

SHAMBERG, JOHNSON & BERGMAN

—TRIAL ATTORNEYS—

FALL 2002

Truck Drops Trailer on Interstate Highway Causing Head Injury

On February 9, 1999, 40-year-old Karen Disidore was driving westbound on I-70 toward her home in Topeka, Kansas. As she was accelerating to pass a Mail Contractors semi tractor which was pulling two 45' trailers, the rear trailer suddenly broke away, veered into her lane, and crushed her car underneath the back of the trailer. Karen sustained serious orthopedic injuries and a significant closed-head injury.

The cause of the trailer separation was disputed, which of course created problems under Kansas's comparative fault law. The focus was on the coupling between the king pin on the runaway trailer and the locking mechanism on the fifth wheel to which it was supposed to be secured. The fifth wheel was inspected and photographed by the Kansas Highway Patrol at the scene, where the lock mechanism was found in the open and unlocked position. This evidence strongly suggested that the king pin had never been properly placed in the throat of the fifth wheel and locked before the truck started down the road. The markings in the grease on the fifth wheel plate led to the

conclusion that during "coupling" the king pin "overrode" the fifth wheel, missing the lock. A proper pre-trip inspection should have detected the dangerous condition.

Vic Bergman and Steve Six filed suit against Mail Contractors of America, Inc., in federal court in Kansas City, Kansas, based on failure of the truck driver to conduct an adequate pre-trip inspection of the critical coupling, which he was required to do pursuant to the Federal Motor Carrier Safety Regulations (FMCSR).

Mail Contractors defended the case, alleging that the breakaway was not caused by a king pin override and failure to inspect, but rather was due to mechanical problems from a combination of a manufacturing defect and poor maintenance. Mail Contractors asked for a comparison of the fault of Holland Hitch Company, the fifth wheel manufacturer, and Unitran, Inc., the company which owned and maintained the subject trailer and fifth wheel. Plaintiff then amended her Complaint to bring Holland Hitch and Unitran into the case as party-defendants, but solely on the allega-

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Welcome

Travel on our nation's interstate and intrastate highways is perilous, fraught with risks and hazards. In 2000, one out of eight traffic fatality collisions involved a large truck, and 457,000 large trucks were involved in traffic crashes in the United States. 4,930 of these were fatal crashes, killing 5,211 people. When an accident involves a large truck the consequences are often catastrophic, involving death or serious injury with permanent disability. For more than 20 years our firm has had the opportunity to investigate, evaluate, and pursue scores of these tragic trucking accident cases. Representation of families in crisis – whether due to injury from trucking accidents or other catastrophic events – is our primary mission. In this issue we report on trucking litigation, including an interesting story of a tragic trucking accident with an inspiring client and great result.

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TRUCKING ACCIDENTS
Special Edition

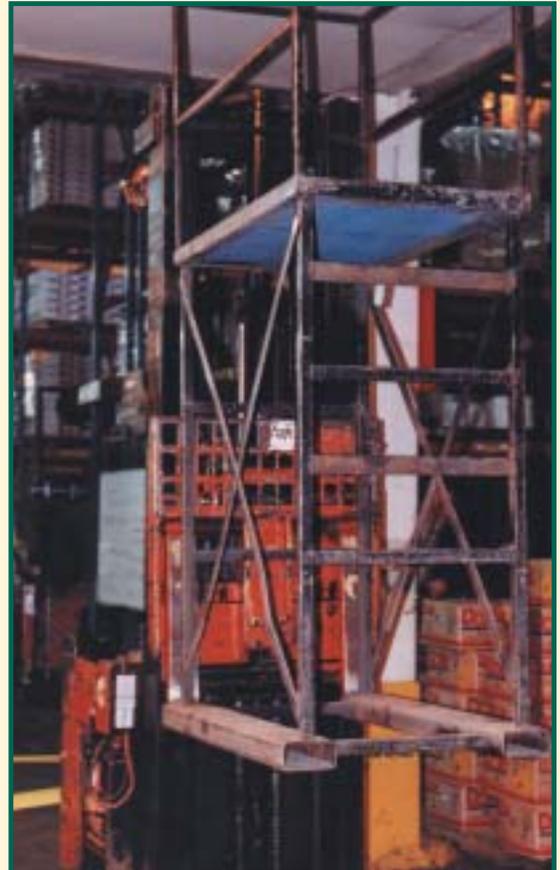
Company's Failure to Provide Safety Training Results In Fatal Forklift Accident

A combination of a company's lax attitude toward safety, an untrained and inexperienced forklift operator, and an unsafe forklift work platform were the recipe for a serious forklift accident at a grocery distribution warehouse in Kansas City, Kansas. Steve Six represented the surviving spouse and two adult children of Bill Stadtherr in their wrongful death claim against the company which operated the warehouse, obtaining a \$1,800,000 settlement as the trial was set to begin.

Bill Stadtherr, a senior systems engineer for a Minnesota company, came to the

warehouse to repair computer equipment housed in the warehouse ceiling. After arriving, Bill was led to the maintenance shop where the defendant provided a forklift, a dangerous and unsafe work platform, and an inexperienced and untrained forklift operator to take him to the worksite. Bill climbed into the work platform along with an employee from another company, and after traveling only a short distance forward, the forklift operator inadvertently engaged the lift toggle switch on the travel control lever of the Raymond Model 31 forklift raising the work platform and propelling the men into the ceiling, whereupon Mr. Stadtherr was crushed to death.

Depositions of the plant safety and training officers revealed that the forklift operator had not received the required training on the use of the Raymond Model 31 forklift, had not been trained on the use of a work platform with a forklift, and did not have the proper forklift certification as required by OSHA 29 C.F.R. 1910.178. The defendant contended that it did not provide the operator training on the Raymond forklift because it assumed the operator had been trained by another company, and it did not provide the operator with training on the use of a work platform because the responsible company official did not know a work platform was in use in the warehouse. Other depositions of current and former employees who worked at the ware-



Work platform attached to Raymond forklift.

house revealed that work platforms were used daily in the plant for numerous maintenance and repair procedures, and this had been a long-standing practice.

Under the Kansas comparative fault statute, K.S. A. § 60-258a, the defendant compared the fault of several parties: The Raymond Forklift Company, alleging the forklift was defectively designed; Bill Stadtherr for failing to take necessary evasive action as the work platform was propelled into the ceiling; and Bill Stadtherr's employer, alleging it failed to provide Bill with appropriate training so he would have known that the defendant's work platform was unsafe.

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SHAMBERG, JOHNSON & BERGMAN

John E. Shamberg*†
Lynn R. Johnson
Victor A. Bergman
John M. Parisi
Stephen N. Six
Scott E. Nutter
Karen A. Eager†
Caroline M. Tinsley††
Aaron M. Kroll††

* OF COUNSEL

† ADMITTED ONLY IN KANSAS

†† ADMITTED ONLY IN MISSOURI

2600 Grand Boulevard, Suite 550
Kansas City, MO 64108
816-474-0004
Fax: 816-474-0003

Kansas Office:
Commerce Plaza I
7300 West 110th Street
Overland Park, KS 66210
913-642-0600

www.sjblaw.com

FORKLIFT CASE
CONTINUED FROM PAGE 2

There was no persuasive evidence that Mr. Stadtherr suffered any physical injury before he was crushed and instantly killed on impact with the ceiling, and therefore, under Kansas law there was no evidence to support a survival claim for post-impact conscious pain and suffering and defendant argued that Kansas law does not allow claims for pre-impact emotional distress (see article below) for Mr. Stadtherr's estate. Plaintiffs' evidence was that decedent's lost future earnings amounted to approximately \$500,000, his family's claim for lost services was approximately \$250,000, and the remaining \$1,050,000 was paid for economic damages for the loss of the decedent's services, attention, protection, training, and guidance as described in Wentling v. Medical Anesthesia Services, 237 Kan. 503 (1985). 

STANDARDS FOR WORK PLATFORMS ON FORKLIFTS

ASME-B 56.1-2000

In the *Stadtherr* case reported in this issue, one of the contested issues was whether the work platform attached to the forklift met safe industry standards. The American Society of Mechanical Engineers has published ASME-B 56.1-2000 safety standards for low lift and high lift trucks including standards for the use of work platforms on forklifts. The standards set forth the requirements for many aspects of safe powered industrial truck use including:

- Section 4.17.3 requires that the work platform comply with the design requirements in Section 7.36.3. Work platform must have:
 - Slip-resistant floor;
 - Minimum floor space of stated size;
 - Protection for personnel in the work platform;
 - Means for securing the personnel in the work platform; and
 - Perimeters for guardrails and guarding.
- Platform must be securely attached to the lifting carriage or forks;
- The platform is horizontal and centered;
- All controls on the truck are placed in neutral and the parking brake set;
- Before elevating personnel, mark area with safety warning devices;
- While personnel are elevated, move the truck only for minor adjustments in horizontal positioning; and
- Have a trained operator controlling the truck.

Plaintiffs' evidence in the *Stadtherr* case was that the work platform (pictured on page 2) did not meet many of the B 56.1 standards.

Pre-Impact Emotional Distress Damages in Kansas

The modern trend in a majority of states is to allow claims for conscious pre-fatal injury and mental anguish resulting from the apprehension of impending death, even without corresponding physical injury. Kansas legal precedents have not resolved the issue; however, a federal court interpreting Kansas law predicted that Kansas would not recognize a claim for negligently induced pre-impact mental anguish, not itself resulting in physical injury, notwithstanding that the accident causes death. Fogarty v. Campbell's 66 Express, Inc., 640 F. Supp. 953, 956 (D. Kan. 1986). The Kansas Supreme Court declined to address whether Kansas would recognize pre-impact

emotional distress claims without accompanying physical injury in St. Clair v. Deny, 245 Kan. 414 (1989). Since *Fogarty* was decided 16 years ago, a number of the authorities relied on by the *Fogarty* court have been reversed and additional jurisdictions have recognized these claims. This article suggests Kansas would join the majority view which allows claims for pre-impact fright and emotional distress damages.

In the *Stadtherr* case (see page 2), evidence showed that Bill Stadtherr suffered fear and mental anguish from his impending death as he was raised up into the ceiling, but he was helpless to do anything to save himself. He suffered fear of death and emotional distress, but

there was not persuasive evidence that he suffered any physical injury before his death.

In a case where the decedent experienced mental anguish resulting from the fear of impending death, but not physical injury prior to an accident causing immediate death, it is an open question in Kansas whether a decedent's estate can pursue a survival claim for the pre-death emotional distress. Faced with this situation, there are two theories of recovery to pursue. First, Kansas law allows recovery for emotional distress injuries without physical injury when the defendant is guilty of reckless or wanton conduct. Roberts v. Saylor,

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allegations of fault against the new defendants. This raised important issues of pleading and burden of proof. Mail Contractors argued that plaintiff's allegations against the new defendants were inadequate since plaintiff made no independent allegations of fault against the new defendants. Plaintiff argued in response that she should not be perceived by a jury as the source of substantive allegations against the new defendants, and that the burden of proof for the claims against Holland Hitch and Unitran should remain with Mail Contractors. Plaintiff requested a ruling that the court would not entertain a Motion for Judgment as a Matter of Law under Federal Rule Civil Procedure 50 at the conclusion of plaintiff's evidence at trial, but rather that any such ruling be deferred until the conclusion of all the evidence. Plaintiff also pled that all the defendants were liable under the theory of *res ipsa loquitur*, which was the subject of a separate Motion for Summary Judgment.

The Honorable G. Thomas VanBebber, Jr. decided all these issues in plaintiff's favor, ruling that a plaintiff may adopt the allegations of a defendant under comparative fault without stating independent allegations of negligence of her own, and that the burden of proof stays with the defendant who initiated the allegations. The court separately decided that the "exclusive control" requirement of *res ipsa loquitur* was satisfied under Kansas law notwithstanding the fact that there were three separate

defendants, including a product manufacturer, which exercised control at different times.

The damages issues were challenging as well. Although Karen's injuries and damages were initially catastrophic, she made a heroic and remarkable recovery, though she has been left with significant permanent problems. She went on, happily, to marry her physician-fiancée before trial. Her ordeal included several surgeries, a two-week hospitalization at the University of Kansas Medical Center, and a five-week stay at the Kansas Rehabilitation Hospital in Topeka. She has been left with some left-sided pain, weakness, and coolness as well as a significant brain atrophy which interferes with her ability to perform executive functions.

The damages included the statutory maximum \$250,000 of non-economic loss, and \$198,000 of medical expenses. The critical damages dispute was over future lost earnings – was Karen Disidore, who had been vice president and general manager of a small manufacturing company, going to eventually be promoted to president of the company and take a significant leap in earnings had she not been injured? Plaintiff's evidence was that Karen was likely to have become president of her company in five years, take a major leap in earnings, and those earnings would continue to grow until retirement. The economic loss projection to age 62 was \$5,800,000 and to age 65 it was \$6,700,000. The defendants had an economist who projected plaintiff's wage loss in the range of \$550,000 –

\$1,750,000. Therefore the value of the case ultimately boiled down to whether the jury was going to believe that the plaintiff would have probably become president of her company.

Ultimately, the case settled for \$5,000,000 after the jury was selected but before opening statements. All of the defendants contributed to the settlement, with \$4,000,000 coming from Mail Contractors of America, Inc., \$500,000 from Unitran, Inc. and

LARGE TRUCK TRAFFIC SAFETY FACTS

One of eight traffic fatalities in 2000 resulted from a collision involving a large truck.

In Missouri in 2000, 10.4% of all fatal crashes involved large trucks.

In Kansas in 2000, 12.3% of all fatal crashes involved large trucks.

In 1997, 41,967 people were killed on the nation's roadways. Of these fatalities, 12.7% or, 5,355 involved accidents with large trucks.

The majority of fatal accidents involving large trucks occur on roads other than interstate highways.

Source: NTSB

\$500,000 from Holland Hitch Company.

Had the plaintiff not been a big earner, with a bright economic future, this case had the potential to be another horrible tragedy in which

a catastrophically injured Kansas plaintiff was left mostly uncompensated, as is so often the situation in Kansas, where so-called "tort reform" continues to take its unfair toll on our most catastrophically injured citizens. 



POWERED INDUSTRIAL TRUCK
OSHA REGULATIONS —
29 C.F.R. 1910.178

OSHA requires that employers using powered industrial trucks provide training, certification, on-going supervision, and other safety related instruction to operators, including:

Each operator is competent to operate a powered industrial truck safely;

Operators go through a training and evaluation program before using a powered industrial truck;

Training shall consist of formal instruction, practical training, and evaluation of the operator's performance in the workplace;

Training shall be conducted by persons who have knowledge, training, and experience to provide the training and evaluate the operator's competence;

Requires refresher training when:

- 1) an operator has been observed to be unsafe;
- 2) operator has been in an accident;
- 3) operator is assigned to drive a different type of equipment;

Evaluation of each operator's performance shall be conducted at least once every three years;

The employer shall certify that each operator has been trained and evaluated and;

The employer shall maintain documents showing the operator's training and certification.

TRUCKING REGULATIONS

Commercial motor vehicles are subject to the laws and regulations of both the United States and the individual states. Each trip in a commercial motor vehicle may be classified as either interstate or intrastate. Commercial motor carriers operate under authority granted by the federal government and the states, and are subject to the Federal Motor Carrier Safety Regulations, 49 C.F.R. Parts 40, 325, 355-379, and 381-399. Intrastate commerce is subject to the FMCSR which must be adopted by the states as a condition of receiving federal assistance through the Motor Carrier Safety Assistance Program. A limited number of variances related to safety are allowed to the states for drivers and vehicles operating in intrastate commerce, such as a lower driving age, relaxed medical qualifications, expanded hours of service, exemptions for specific commodities, and exemptions for certain vehicles.

Lawyers handling trucking litigation need to familiarize themselves with the regulations that apply, and the scope of the regulation is surprisingly vast, covering such subjects as noise, emission standards, commercial drivers' license standards, qualifications of drivers, the driving of motor vehicles, parts

and accessories, accident reporting, hours of service, inspection and maintenance of vehicles and equipment, transportation of hazardous materials, and a wide array of other subjects which might be

EXPERTS FOR TRUCKING ACCIDENT CASES

Experts with understanding of the unique aspects of trucking industry operation, tractor-trailer performance characteristics, and a wide variety of other expertise are indispensable to the successful preparation of a trucking accident prosecution or defense. The most common areas of expertise are:

- Transportation research;
- Fleet operation and safety;
- Accident reconstruction and failure analysis; and
- Tractor, trailer, and component maintenance.

the basis for a claim of negligence in any given case.

The literature on trucking regulation is vast. The best single source of regulatory information is J. J. Keller & Associates, Inc. which has a thick catalogue of information on virtually any detail of trucking operation and regulation, including video presentations.

We recommend the following publications from J. J. Keller & Associates:

Federal Motor Carrier Safety Regulations Handbook. This publication above includes the regulations, plus U.S. Department of Transportation interpretations of the regulations.

Official Trucking Safety Guide, which includes all of the Federal Motor Carrier Safety Regulations, along with the forms which are required or suggested by the FMCSR, tracks proposed changes in the regulations through a loose-leaf service, and reproduces the state regulatory provisions and citations for every state.

Fleet Safety Compliance Manual, which is published for the benefit of trucking companies in helping them discharge their many detailed responsibilities under the regulations. This manual contains all of the Federal Motor Carrier Safety Regulations, as well as the interpretations, and supplementary information to assist the motor carrier with compliance.

There are also a number of publications of the U.S. Department of Transportation, Office of Motor Carriers, which provide detailed and helpful information. One example is *The Commercial Vehicle Preventable Accident Manual, A Guide to Counter Measures*, available from Triodyne, Inc. of Niles, Illinois.



John M. Parisi Elected as President of Kansas Trial Lawyers' Association

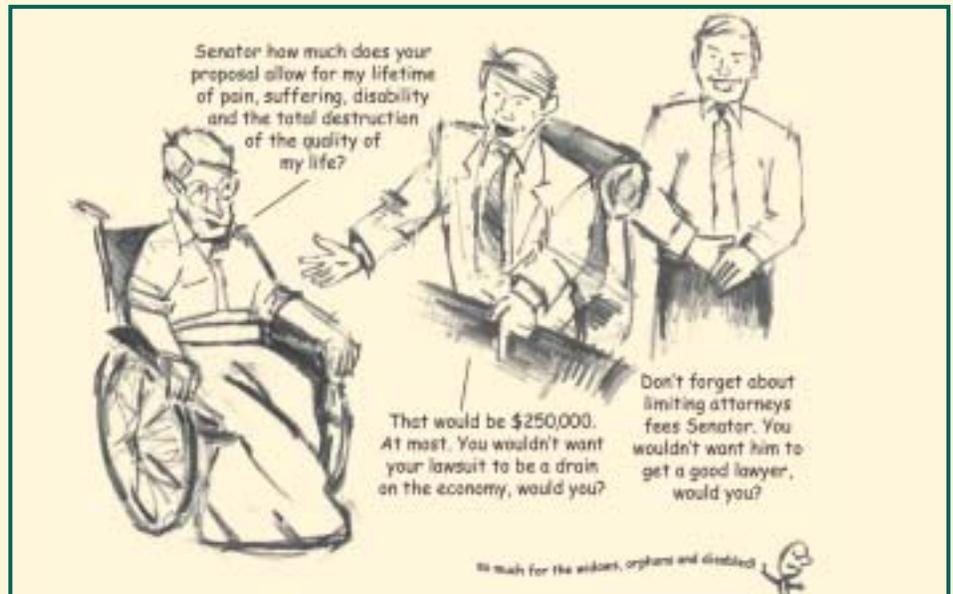
We proudly congratulate our partner, John M. Parisi, on being elected President of the Kansas Trial Lawyers' Association (KTLA) at the association's annual meeting in Aspen, Colorado on June 20, 2002. John becomes the 50th President in the history of KTLA, an organization of over 750 trial lawyers dedicated to representing families and workers, improving the legal profession, and promoting issues important to consumers. John has served KTLA well over the years as Vice-President of Legislation, Vice-President of Education, Vice-President of Public Affairs, Secretary, Treasurer, and Member-At-Large. Our firm has a history of KTLA leadership, with our partner, Lynn Johnson, serving as past president of KTLA. We are proud of John for this and his many other exceptional accomplishments.

PRE-IMPACT DAMAGES CONTINUED FROM PAGE 3

230 Kan. 289, 292 (1981) (tort of outrage). Second, *Fogarty* is not binding precedent on any court and the matter is ripe for further litigation. The *Fogarty* interpretation of Kansas law works to deny recovery to plaintiffs who have suffered serious mental anguish from fear of impending death and who died instantly in the accident.

The *Fogarty* opinion reflects an extreme reluctance on the part of the Court to reach its holding barring pre-impact fright damages. The *Fogarty* court questioned the foundation on which Kansas doctrine of pre-impact mental anguish damages is premised and noted several examples where the rule leads to an unfair result. The Court noted several jurisdictions which did permit pre-impact fright damages in 1986, including Louisiana, New York, Texas, Florida, and Connecticut. All of these jurisdictions still recognize the doctrine of pre-impact mental anguish

damages. See, e.g., *Lang v. Bouju*, 245 A.D. 2d 1000, 1001 (N.Y. Sup. Ct. 1997); *Barereton v. United States*, 973 F. Supp. 752, 757 (E.D. Mich. 1997); *Harvey v. State*, 799 So.2d. 569, 578 (La. Ct. App. 2001). Importantly, since the *Fogarty* decision Wisconsin, New Hampshire, Nebraska, Maryland, and Georgia have all joined the majority of states which allow recovery for pre-impact fright that is accompanied by physical consequences or impact. See, e.g., *Bowen v. Lumbermen's Mut. Cas. Co.*, 517 N.W.2d 432, 446 (Wis. 1994) (allowing bystander negligent infliction of emotional distress claim without physical injury); *Thiebault v. Campbell*, 622 A.2d 212, 215 (N.H. 1993); *Nelson v. Dolan*, 434 N.W.2d 25, 31 (Neb. 1989); *Beynov v. Montgomery Cablevision*, 718 A.2d 1161, 1183 (Md. 1998); *Dept. of Transportation v. Dupree*, 2002 Ga. App. LEXIS 715 @ * 29-30 (Ga. Ct. App. 2002). The modern trend is to allow pre-impact fear of impending death damages, and plaintiffs should advance these claims in Kansas.

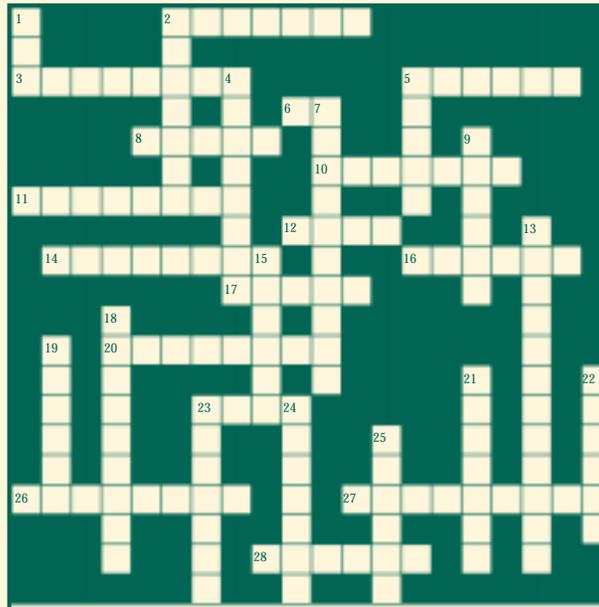


Answers to Trucker's Puzzle - Across: (2) tiltcab (3) gladhand (5) handle (6) CB (8) steam (10) Bigfoot (11) Kenworth (12) Jake (14) icecream (16) Smokey (17) dolly (20) eighteen (23) Mack (26) manifest (27) jackknife (28) diesel Down: (1) log (2) tractor (4) deadhead (5) Hoffa (7) bobtailing (9) Convoy (13) deregulation (15) Model C (18) Peterbilt (19) Toyota (21) Truckin (22) pumper (23) monster (24) kingpin (25) scales

TRUCKER'S PUZZLER

ACROSS

2. First built in 1935 to save on the length of the tractor so trailers can be longer and carry larger payloads.
3. Politicians do it and truckers use it to make airbrake connections.
5. Flabby stuff around one's waist or CBer's name.
6. Trucker communicator or former KU basketball player McGrath.
8. Power source for earliest trucks.
10. The original monster truck from St. Louis.
11. Barbie's beau's value.
12. Give this guy a brake to control truck's downhill speed.
14. Kids' favorite summer truck.
16. Truckers' name for Highway Patrol.
17. Equipment with female name which converts a semi trailer to a full trailer.
20. Number of wheels on a typical tractor-trailer rig.
23. Fast food "Big" burger and a famous line of trucks.
26. How the destiny of U.S. western expansion was described or listing of cargo.
27. Compliment to Jill's fork.



28. Actor in XXX, *Saving Private Ryan* and *The Fast and the Furious* or fuel source for most modern trucks

DOWN

1. Put one on the fire or driver's daily record of service.
2. Nickname of "large" former Michigan basketball star now in NBA.
4. They followed their favorite rock group on tour or to haul an empty trailer.

5. Teamster who allegedly resides beneath Giants' stadium.
7. Operating a tractor without a trailer.
9. The best darn trucker movie ever made starring Kris Kristopherson, 1978.
13. 1980 federal action made it possible for individuals to get trucking authority from the ICC.
15. Ford's first commercial vehicle, manufactured in 1905.
18. He made trucks instead of picking a peck of pickled peppers.
19. Brand of truck favored by Taliban according to Time magazine.
21. Hit song in which legendary rock group was "set up like a bowling pin" in New Orleans.

22. Fire truck.
23. Freakish truck with extremely oversized wheels.
24. Mob leader or piece of steel bolted to the bottom of trailer which connects to the fifth wheel.
25. Both truckers and weight watchers dread them.

SHAMBERG, JOHNSON & BERGMAN

2600 Grand Boulevard, Suite 550
Kansas City, Missouri 64108

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