

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

**ROSS MITCHELL and BLANCA MITCHELL, H/W**  
3421 West 80<sup>th</sup> Street, Apt 205  
Hialeah, FL 33018,

Plaintiff,

v.

**PATHE DIALLO**  
5197 Seaside Court  
Atlanta, GA 30349,

and

**WERNER ENTERPRISES, INC.**  
14507 Frontier Road  
Omaha, NE 68145,

and

**WERNER TRANSPORTATION, INC.**  
14507 Frontier Road  
Omaha, NE 68145,

and

**GRA-GAR, LLC**  
14507 Frontier Road  
Omaha, NE 68145,

and

**WERNER GLOBAL LOGISTICS, INC.**  
14507 Frontier Road  
Omaha, NE 68145,

and

**WERNER GLOBAL LOGISTICS, U.S., LLC**  
14507 Frontier Road  
Omaha, NE 68145,

Case No.:

**COMPLAINT**

and

**WERNER LEASING, LLC**

14507 Frontier Road  
Omaha, NE 68145,

and

**WERNER MANAGEMENT, INC.**

14507 Frontier Road  
Omaha, NE 68145,

and

**PHILLIPS MANUFACTURING, CO.**

4949 S. 30<sup>th</sup> Street  
Omaha, NE 68107,

and

**PHILLIPS MANUFACTURING CO. OF  
OHIO, LLC**

4949 S. 30<sup>th</sup> Street  
Omaha, NE 68107,

and

**PHILLIPS REALTY, LLC**

4949 S. 30<sup>th</sup> Street  
Omaha, NE 68107,

Defendants.

**CIVIL ACTION – COMPLAINT**

**PARTIES**

1. Plaintiff, Ross Mitchell is an adult individual who resides at 3421 W. 80<sup>th</sup> Street, Apt. 205, Hialeah, Florida 33018.

2. Defendant, Pathe Diallo is an adult individual who resides at 5197 Seaside Court, Atlanta, GA 30349.

3. Defendant, Werner Enterprises, Inc. is a corporation, or other business entity organized under Nebraska law with its principal place of business and/or corporate headquarters located at 14507 Frontier Road, Omaha, Nebraska 68145.

4. Defendant, Werner Transportation, Inc. is a corporation, or other business entity organized under Nebraska law with its principal place of business and/or corporate headquarters located at 14507 Frontier Road, Omaha, Nebraska 68145.

5. Defendant, Gra-Gar, LLC is a corporation, or other business entity organized under Nebraska law with its principal place of business and/or corporate headquarters located at 14507 Frontier Road, Omaha, Nebraska 68145.

6. Defendant, Werner Global Logistics, Inc. is a corporation, or other business entity organized under Nebraska law with its principal place of business and/or corporate headquarters located at 14507 Frontier Road, Omaha, Nebraska 68145.

7. Defendant, Werner Global Logistics, U.S., LLC is a corporation, or other business entity organized under Nebraska law with its principal place of business and/or corporate headquarters located at 14507 Frontier Road, Omaha, Nebraska 68145.

8. Defendant, Werner Leasing, LLC is a corporation, or other business entity organized under Nebraska law with its principal place of business and/or corporate headquarters located at 14507 Frontier Road, Omaha, Nebraska 68145.

9. Defendant Werner Management, Inc. is a corporation, or other business entity organized under Nebraska law with its principal place of business and/or corporate headquarters located at 14507 Frontier Road, Omaha, Nebraska 68145.

10. Defendants, Werner Enterprises, Inc., Werner Transportation, Inc., Gra-Gar, LLC, Werner Global Logistics, Inc., Werner Global Logistics, U.S., LLC, Werner Leasing, LLC and Werner Management, Inc. shall hereinafter collectively be referred to as the “Werner Defendants.”

11. Defendant Phillips Manufacturing, Co. is a corporation, or other business entity organized under Nebraska law with its principal place of business and/or corporate headquarters located at 4949 S. 30<sup>th</sup> Street, Omaha, Nebraska 68107.

12. Defendant Phillips Manufacturing, Co. of Ohio, LLC is a corporation, or other business entity organized under Ohio law with its principal place of business and/or corporate headquarters located at 4949 S. 30<sup>th</sup> Street, Omaha, Nebraska 68107.

13. Defendant Phillips Realty, LLC is a corporation, or other business entity organized under Nebraska law with its principal place of business and/or corporate headquarters located at 4949 S. 30<sup>th</sup> Street, Omaha, Nebraska 68107.

14. Defendants, Phillips Manufacturing Co., Phillips Manufacturing Co. of Ohio, LLC and Phillips Realty, LLC shall hereinafter collectively be referred to as the Phillips Defendants.

**ALLEGATIONS COMMON TO ALL COUNTS**

15. At all times relevant hereto, the Defendants acted and/or failed to act through their agents, servants, employees, predecessors, successors, and/or workmen, and accordingly, any negligent act and/or omission committed by the Defendants’ agents, servants, employees, predecessors, successors, and/or workmen imposes liability on Defendants under the laws of agency, *respondeat superior*, and/or vicarious liability.

16. At all relevant and material times Mr. Diallo operated a Kenworth T680 Truck bearing Nebraska license plate number W13859 (Werner Truck No. 62989) which had a trailer (Werner Trailer No. 32068) bearing license plate number 148390 attached to.

17. At all relevant and material times, Werner Defendants, individually and/or collectively, owned and/or controlled the vehicle and trailer which were involved in the incident hereinafter described.

18. At all relevant and material times, the Werner Defendants maintained the exclusive right to control the use and/or storage of the subject vehicle and trailer involved in the incident.

19. At all relevant and material times, the Werner Defendants did exercise exclusive control over the use and/or storage of the subject vehicle.

20. At all relevant and material times, Mr. Diallo operated the vehicle and trailer with the permission of the Werner Defendants.

21. At all relevant and material times, Mr. Diallo operated, controlled and/or possessed the vehicle within the course and scope of his employment, agency, apparent agency, contractual and/or other relationship with the Werner Defendants.

22. The Werner Defendants were responsible for ensuring that Mr. Diallo received appropriate training and/or instruction to operate the Werner vehicle and trailer.

23. At all times material, hereto the subject tractor trailer was being used for the purpose of business at the direction of the Werner Defendants and on the behalf of the Werner Defendants under the authority granted to the Werner Defendants by the Federal Motor Carrier Safety Administration. As a result, the Werner Defendants are legally responsible for Mr. Diallo's operation of the vehicle, including his tortious acts and/or omissions in this matter.

24. At all times material hereto, the Werner Defendants owed a duty to exercise reasonable care in the ownership, operation, maintenance, control and/or use of the subject tractor trailer.

25. At all times material hereto, the Werner Defendants had the exclusive right to control the operation and/or use of the tractor trailer.

26. Upon information and belief, Mr. Diallo was under dispatch for the Werner Defendants at all times material hereto.

27. At the time of the incident, Mr. Diallo was operating the vehicle on behalf of and for the benefit of the Werner Defendants.

28. The Werner Defendants are interstate motor carriers and pursuant to federal and state laws are responsible for the actions of Mr. Diallo under the doctrines of lease liability, agency and/or apparent agency.

29. On January 2, 2016, Mr. Mitchell was lawfully on the premises of the Phillips Defendants' facility located at 14949 S. 30<sup>th</sup> Street in Omaha, Nebraska (hereinafter "Premises), and therefore, was lawfully on the premises as a business invitee to whom the Phillips Defendants owed the highest duty of care for Mr. Mitchell's health, safety, and well-being under the law.

30. The Phillips Defendants owned, operated, maintained, and/or were otherwise responsible for the Premises, including the loading dock and surrounding area where the incident occurred.

31. The Premises where the incident occurred, including the loading dock and surrounding area were, at all times relevant hereto, constructed, developed, owned, occupied, operated, possessed, leased, rented, maintained, and/or otherwise controlled by the Phillips Defendants.

32. At all times relevant and material hereto, the Phillips and Werner Defendants knew or should have known that those on the Premises, including Mr. Mitchell required a safe means of

loading and unloading product at the Premises and/or otherwise completing his work at the Premises.

33. At all times relevant material hereto, the Phillips and Werner Defendants failed to provide Mr. Mitchell with a safe means of loading and unloading product at the Premises and/or otherwise completing his work at the Premises.

34. The Phillips Defendants and Werner Defendants collectively failed to provide Mr. Mitchell with safe means and methods to complete his work at the Premises.

35. The Phillips Defendants and Werner Defendants individually and/or collectively failed to employ safety programs, safety measures, and/or safety devices to prevent incidents such as Mr. Mitchell's.

36. The Phillips Defendants and/or Werner Defendants knew and/or should have known of the importance of developing, documenting, implementing, maintaining and communicating appropriate work procedures, measures, inspections, and precautions to control loading dock hazards.

37. The Phillips Defendants and/or Werner Defendants failed to appropriately develop, document, implement, maintain and communicate appropriate work procedures, measures, inspections, and/or precautions to control loading dock hazards.

38. At the time of the incident, Mr. Diallo was attempting to dock the tractor trailer.

39. At the time of the incident, Mr. Mitchell was waiting for a Phillips' employee to provide him with a cutting tool to open the safety seal on the trailer.

40. Mr. Mitchell was seriously and permanently injured when Mr. Diallo negligently struck Mr. Mitchell in the loading dock area of the Phillips' facility while operating the Werner

vehicle and trailer which resulted in Mr. Mitchell being pinned and/or crushed between the trailer and the loading dock of the Phillips' facility.

41. The subject tractor trailer is an instrumentality that is peculiarly dangerous in its operation.

42. Defendants, individually and/or collectively, knew or should have known that the operation of a tractor trailer on the Premises, including docking procedures was likely to create a peculiar risk of harm to others especially given the lack of adequate/appropriate docking procedures and/or docking equipment and/or personnel on the Premises, unless special precautions were taken.

43. Defendants, individually and/or collectively, knew or should have known that the operation of a tractor trailer on the Premises, including docking procedures constituted a peculiar risk creating a recognizable danger out of the work itself, especially given the lack of docking procedures and/or docking equipment and/or personnel to assist in the docking procedure.

44. Despite this knowledge, Defendants, individually and/or collectively, disregarded said peculiar risk and are jointly and severally liable to Plaintiffs pursuant to the Restatement of Torts (Second) §§416 and 427.

45. Defendants, individually and/or collectively, had superior knowledge of the defects which existed on the Premises and/or of the dangerous conditions created by the operation of a tractor trailer without sufficient docking procedures, docking equipment and/or adequate personnel.

46. Prior to the incident, the Phillips Defendants did not provide Mr. Mitchell any docking procedures.

47. Prior to the incident, the Phillips Defendants did not assist in the docking process.



48. Prior to the incident, the Phillips Defendants did not supply Mr. Mitchell with wheel chocks and/or other equipment (e.g., automatic vehicle restraints, wheel-based vehicle restraints) to assist in the docking process, which could have been utilized to secure the vehicle until the safety seal was removed.

49. Prior to the incident, the Defendants, individually and/or collectively, knew that Mr. Mitchell and other invitees on the Premises transported freight which had security seals on the trailer.

50. Therefore, the Defendants, individually and/or collectively, knew or should have known that individuals such as Mr. Mitchell would require access to cutting tools in order to access the freight to be unloaded at the facility.

51. In the instant matter, the Defendants failed to provide Mr. Mitchell reasonable access to the tools necessary to allow him to safely complete his job.

52. The aforesaid accident was caused by the, individual and/or collective, negligence, carelessness, and/or recklessness of the Defendants.

53. As a direct, proximate, and substantial result of the negligence, carelessness, and recklessness of Defendants as described herein, Mr. Mitchell suffered injuries including but not limited to: multiple pelvic fractures, lumbosacral plexus injury, urethra injuries, neuromuscular dysfunction of the bladder, pelvic crush injury, back injuries, spinal injuries, lumbar disc herniation, calculus of the kidney, as well as complications associated with his injuries, as well as other contusions and bruises all of which are serious and permanent in nature and constitute a serious impairment of a bodily function, required medical attention, caused him to suffer great pain and suffering, loss of life's enjoyment, diminishment of earning capacity, loss of wages,

medical expenses, scarring, disfigurement, embarrassment, humiliation and other emotional, financial and physical injuries.

54. As a direct, proximate, and substantial result of the, individual and/or collective negligence, carelessness, and recklessness of Defendants as herein described, Mr. Mitchell required medical treatment and care and may require care in the future, including surgery, which would not have been necessary but for Defendants' negligence, carelessness, and recklessness.

55. As a direct, proximate and substantial result of the, individual and/or collective, negligence, carelessness and recklessness of all Defendants as herein described, Mr. Mitchell has suffered and will suffer in the future pain and suffering, scarring, disfigurement, humiliation, embarrassment, inconvenience, aches and pains, restrictions of movement, and the loss of ability to engage in and enjoy normal pursuits and activities of daily living.

56. As a direct, proximate and substantial result of the, individual and/or collective, negligence, carelessness and recklessness of all Defendants as herein described, Mr. Mitchell has developed or may develop in the future painful conditions and/or arthritic conditions and/or other future medical complications due to his injuries.

57. As a direct, proximate and substantial result of the, individual and/or collective negligence, carelessness and recklessness of all Defendants as herein described, Mr. Mitchell has incurred and may incur in the future medical expenses due to his injuries.

58. As a direct, proximate and substantial result of the, individual and/or collective negligence, carelessness and recklessness of all Defendants as herein described, Mr. Mitchell has suffered lost earnings, and may in the future suffer a loss of earnings and/or earnings capacity.

59. The individual and/or collective negligence, carelessness and recklessness of all Defendants as herein described was the sole legal, factual and proximate cause of Mr. Mitchell's injuries and damages, and were due in no part to any act or omission by Mr. Mitchell.

**COUNT I**  
**NEGLIGENCE**  
**ROSS MITCHELL V. PATHE DIALLO**

60. Mr. Mitchell incorporates by reference the allegations set forth in the preceding paragraphs as though they were fully set forth at length here.

61. Defendant Pathe Diallo owed Plaintiff and the world at large a duty to drive, operate and control his vehicle and trailer in a safe and non-negligent manner.

62. Defendant Pathe Diallo breached his duty of care by carelessly, negligently and recklessly operating his vehicle without due concern or regard for Plaintiff's safety.

63. More specifically, the acts and/or omissions of Defendant Pathe Diallo which constituted negligence, carelessness, and recklessness included:

- a. failing to properly operate, manage and control his vehicle;
- b. operating the said vehicle without regard for the safety of others, particularly Mr. Mitchell;
- c. failing to keep a proper lookout;
- d. failing to yield to pedestrians;
- e. failing to remain a safe and clear distance away from Mr. Mitchell's person;
- f. failing to stop in due time to avoid striking Mr. Mitchell;
- g. failing to timely apply the brakes;
- h. failing to control his vehicle in a reasonable and prudent fashion;
- i. operating, steering and controlling his vehicle in a careless and/or negligent manner;

- j. failing to observe the roadway and/or the pedestrians thereon;
- k. failing to remain alert at the wheel;
- l. operating the vehicle before determining the location of Mr. Mitchell;
- m. failing to take all necessary steps and precautions to ensure the safety of Mr. Mitchell;
- n. failing to give a sign, signal or warning of the approach of his vehicle and the fact that Defendant was about to cause this collision;
- o. failing to abide by the applicable statutes, rules and/or regulations of the road, including those in the FMCSR and FMCSA;
- p. failing to act reasonable under the circumstances;
- q. violating the ordinances of the City of Omaha and the laws of the State of Nebraska; and
- r. such other acts of negligence which may be revealed during discovery.

64. At all times relevant hereto, Defendants had actual or constructive knowledge of the acts and omissions of its joint venturers, agents, servants, employees and ostensible agents, including without limitation the other named Defendants herein, all of whom were acting within the scope of their employment, authority or apparent authority.

65. As a direct, factual and proximate result of the individual and/or collective negligence, carelessness and recklessness of the Defendants identified herein, Mr. Mitchell suffered and continues to suffer from the injuries and damages described above and incorporated herein by reference.

**WHEREFORE**, Plaintiff Ross Mitchell demands judgment in his favor and against each of the above-named Defendants, jointly and severally, in an amount in excess of \$75,000.00, plus interest, delay damages, costs, and any and all other relief this Honorable Court deems just and appropriate.

**COUNT II – NEGLIGENCE**  
**ROSS MITCHELL V. WERNER ENTERPRISES, INC., WERNER**  
**TRANSPORTATION, INC., GRA-GAR, LLC, WERNER GLOBAL LOGISTICS, INC.,**  
**WERNER GLOBAL LOGISTICS U.S., LLC, WERNER LEASING, LLC AND WERNER**  
**MANAGEMENT, INC.**

66. Plaintiff incorporates by reference the allegations set forth in the preceding paragraphs as though they were fully set forth at length here.

67. The Werner Defendants owed Plaintiff and the world at large a duty to ensure that its vehicle was driven, operated, and controlled in safe and non-negligent manner.

68. As set forth above, the Werner Defendants provided Mr. Diallo express and/or implied permission to operate the subject tractor trailer.

69. At all relevant and material times, Mr. Diallo operated, controlled and/or possessed the vehicle within the course and scope of his employment, agency, apparent agency, contractual and/or other relationship with the Werner Defendants.

70. The Werner Defendants were responsible for ensuring that Mr. Diallo received appropriate training and/or instruction to operate the Werner vehicle and trailer.

71. At all times material, hereto the subject tractor trailer was being used for the purpose of business at the direction of the Werner Defendants and on the behalf of the Werner Defendants under the authority granted to the Werner Defendants by the Federal Motor Carrier Safety Administration.

72. At all times material hereto, the Werner Defendants owed a duty to exercise reasonable care in the ownership, operation, maintenance, control and/or use of the subject tractor trailer.

73. At all times material hereto, the Werner Defendants had the exclusive right to control the operation and/or use of the tractor trailer.

74. Upon information and belief, Mr. Diallo was under dispatch for the Werner Defendants at all times material hereto.

75. At the time of the incident, Mr. Diallo was operating the vehicle on behalf of and for the benefit of the Werner Defendants.

76. The Werner Defendants are interstate motor carriers and pursuant to federal and state laws are responsible for the actions of Mr. Diallo under the doctrines of lease liability, agency and/or apparent agency.

77. More specifically, the acts and/or omissions of the Werner Defendants by and through their agent, contractor, independent contractor, servant, employee, and/or individual otherwise under their control, Pathe Diallo, which constituted negligence, carelessness and/or reckless included:

- a. failing to properly operate, manage and control his vehicle;
- b. operating the said vehicle without regard for the safety of others, particularly Mr. Mitchell;
- c. failing to keep a proper lookout;
- d. failing to yield to pedestrians;
- e. failing to remain a safe and clear distance away from Mr. Mitchell's person;
- f. failing to stop in due time to avoid striking Mr. Mitchell;
- g. failing to timely apply the brakes;
- h. failing to control his vehicle in a reasonable and prudent fashion;
- i. operating, steering and controlling his vehicle in a careless and/or negligent manner;
- j. failing to observe the roadway and/or the pedestrians thereon;
- k. failing to remain alert at the wheel;

- l. failing to take all necessary steps and precautions to ensure the safety of Mr. Mitchell;
- m. failing to give a sign, signal or warning of the approach of his vehicle and the fact that Defendant was about to cause this collision;
- n. failing to abide by the applicable statutes, rules and/or regulations of the road, including those in the FMCSR and FMCSA;
- o. failing to equip the vehicle with wireless backup cameras;
- p. failing to provide the equipment necessary for Mr. Diallo to safely operate the vehicle;
- q. failing to act reasonable under the circumstances;
- r. violating the ordinances of the City of Omaha and the laws of the State of Nebraska; and
- s. such other acts of negligence which may be revealed during discovery.

78. At all times relevant hereto, Defendants had actual or constructive knowledge of the acts and omissions of its joint venturers, agents, servants, employees and ostensible agents, including without limitation the other named Defendants herein, all of whom were acting within the scope of their employment, authority or apparent authority.

79. As a direct, factual and proximate result of the individual and/or collective negligence, carelessness and recklessness of the Defendants identified herein, Mr. Mitchell suffered and continues to suffer from the injuries and damages described above and incorporated herein by reference.

**WHEREFORE**, Plaintiff Ross Mitchell demands judgment in his favor and against each of the above-named Defendants, jointly and severally, in an amount in excess of \$75,000.00, plus interest, delay damages, costs, and any and all other relief this Honorable Court deems just and appropriate.

**COUNT III – NEGLIGENT SUPERVISION,  
NEGLIGENT HIRING, NEGLIGENT RETENTION  
ROSS MITCHELL V. WERNER ENTERPRISES, INC., WERNER  
TRANSPORTATION, INC., GRA-GAR, LLC, WERNER GLOBAL LOGISTICS, INC.,  
WERNER GLOBAL LOGISTICS U.S., LLC, WERNER LEASING, LLC AND WERNER  
MANAGEMENT, INC.**

80. Plaintiff incorporates by reference the allegations set forth in the preceding paragraphs as though they were fully set forth at length here.

81. The Werner Defendants owed Plaintiff and the world at large a duty to use reasonable care to ensure that its employee, agent, contractor, and/or servant Paithe Diallo used their property in a manner which did not intentionally harm others and/or create an unreasonable risk of harm to others.

82. The Werner Defendants breached their duty of care by allowing their vehicle to be driven carelessly, negligently and recklessly without due concern or regard for Plaintiff.

83. More specifically, the acts and/or omissions of the Werner Defendants, by and through, Mr. Diallo which constituted negligence, carelessness, and recklessness included:

- a. failing to properly operate, manage and control his vehicle;
- b. operating the said vehicle without regard for the safety of others, particularly Mr. Mitchell;
- c. failing to keep a proper lookout;
- d. failing to yield to pedestrians;
- e. failing to remain a safe and clear distance away from Mr. Mitchell's person;
- f. failing to stop in due time to avoid striking Mr. Mitchell;
- g. failing to timely apply the brakes;
- h. failing to control his vehicle in a reasonable and prudent fashion;
- i. operating, steering and controlling his vehicle in a careless and/or negligent manner;



- j. failing to observe the roadway and/or the pedestrians thereon;
- k. failing to remain alert at the wheel;
- l. failing to take all necessary steps and precautions to ensure the safety of Mr. Mitchell;
- m. failing to give a sign, signal or warning of the approach of his vehicle and the fact that Defendant was about to cause this collision;
- n. failing to abide by the applicable statutes, rules and/or regulations of the road, including those in the FMCSR and FMCSA;
- o. violating the ordinances of the City of Omaha and the laws of the State of Nebraska; and
- p. such other acts of negligence which may be revealed during discovery.

84. As a direct, factual and proximate result of the individual and/or collective negligence, carelessness and recklessness of the Defendants identified herein, Mr. Mitchell suffered and continues to suffer from the injuries and damages described above and incorporated herein by reference.

85. The Werner Defendants knew or should have known that they had the ability to control Mr. Diallo's possession, storage, and/or use of the tractor trailer.

86. The Werner Defendants knew or should have known of the necessity and opportunity for exercising control over Mr. Diallo's possession and/or use of the tractor trailer.

87. The Werner Defendants knew or should have known of Mr. Diallo's carelessness and incompetence related to his use of the subject tractor trailer.

88. Upon information and belief, the Werner Defendants failed to enforce their own policies regarding the use, supervision of use or training related to the use of their tractor trailers despite actual or constructive knowledge that its employees, agents, authorized users and/or

contractors negligently, carelessly, and/or recklessly operated the Werner Defendants' chattel (e.g., tractor trailers).

89. The Werner Defendants failed to exercise due care in determining Mr. Diallo's propensity to operate the Werner Defendants tractor trailer vehicle in a negligent, careless, and/or reckless manner.

90. Upon information and belief, had the Werner Defendants conducted an appropriate investigation into Mr. Diallo's background, the subject incident could have been avoided.

91. Upon information and belief, had the Werner Defendants appropriately supervised and/or trained Mr. Diallo the incident could have been avoided.

92. Upon information and belief, had the Werner Defendants enforced their own policies related to the safe operation of the subject tractor trailer the incident could have been avoided.

93. The Werner Defendants failure to appropriately train/supervise Mr. Diallo and/or the Werner Defendants negligent selection and/or retention of Mr. Diallo caused the subject incident.

94. The Werner Defendants permitted and/or failed to prevent Mr. Diallo from negligently, carelessly, and/or recklessly operating the Werner Defendants' tractor trailer despite actual and/or constructive knowledge that Mrs. Johnson and/or Mr. Johnson possessed certain characteristics, propensities, and/or was engaging and/or had engaged in behavior that rendered Mr. Diallo incompetent to operate the Werner tractor trailer.

95. At all times relevant hereto, Defendants had actual or constructive knowledge of the acts and omissions of its joint venturers, agents, servants, employees and ostensible agents,

including without limitation the other named Defendants herein, all of whom were acting within the scope of their employment, authority or apparent authority.

96. As a direct, factual and proximate result of the individual and/or collective negligence, carelessness and recklessness of the Defendants identified herein, Mr. Mitchell suffered and continues to suffer from the injuries and damages described above and incorporated herein by reference.

**WHEREFORE**, Plaintiff Ross Mitchell demands judgment in his favor and against each of the above-named Defendants, jointly and severally, in an amount in excess of \$75,000.00, plus interest, delay damages, costs, and any and all other relief this Honorable Court deems just and appropriate.

**COUNT IV – NEGLIGENCE**  
**ROSS MITCHELL V. PHILLIPS MANUFACTURING CO., PHILLIPS**  
**MANUFACTURING CO. OF OHIO, LLC AND PHILLIPS REALTY, LLC**

97. Plaintiff incorporates by reference the allegations set forth in the preceding paragraphs as though they were fully set forth at length here.

98. The Phillips Defendants, individually and/or collectively, owned, possessed, controlled, supervised, leased, maintained, constructed, and/or were otherwise responsible for the Premises on January 2, 2016, and had a duty and obligation to ensure the safety of the Premises as described herein.

99. Defendant breached the duties it owed to Mr. Mitchell and the public at large through its negligent, careless, reckless, and/or intentional conduct which consisted of at least the following:

- a. failing to keep and maintain the Premises in a reasonably safe condition;
- b. failing to identify dangerous conditions on the Premises;

- c. failing to supervise the operation of tractor trailers on the Premises, including docking operations despite having superior knowledge of risks and dangers associated with the operating of tractor trailers on the premises;
- d. failing to have adequate and/or appropriate docking procedures, docking equipment and/or personnel;
- e. causing or permitting a nuisance to exist on the Premises;
- f. failing to obtain an appropriate and adequate engineering survey;
- g. failing to obtain an appropriate and site safety plan;
- h. failing to properly and adequately maintain the Premises, including the docking equipment;
- i. defectively designing the Premises;
- j. failing to properly and adequately correct the defective and unsafe condition(s) of the Premises;
- k. failing to properly and/or adequately inspect the Premises to ascertain the existence of unsafe conditions thereon;
- l. failing to recognize, correct, or warn against the dangerous pedestrian hazard posed by Defendants failure to have adequate docking procedures, docking equipment, docking personnel;
- m. failing to protect and warn those business invitees on the Premises, such as Mr. Mitchell, of the dangerous conditions at the Premises, such as the pedestrian hazard posed by Defendants failure to have adequate docking procedures, docking equipment, docking personnel;
- n. failing to post signs or warnings or markings advising those on the Premises, specifically Mr. Mitchell of the lack of adequate docking procedures, docking equipment, docking personnel;
- o. failing to discover unreasonably dangerous conditions on the Premises, and failing to take reasonable measures to remove, correct, protect, and/or warn those on the premises, specifically Mr. Mitchell, of same;
- p. failing to use adequate materials and/or safety equipment for the docking of tractor trailers on the Premises.

- q. failing to properly inspect, repair, maintain, erect, or service the facility, including the docking locations.
- r. failing to act reasonable under the circumstances;
- s. failing to routinely inspect the Premises;
- t. intentionally and/or recklessly cutting corners and/or reducing resources in order to expedite the job and/or save money, at the expense of safety;
- u. failing to implement a comprehensive and adequate safety programs on the site;
- v. failing to exercise reasonable care as a responsible party in possession, control, operation and maintenance of the premises; and
- w. violating OSHA, BOCA, FMCSR, FMCSA and/or other applicable codes, regulations and statutes.

100. At all times relevant hereto, Defendants had actual or constructive knowledge of the acts and omissions of its joint venturers, agents, servants, employees and ostensible agents, including without limitation the other named Defendants herein, all of whom were acting within the scope of their employment, authority or apparent authority.

101. As a direct, factual and proximate result of the individual and/or collective negligence, carelessness and recklessness of the Defendants identified herein, Mr. Mitchell suffered and continues to suffer from the injuries and damages described above and incorporated herein by reference.

**WHEREFORE**, Plaintiff Ross Mitchell demands judgment in his favor and against each of the above-named Defendants, jointly and severally, in an amount in excess of \$75,000.00, plus interest, delay damages, costs, and any and all other relief this Honorable Court deems just and appropriate.

**COUNT V – LOSS OF CONSORTIUM**  
**BLANCA MITCHELL V. ALL DEFENDANTS**

102. Plaintiff incorporates by reference all of the preceding averments as if set forth fully herein at length.

103. At all times material hereto, Plaintiff, Blanca Mitchell, was the legal wife of Plaintiff, Ross Mitchell, and resided with him.

104. As a direct and proximate result of the injuries, damages, and losses sustained by her husband, Ross Mitchell, Ms. Mitchell has suffered and will continue to suffer, the loss of her husband's services, companionship, support, advice, and consortium, all to her great detriment and loss.

105. As a direct and proximate result of the conduct and/or inaction of defendants described elsewhere in this Complaint, Ms. Mitchell, has in the past, and will in the future, be obligated to expend various sums of money for the treatment of her husband's injuries and for transportation and home services.

106. Plaintiff hereby claims the full measure of damages for loss of consortium.

**WHEREFORE**, Plaintiff Blanca Mitchell demands judgment in her favor and against each of the above-named Defendants, jointly and severally, in an amount in excess of \$75,000.00, plus interest, delay damages, costs, and any and all other relief this Honorable Court deems just and appropriate.

**PRAYER FOR RELIEF**

Based on the foregoing, Ross Mitchell and Blanca Mitchell respectfully request judgement against the Defendants, jointly and severally, for: (1) Plaintiff, Ross Mitchell's economic and non-economic compensatory damages according to proof; (2) Plaintiff, Blanca Mitchell's damages for

loss of consortium; (3) attorney's fees, costs (including pre-judgment interest), and expenses related to this action; and (4) all such other relief as the Court deems just.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs hereby request a jury trial. Plaintiffs hereby designate Omaha, Nebraska as the place for the trial.

Respectfully submitted,

**MESSA & ASSOCIATES, P.C.**

BY: /s/ Thomas N. Sweeney.  
Thomas N. Sweeney, Esquire  
Attorneys for Plaintiffs  
Messa & Associates, P.C.  
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Philadelphia, PA 19103  
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Dated: December 31, 2019

JS 44 (Rev. 08/18)

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

Ross Mitchell and Blanca Mitchell

(b) County of Residence of First Listed Plaintiff Miami-Dade, FL  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)  
Thomas N. Sweeney 215-568-3500  
Messa & Associates, P.C.  
123 S. 22nd St., Phila., PA 19103

**DEFENDANTS**

Pathe Diallo, Werner Enterprises, Inc., Werner Transportation, Inc., Gra-Gar, LLC, Werner Global Logistics, Inc., et al.

County of Residence of First Listed Defendant Fulton County  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                                       |                                       |   |                            |                                       |
|---|---------------------------------------|---------------------------------------|---|----------------------------|---------------------------------------|
|   | PTF                                   | DEF                                   |   | PTF                        | DEF                                   |
| Citizen of This State                   | <input type="checkbox"/> 1            | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State                | <input checked="" type="checkbox"/> 2 | <input type="checkbox"/> 2            | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3            | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

| CONTRACT  | TORTS   | FORFEITURE/PENALTY   | BANKRUPTCY  | OTHER STATUTES  |   |
|---|---|--|---|---|---|
| <input type="checkbox"/> 110 Insurance<br><input type="checkbox"/> 120 Marine<br><input type="checkbox"/> 130 Miller Act<br><input type="checkbox"/> 140 Negotiable Instrument<br><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment<br><input type="checkbox"/> 151 Medicare Act<br><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)<br><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits<br><input type="checkbox"/> 160 Stockholders' Suits<br><input type="checkbox"/> 190 Other Contract<br><input type="checkbox"/> 195 Contract Product Liability<br><input type="checkbox"/> 196 Franchise | <b>PERSONAL INJURY</b><br><input type="checkbox"/> 310 Airplane<br><input type="checkbox"/> 315 Airplane Product Liability<br><input type="checkbox"/> 320 Assault, Libel & Slander<br><input type="checkbox"/> 330 Federal Employers' Liability<br><input type="checkbox"/> 340 Marine<br><input type="checkbox"/> 345 Marine Product Liability<br><input checked="" type="checkbox"/> 350 Motor Vehicle<br><input type="checkbox"/> 355 Motor Vehicle Product Liability<br><input type="checkbox"/> 360 Other Personal Injury<br><input type="checkbox"/> 362 Personal Injury - Medical Malpractice | <input type="checkbox"/> 365 Personal Injury - Product Liability<br><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability<br><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability<br><b>PERSONAL PROPERTY</b><br><input type="checkbox"/> 370 Other Fraud<br><input type="checkbox"/> 371 Truth in Lending<br><input type="checkbox"/> 380 Other Personal Property Damage<br><input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881<br><input type="checkbox"/> 690 Other<br><b>LABOR</b><br><input type="checkbox"/> 710 Fair Labor Standards Act<br><input type="checkbox"/> 720 Labor/Management Relations<br><input type="checkbox"/> 740 Railway Labor Act<br><input type="checkbox"/> 751 Family and Medical Leave Act<br><input type="checkbox"/> 790 Other Labor Litigation<br><input type="checkbox"/> 791 Employee Retirement Income Security Act<br><b>IMMIGRATION</b><br><input type="checkbox"/> 462 Naturalization Application<br><input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 422 Appeal 28 USC 158<br><input type="checkbox"/> 423 Withdrawal 28 USC 157<br><b>PROPERTY RIGHTS</b><br><input type="checkbox"/> 820 Copyrights<br><input type="checkbox"/> 830 Patent<br><input type="checkbox"/> 835 Patent - Abbreviated New Drug Application<br><input type="checkbox"/> 840 Trademark<br><b>SOCIAL SECURITY</b><br><input type="checkbox"/> 861 HIA (1395ff)<br><input type="checkbox"/> 862 Black Lung (923)<br><input type="checkbox"/> 863 DIWC/DIWW (405(g))<br><input type="checkbox"/> 864 SSID Title XVI<br><input type="checkbox"/> 865 RSI (405(g))<br><b>FEDERAL TAX SUITS</b><br><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)<br><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 375 False Claims Act<br><input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))<br><input type="checkbox"/> 400 State Reapportionment<br><input type="checkbox"/> 410 Antitrust<br><input type="checkbox"/> 430 Banks and Banking<br><input type="checkbox"/> 450 Commerce<br><input type="checkbox"/> 460 Deportation<br><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations<br><input type="checkbox"/> 480 Consumer Credit<br><input type="checkbox"/> 485 Telephone Consumer Protection Act<br><input type="checkbox"/> 490 Cable/Sat TV<br><input type="checkbox"/> 850 Securities/Commodities/Exchange<br><input type="checkbox"/> 890 Other Statutory Actions<br><input type="checkbox"/> 891 Agricultural Acts<br><input type="checkbox"/> 893 Environmental Matters<br><input type="checkbox"/> 895 Freedom of Information Act<br><input type="checkbox"/> 896 Arbitration<br><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision<br><input type="checkbox"/> 950 Constitutionality of State Statutes |

**V. ORIGIN** (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. 1332

Brief description of cause:

Tractor Trailer Incident, Negligence, Negligent Supervision

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ Excess of \$75,000 CHECK YES only if demanded in complaint: JURY DEMAND:  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE \_\_\_\_\_

DOCKET NUMBER \_\_\_\_\_

DATE

12/31/19

SIGNATURE OF ATTORNEY OF RECORD

*Thomas N. Sweeney*

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_