

## Transportation Update: Lost Profits Award Reversed for Forklift Damaged in Transit

ATTORNEYS

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03.05.2018

On December 15, 2017, the Texas Court of Appeals, Third District, at Austin, in the case *Mid-Continent Lift & Equipment, LLC v. J. McNeill Pilot Car Service*, reversed an \$80,000 jury award for lost profits associated with a forklift damaged when it came into contact with an overpass. This opinion illustrates the importance of having sound evidence to support a lost profits claim.

### A. Background

Mid-Continent Lift & Equipment, LLC ("Mid-Continent") buys, sells and rents used forklifts. In 2009, Mid-Continent bought a used forklift (the "Omega"). After experiencing persistent maintenance problems, Mid-Continent contracted with Clinton Wood ("Wood"), a forklift dealer, to repair the Omega and present it for rental in San Antonio, Texas.

Wood hired a trucking company to transport the Omega from McGregor, Texas to San Antonio. While heading south on I-35, the truck carrying the Omega attempted to go under an overpass despite having insufficient ground clearance. The Omega struck the overpass, damaging the overpass and the Omega.

Mid-Continent sued the trucking company, LBJ Fleet Services, Inc., and the two entities retained to operate pilot cars for the oversized/overweight load, McNeill Pilot Car Service and Gypsy Pilot Car. Mid-Continent sought to recover repair costs and lost profits based on negligence theories. The jury ruled in favor of Mid-Continent and against McNeill, the only remaining defendant, and assessed 22% of the responsibility to McNeill. The jury found Mid-Continent had incurred \$143,349 in repair costs and \$80,000 in lost profits. McNeill appealed.

### B. Discussion

McNeill maintained that Mid-Continent failed to present legally sufficient evidence that it had incurred lost profits. The court of appeals instructed that proof of lost profits must be made with "competent evidence" and, at a minimum, opinions or estimates of lost profits must be based on objective facts, figures or data from which the amount of lost profits can be ascertained. The court noted that lost profits, by definition, must be profits - the net of income from a business activity, less the expenses incurred.

At trial, Mid-Continent called its President, Matt Rogers, who admitted that Mid-Continent did not make any profit from renting the Omega prior to the accident. Mid-Continent also called Wood as a "non-retained" expert but did not elicit any definitive calculation, estimate or opinion as to the amount of net profits it would have obtained from renting the Omega from the date of the accident to trial.

Mid-Continent contended that the jury received sufficient data to make "simple calculations" to determine Mid-Continent's lost profits. However, the court viewed Mid-Continent's evidence as being too speculative, held that Mid-Continent's proof fell below the "reasonable certainty" standard required to recover lost-profits and reversed the jury award for lost profits.

#### **C. Why Is This Important?**

1. Prior to trial, Mid-Continent had designated supportive experts, but successful pre-trial challenges to the reliability or competence of their opinions relegated Mid-Continent to rely solely on Rogers and Wood to establish lost profits at trial.
2. Without definitive calculations, estimates or opinions as to the amount of net profits lost, it is hard for a party to maintain a jury award for lost profits on appeal.
3. Engaging a reliable and credible expert to express opinions and/or calculations of lost profits may make sense depending on the extent of the damages.