and the expenses down and I've been able
25 to do that pretty well.

**DEPOSITION OF JORDAN PENNINGTON
JUNE 16, 2011**

1 Q: How were you able to get revenues up?

2 A: We started advertising pretty heavily. As you might guess, the business name is kind of
3 catchy and it makes for some great advertising.

4 Q: Speaking of, can you identify Exhibit 12?

5 A: Yes sir, that's a photo of the front of the store where this accident happened. As you can
6 see, I've spent a lot of money making the stores catch the eye, so to speak. A lot of
7 money.

8 Q: How were you able to get expenses down?

9 A: The first thing you do is look around and see if you have excess employees. Employees
10 are one of the huge costs in any business. If you've got too many of them, it can be a real
11 drain. So I looked around and slashed the nonessential personnel.

12 Q: What else did you do to get expenses down?

13 A: I cut out other expense items that could either be eliminated or deferred. My uncle was
14 setting aside a fairly significant amount of cash every year for maintenance, and I pared
15 that down consistent with good business practices.

16 Q: Are you familiar with the incident that happened on February 17, 2010, at your building?

17 A: Yes, unfortunately, I was actually in the business the day it happened.

18 Q: What was Mr. Acker doing on the roof at the time of the fall?

19 A: If you are asking what he was supposed to be doing, the answer is that he was supposed
20 to be repairing the roof.

21 Q: Was Mr. Acker one of your employees or did he work for somebody else?

22 A: He worked for Need A Fix Roofing. I had hired Need A Fix to make necessary repairs
23 on the roof because it started leaking pretty badly after that big snow we had last year.

24 Q: It snows in Lone Star?

25 A: It sure did last year.

**DEPOSITION OF JORDAN PENNINGTON
JUNE 16, 2011**

1 Q: Did you go up on the roof to take a look at the condition before you called Need A Fix?

2 A: No, I can't say that I've ever been on the roof of that building. My head of maintenance
3 and head of safety went up on the roof and took a look around.

4 Q: Who is your head of maintenance and safety?

5 A: That would be the red headed wonder, Christine Stroud.

6 Q: What is Christine Stroud's job description?

7 A: Stroud is responsible for keeping up the maintenance of our equipment, such as our
8 refrigerators and our dairy cases and the like. She is also in charge of maintaining the
9 building itself as needed. Stroud also has responsibilities for safety and training of
10 employees.

11 Q: What is Ms. Stroud's background that qualifies her for this safety and training position?

12 A: I don't really know the answer to that. She was an employee when I took the business
13 over, she told me she wasn't nonessential, so I kept her around.

14 Q: Have you ever attended any of Stroud's training sessions?

15 A: No, I'm too busy to do things like that. I trust that the employees are getting proper
16 training, and our safety record bears that out.

17 Q: What is your safety record?

18 A: We have not had any kind of accident in the past five years. That's pretty good,
19 considering how many grapes people throw on the floor.

20 Q: Can you identify Exhibit 7?

21 A: Yes, Exhibit 7 is a manufacturer's sheet on the skylights in our roof.

22 Q: Where did this come from?

23 A: It was in my uncle's files concerning the building.

24 Q: Have you verified that the sheet actually shows the skylights that are in place?
25

**DEPOSITION OF JORDAN PENNINGTON
JUNE 16, 2011**

1 A: Well, again, I've never been up on the roof, but Ms. Stroud tells me that this is the right
2 sheet for those skylights.

3 Q: Can you identify Exhibit 8?

4 A: Yes, that is an original invoice for the purchase of the skylights from the manufacturer
5 that's listed in Exhibit 7.

6 Q: What is the date of that invoice?

7 A: August 18, 1977.

8 Q: Is it possible those skylights have been in place without replacement for the past thirty
9 years?

10 A: Yes, that's what it appears to be. My uncle kept careful records of every expenditure he
11 made on the building, every maintenance item he ever had to perform, every piece of
12 equipment he had to replace. There are not any other invoices for skylights.

13 Q: Can you identify Exhibit 9?

14 A: Yes, that is the invoice for some new skylights.

15 Q: Why were these skylights purchased?

16 A: After the accident, we decided that we should replace some of the skylights in the roof.
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**DEPOSITION OF CORY HARBOUR
OCTOBER 3, 2011**

1 Q: What is your name?

2 A: Cory Harbour.

3 Q: Where do you reside?

4 A: I reside in Dublin.

5 Q: Ireland?

6 A: No Dublin, Lone Star. It's the home of Dublin Dr Pepper, as compared to the regular
7 stuff they bottle in Waco.

8 Q: What is your occupation or profession?

9 A: I am a materials specialist.

10 Q: Who is your employer?

11 A: I am self employed as a consultant.

12 Q: What is your educational background?

13 A: I attended William Mitchell College of Cosmic Harmony in Ozone, Arkansas for 5 years.
14 Never did get a degree. Then I moved back down here and went to Lone Star A&M
15 University, where I received double degrees in Civil and Mechanical Engineering.

16 Q: What is your work background?

17 A: Right out of A&M, I went to work for the City of Austin. Jobs were pretty tight then, and
18 I couldn't find anything that fit my degrees, so I took a job as a supervisor of the waste
19 management operations for the City of Austin.

20 Q: What were your job duties?

21 A: I supervised the crews that operated the mobile equipment used to effectuate the waste
22 management program within the City of Austin.

23 Q: You supervised the garbage pickup crews?

24 A: That's one way to put it.

25 Q: How long did you work for the City of Austin in that capacity?

**DEPOSITION OF CORY HARBOUR
OCTOBER 3, 2011**

1 A: For about five years.

2 Q: How did that employment terminate?

3 A: I was terminated by the City of Austin because I insisted that the drivers of the waste
4 management effectuation vehicles at least have a green card, if not an actual driver's
5 license. I insisted, they resisted, and they won.

6 Q: What did you do after City of Austin fired you?

7 A: I was lucky enough to find a job that fit my education. I went to work for a company that
8 manufactured materials for building things.

9 Q: What kind of materials are we talking about?

10 A: Steel, fiberglass, some plastics.

11 Q: How long did you work for that company?

12 A: For about fifteen months. I left them in order to become a consultant, because I
13 discovered you can make a lot more money becoming an expert witness than you can
14 working in the industry.

15 Q: And how long have you been serving as a consultant or expert witness?

16 A: I've served as both a consultant and an expert, and I have been doing that for the past
17 four years.

18 Q: Were you asked to look into the facts and circumstances surrounding the death of Mr.
19 Acker?

20 A: Yes, you've asked me to take a look at that accident and give opinions regarding caused
21 it.

22 Q: What did you review in order to undertake that assignment?

23 A: I reviewed all of the depositions that were taken, and I understand mine is the last one
24 being taken. I also reviewed the OSHA files on this matter, and I looked at the
25 manufacturer's data sheet setting forth the specifications for the skylights in question. I

**DEPOSITION OF CORY HARBOUR
OCTOBER 3, 2011**

1 also did some independent research regarding plastics and their breaking resistance
2 capabilities.

3 Q: Were you able to form an opinion regarding how this accident happened?

4 A: Yes, my opinion is that the accident was caused when the skylight broke. The skylight
5 broke because Mr. Acker was either standing on it or deliberately jumped on it.

6 Q: What is the basis for your assumption that Mr. Acker might have been standing on the
7 skylight?

8 A: I read a statement from a coworker who was on the roof at the same time. Although the
9 coworker did not witness the actual accident, he said he had observed Mr. Acker actually
10 standing on one of the other skylights earlier in the day.

11 Q: Who was the coworker?

12 A: His name was Tim Williams.

13 Q: Was the coworker knowledgeable about why Mr. Acker was standing on the skylight?

14 A: Not really, he just said Acker was kind of standing there flexing up and down on his toes.
15 He thought maybe Rodney was just getting off the hot black part of the roof, which was
16 pretty brutal on our feet. The coworker said he thought it was pretty dumb for Rod A to
17 be there, and told him so, but he just shrugged.

18 Q: Your second scenario is that Mr. Acker deliberately jumped on the skylight. What makes
19 you think so?

20 A: Well, we'll get more into that in a minute in terms of the analysis of what the skylights
21 would withstand, but from a general standpoint, jumping on the skylight would have
22 exerted more impact type force. But in my opinion, either one of those things could have
23 done the job, depending on the breaking strength of the skylight material.

24 Q: Speaking of the breaking strength of the skylight material, did you have it tested?
25

**DEPOSITION OF CORY HARBOUR
OCTOBER 3, 2011**

1 A: Yes, I had a skylight that resembled the one that broke taken out of the roof and sent to
2 the lab for testing.

3 Q: How did you choose the skylight that you sent for testing?

4 A: Well, I looked for a skylight that had similar characteristics in terms of the cracking or
5 crazing that appeared to be present in the one that Mr. Acker fell through.

6 Q: Wasn't the one that Mr. Acker fell through totally shattered by the fall?

7 A: Yes, that did complicate my analysis. I admit it was hard to know exactly what it looked
8 like before the accident. But I assumed it was like the average skylight up there.

9 Q: What lab did you send this to?

10 A: I sent it to a lab in China Grove that specializes in testing the breaking strength in various
11 materials. It is a lab that I have personally worked with on many occasions, and it is a
12 certified testing laboratory. I have complete confidence in their abilities.

13 Q: Can you identify Exhibit 4?

14 A: Yes, that is the laboratory testing results on the skylight that I sent them.

15 Q: What do these results show us?

16 A: This testing demonstrated that the exemplar skylight would withstand 600 pounds of
17 pressure placed on the skylight itself without breaking.

18 Q: Did Mr. Acker weigh 600 pounds?

19 A: Close to it, I think. Well, not really. His wife told me he barely tipped the scales at 160
20 pounds.

21 Q: If he weighed something less than that, how would that affect your analysis?

22 A: It wouldn't affect it much. You see, these results indicate that even after thirty years of
23 service, the skylight material still had a hefty percent of its breaking strength available.
24 In terms of where they were, which was on a roof, and given the fact that they were
25 generally inaccessible, it is my opinion that the skylights did not present an unreasonable

**DEPOSITION OF CORY HARBOUR
OCTOBER 3, 2011**

1 danger to people. Given the fact that the roof is not a work area, the slight possibility that
2 the skylights had lost some of their breaking strength is really pretty irrelevant.

3 Q: Based on these test results, can you rule out either standing on the skylight or jumping on
4 the skylight as cause of this accident?

5 A: Either one of those things is just as likely as the other, in my opinion.

6 Q: Is it possible that Mr. Acker simply tripped on something on the roof and fell through the
7 skylight?

8 A: No, I would think if he had fallen his weight would have been more evenly distributed
9 across the surface of the skylight. This three hundred pound number really came from
10 dropping a weight from 3 feet onto a very concentrated point in the center of the skylight.
11 If you spread the weight out, you get a different result.

12 Q: Did you have the lab test that scenario?

13 A: I couldn't use up all the skylights on the roof. I only took one to test.

14 Q: In the final analysis, what is your opinion of the ultimate cause of this accident?

15 A: Either Mr. Acker was deliberately standing in the middle of the skylight, which means he
16 was incredibly fearless, or he deliberately jumped through it, which means he was
17 incredibly suicidal.

18 Q: Can you identify Exhibit 10?

19 A: That's part of my personnel file from the City of Austin. A small part of it.
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**DEPOSITION OF TIM WILLIAMS
JULY 11, 2011**

1 Q: Tell us your name, please?

2 A: My name is Tim Williams.

3 Q: Where do you reside?

4 A: I live in Armadillo, here in Lone Star.

5 Q: How long have you lived in Armadillo?

6 A: Seems like all my life, but it's really just two years. Before that, I lived in a town in
7 Oklahoma, the actual name of which I apparently can't mention here.

8 Q: How are you employed?

9 A: I work for Need A Fix Roofing Company.

10 Q: What is your job at Need A Fix?

11 A: I am a laborer. I work on roofs.

12 Q: Were you familiar with Rodney Acker?

13 A: Poor dead Rodney. Yeah, I knew Rodney.

14 Q: Were you working with Mr. Acker on the roof of the store belonging to Tom Tongue
15 Grocery Empire on the date of his death?

16 A: Yes, I was on the roof of their Armadillo store with Rodney that day.

17 Q: Did you observe Mr. Acker doing anything you thought to be unusual that day?

18 A: Yes, early in the day, right after we got to work, I saw Rodney standing on one of the
19 skylights on the roof of the building. He was kinda flexing up and down on his toes. I
20 didn't know what to make of that.

21 Q: Did you ask him why he was doing that?

22 A: Yes, I asked him why he was doing such a foolish thing.

23 Q: And what was his response?
24
25

**DEPOSITION OF TIM WILLIAMS
JULY 11, 2011**

1 A: He didn't really answer the question. He just looked at me and shook his head.

2 Q: What did you do then?

3 A: I just let him be. I could tell he wasn't his usual self, that he had lost his sense of humor.

4 Q: Can you identify Exhibit 11?

5 A: Yes, that's a picture of Rodney and Big Ed Kronk, who Rodney always said was his best
6 friend.

7 Q: Have you seen this photo before?

8 A: Yeah, Rodney had it in his pickup one day, showing it to us and laughing about it.

9 Q: Can you explain what they were doing in this photograph?

10 A: Uh, um, Easter?
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Citation and Notification of Penalty

Company Name: TOM TONGUE GROCERY EMPIRE, INC.
Inspection Site: 1492 MERCHANT MARKET, ARMADILLO, LONE STAR

Citation 1 Item 1 Type of Violation: **Other than Serious**

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Tom Tongue Grocery Empire Roof Area: On July 2, 2009, employees were engaged in labor on the roof of the premises, placing 2x4 boards along the roof to hold down tar paper. The employees were exposed to hazards on and near the roof area without receiving instruction from the employer in the recognition of unsafe conditions to control or eliminate hazards.

Conditions including, but not limited to:

- a.) Use of fall protection while working around unguarded edges;
- b.) Working in close proximity to unguarded holes.

Messages


New Message


Direct Messages


 **BigTimeCrimester** Pamela Mackey 4
April 14, 2010 10:09 am



Send ed_kronk1 a message

 **BigTimeCrimester** Pamela Mackey
I'm kinda worried...
February 17, 2010 6:09 am

 **BigTimeCrimester** Pamela Mackey
He threw some stuff around, then got really morose and drunk. When he left this morning he said goodbye in a really creepy way.
February 17, 2010 6:09 am

 **ed_kronk1**
uh oh. now what?
February 17, 2010 6:04 am


 **BigTimeCrimester** Pamela Mackey
rodney knows
February 17, 2010 6:01 am

EXHIBIT 2

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 18005539910
Inspection Date(s): February 17, 2010
Issuance Date: September 15, 2010



Citation and Notification of Penalty

Company Name: Need A Fix Roofing Company, Inc.

Inspection Site: Tom Tongue Grocery Empire, Inc., 1492 Merchant Market, Armadillo, Lone Star

Citation 1 Item 1 Type of Violation: **Serious**

OSHA ACT 1970 Sec. 5(a): (1) Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this Act.

Tom Tongue Grocery Empire roof: On 2/17/2010, an employee was exposed to potential fall hazards and potential trip hazards. The roof area on which the employee was working was not free from recognized hazards that were likely to cause death or serious physical harm to the employees.

EXHIBIT 3

March 15, 2010

CLIENT: Tom Tongue Grocery Empire, Inc., Armadillo, Lone Star
c/o Jordan Pennington, President, CEO, COO

MATERIALS SUBMITTED FOR TESTING:

1. Sample 1: Shattered skylight with frame and 5 pieces plastic skylight material, observed to be crazed, cracked, weathered, and semi-opaque due to long exposure to sunlight and elements
2. Sample 2: Exemplar skylight with frame, observed to be crazed, cracked, weathered, and semi-opaque due to long exposure to sunlight and elements, taken from general area of roof as first

TESTING REQUESTED:

Determine breaking strength per ASTM R-549; mfg sheet submitted with materials shows breaking strength rating to 600 lbs total bearing weight or 300 lbs per sq. foot

METHODOLOGY:

1. Sample 1 pieces to be subjected to load testing individually.
2. Sample 2 will be tested by loading with weighted sandbag in the approximate shape of a 6'0" male, beginning with weights of <100 pounds and moving up in 50 pound intervals until breaking is observed, with a maximum of 600 pounds. First round testing to be accomplished by lowering weighted sandbag onto surface to cover surface evenly. If no breaking observed, second round testing will be carried out with 3 foot drop onto center point of skylight, again beginning with <100 pounds and adding 50 pounds per test until breaking is observed, with a maximum of 300 pounds.

RESULTS:

1. Testing of broken skylight pieces was inclusive because the pieces were shattered as part of the operative accident.
2. The exemplar skylight survived first round testing intact and without observable degradation from the testing.
3. Second round testing was initiated at 50 pounds dropped 3 feet onto the center point of the skylight. The exemplar skylight failed at 150 pounds, shattering in a pattern suggestive of Sample 1.

EXHIBIT 4



EXHIBIT 5



EXHIBIT 6



FLEXCORP DOMED SKYLIGHT SERIES III SPECIFICATION SHEET

Skylight Construction

Supplied to the building site in pre-assembled form where possible, FLEXCORP skylights are constructed of two components - a *shatterproof* molded acrylic skylight dome and an exclusively designed aluminum curb frame. Domes are offered in a variety of shapes. Curb frames may be mounted to wood or concrete curbs constructed by others, or to preformed metal curbs supplied by FLEXCORP.

Use

- For all commercial, industrial, institutional or residential buildings.
- With flat or sloping roofs, any construction.
- For new construction or renovation of existing structures.
- For conventional or unusual applications.

Skylight General Features

- Wide range of standard types, dome color and sizes to suit virtually any function or aesthetic requirement; also custom fabricated to any size or shape for unusual lighting effects.
- Fast installation of pre-assembled units minimizes on-site costs.
- Engineered to meet Uniform Building Code live load requirements.
- Tested to be *shatterproof* for loading up to 600 lbs total bearing weight or 300 lbs per sq. ft.
- Acrylic dome materials proven to resist discoloration, hazing and loss of strength in more than a half-century of successful outdoor use.
- Meets fire code requirements when tested in accordance with ASTM D-635.

Flexcorp, Inc. 9588 Oxlip Road, Bucksnot, MN 55114
“BUCKSNORT! ALL THE CHARM OF MINNEAPOLIS—HALF THE MOSQUITOS!”

EXHIBIT 7



PRODUCT INVOICE

DATE: AUGUST 18, 1977

PURCHASER: Tom Tongue Grocery Store, Inc.
2121 Sina Weibo Way
Armadillo, Lone Star 76706

DELIVERY ADDRESS: Same

PRODUCT	QUANTITY	PRICE/UNIT	TOTALS
Flexcorp Domed Skylights	120	143.51	17,221.20
Metal Mounting Frames	120	45.89	5,506.80
Hi-Torque Frame Bolts	960	2.26	2,169.60
Hail Screens	*	*	*
*Declined			

Flexcorp, Inc. 9588 Oxlip Road, Bucksnort, MN 55114
“BUCKSNORT! ALL THE CHARM OF MINNEAPOLIS—HALF THE MOSQUITOS!”



Delux Rooflite Products, Inc.
2200 Ross Avenue, Doolittle, Lone Star 77998

INVOICE

DATE: March 12, 2010
PURCHASER: Tom Tongue Grocery Empire, Inc.
1492 Merchant Market
Armadillo, Lone Star 76719
DELIVER TO: Same

PRODUCT	QTY	PRICE	TOTALS
Delux Maxi-Dome Skylights	35	412.36	14,432.60
Aluminum Roof Mounts	35	87.55	3,064.25
Screw Downs	280	1.25	350.00
Skylight Screens	35	50.12	1,754.20
FREIGHT			247.14
			19,848.19

EXHIBIT 9



CITY OF AUSTIN

HUMAN RESOURCES DEPARTMENT
P.O. BOX 111
AUSTIN, LONE STAR 75601

EMPLOYEE: Cory Harbour
DATE: February 15, 2007

ACTION: TERMINATION FOR CAUSE—SEXUAL HARASSMENT

City of Austin employee CORY HARBOUR, date of employment 5/4/95, is hereby TERMINATED FOR CAUSE. Said employee violated Personnel Policy MN52-012.456 in that on the date noted above, said employee was observed by co-worker and informant Doug Farnsley to be engaged in conversation with another employee of the City of Austin, specifically [blocked for privacy purposes] in which conversation said CORY HARBOUR stated in an audible voice "That's a nice shirt you have on today." Such conversation violates City of Austin policies regarding sexual harassment, and further violates City of Austin policies regarding gender sensitivity.

CORY HARBOUR has previously demonstrated a propensity to expressions of intolerance that indicate an endemic lack of respect for the rights of fellow employees, and has been warned. Having been placed on Step 1 Discipline and undisclosed probation three weeks prior to the above date, CORY HARBOUR is eligible for termination and is hereby terminated for cause.

DATED this 15th day of February, 2007.

_____/s/ Zach Hall_____
Zach Hall
Director of Correctness

EXHIBIT 10



Tom Tongue

We'll Lick Any Price!



EXHIBIT 12

NO. 10-06597-CV

PAMELA MACKEY ACKER,

Plaintiff,

v.

TOM TONGUE GROCERY EMPIRE,
INC.,

Defendant.

§
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§

IN THE 999th DISTRICT COURT

IN AND FOR TRAVIS COUNTY

STATE OF LONE STAR

FINAL JURY INSTRUCTIONS

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you to the facts as you find them, from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received into evidence, and all facts that may be admitted or agreed to by the parties. In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case, but you should not speculate on any matters outside the evidence.

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the

ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in light of your own experience and common sense.

The issue for your determination is whether the death of Rodney Acker was the result of the negligence, if any, of Tom Tongue Grocery Empire, Inc. or Need A Fix Roofing. In that regard, you are instructed that Pamela Mackey Acker has the burden of proof on the negligence claim against Tom Tongue Grocery Empire, Inc., meaning that Pamela Mackey Acker must convince you by a preponderance of the evidence that Rodney Acker's death was the result of Tom Tongue Grocery Empire Inc.'s negligence, if any. You are further instructed that Tom Tongue Grocery Empire, Inc. has the burden of proof on the claim that Rodney Acker's death was caused in whole or in part by the negligence, if any, of Need A Fix Roofing.

You are instructed that the term "negligence" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances. With respect to Tom Tongue Grocery Empire, Inc., "negligence" means the existence of a condition that posed an unreasonable risk of harm, of which Tom Tongue Grocery Empire, Inc. had actual knowledge and of which Rodney Acker did not have actual knowledge, and that Tom Tongue Grocery Empire, Inc. failed to either adequately warn Rodney Acker of the condition or failed to make the condition reasonably safe.

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

“Proximate cause” means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Answer “Yes” or “No” to all questions unless otherwise instructed. A “Yes” answer must be based on a preponderance of the evidence unless you are otherwise instructed. If you do not find that a preponderance of the evidence supports a “Yes” answer, then answer “No.” The term “preponderance of the evidence” means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires an answer other than “Yes” or “No,” your answer must be based on a preponderance of the evidence unless you are otherwise instructed.

At this point in the trial, you, as jurors, are deciding if Rodney Acker’s death was proximately caused, in whole or in part, by the negligence, if any, of Tom Tongue Grocery Empire, Inc. or Need A Fix Roofing. If you find Tom Tongue Grocery Empire, Inc. was at fault in whole or in part, you will hear additional argument from the attorneys and you will hear additional witnesses testify concerning damages. Until that time, you are not to concern yourselves with any question of damages. Your verdict must be based on the evidence that has been received and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy, or any other sentiment for or against any party. When you retire to the jury room, you should select one of your members to act as foreperson, to preside over your

deliberations, and to sign your verdict. You will be given a verdict form, which I shall now read and explain to you.

(READ VERDICT FORM)

When you have agreed on your verdict, the foreperson, acting for the jury, should date and sign the verdict form and return it to the courtroom. You may now retire to consider your verdict.

NO. 10-06597-CV

PAMELA MACKEY ACKER,

Plaintiff,

v.

TOM TONGUE GROCERY EMPIRE,
INC.,

Defendant.

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IN THE 999th DISTRICT COURT

IN AND FOR TRAVIS COUNTY

STATE OF LONE STAR

JURY QUESTION No. 1

Did the negligence, if any, of the following proximately cause the death of Rodney Acker?

Answer "Yes" or "No" for each of the following:

- 1. Tom Tongue _____
- 2. Need A Fix Roofing _____
- 3. Rodney Acker _____

If you have answered “yes” with respect to more than one party in response to Jury Question No. 1, answer the following Jury Question; otherwise, do not answer the following Jury Question.

JURY QUESTION NO. 2

What percentage of the negligence that caused the death of Rodney Acker do you find to be attributable to each of those listed below and found by you, in your answer to Jury Question No. 1, to have been negligent?

- 1. Tom Tongue _____
- 2. Need A Fix Roofing _____
- 3. Rodney Acker _____
- Total 100%

CERTIFICATE

We the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into Court as our verdict.

Presiding Juror

To be signed by those rendering the verdict if not unanimous.
