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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

CANDACE SLAGOWSKI, *et al.*,  
Plaintiffs,

v.

CENTRAL WASHINGTON ASPHALT, INC.,  
*et al.*,  
Defendants.

Case No. 2:11-CV-00142-APG-VCF

**ORDER**

(Doc. ##161, 273, 302, 306, 318)

This case arises out of a December 12, 2010 multi-vehicle accident on a Nevada two-lane highway which resulted in the death of Jon Michael Slagowski and injury to others. Defendants Central Washington Asphalt, Inc., Donald Hannon, James Wentland, and Jerry Goldsmith request that I grant judgment on the pleadings in their favor on the claims for punitive damages, medical expenses, and funeral expenses asserted by Plaintiffs Quentin Slagowski, Anika Slagowski, and Rowan Slagowski. Defendants assert that because none of the Plaintiffs is the personal representative of Jon Michael Slagowski's estate, Plaintiffs have no standing under Nevada's wrongful death statute to seek these types of damages. Plaintiffs respond that Defendants waived any challenge to their capacity to sue. Alternatively, Plaintiffs request leave to amend the Complaint to add the estate's personal representative as a party. I conclude the proper course is to allow the personal representative of the decedent's estate to join the action as the real party in interest to pursue medical and funeral expenses and punitive damages. I therefore deny Defendants' motion to dismiss.

Plaintiffs separately move to amend to add a new claim of aiding and abetting. Magistrate Judge Ferenbach recommended I deny the motion to amend because there is no private right of action under the Motor Carrier Act ("MCA") or the Federal Motor Carrier Safety Regulations ("FMCSR") promulgated thereunder, and consequently amendment to add an aiding and abetting claim based on violations of the MCA and FMCSR would be futile. Plaintiffs object to

1 Magistrate Judge Ferenbach’s recommendation, arguing they are not seeking to assert a claim  
2 under the MCA or the FMCSR. Rather, they referred to those statutes only as the standard of  
3 care for their claim that Defendants negligently and recklessly encouraged driving while fatigued,  
4 which will be shown in part by the fact that Defendants violated the FMCSR’s requirements on  
5 how many hours a day a driver may work and drive. Magistrate Judge Ferenbach’s decision was  
6 correct given how the matter was argued to him; but given Plaintiffs’ clarification of their  
7 proposed new claim in their objection, I grant Plaintiffs leave to amend to add a claim for aiding  
8 and abetting negligent fatigued driving.

9 **I. Motion for Judgment on the Pleadings - Punitive and Special Damages**

10 Because the “common law afforded no remedy in damages for a wrongful death,”  
11 Nevada’s wrongful death statute (Nev. Rev. Stat. § 41.085(2)) “provides the only measure of  
12 damages, and designates the only person who can maintain such an action.” *Wells, Inc., v.*  
13 *Shoemake*, 177 P.2d 451, 456 (Nev. 1947). Under that statute, both the decedent’s heirs and the  
14 personal representative of the decedent’s estate may maintain actions against the person who  
15 caused the death, “with neither being able to pursue the other’s separate claim.” *Alcantara ex rel.*  
16 *Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 914 (Nev. 2014); Nev. Rev. Stat. § 41.085(2).  
17 To avoid double recovery, the statute sets forth which damages the heirs may recover and which  
18 damages the personal representative may recover. *Alsenz v. Clark Cnty. Sch. Dist.*, 864 P.2d 285,  
19 286-87 (Nev. 1993); Nev. Rev. Stat. §§ 41.085(4), (5). Only the estate’s personal representative  
20 may recover the decedent’s medical and funeral expenses, and “[a]ny penalties, including, but not  
21 limited to, exemplary or punitive damages that the decedent would have recovered if the decedent  
22 had lived.” *Id.* § 41.085(5).

23 In their Complaint, Plaintiffs request punitive damages and medical and funeral expenses  
24 incurred in relation to Jon Michael Slagowski’s death. [Dkt. #30 at 6, 8.] Plaintiffs do not allege  
25 in the Complaint that they are the personal representatives of Jon Michael Slagowski’s estate. In  
26 response to Defendants’ motion, Plaintiffs concede that non-party Patricia Dean is the estate’s  
27 personal representative. Plaintiffs nevertheless argue that Defendants waived any challenge to  
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1 their capacity to assert these claims by not raising the issue in Defendants' Answer.

2 Alternatively, Plaintiffs request I grant leave to amend the Complaint to add Dean as the real  
3 party in interest because Defendants waited to raise this issue until after the expirations of both  
4 the statute of limitations and the deadline to add parties, and Defendants should not be rewarded  
5 for failing to raise the issue earlier when any defects could have been cured.

6 Defendants respond that because Plaintiffs sought these damages in their own names  
7 rather than in a representative capacity, Defendants' challenge is aimed at Plaintiffs' standing, not  
8 capacity or status as the real party in interest. Defendants argue that standing is a jurisdictional  
9 issue that cannot be waived. Alternatively, Defendants argue that because the Complaint did not  
10 adequately allege Plaintiffs were suing in a representative capacity, I should permit Defendants to  
11 amend their Answer to add the defense of lack of capacity. Defendants also contend amendment  
12 to add Dean as a party is not warranted, either through Federal Rule of Civil Procedure 17's real  
13 party in interest provision or as a Rule 15 amendment. Defendants assert that Plaintiffs have  
14 known from the outset that they were not the estate's representative, and the estate representative  
15 chose not to pursue a wrongful death claim on the estate's behalf. Defendants contend that the  
16 statute of limitations and the deadline to amend have long since expired for a claim that Plaintiffs  
17 and Dean have known about since the inception of this case, and amendment therefore is  
18 inappropriate.

19 A. Article III Standing

20 Although Defendants styled their motion as one for judgment on the pleadings under  
21 Federal Rule of Civil Procedure 12(c), to the extent Defendants contend Plaintiffs lack  
22 jurisdictional standing, then Defendants' motion is one to dismiss for lack of subject matter  
23 jurisdiction under Rule 12(b)(1). "A Rule 12(b)(1) jurisdictional attack may be facial or factual."  
24 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the  
25 challenger asserts that the allegations contained in a complaint are insufficient on their face to  
26 invoke federal jurisdiction." *Id.* "[I]n a factual attack, the challenger disputes the truth of the  
27 allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* When resolving  
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1 a factual attack, the court “may review evidence beyond the complaint without converting the  
2 motion to dismiss into a motion for summary judgment.” *Id.*

3 To establish standing in the Article III constitutional sense, the plaintiff first “must show  
4 that it has suffered ‘an injury in fact,’ i.e., ‘an invasion of a legally protected interest which is (a)  
5 concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.’” *Ass’n of*  
6 *Public Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 950 (9th Cir. 2013)  
7 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Second, the plaintiff must  
8 show that the injury is “fairly traceable” to the defendant’s challenged conduct. *Id.* at 953  
9 (quotation omitted). Finally, the plaintiff must show the injury is redressable by a favorable court  
10 decision. *Id.* at 954.

11 Defendants make both facial and factual attacks on Plaintiffs’ standing by arguing the  
12 Complaint did not set forth sufficient facts to allege standing, and by attaching to their motion  
13 evidence that Dean is the estate representative. Plaintiffs have established the minimum  
14 constitutional standing to overcome Defendants’ facial challenge. The Complaint alleges  
15 Defendants negligently caused the car accident that resulted in Plaintiffs’ father’s death, and  
16 Plaintiffs seek damages in redress. Taking the Complaint and all reasonable inferences therefrom  
17 as true, it is reasonable to infer Plaintiffs also are pursuing a representative claim by seeking to  
18 recover medical expenses, funeral expenses, and punitive damages. The Complaint cites to the  
19 Nevada wrongful death statute and specifically itemizes these categories of damages, which are  
20 available only to the estate’s representative. [Dkt. #30 at 6, 8.]

21 As for Defendants’ factual attack, Plaintiffs present evidence that Jon Michael Slagowski  
22 died intestate, and Plaintiffs, as his minor children, are beneficiaries of the estate. [Dkt. #184 at 1-  
23 2.] To the extent the estate is depleted by medical or funeral expenses, or is entitled to recover  
24 punitive damages, Plaintiffs’ interests in the estate are impacted. Injuries are redressable through  
25 court-ordered compensation to the estate, which ultimately will inure to Plaintiffs’ benefit.  
26 Plaintiffs therefore have a sufficient stake in the controversy to meet the minimum constitutional  
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1 standing for medical and funeral expenses and punitive damages arising out of Defendants'  
2 alleged negligence in causing Plaintiffs' father's death.

### 3 B. Prudential Standing

4 Prudential standing requires a plaintiff to assert his or her own legal interests as the real  
5 party in interest. *Dunmore v. United States*, 358 F.3d 1107, 1112 (9th Cir. 2004) (citing *Warth v.*  
6 *Seldin*, 422 U.S. 490, 499 (1975)); *see also* Fed. R. Civ. P. 17(a)(1) ("An action must be  
7 prosecuted in the name of the real party in interest."). Unlike Article III standing, prudential  
8 standing is not a matter of the Court's jurisdiction, and may be waived. *City of L.A. v. Cnty. of*  
9 *Kern*, 581 F.3d 841, 846 (9th Cir. 2009).

10 Pursuant to Rule 9(a), a pleading need not allege a party's authority to sue in a  
11 representative capacity "[e]xcept when required to show that the court has jurisdiction." If an  
12 opposing party intends to raise the issue of capacity or authority to sue, it must do so "by a  
13 specific denial." Fed. R. Civ. P. 9(a)(2). The specific denial "must be made in the responsive  
14 pleading or by motion before pleading." *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874,  
15 878 (9th Cir. 2000) (quotation omitted). An objection that the plaintiff is not the real party in  
16 interest likewise is waivable if not raised in "a timely manner." *United States for Use & Benefit of*  
17 *Reed v. Callahan*, 884 F.2d 1180, 1183 n.4 (9th Cir. 1989).

18 Defendants waived their objection that Plaintiffs are not the real party in interest or do not  
19 have authority to sue on the estate's behalf by failing to raise these issues earlier. From the  
20 inception of this case, Plaintiffs' Complaint requested damages available only to the estate's  
21 representative. Defendants' Answer did not specifically deny that Plaintiffs lacked the capacity  
22 or authority to sue on the estate's behalf, or that Plaintiffs were not the real parties in interest with  
23 respect to the requests for medical and funeral expenses and punitive damages. Defendants also  
24 did not thereafter raise the issues in a timely manner. Rather, Defendants waited until after the  
25 statute of limitations and the deadline to amend expired.

26 Defendants request I grant them leave to amend their Answer to raise the issues now  
27 because it was not clear from the Complaint that Plaintiffs were asserting a representative claim.  
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1 However, as discussed above, it is reasonable to infer from the Complaint's allegations that  
2 Plaintiffs were asserting a representative claim. Defendants could have raised the issue of  
3 Plaintiffs' authority to seek these damages earlier, but were not diligent in doing so. Defendants  
4 therefore have not met Rule 16's good cause standard for amending the Scheduling Order. *See*  
5 *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 952 (9th Cir. 2006); *see also*  
6 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992).

7 Even if Defendants could show good cause to amend the Scheduling Order, I would  
8 exercise my discretion to deny leave to amend under Rule 15. *Gardner v. Martino*, 563 F.3d 981,  
9 990 (9th Cir. 2009). I consider five factors in deciding whether to grant leave to amend under  
10 Rule 15(a): "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of  
11 amendment, and (5) whether plaintiff has previously amended his complaint." *Allen v. City of*  
12 *Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Delay alone does not suffice to deny  
13 amendment, but it is a relevant factor to consider, particularly where the party moving to amend  
14 provides no explanation for the delay. *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194  
15 F.3d 980, 986 (9th Cir. 1999).

16 Defendants have not previously moved to amend their Answer, and I do not find bad faith.  
17 However, Defendants unduly delayed filing their motion and they have provided no explanation  
18 for why they waited so long to move for judgment on the pleadings. Defendants filed their  
19 Answer in July 2011. [Dkt. #32.] Even considering the third party practice in this case and the  
20 consolidated cases, the pleadings closed on November 5, 2012, when Third Party Defendant  
21 Doreen Law filed her Answer to Defendants' counterclaim in one of the consolidated actions.  
22 [Dkt. #13 in 2:12-CV-01435-APG-VCF.] Yet Defendants did not file their motion until  
23 November 2013, after the statute of limitations ran and shortly after the deadline to amend to add  
24 parties expired. [Dkt. #127 (setting October 1, 2013 deadline to amend to add parties).] Allowing  
25 Defendants to raise the issue now would prejudice Plaintiffs and the estate, who easily could have  
26 cured any deficiencies in clarifying the appropriate party to pursue the medical and funeral  
27 expenses and punitive damages under Rules 15 and 17 had Defendants made a timely objection.  
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1           Additionally, amendment of Defendants' Answer would be futile, because under Rule  
2 17(a), the estate is substituted in as the real party in interest for the pursuit of medical and funeral  
3 expenses and punitive damages. Rule 17(a)(3) provides that "[t]he court may not dismiss an  
4 action for failure to prosecute in the name of the real party in interest until, after an objection, a  
5 reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into  
6 the action." If the real party in interest ratifies, joins, or substitutes in, "the action proceeds as if it  
7 had been originally commenced by the real party in interest." Fed. R. Civ. P. 17(a)(3). Rule 17(a)  
8 applies when the wrong party filed suit because determining the proper party was difficult or  
9 because "an understandable mistake has been made." *United States for Use & Benefit of Wulff v.*  
10 *CMA, Inc.*, 890 F.2d 1070, 1074 (9th Cir. 1989) (citing 1966 Advisory Comm. Notes). The Court  
11 should consider equitable principles when applying Rule 17(a). *See id.* at 1075 ("Rule 17(a) is the  
12 codification of the salutary principle that an action should not be forfeited because of an honest  
13 mistake; it is not a provision to be distorted by parties to circumvent the limitations period.");  
14 Fed. R. Civ. P 17, 1966 Advisory Comm. Notes (stating the substitution provision was added "in  
15 the interests of justice" and to "insure against forfeiture and injustice").

16           Following Defendants' objection to Plaintiffs' status, Dean filed a declaration indicating  
17 that in her capacity as the estate representative, she authorizes the current action, agrees the estate  
18 will be bound by its result, and agrees to substitute in as a plaintiff in this action. It is  
19 questionable whether it was difficult to determine who the proper party was or that an  
20 understandable mistake was made regarding the identity of the proper party in this case. But  
21 Plaintiffs are closely aligned with the estate because they are the estate's only beneficiaries, and  
22 thus practically speaking, any benefit to the estate will inure to Plaintiffs. In the interests of  
23 justice and to avoid a forfeiture, I will allow Dean, as the personal representative of the estate of  
24 Jon Michael Slagowski, to join and be substituted as the real party in interest for the pursuit of  
25 damages permitted under Nev.Rev.Stat. § 41.085(5), including medical expenses, funeral  
26 expenses, and punitive damages. *See Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 712  
27 (9th Cir. 1992).

1           Considering the equities, joinder and substitution is appropriate. Plaintiffs and the estate  
2 would be severely prejudiced because the statute of limitations on the estate's claim has run and  
3 the deadline to amend to add parties in this case also has expired. On the other hand, the  
4 prejudice to Defendants is minimal. Defendants have known about the request for medical and  
5 funeral expenses and punitive damages since the outset and have defended this action for over  
6 two years without challenging Plaintiffs' status. To the extent Defendants could be prejudiced,  
7 Defendants contributed to the situation by failing to raise the issue earlier in the case. Had  
8 Defendants done so, the result would have been the same as now. Defendants have not identified  
9 any additional discovery they would need to take or any other prejudice they might suffer by the  
10 estate's joinder and substitution. Given Rule 17's policy preference of avoiding forfeitures and  
11 the general policy favoring resolving cases on the merits,<sup>1</sup> I deny Defendants' motion for  
12 judgment on the pleadings. I allow Plaintiffs to amend the Complaint to join and substitute Dean  
13 as the personal representative of Jon Michael Slagowski's estate as the real party in interest  
14 seeking medical expenses, funeral expenses, and punitive damages arising out of Defendants'  
15 alleged negligence. Under Rule 17(a)(3), this action will proceed as if those claims had been  
16 originally commenced by the estate's representative.

## 17           **II. Motion to Amend, Report and Recommendation, and Objections**

18           Plaintiffs separately move to amend their Complaint to add a new claim of aiding and  
19 abetting.<sup>2</sup> [Doc. #273.] Magistrate Judge Ferenbach recommended I deny the motion to amend  
20 because there is no private right of action under the MCA and FMCSR, and consequently  
21 amendment to add a claim for aiding and abetting a violation of the Act or its regulations would  
22 be futile. [Doc. #302.] Plaintiffs object to Magistrate Judge Ferenbach's recommendation,  
23 arguing they are not seeking to assert a claim under the MCA or the FMCSR. Rather, they seek to  
24 assert a claim that Defendants negligently and recklessly encouraged driving while fatigued,  
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26           <sup>1</sup> See, e.g., *Foman v. Davis*, 371 U.S. 178, 181-82 (1962).

27           <sup>2</sup> In their motion to amend, Plaintiffs also seek to add the estate's personal representative as a  
28 party. Because I am granting that relief as discussed above, this portion of Plaintiffs' motion to amend is  
moot.



1 which will be shown in part by the fact that Defendants violated the FMCSR's requirements on  
2 how many hours a day a driver may work and drive; they referred to the MCA and FMCSR only  
3 as a standard of care.

4 Defendants respond that I should not consider Plaintiffs' newly-fashioned claim, and even  
5 if considered, the new claim at heart still rests upon a violation of the MCA and regulations  
6 because there is no other evidence that Hannon or Wentland were fatigued at the time of the  
7 accident.

8 Pursuant to 28 U.S.C. § 636(b)(1)(A), a magistrate judge may hear and determine:

9 any pretrial matter pending before the court, except a motion for injunctive relief,  
10 for judgment on the pleadings, for summary judgment, to dismiss or quash an  
11 indictment or information made by the defendant, to suppress evidence in a  
12 criminal case, to dismiss or to permit maintenance of a class action, to dismiss for  
failure to state a claim upon which relief can be granted, and to involuntarily  
dismiss an action.

13 When reviewing an objection to a magistrate judge's order under § 636(b)(1)(A), the objecting  
14 party must show the magistrate judge's order is "clearly erroneous or contrary to law." 28 U.S.C.  
15 § 636(b)(1)(A). Under § 636(b)(1)(B), a magistrate judge may submit to the district judge  
16 proposed findings of fact and recommendations for the resolution of any motion excepted in  
17 subparagraph (A). The district court reviews the magistrate judge's recommendations de novo.  
18 28 U.S.C. § 636(b)(1).

19 A motion to amend a complaint falls within a magistrate judge authority to hear and  
20 determine under § 636(b)(1)(A). However, where amendment is denied as futile, the ruling is  
21 akin to a motion dismiss for failure to state a claim. *See Miller v. Rykoff-Sexton, Inc.*, 845 F.2d  
22 209, 214 (9th Cir. 1988). A motion to dismiss for failure to state a claim is one of the excepted  
23 motions under § 636(b)(1)(A) and thus falls under § 636(b)(1)(B). Out of an abundance of  
24 caution, I will review Magistrate Judge Ferenbach's July 22 Order de novo under § 636(b)(1)(B).  
25 I have discretion to consider new evidence presented for the first time in an objection to the  
26 magistrate judge's recommendation. *Brown v. Roe*, 279 F.3d 742, 744-45 (9th Cir. 2002).

1           Magistrate Judge Ferenbach’s decision was correct given how the matter was presented to  
2 him. Plaintiffs’ motion specifically requested leave to amend “to assert a new cause of action  
3 against Defendant [Central Washington Asphalt, Inc.] and its drivers for aiding and abetting each  
4 other to violate the FMCSR regulations.” [Dkt. #273 at 7.] The proposed amended complaint  
5 likewise alleged that Defendants “aided, abetted, and encouraged each other in violating 49 CFR  
6 392.3 and 49 CFR 395.3, and 49 CFR 395.8.” [Dkt. #237-6 at 6.] Plaintiffs’ reply also focused  
7 on Defendants allegedly colluding to violate the FMCSR rules regarding hours of service and  
8 maintaining proper log books. [Dkt. #296 at 6-7.]

9           Virtually all courts that have examined this issue have concluded there is no private right  
10 of action for personal injuries arising from a violation of the MCA or its safety regulations. *See,*  
11 *e.g., Courtney v. Ivanov*, --- F. Supp. 2d. ----, 2014 WL 4097351, at \*3-6 (W.D. Pa. 2014)  
12 (collecting cases). I agree with these courts that, because Congress provided an express cause of  
13 action for commercial disputes but did not provide an express cause of action for personal injuries  
14 arising out of a violation of the Act, Congress did not intend to provide a private right of action  
15 for personal injuries. *See, e.g., id.* Rather, negligence actions for personal injuries would remain a  
16 matter for resolution under applicable state law.

17           Plaintiffs clarify in their Objections that they are not seeking to add a claim that  
18 Defendants aided and abetted violations of the MCA or FMCSR. Instead, Plaintiffs assert  
19 Defendants were negligent by assisting and encouraging each other to drive commercial motor  
20 vehicles in a fatigued state. Plaintiffs contend any reference to the MCA and FMCSR will be to  
21 establish a standard of care, not as an independent claim. Although this is a new argument raised  
22 for the first time in Plaintiffs’ objections, I exercise my discretion to consider it because Plaintiffs  
23 should not forfeit a potentially meritorious claim due to their inartful presentation of the issue to  
24 the Magistrate Judge.

25           Considering the usual factors in evaluating whether to allow amendment, there is no  
26 evidence of bad faith, and Plaintiffs have not previously amended their Complaint. Plaintiffs also  
27 have not unduly delayed. Plaintiffs apparently did not discover the basis for their motion until the  
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1 depositions of Goldman, Wentland, and Hannon in May 2014, and Plaintiffs moved to amend  
2 approximately two months later. Defendants have not identified any prejudice.

3 Defendants contend amendment would be futile because even with Plaintiffs' clarification  
4 in their Objections, the alleged underlying tort remains a violation of the FMCSR. Defendants  
5 also argue Plaintiffs present no facts showing Hannon, Wentland, or Goldsmith were actually  
6 fatigued on the night in question.

7 To state an aiding and abetting claim, Plaintiffs must allege Defendants "substantially  
8 assist[ed] or encourage[d] another's conduct in breaching a duty to a third person." *Dow Chem.*  
9 *Co. v. Mahlum*, 970 P.2d 98, 112 (Nev. 1998), *overruled in part on other grounds by GES, Inc. v.*  
10 *Corbitt*, 21 P.3d 11 (Nev. 2001). Plaintiffs must allege: (1) that Defendants negligently injured  
11 Jon Michael Slagowski; (2) that Defendants were aware of their role in promoting the negligent  
12 behavior at the time they provided assistance; and (3) that Defendants knowingly and  
13 substantially assisted the negligent behavior. *Id.*

14 Plaintiffs have clarified that their aiding and abetting claim does not depend on a violation  
15 of the FMCSR. Rather, Plaintiffs intend to use the FMCSR as a standard of care. A reasonable  
16 jury could find driving while tired is negligent behavior regardless of whether the FMCSR set  
17 forth regulations on how many hours commercial drivers should be permitted to work and drive  
18 in a single day. *Anderson v. Baltrusaitis*, 944 P.2d 797, 800 (Nev. 1997) (stating that whether a  
19 party is negligent generally is a question of fact for the jury unless "different minds can  
20 reasonably arrive at but one result" (quotation omitted)). Additionally, state and federal safety  
21 regulations may provide evidence that a driver acted negligently. *See, e.g., Drummond v. Mid-*  
22 *West Growers Co-op. Corp.*, 542 P.2d 198, 201-03 (Nev. 1975) (discussing truck driver's  
23 violation of state and federal laws regarding placing flares behind his stopped vehicle as evidence  
24 of negligence); *Wang v. Marziani*, 885 F. Supp. 74, 79 (S.D.N.Y. 1995) (holding that "a  
25 reasonable jury could conclude that logging more than seventy hours during an eight-day period,  
26 falsifying the duty log and failing to secure all cargo, all in violation of Department of  
27 Transportation safety regulations . . . constitute reckless indifference to the rights of others"

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1 (quotation and internal citations omitted)); *Greist v. Phillips*, 906 P.2d 789, 793 (Or. 1995)  
2 (holding that a reasonable jury could find a driver working more than 70 hours in 8 consecutive  
3 days in violation of federal standards substantially contributed to an accident). With Plaintiffs'  
4 clarification, their proposed negligence claim is not, at heart, a claim for aiding and abetting  
5 violations of the MCA or FMCSR.

6         Additionally, the proposed amended complaint alleges Defendants negligently caused the  
7 accident that resulted in Jon Michael Slagowski's death. [Dkt. #273-6 at 4-5.] As evidence of  
8 negligence, Plaintiffs allege not only that Hannon executed a negligently dangerous maneuver  
9 after Wentland told him it was safe to proceed, but also that at the time of the accident,  
10 Defendants violated the federal safety regulations regarding the maximum number of hours to  
11 work in a day. [*Id.* at 4-7.] A reasonable inference from this allegation is that Defendants drove a  
12 long time on the day of the accident, and they were tired as a result. The proposed amended  
13 complaint also alleges Defendants were aware of their role in promoting the negligent behavior at  
14 the time they provided assistance. Defendants knew they were governed by safety regulations  
15 limiting the hours they could drive but had a practice of violating those provisions and their  
16 employer ratified this conduct. [*Id.*] A reasonable inference from these allegations is that the  
17 individual Defendants had a habit of driving for long periods of time, potentially resulting in  
18 fatigue, and their employer had a practice of encouraging this negligent behavior. Finally, the  
19 proposed amended complaint alleges Defendants knowingly and substantially assisted the  
20 negligent behavior because they knew of this conduct but continued to engage in and ratify the  
21 practice. Defendants' other arguments relate to whether Plaintiffs will be able to prove their  
22 claim, but those are issues more suitably resolved at summary judgment.

23         Because Plaintiffs' proposed amended complaint as clarified states a claim, I will grant  
24 Plaintiffs leave to amend to add an aiding and abetting claim. Plaintiffs shall file and serve the  
25 proposed amended complaint, pursuant to Local Rule 15-1(b).

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**III. Conclusion**

IT IS THEREFORE ORDERED that Defendants' Rule 12(c) Motion to Dismiss the Punitive and Special Damages Claims (Doc. #161) is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Emergency Motion to Amend the FRCP Rule 16 Case Management Conference Order to Allow Plaintiffs to Amend Their Complaint (Doc. #273) is hereby GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Objection (Doc. #306) to the Magistrate Judge's Report and Recommendation (Doc. #302) is hereby SUSTAINED as more fully explained in this Order.

IT IS FURTHER ORDERED that Plaintiffs shall file and serve their amended complaint immediately.

IT IS FURTHER ORDERED that Defendants' Motion to Strike Reply (Doc. #318) is hereby DENIED.

DATED this 30th day of September, 2014.

  
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ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE