

ALABAMA

Can a Company Ever be Responsible for a Customer's Sexual Harassment of an Employee?

It can be a part of daily life. At times, customers or clients will flirt or joke in “inappropriate ways,” typically with female employees. Some places of business may be more prone to this kind of conduct than others. You might imagine that waitresses in a cocktail bar, or trainers at a health club could be exposed to this type of behavior more often than female employees in more staid occupations. However, no business is immune to this problem, and it occurs frequently at sales offices, banks, doctors' offices, law firms—just about every kind of business which has contact with the general public.

During the present challenging economic times, it may be even more difficult to balance the concept that “the customer is always right” with an employer's obligation to provide an environment for its employees which does not expose them to pervasive sexual harassment.

What does the law require employers to do to prevent such behavior? Surprisingly, there have been few legal cases and relatively few legal articles which address an employer's duty in this regard. While untold numbers of cases and articles address an employer's obligation to prevent harassing conduct by supervisors or co-workers, little has been written on the subject of customer harassment.

However, California state courts have recently addressed this issue specifically and the issue is now before the California State Supreme Court with regard to a state statute prohibiting harassment. In *Salazar v.*

Diversified Paratransit, Inc., a bus driver sued her company when she was assaulted physically by a male client. The Court of Appeals held that the employee had no cause of action because her claim was based on customer conduct, rather than supervisor or co-employee conduct. The California Supreme Court has agreed to consider the case on appeal. Since California is often a place where new claims and legal theories are explored before they are presented elsewhere in the country, it is likely that we will see an increase in these types of claims in Courts in our area soon.

Indeed, in a recent federal case decided in March of this year by the Eleventh Circuit Court of Appeals, *Watson v. Blue Circle, Inc.*, that Court considered customer harassment as a part of the plaintiff's claim in reversing a summary judgment granted on behalf of an employer. The Plaintiff in the case is a truck driver—one of only three women drivers at the facility where she works, Blue Circle. She claimed that male customers and co-workers propositioned her frequently. The Eleventh Circuit held that the employee's allegations against her co-workers and the customers constituted a single unlawful employment practice. In essence, the Eleventh Circuit Court of Appeals combined the allegations about customers conduct along with that of co-workers in deciding whether the company's sexual harassment policy was effective, and whether the employee had timely complained about the harassment. Although the Eleventh Circuit did not squarely address the question of whether an employer is responsible for customer harassment of an employee, this opinion suggests that the door may be opening soon. In particular, this decision suggests that when courts consider whether an employee's work environment is one of pervasive harassment,

courts may be considering the behavior of customers as well as employees.

In the meantime, what can employers do to avoid potential harassment claims based on customer behavior?

1. First and foremost, like you already know, have a clear and well disseminated Anti-Harassment Policy.
2. Make sure your Anti-Harassment Policy provides avenues for complaints about customers and clients as well as employees.
3. Be certain the policy is consistently and effectively followed.
4. Be prepared to let even your customers know that certain behavior will not be tolerated.

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AR K A N S A S

Arkansas Passes Tort Reform

Enacted in Arkansas March 25, 2003, the “Civil Justice Reform Act of 2003” revolutionizes joint and several tort liability and limits compensatory and punitive damages that may be assessed in any action for incidents occurring on or after March 25, 2003, involving personal injury, property damage, or wrongful death. This report summarizes the key changes that will impact the trucking industry.

Joint and Several Liability. In the past, a victorious plaintiff could collect 100% of the judgment from any of several defendants, even if that defendant were only 1% at fault. Also, the jury could apportion fault only among those parties actually named in the lawsuit (even if a nonparty was partly responsible). The Act changes this “joint and several” tort liability in two principal ways. First, the jury may now consider the negligence of *non-parties*, as well as parties, in apportioning fault. Second, subject to two exceptions, each defendant can only be allocated damages equal to that defendant’s degree of fault.

First Exception—the Insolvent Co-Defendant. The first exception applies when a defendant is found to be more than 10% at fault and another defendant is unable to pay all or part of its share. Under these circumstances, a judge can increase the solvent defendant’s share of the damages, but only if (1) the plaintiff timely requests a determination that all or part of the amount due will not be “reasonably collectible” from one or more of the defendants; and (2) the court determines that the amount is not “reasonably collectible.” The amount a judge may increase a solvent defendant’s

proportional share depends upon that defendant’s degree of fault.

Second Exception—Acting in Concert or As Principal. The second exception applies in the context of intentional torts and then only if the defendants acted in concert with, or if one or more of the defendants (e.g., a truck driver) acted as an agent or servant of, another defendant (e.g., a trucking company). If so, then a defendant may have to pay the other entity’s share as well as its own.

Procedural Considerations. As noted above, when assessing percentages of fault, the court will allocate fault among all responsible persons or entities, even if they are not parties to the suit. This includes any entity that settled with the plaintiff. If a defendant wants the court to consider the negligence or fault of a non-party when allocating fault, then at least 120 days prior to the trial the defendant must file a notice that (1) identifies the non-party and (2) states why the non-party was at fault. As was the case under prior law, a plaintiff found to be 50% or more at fault will not be able to recover any damages.

Punitive Damages. The Act changes the law of punitive damages in three significant ways.

Proof Required. To recover punitive damages, the plaintiff will have to prove by clear and convincing evidence either: (1) that a defendant found liable for compensatory damages maliciously or recklessly continued in a course of conduct, even though it knew or should have known that such conduct would naturally and probably result in injury or damage; or (2) that the defendant intentionally pursued a course of conduct causing injury or damage

Cap on Punitive Damages. The Act will normally limit punitive damages per plaintiff to the greater of (1) \$250,000.00, or (2) three times the amount of compensatory damages (up to \$1 million). The caps do not apply if the plaintiff proves through clear and convincing evidence that the defendant intentionally engaged in conduct designed to harm the plaintiff.

Bifurcation of Proceedings. The Act also makes it easier to obtain separate trial segments (“bifurcated proceedings”) on compensatory damages/punitive damages. When punitive damages are sought, any party may request a bifurcated proceeding at least ten days prior to trial. In a bifurcated trial the fact finder must first determine that the plaintiff is entitled to compensatory damages before considering whether to award punitive damages. Therefore, evidence that is relevant only to establishing punitive damages, such as the financial condition of the defendant, will not be admissible in the first liability/compensatory damages phase.

Evidence of Medical Bills. The Act limits evidence of medical care/treatment-related damages to those costs *actually* paid on behalf of the plaintiff (or those unpaid bills for which the plaintiff or any third party is legally responsible). Thus, if the medical care provider’s actual charges are restricted (for example by an HMO’s fee schedule), the plaintiff may introduce only those “reduced” charges.

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CALIFORNIA

Motor Carrier Held Liable for the Negligence of its Independent Contractor

In *Serna v. Pettey Leach Trucking (2003)* 110 Cal.App.4th 1475, a wrongful death action against an interstate motor carrier who only made the arrangements for transportation of goods, the court held that the motor carrier is liable to plaintiffs for harm caused by the negligence of the carrier's independent contractor who transported the goods and caused the death of decedent.

Facts. A Georgia poultry company requested Pettey Leach Trucking, Inc. (PLT) to arrange transportation to California for a load of frozen poultry. PLT agreed, and the bill of lading identified PLT as the "carrier." Then, PLT arranged for another motor carrier, Sky Transportation, Inc. ("Sky") to pick up the poultry and transport it to California. The bill of lading was signed by a driver employed by Sky who drove a truck registered and maintained by Sky. When the Sky truck reached California, the driver negligently collided with a motorcycle driven by decedent, Mr. Serna. Decedent's wife and children brought a wrongful death action against PLT, claiming PLT was vicariously liable for the Sky truck driver's negligence. PLT, as a defense, alleged it was merely acting as a broker, not a carrier for the transportation of goods. PLT also argued that since frozen poultry is exempt under certain statutory regulations, it cannot be held vicariously liable for the tort of Sky.

Holding. The court held that a carrier who undertakes an activity (1) which can be lawfully carried on only under a public franchise and authority and (2) which involves possible danger to the public, is

liable to a third person for harm caused by the negligence of the carrier's independent contract. The court reasoned, were the rule otherwise, a carrier could escape liability for the negligence of its independent contractors, thus reducing the incentive for careful supervision and depriving those who are injured of the financial responsibility of those to whom the privilege was granted. For these reasons, the carrier's duties are non-delegable, and it is only when the carrier is "not regulated" at all that the rule is otherwise.

The court further held the cargo "poultry exemption" does not mean PLT was "not regulated" or that it was not subject to the authority of the surface transportation board. The exemption for the transportation of agricultural commodities, including poultry, exempts the cargo, not the carrier, and the exempt nature of the commodity has no bearing on the application of financial responsibility and safety regulations adopted by the surface transportation board.

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COLORADO

Colorado's Motorist Insurance Identification Data-Base Program; Insurer Reporting Requirements are Increased in 2004, But Exemptions for Commercial Vehicles are Unaffected

History and Operation of the Database

Colorado's Motorist Insurance Identification Database Program (MIIDB) evolved from a 1995 legislation known as the Uninsured Motorist Identification Database Program Act. This legislation directed the Transportation Legislation Review Committee to examine Colorado's compulsory motor vehicle insurance system and the problem of uninsured motorists in the state for the purpose of proposing legislation to "... alleviate if not eliminate the problem." The law has been modified several times since 1995, most recently during the 2003 legislative session of The Colorado General Assembly.

The MIIDB is maintained by Explore Information Services ("Explore"), the "designated agent" Colorado contracted with to perform this service for the state. Every automobile insurer issuing policies in the state of Colorado is required to submit information to Explore regarding policies issued in Colorado. The contents of the report include the name, date of birth, driver's license number, and address of each named insured owner or operator; the make, year, and vehicle identification number of each insured motor vehicle and the

policy number, effective date, and expiration date of each policy. “Self-insured” vehicle owners are not required to report to Explore. Explore also receives reports from the Colorado Department of Revenue listing the registered owner of Colorado vehicles. Explore then matches records to determine whether each registered vehicle is insured. If no match is located, Explore mails a notice to the vehicle owner advising them of Colorado’s mandatory insurance laws.

Insurer Reporting Requirements

The MIIDB reporting requirements for insurance companies are contained in §10-4-615, C.R.S. The amendments to this statute, as enacted by the General Assembly under Senate Bill 03-239, expand insurer reporting requirements over the next year. Previously, insurers were required to provide a record of each policy issued during the immediately preceding month to the Explore before the seventh working day of each calendar month.

The new reporting requirements are a great deal more onerous for insurers. Revised § 10-4-615, C.R.S. provides that beginning on January 1, 2004, each insurer that has ten thousand or more current policies in place for the preceding six months must report policy information in each of twenty-six reporting periods for the immediately preceding two-week period. Then, beginning on July 1, 2004, each insurer that has ten thousand or more current policies in place for the preceding six months must provide policy information every week for the immediately preceding week. Such information shall be reported no later than seven working days after the last date of the report period.

Additionally, beginning January 1, 2004, each insurer must provide policy information on all existing policies issued at least

every six months. Finally, each insurer is required to provide information regarding changes to existing policies to Explore at the time the insurer receives such information.

Commercial Lines Exemption

Section 10-4-615, C.R.S. provides for creation of an exception from the reporting requirements for commercial lines of insurance and the Department of Revenue has issued a regulation that contains limited reporting requirements for policies of commercial insurance.

Section 10-4-615(1)(a), C.R.S. (2003) provides in pertinent part:

Each insurer that issues a policy pursuant to this part 6 or part 7 of this article shall provide to the designated agent selected in accordance with section 42-7-604 (4), C.R.S., a record of each policy issued during the immediately preceding period. Such record shall comply with the requirements of subsections (2) and (3) of this section, **except as may otherwise be provided for commercial lines of insurance in rules adopted by the department.** (emphasis added)

In accordance with this legislative mandate, the Colorado Department of Revenue (DOR), Driver Support Services Motor Vehicle Division, issued a Regulation. The current version of the regulation, titled “Final Rule, Amendments to Regulation I Motorist Insurance Identification Database” (“Regulation I”), went into effect on November 1, 1999.

Section 6, of Regulation I contains the reporting requirements for commercial lines of insurance. Importantly, the Regulation states that “the primary purpose of the database is to track personal motor vehicles rather than commercial

vehicles.” The Motor Vehicle Registration file transmitted to Explore by DOR contains primarily personal motor vehicle information. Commercial vehicles registered for interstate operations are maintained in a separate, distinct, database maintained by the Motor Carrier Services Division.

However, information on some commercial vehicles operated within the State of Colorado is also included in the DOR file and insurance information reporting is required for these vehicles.

Specifically, Regulation I requires the following reporting of commercial policies:

- ▶ Commercial motor vehicle policies should be reported as vehicle specific policies if vehicle information is available. Vehicle information includes the vehicle’s VIN (Vehicle Identification Number), make and year.
- ▶ Insurers issuing commercial motor vehicle policies not able to report on a vehicle specific basis will be allowed to report on a non-vehicle specific type. The owners’ name and address is required but vehicle and driver information is not required. While vehicle information, including the VIN, make and year is not required for non-vehicle specific policies, insurers should send that data if they have the VIN on file.
- ▶ For non-vehicle specific policies, matching will be done by Explore using the insured name and address against the vehicle registered owner’s name and address. Any vehicles matched will have the insurance status set as exempt.

Once identified as such, the commercial vehicle will be noted as insured by a commercial motor vehicle policy and exempt from further tracking unless the carrier subsequently notifies Explore that

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the vehicle is no longer insured by a commercial motor vehicle policy.

Additionally, Explore is authorized to mark vehicles with specified license plate types as exempt from MIIDB insurance information tracking. These license plate types are: Buses (the first three characters of the License Type field are BUS); Dealers (DLR); Farm Vehicles (FTK or FTR); Special Mobile Equipment (SME); Special Mobile Machinery (SMM); Special Use Vehicle (SVW); Trailers (TRL); and Truck Tractor (TTR).

The following are also exempt if the last three characters of the license plate are: CNY, CTY (city/county plates); RNT, RTL (rental plate); SOC (State of Colorado); CCL (TV/radio).

In addition, a "C" in the Carrier Type field on any plate indicates the vehicle is used for commercial purposes and will be marked exempt.

The matching process is designed to minimize the number of notices sent to request insurance information from registered owners by Explore and to minimize the opportunity for owners of vehicles insured pursuant to a commercial policy from receiving a citation for no insurance.

Conclusion

Although the Database reporting statute was amended during the 2003 legislative session, to require more frequent reporting, the exemption from Database tracking for commercial policies, as stated in the 1999 Regulation, remains unchanged. Regulation I requires that information on commercial policies be reported when the policy is issued. If a commercial policy does not identify individual vehicles, the insurer must report the name and the address of the insured. Under the

Regulation, Explore is responsible for matching the name and address of the insured with the name and address of the registered owner of the vehicle. Once a vehicle is identified as insured under a commercial motor vehicle policy, it is exempt from further tracking.

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C O N N E C T I C U T**Connecticut Supreme Court
Elaborates on Standards
for Admissibility of Expert
Opinion Testimony**

The Connecticut Supreme Court recently elaborated on the proper method to be employed by trial courts when considering the admissibility of expert opinion testimony and evidence. In *Hayes v. Decker*, 263 Conn. 677, 822 A.2d 228 (2003), the Court upheld the decision of the Connecticut Appellate Court overruling and remanding a medical malpractice case wherein the evidence from the plaintiff's medical expert was excluded. The Court also elaborated on Connecticut's adoption of the framework set forth in *Daubert v. Merrell Pharmaceuticals*, as well as the method for determining the admissibility of innovative scientific evidence in Connecticut as enunciated in *State v. Porter*.

In brief, the case arose out of a course of treatment of a fifty year old man, Gilbert Hayes. During a physical in May, 1995 Hayes reported problems with sexual dysfunction to an internist, Dr. Decker, and demonstrated multiple cardiac risk factors. Dr. Decker recommended that the plaintiff lose weight to control his blood pressure and that he stop taking Procardia as a possible solution for sexual dysfunction. Hayes stopped taking Procardia in June, 1995. In July, 1995, the plaintiff suffered a massive heart attack. Shortly thereafter, he underwent triple bypass surgery.

The plaintiff's complaint alleged that Dr. Decker failed to properly diagnose and treat symptoms of cardiac ischemia, and that he permitted the plaintiff to discontinue Procardia without substituting another heart medication. During trial, the defen-

dant filed a motion in limine to preclude testimony from the plaintiff's expert witness pursuant to *State v. Porter*. At the *Porter* hearing, the plaintiff's expert testified that "although the discontinuation of the plaintiff's blood pressure medication did not cause [the plaintiff's] heart attack, it did cause his blood pressure to rise and resulted in more tissue damage than otherwise would have occurred had he not stopped taking the medication." His opinion was based on studies regarding blood pressure and oxygen demand and the interplay of the two during the acute phase of a heart attack. He also testified about studies involving Procardia and blood pressure.

The expert further testified that he was not aware of any research or completed study that would demonstrate a link between failure to take blood pressure medication and an increase in the severity of a heart attack. The trial court precluded the expert from testifying "because there was no study concluding that the withdrawal of Procardia will increase the severity of heart attack" such that the expert's opinion was "speculative." A defendant's verdict was rendered in the trial court by a jury. The trial court denied the plaintiff's motion to set aside the verdict in light of the lack of documentation regarding a link between Procardia and the severity of a heart attack.

The plaintiff filed an appeal arguing that the trial court misapplied *State v. Porter*, regarding the admissibility of scientific evidence. The Connecticut Appellate Court reversed the trial court in favor of the plaintiff holding that "the [trial] court incorrectly applied the law as set forth in *Porter* because the plaintiff's medical expert's testimony as to the link between the discontinuation of Procardia and an increase in severity of the plaintiff's heart

attack should have been considered under the standards for the admissibility of expert opinion testimony." The expert's testimony should have been considered, including his testimony regarding the documented effects of Procardia. Further, "the relationship between blood pressure and tissue damage during a heart attack should have been considered under the standard for the admissibility of scientific evidence under *Porter*, or simply admitted on a showing of relevance. The [trial] court never made this crucial distinction and, in applying the *Porter* analysis to [the plaintiff's medical expert's] opinion *rather than to the scientific evidence on which it was based*, improperly excluded all of his proposed testimony on Procardia, blood pressure and the amount of tissue damage that may occur during a heart attack."

The Connecticut Supreme Court held that the trial court abused its discretion in excluding the plaintiff's medical expert's testimony and affirmed the appellate court. The Supreme Court noted that the trial court excluded the plaintiff's medical expert's anticipated testimony because of the fact that there were no studies documenting a nexus between discontinuation of Procardia and the severity of a heart attack and because the trial court concluded that "the more reliable evidence was that the speed of treatment increases the severity of a heart attack." The appellate court properly concluded that the foregoing grounds improperly focused on the conclusions of the medical expert rather than the methodology by which they were reached: "[T]he *Porter* analysis is meant to determine whether the methodologies or premises underlying an expert witness' conclusions are valid, not to assess the credibility of the expert's ultimate conclusion." *Id.* at 686. In addition, the trial court's second basis for precluding the

plaintiff's medical expert's testimony was a misapplication of *State v. Porter*, which noted that the crux for admissibility for innovative scientific evidence is the methodology employed to reach a conclusion, as opposed to the legitimacy of the conclusion itself. In the present case, the court focused on the conclusion reached by the plaintiff's medical expert as opposed to the methodology used by the expert, in contravention of *Porter*.

The Connecticut Supreme Court also concluded that the evidence at issue was not subject to a *Porter* analysis and may have been admissible on a mere relevance basis. In other words, the evidence the plaintiff sought to introduce through his medical expert consisted of generally accepted principles which are supported by numerous studies.

In sum, the Connecticut Supreme Court provided judicial gloss on the application of *Daubert* and *State v. Porter* admissibility analyses while reiterating that the crux of the consideration is the methodology used by the expert in reaching an opinion rather than the conclusion drawn therefrom.

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FLORIDA

Contingency Risk Multipliers Disallowed

The Supreme Court of Florida has recently addressed the issue of attorney fees once again. *Sarkis v. Allstate Ins. Co.*, 2003 Fla. Lexis 1710. In this case, the Supreme Court considered whether a contingency risk multiplier may be applied to an award of attorney fees pursuant to Fla. Stat. §768.79 (1990) and concluded that the multiplier may not be utilized. This Decision clarifies the confusion among the district courts of appeal.

As you may already know, Fla. Stat. § 768.79 allows for the prevailing party in a lawsuit to also recover his fees and costs if certain conditions are met. Specifically, this statute declares that if a plaintiff makes an offer to settle a lawsuit (called an offer of judgment) and the defendant rejects that offer and a jury subsequently awards the plaintiff 25% more than the offer of judgment, then the plaintiff may recover his costs and fees from the defendant in addition to the judgment. Conversely, if a defendant makes an offer of judgment to the plaintiff and the plaintiff rejects the offer and subsequently recovers 25% less than the offer, then the defendant is entitled to fees and costs from the plaintiff. It is significant to note that the fees and costs that can be recovered under § 768.79 begin to accrue only after the offer of judgment is formally presented to the other party.

The reasoning behind § 768.79 is to encourage the settlement of claims and to decrease the congestion of litigation in the courts. When determining the appropriate amount of fees, a court must determine what is appropriate pursuant to the criteria as set forth in subsection § 768.79(7)(b). The court must also consider the factors

established by the Florida Supreme Court in the Florida Rules of Civil Procedure 1.442(h)(2) when establishing reasonable attorney fees.

In *Sarkis*, the trial court not only awarded the plaintiff attorney fees according to a reasonable hourly rate, but also applied a contingency risk multiplier of 1.5 to enhance the overall award. The trial court utilized the traditional contingency risk multiplier analysis to conclude that a multiplier was appropriate in this case. The defendant appealed, of course, and the Fifth District Court of Appeal reversed, finding as a matter of law that contingency risk multipliers cannot be applied to attorney fees that are awarded pursuant to §768.79, and the Florida Supreme Court agreed.

The rationale behind the Supreme Court's opinion is straightforward. The Court points out the difference between the policies underlying the use of the contingency risk multiplier and the award of attorney fees pursuant to § 768.79. While §768.79 is used as a tool to encourage settlement and to discourage litigation, the contingency risk multiplier is actually a tool to encourage litigation. The purpose behind the multiplier is to encourage attorneys to take cases that contain greater risk of non-payment in order to promote access to the courts by those who cannot afford competent counsel. Obviously, these two policies are diametrically opposed to one another. The Court resolved this discrepancy by strictly construing § 768.79 and Fla. R. Prof. Cond. 1.442, which means that since neither the statute nor the rule of professional conduct expressly approve of applying a contingency risk multiplier to attorney fees in the context of an offer of judgment then such use of the multiplier is prohibited.

The *Sarkis* decision does not affect the traditional application of attorney fees

under § 768.79 with regards to offers of judgment. Plaintiffs may still obtain reasonable attorney fees if the judgment is 25% more than their offer and defendants may obtain attorney fees if the judgment is 25% less than their offer. The only thing the *Sarkis* decision really does, is it disallows the use of a contingency risk multiplier when a court is calculating the amount of reasonable attorney fees in the situation where the plaintiff has recovered more than 25% of the offer rejected by the defendant. Thus, when you consider whether to accept or to reject a plaintiff's offer, you need not fear that if you should lose the case and attorney fees are awarded that the court will use a contingency risk multiplier to substantially increase the amount of attorney fees you will be required to pay.

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G E O R G I A

Logo Liability Rule: A Warning For Common Carriers

“It is common practice for motor carriers who operate under the authority of the ICC [Interstate Commerce Commission] . . . to lease equipment from independent contractors who are not regulated by the ICC. Historically, this practice led to abuses which threatened the economic stability of the trucking industry and public interest.” *Prestige Cas. Co. v. Michigan Mutual Ins. Co.*, 99 F.3d 1340, 1342 (6th Cir. 1996). Before federal regulations governed these relationships, common carriers used these agreements to insulate their liability. In today’s regulated marketplace, this protection is limited. This article briefly explores this relationship and its impact on common carriers.

Typical Scenario: Motor Carrier enters into a lease arrangement with Truck Driver to haul goods from New York to Georgia. Truck Driver places Motor Carrier’s logo and ICC number on the side of his tractor, picks up a loaded trailer and heads down Interstate 95. Truck Driver drops off the trailer, and in order to help defray his expenses, finds another trailer to haul part of the way on his journey to his home state. He keeps Motor Carrier’s logo and ICC number on the side of his tractor. Truck Driver negligently cuts off a driver in South Carolina on his way home and the driver is injured in the accident.

In some states, the driver of the passenger vehicle could file a claim against Truck Driver and the Motor Carrier under the legal theory of *respondent superior*.

Respondent superior is a theory that allows an injured party to sue an employer for the negligent acts of its employee. However, to successfully reach Motor Carrier’s money, the injured party must establish that the truck driver was an employee of Motor Carrier at the time of the accident. This might be tough to do because in some states, Truck Driver is viewed only as an independent contractor, not an employee of Motor Carrier. Thus, the injured party can potentially be left without a substantial purse to pay for his injuries.

This example demonstrates that the use of non-owned vehicles by authorized motor carriers “caused public confusion as to who was financially responsible for the vehicles.” *Prestige*. As a remedy to this abuse, the ICC was amended. See 49 U.S.C. § 304(e) (1956), revised 49 U.S.C. § 11107 (1978). These amendments resulted in the promulgation of regulations which require that every lease entered into between an ICC-licensed carrier, must contain a clause stating that the ICC carrier maintains “exclusive possession, control, and use of the equipment for the duration of the lease . . . [and] assume[s] complete responsibility for the operation of the equipment for the duration of the lease.” 49 C.F.R. § 376.12(c)(1) (2001). “The majority of authority holds that 49 C.F.R. § 376.12(c) creates a carrier’s liability for a leased truck’s negligence as a matter of law.” *Reliance Nat’l. Ins. Co. v. Royal Indemn. Co.*, 2001 WL 984737 (S.D.N.Y. Aug. 24, 2001) (citing case law from the Fifth, Sixth, Eighth, Ninth and Tenth Circuit Courts of Appeal). This principal is referred to as the logo liability rule, *Id.*, and is based on the premise that a leased driver operating under the permit of a licensed carrier is a statutory employee of the carrier for which the carrier is

vicariously liable for the negligence of the driver. *Empire Indemnity Ins. Co. v. Carolina Cas. Ins. Co.*, 838 F.2d 1428, 1433 (5th Cir. 1988). In a majority of states, if the truck driver in the above example continues to display the motor carrier’s logo and ICC number (which the truck driver is required to do when hauling goods interstate for the benefit of the motor carrier), he will be classified as a “statutory employee” of the motor carrier, even though at the time of the accident the Truck Driver was finished delivering goods for the motor carrier.

In a minority of states, the ICC requirements are interpreted more narrowly. These states tend to limit the scope of a motor carrier’s liability based on the given facts. Under the test employed in these minority states, a motor carrier would not be liable for the accident discussed above because it occurred while the truck driver was not on the motor carrier’s business, regardless of whether the logo was displayed.

A motor carrier that leases a commercial motor vehicle from an owner-operator should heed the potential liability the carrier is exposed to for the negligent acts of a leased driver. Additionally, a motor carrier should analyze its insurance policies, as insurers will often exclude coverage under a lease arrangement, which potentially exposes the motor carrier at financial risk for the owner-operator’s acts. As states differ on the application of these rules, liability may or may not exist—depending on your location.

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I N D I A N A

Lawyer Takes a Ride as a Trucker

I recently had the pleasure of driving my first BIG RIG. It was a crisp autumn day filled with all the promise of a holiday morning when two of the partners, myself and a paralegal set out on a journey to a local trucking company that was gracious enough to give us a tour. We were there to examine the safety equipment and mechanicals of tractor-trailers for the transportation litigation section of our firm. Boldly I inquired as to whether the owner would allow me take the 18-wheeler out for a spin, and much to my delight and astonishment he agreed to my request!

I am happy to report that the air compression seats are incredibly comfortable, and the hang mirrors and added safety features definitely enhance the visibility from inside the tractor. However, what has remained with me from that day even more than the once in a lifetime experience of driving the BIG RIG was the fact that once in the cab—that driver has only herself and her equipment to rely upon. Smaller vehicles are easily and quickly lost from visibility, even with the addition of hang mirrors and additional mirror options for added safety. Any selfish, sudden, stupid movement by a fellow motorist can result in horrific collisions with tragic results. Shifting through ten gears while traveling 65 miles per hour and over is not an easy task—and one few motorists realize is necessary every time a semi driver is cut off by a smaller, faster vehicle.

Perhaps we cannot all have the experience of operating an eighteen-wheeler on the open road, but maybe we can all try to remember—and to remind every person we know as often as possible, and to tell them to tell every person that they know,

and so on—that although we all wish traffic would move a little faster—cutting off our tractor-trailer driving friends can result in a much bigger catastrophe than being an hour late. And maybe in doing so we can save one life.

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I N D I A N A

Lakes and Rivers Transfer (a Division of Jack Gray Transport) v. Rudolph Robinson Steel Company, 2003 WL 22160276 (Ind.App.Ct. Sept. 19, 2003) (Pre-trial attachment by trucking company in association with demand for payment is oppressive)

Robinson Steel entered into an agreement with Orion Maritime, Inc. to ship steel to the U.S. for Robinson's customers in the Midwest. The steel was to be shipped on a ship owned and operated by Orion. The cargo was to be unloaded at Detroit and Chicago. However, only a portion of the steel bound for Detroit was unloaded there, as the ship was diverted to Burns Harbor, Indiana, which was not one of the scheduled ports. The Chicago cargo and the remaining Detroit cargo was unloaded in Indiana. The diversion of the ship caused Robinson to incur unexpected additional costs for shipping, so Orion agreed to pay for associated costs. Lakes and Rivers (L&R) was to do the transfer and unloading. Lakes and Rivers attempted to communicate with Robinson to see who would be responsible for the stevedoring charges. Robinson told L&R that Orion would be responsible and sent the agreement it had with Orion to L&R.

For the next six months, L&R attempted to collect the charges from Orion. Orion repeatedly acknowledged liability but never paid. After its failure with Orion, L&R then made a demand for payment from Robinson and filed suit against Robinson. L&R requested and obtained a pretrial

order attaching a quantity of Robinson's steel that remained at Burns Harbor, Indiana in L&R's possession, pending resolution of the merits of the underlying action. Both parties filed motions for summary judgment on the underlying claim. The trial court granted Robinson's summary judgment motion and denied L&R's motion. The Appellate Court affirmed, holding that Robinson had no contractual obligation to pay L&R for services Orion requested and for which it agreed to pay for on behalf of Robinson.

Thereafter, Robinson filed a counterclaim against L&R, alleging that the pretrial attachment was wrongful and oppressive and seeking damages. The trial court granted a partial summary judgment in favor of Robinson, finding that Robinson was entitled to judgment on the counterclaim as a matter of law. The issue of damages was to be determined at trial. L&R appealed, raising only the issue of whether an attachment-defendant (Robinson) in a civil action is entitled to recover damages for wrongful and oppressive attachment as a matter of law when it prevails via summary judgment in the underlying action. The Court of Appeals reversed and remanded. On remand, the trial court issued an order finding that the attachment was oppressive, awarding over \$119,000 in damages including over \$64,000 in attorneys fees. L&R appealed that decision. The Court of Appeals then affirmed, holding that the attachment was oppressive and that Robinson was entitled to attorneys fees.

The Court of Appeals held that the trial court's decision was not erroneous since Orion, the ship owner, admitted that it was responsible for fees (and L&R went after Robinson anyway), the purchasers were not able to pick up the steel, and some of them were told that the shipper (Robinson) had not paid its bills, damaging Robinson's

goodwill and creating embarrassment, and the steel was damaged by weather. The Court held that damages available included expenses incurred in defending against the attachment proceeding and damages for injury to or loss to the property once it is seized. Therefore, attorneys' fees were appropriate.

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KENTUCKY

Recent Developments in Punitive Damages: Constitutional Challenges and Recent Kentucky Cases

I. State Farm Mutual Automobile Insurance Co. V. Campbell, 538 U.S. _____, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

This case was decided by the United States Supreme Court on April 7, 2003. The Court's opinion deals with the evidence that can properly be used to demonstrate the degree of the defendant's reprehensibility in a punitive damages case. The opinion finally gives lower courts guidance they can use in a concrete fashion when called upon to decide whether, and how much, to reduce outlandish punitive damages awards.

Prior to trial, State Farm moved to exclude evidence of alleged conduct that occurred in unrelated cases outside of Utah (the state where the case was pending), based on *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The trial court denied that motion. During the trial, the Campbells introduced extensive expert testimony regarding unsavory and fraudulent practices by State Farm for over 20 years in numerous other states outside Utah. The jury eventually awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court subsequently reduced to \$1 million and \$25 million, respectively.

The United States Supreme Court reversed. The Court strongly re-affirmed its adherence to the three guideposts established in *Gore*: (1) the degree of reprehensibility of the defendant's conduct;

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(2) the ratio of the punitive damages to the plaintiff's actual or potential harm; and (3) a comparison of the punitive damages to civil or criminal penalties for comparable conduct. Justice Kennedy's majority opinion declared that, under the principles outlined in *Gore*, "this case is neither close nor difficult."

1. Reprehensibility. The Court held that as a general rule, a state cannot impose punitive damages to punish a defendant for acts which occurred outside the jurisdiction of the Court, even if those acts were unlawful where they occurred. The Supreme Court emphasized that the jury must be instructed that it may not use evidence of out-of-state conduct to punish a defendant for action in the jurisdiction where it occurred. Also, the only type of conduct that can justify the imposition of punitive damages is the conduct that harmed the plaintiff.

2. Ratio. The Court reiterated its pronouncement in *Gore* that the amount of punitive damages awarded must be "reasonable and proportionate" to the amount of harm to the plaintiff and the amount of compensatory damages awarded. The Court declared that a constitutionally permissible ratio will seldom exceed single digits, or a nine to one ratio.

In addition, the U.S. Supreme Court disapproved the use of State Farm's "enormous" wealth as a basis for reinstating the jury's award. "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." Therefore, the argument that it takes an extremely large punitive damages award to "send a message" to a wealthy defendant

does not justify a departure from the normal rule of single digits.

3. Other comparable penalties. The third guidepost from *Gore* is a comparison between the punitive damages award and civil or criminal penalties which are available in comparable cases. The Court did note that the most relevant civil penalty for this type of conduct under Utah law was a \$10,000 fine for an act of fraud, an amount "dwarfed" by the \$145 million punitive damages award. This approach should be aggressively argued in truck accident litigation where civil and criminal penalties may be relatively small amounts.

State Farm was a bad faith case involving economic damages, not personal injuries. Nevertheless, any lingering questions as to whether its analysis applies to personal injury or product liability cases are now answered in several other cases. Several cases including two originating from Kentucky, *Ford Motor Co. v. Smith*, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (May 19, 2003), and *Chrysler Corp. v. Clark*, 02-1748 (October 6, 2003), demonstrate compellingly that the Court considers personal injury cases to be directly governed by its holding in *State Farm*. In these cases the U.S. Supreme Court granted review, vacated the judgement and remanded for reconsideration in light of *Gore*, and/or *State Farm*, sending a strong signal to lower courts in both the state and federal systems.

II. Recent Kentucky Cases

A. *Sand Hill Energy, Inc. v. Ford Motor Co.*, Ky., 83 S.W.3d 483 (2002).

This was a product liability case involving a 1977 Ford pickup. The jury awarded \$3 million in compensatory damages and \$20 million in punitives. The Kentucky Supreme

Court, however, reinstated the compensatory award and \$15 million of the punitive award. Justice Cooper wrote a blistering dissent, suggesting that the majority was less interested in due process than it was in the "redistribution of wealth". On May 19, 2003, the United States Supreme Court granted *certiorari*, vacated the Kentucky Supreme Court opinion and remanded the case for reconsideration in light of *State Farm*. Oral arguments before the Kentucky Supreme Court are currently scheduled in fall 2003. There is a strong argument that the 5 to 1 ratio is excessive in a case in which the plaintiff received a substantial compensatory award which clearly contained a punitive element.

B. *Rockwell International Corp. v. Wilbite*, 203 WL 21826306 (Ky. App., August 8, 2003) (not final).

This was a PCB contamination case in which the jury awarded over \$7.6 million in compensatory damages and \$210,000,000.00 in punitive damages, a ratio of more than 27 to 1. The Kentucky Court of Appeals reversed the judgment in its entirety. With respect to punitive damages, the Court found no need to specifically address the constitutionality of the award under *Gore* and *State Farm*. Instead, the Court held that the punitive award was the result of passion and prejudice created by plaintiffs' counsel in an inflammatory closing argument which, among other things, repeatedly lampooned Rockwell's location in Seal Beach, California, "where everybody has a tan and a \$60 haircut and life is good." The Court noted briefly that, even if it had not reversed the punitive award on these grounds, it would have been required to reduce the amount of the award consistent with *State Farm*. A motion for discretionary review has been filed by the

plaintiffs in the Kentucky Supreme Court to reinstate the entire award.

A longer version of this article was presented as part of a recent ALFA seminar on punitive damages and is available from the authors.

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M I C H I G A N

Evidence of a Defendant's Criminal Conviction is Now Admissible in a Civil Case

In *Waknin v Chamberlain*, 467 Mich 329; 653 NW2d 176 (2002), the Michigan Supreme Court recently held that evidence of a defendant's criminal conviction can be introduced in a civil case. Prior to this decision, such evidence was inadmissible.

After being convicted of assault and battery, the defendant was sued by the plaintiff in a civil suit for assault and battery, in part on the same basis of the same act that resulted in the defendant's conviction. The trial court did not allow evidence of the defendant's conviction to be introduced in the civil case. The jury returned a verdict of no cause of action.

Subsequently thereafter, the plaintiff filed a motion for a new trial, however, the trial court, relying on *Wheelock v Eyl*, 393 Mich 74, 79; 223 NW2d 276 (1974) and MRE 403, denied the plaintiff's motion. The Court of Appeals, relying on MRE 403, affirmed the lower court's decision and held that the trial court did not err in excluding evidence of the defendant's conviction as the probative value of this evidence was outweighed by its prejudicial effect. The Michigan Supreme Court reversed the Court of Appeals' judgment and remanded the case back down to the trial court for a new trial.

The Michigan Supreme Court, in its analysis, acknowledged its earlier decision in *Wheelock*, where it stated "a criminal conviction after trial, or plea, or payment of a fine is not admissible as substantive evidence of conduct at issue in a civil case arising out of the same occurrence."

Wheelock, supra, at 79. However, it noted that *Wheelock* was decided prior to the adoption of the Michigan Rules of Evidence.

Wheelock's decision was simply inconsistent with the rules of evidence.

With that, the Court engaged in a detailed analysis of the Rules of Evidence. It found the defendant's conviction of assault and battery for the same conduct that plaintiff was seeking civil damages for, as relevant evidence pursuant to MRE 401 and thus admissible pursuant to MRE 402. The Court then looked at MRE 403 in assessing the admissibility of the defendant's criminal conviction in the civil suit. It indicated that "evidence is not inadmissible simply because it's prejudicial." Furthermore, it heavily emphasized the term "unfair prejudice" in MRE 403. The Court referred to *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998), where it stated: "Rule 403 does not prohibit prejudicial evidence; only evidence that is unfairly so. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." The Court agreed with the lower court's decision that the admission of the defendant's conviction would be prejudicial, however, it believed that the prejudicial effect of the admission of defendant's conviction would not be unfair.

The Court held that the admission of evidence of the criminal conviction in a civil case, arising from the same incident that resulted in the criminal conviction, is admissible and its prejudicial effect would not be unfair.

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M I S S O U R I

Worker's Compensation Bars Claim by Passenger Against Driver

On May 8, 2000 the plaintiff was a passenger in a tractor trailer traveling in Iowa. The plaintiff and defendant, Kenneth Robertson, were employed by Emerson Electric Company. The plaintiff claimed that due to the carelessness and negligence of Mr. Robertson the vehicle overturned causing the plaintiff serious and permanent injury. Specifically the plaintiff alleged that defendant Robertson was careless and negligent by: 1) operating his vehicle at a speed that was excessive under the circumstances; 2) taking a route that was inappropriate for the tractor trailer; 3) failing to ensure the load was secure and would not shift; and 4) operating his vehicle when he knew the load had shifted thereby creating a substantial risk of overturning.

The defendant filed a motion to dismiss for lack of subject matter jurisdiction and asserted the workers' compensation bar. The appellate court, relying on a Missouri Supreme Court opinion, *State Ex. Rel Taylor v. Wallace*, 73 S.W.3d 620 (Mo.banc 2002), held that the Workers' Compensation Law provides the exclusive remedy against employers covered by its provisions and its immunity from suit extends to employees of the exempt employer, albeit in a more limited fashion.

The appellate court indicated that an employee may sue a fellow employee for purposeful negligent acts outside the scope of the employer's responsibility to provide a safe work place. The court determined that the assertion that the defendant operated the tractor trailer in a manor that was careless constituted an allegation that

defendant failed to discharge the employer's duty to provide a safe work place. These allegations did not rise to the kind of purposeful, affirmatively dangerous conduct that would place the fellow employee outside the protection of the Workers' Compensation Law. Therefore, the trial court was affirmed in dismissing the civil action.

Denis Brown v. Kenneth Robertson, Missouri Court of Appeals, Eastern District, Case No. ED 81952 (4/15/2003).

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M I S S O U R I

Satellite Information Part of Rule 26 Disclosure?

The Eighth Circuit Court of Appeals, in *U.S. Xpress Enterprises, Inc. v. J.B. Hunt Transport, Inc.* 203 WL 367210 (8th Cir. Mo.), recently touched upon whether or not longitude/latitude information should be disclosed in a Rule 26 disclosure. The Federal Rules of Civil Procedure require parties to make initial disclosures. The Rule, 26(a)(1)B, in pertinent part, reads:

“A party must, without awaiting any discovery requests, provide the other parties: . . . (B) a copy of or a description by category and location of, all documents, data, compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support his claims or defenses, unless solely for impeachment . . .”

The Court, in an off hand way, dealt with whether or not Quaalcom, or similar information should have been disclosed under Rule 26 disclosure.

The lawsuit arose out of an accident that occurred in October of 1999. Bruce Smith was a driver for U.S. Xpress. Mr. Smith claimed that as he was beginning to overtake another tractor trailer, that tractor trailer encroached upon his lane and forced him over a guard rail and off an overpass. Mr. Smith's tractor trailer landed on a pickup truck killing the driver of the pickup as well as Mr. Smith.

U.S. Xpress sued J.B. Hunt and XTL Transport, Inc., who were, apparently, suspected to be the operator of the encroaching rig. On or about February 14, 2000 XTL provided U.S. Xpress with Rule 26 disclosures. Shortly thereafter, U.S. Xpress provided XTL

with Rule 26 Disclosures. Neither U.S. Xpress or XTL included latitude/longitude data.

U.S. Xpress requested XTL's longitude/latitude data in June of 2000. In January of 2001 XTL provided the information. At no time prior to trial did XTL either formally or informally request that U.S. Xpress provide its longitude/latitude data for the U.S. Xpress tractor trailer.

The jury assessed XTL's fault at 97 percent. After the trial, XTL discovered that U.S. Xpress had the longitudinal/latitudinal information. XTL formally moved to reopen discovery after U.S. Xpress provided the information. XTL also moved for a new trial based on newly discovered evidence.

The Court denied the motion to reopen discovery. With respect to their motion for new trial, the court noted that since XTL had knowledge of the availability of the information a new trial would not be ordered.

Interestingly, in foot note 6, the Court takes a "sauce for the goose" approach. The Court questioned XTL's assertion that US Xpress failed to make a "complete" disclosure pursuant to Rule 26 because XTL did not disclose its own longitude/latitude data pursuant to Rule 26. The Court noted that XTL only disclosed its information after a request was made for the data by counsel during the deposition.

While the Eighth Circuit did not clearly say that a Rule 26 disclosure should include satellite tracking information, it seems clear that one cannot complain about the failure to disclose this information pursuant to a Rule 26 disclosure, especially if they have not disclosed their own.

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NEBRASKA

ADA Plaintiffs Must Exhaust DOT Administrative Remedies

Until the prescribed Department of Transportation (DOT) administrative remedies have been exhausted, a claim brought by a truck driver against a motor carrier under the Americans with Disabilities Act (ADA) will not be heard by a court of law, according to a recent ruling by the Eighth Circuit Court of Appeals. See *Harris v. P.A.M. Transport, Inc.*, 339 F.3d 635 (8th Cir. 2003).

A prospective truck driver brought suit against a motor carrier after being denied a driving position with the carrier. By the terms of his agreement with the motor carrier, the driver had attended driver-training school, where he underwent a medical examination. Based on the examination, the school's physician concluded that the driver satisfied DOT medical requirements, and issued him a certificate of physical qualification.

However, upon review of the driver's medical history, physicians for the motor carrier decided that the driver was not medically qualified for the position, and the carrier subsequently informed the driver that he would not be hired. The driver filed a complaint with the Equal Employment Opportunity Commission (EEOC), that then became subject to federal court litigation. The driver alleged that the motor carrier discriminated against him in violation of the ADA by reviewing his medical records and denying him employment even after he had passed a DOT physical, when other drivers were not subjected to the same medical review. The trial court dismissed the driver's claims without prejudice, finding that he had failed to exhaust the appropriate

administrative remedies before filing the lawsuit.

On appeal, the Eighth Circuit Court of Appeals said that when there is a dispute between the driver's physician and the motor carrier's physician regarding the driver's physical qualifications, DOT regulations provide appeal procedures that must be followed before the driver may seek relief in court. Until the administrative appeal procedures were followed, the driver could not show that he was medically qualified to drive a truck, an essential element that must be proved to prevail in a claim under the ADA. Thus, because driver fitness is an issue clearly within the DOT's regulatory scheme and expertise, until the driver exhausted the DOT administrative remedies regarding disputes over his medical qualifications, he could not seek judicial relief for the alleged discrimination.

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NORTH CAROLINA

North Carolina Now Requires Workmen's Compensation Insurance for Independent Contractors

Effective October 1, 2003, North Carolina amended N.C.G.S. § 97-19.1. The statute now requires a principle contractor, intermediate contractor, or subcontractor to provide worker's compensation insurance for both employees and for independent contractors whom they hire to operate a truck, tractor, or truck tractor-trailer licensed by a governmental motor vehicle regulatory agency.

Under prior law, worker's compensation insurance was not required for drivers who were independent contractors, even when the drivers were operating trucks owned by the trucking company. Now, if the principle contractor, intermediate contractor, or sub-contractor does not provide worker's compensation insurance for independent contractor drivers, he will be liable as an employer for the payment of compensation and other benefits on account of any injury or death of the independent contractor and his employees or sub-contractors due to an accident arising out of and in the course of the performance of the work covered by the contract. The principle contractor and the independent contractor driver may, however, include an agreement for the independent contractor to reimburse the cost of the insurance in the underlying agreement.

Therefore, in order to avoid the added cost of worker's compensation insurance for independent contractor drivers, trucking companies must include a provision in their contracts with independent contractor drivers to reimburse the trucking

company for the added cost of the insurance. Otherwise, the company will bear the added cost of purchasing worker's compensation insurance for independent contractor drivers.

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NORTH CAROLINA

Inadequate Driver Training, Poor Maintenance, and Failure to Immediately Stop Using Defective Vehicle Leads to Liability in Bus Accident

In February 2003, in *Floyd v. McGill*, 156 N.C.App. 29, 575 S.E.2d 789 (2003), the North Carolina Court of Appeals affirmed a jury verdict finding negligence by a bus driver, her transit management company, and a city for an accident in which the bus driver drove a city-owned bus into the rear end of a woman's truck. The Court also affirmed the damages awards of \$750,000.00 for personal injuries and \$75,000.00 for loss of consortium. Though not a trucking case, some of the principles regarding training the driver and maintaining the vehicle applied by the court in *Floyd* apply with equal effect to trucking companies and their trucks.

The evidence showed that the bus driver had recently completed a 5-week training course, was a probationary employee, and was not on the right route at the time of the accident. The bus driver testified that the brakes were inefficient and not responding normally, that she had to apply the brakes slowly and allow extra distance for stopping, that the speedometer was not working and that she had to "kind of feel" her speed, that she had not been told in training that operating a vehicle without a speedometer is illegal, that the horn was not working and she knew it was illegal to operate the bus without a functioning horn, that she had been told to report bus problems to the dispatcher, that she did not remember if she reported the bus problems, and that she could not

remember how much classroom training she had received. The transit management's safety director testified about the bus preventative maintenance schedule, that the brakes were leaking and were repaired the evening after the accident but were not damaged in the accident, and that drivers with bus problems were told to remove the bus from service immediately and contact the dispatcher. However, he added that drivers with problems such as an inoperable speedometer could finish their routes before finding a location to exchange the bus.

On appeal, the defendants argued that there was insufficient evidence to submit to the jury the issues of negligent training of the bus driver, the inadequacy of the brakes, and the failure to maintain the brakes. The court held that the evidence was sufficient to allow a jury to conclude that the transit company did not meet its duty of care while training the driver and was negligent in allowing the bus to be operated with inadequate brakes and failing to maintain the brakes. The defendants also argued that the court erred in instructing the jury that it could decide whether operating the bus without an operable horn and speedometer could have been a proximate cause of the accident. The court held that the evidence allowed more than one inference to be drawn regarding the proximate cause of the accident. The trial court had instructed the jury that it could find either the operation without an operable speedometer or without an operable horn to be the proximate cause but was not required to find either to be the proximate cause. The court held it was proper to allow the jury to draw such inferences from the facts of the inoperable speedometer and horn.

To avoid the liability found in this case, trucking companies must ensure that:

(1) their policies include immediately taking out of service trucks with maintenance problems that could cause or contribute to causing an accident, (2) their drivers' training programs are thorough with respect to the law governing operation of the trucks and actions to take when a truck's safety devices (e.g., horn, brakes, speedometer) fail; and, (3) that such training is thoroughly documented.

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O H I O

Ohio Supreme Court Overrules Controversial Insurance Liability Ruling

The Ohio Supreme Court recently limited its controversial *Scott-Pontzer v. Liberty Mutual Fire Insurance Company* opinion (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116 and overruled the companion case of *Ezawa v. Yasuda Fire and Marine Insurance Company of America* (1999), 86 Ohio St.3d 557, 715 N.E.2d 1142 in *Westfield Insurance Company v. Galatis* (2003), 100 Ohio St.3d ____, 2003 — Ohio — 5849. In *Scott-Pontzer*, the Ohio Supreme Court expanded insurance coverage in the uninsured/underinsured motorist context to provide coverage to an employee who was killed while driving his own vehicle and while he was not within the scope and course of his employment with Superior Dairy. The opinion turned upon the Court's interpretation of the word "YOU" as the named insured in the insurance policy.

The Court reasoned that even though "YOU" was defined in the policy as referring to those named on the declarations page, "[I]t would be reasonable to conclude that 'YOU' while referring to Superior Dairy [plaintiff's decedent's employer], 'YOU' also includes Superior Dairy's employees since a corporation can act only by and through real live persons. It would be nonsensical to limit protection solely to the corporate entity, since a corporation, itself, cannot occupy an automobile, suffer bodily injury or death or operate a motor vehicle. Here, naming the corporation as the insured is meaningless unless the coverage extends to some person or persons—including to the corporation's

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employees.” Based upon the perceived ambiguity, the court extended UM/UIIM coverage to the plaintiffs.

Further, uninsured/underinsured motorists coverage was extended to an umbrella policy issued by Liberty Mutual Insurance Company by operation of law since UM/UIIM coverage was not offered when the employer applied for the umbrella policy.

In *Ezawa*, uninsured/underinsured motorist coverage was extended to a second class of insureds—a family member of an employee, based upon the policy language “if you are an individual, any family member.” The son of an employee who was a passenger in his father’s car even though the son was not an employee of the company nor was his father within the course and scope of his employment at the time of the incident.

The *Scott-Pontzer* opinion has led to an explosion of cases in Ohio, and has often led to absurd results, e.g. extending coverage to a bicyclist and even to a pedestrian. Many insurers have stopped writing business in Ohio and many companies have found this type of climate inhospitable. Ohio courts have been buried with the explosion of *Scott-Pontzer* cases (since the statute of limitations for a contract in Ohio is fifteen years, files that had been closed were re-opened and cases were re-filed by savvy plaintiffs’ counsel, one of whom remarked that his office motto was “Why worry about new files when you can keep re-opening old files!”), much like the impact of asbestos cases on the courts.

In the *Westfield v. Galatis* opinion, the Ohio Supreme Court limited uninsured/underinsured motorist coverage in commercial auto liability policies for employees to losses that occur within the

course and scope of employment and specifically overruled *Ezawa*. The era of the much-criticized *Scott-Pontzer* opinion is effectively over. Thousands of related cases awaiting decision are also expected to be dismissed.

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O K L A H O M A

Master/Servant Release Rule Extended to Dismissals

***Sisk v. J.B. Hunt*, –P.3d–, 2003 OK 69**

The common law release rule has long been the law in Oklahoma; release of the servant tortfeasor will also release any claim against the master based upon vicarious liability. *Mid-Continent Pipeline Co. v. Crauthers*, 267 P.2d 568, 571 (Okla. 1961). In July, the Oklahoma Supreme Court confirmed this rule also applies when a plaintiff dismisses his claim against the servant.

A plaintiff may dismiss a claim once and only once, without prejudice to the claim’s refiling within one year from the dismissal, regardless of whether the statute of limitations has run. 12 O.S. § 100. In *Sisk*, the plaintiff had availed himself of statute and re-filed against an allegedly negligent driver and his employer, J.B.Hunt. Just before trial, the plaintiff dismissed the driver a second time, expressly denoting the dismissal as “without prejudice.” The undisputed effect of the second dismissal, regardless of the language used, was that any future claim against the driver/servant was legally barred by the statute in question.

The plaintiff argued that section 100 was, in effect, a procedural bar to maintaining any future claim against the servant destroying only the available remedy not the actual claim, and therefore the second dismissal should have no impact on the claim against the master. Repeatedly emphasizing the plaintiff’s own affirmative act in dismissing the servant, the Supreme Court determined s “bar that arises by force of law from a plaintiff’s voluntary act of dismissal is as effective as any other

form of express release that would extinguish the claim against the servant.”

***Brennen v. Aston*, —P.3d—,
2003 WL 22439716**

The Oklahoma Supreme Court recently confirmed that depreciation in value of otherwise fully repaired personal property is recoverable as damages. Though there has not been much doubt in most jurisdictions regarding this issue, in Oklahoma, well-settled authority had generally allowed for the cost of repairs and loss of use damages in property damage cases. Even though Oklahoma’s uniform jury instruction for property damage specifically expressly allowed for cost of repairs “plus” depreciation, the absence of references to depreciation in the published case law has contributed to some minimal controversy on the issue. In *Brennen*, the Oklahoma Supreme Court laid the issue to rest and affirmed a trial court’s award of depreciation damages to a fully repaired truck after a motor vehicle accident. The depreciation damage was presented by expert testimony. (NOTE: This opinion has not yet been released for official publication, making it subject to revision or withdrawal at any time until publication, if ever.)

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P E N N S Y L V A N I A

**Pennsylvania Supreme Court
Clarifies Post-Trial Procedure in
Declaratory Judgement Actions**

In *Motorists Mutual Insurance Co. v. Pinkerton*, 530 A. 2d 958, 2003 Pa. LEXIS 1462 (Pa. 2003), the Supreme Court of Pennsylvania held that challenges to declaratory orders entering following a trial should follow the same procedure as that for other post-trial orders, namely, the losing party must file a post-trial motion instead of immediately appealing.

Motorists Mutual actually involved four cases consolidated for appeal. The facts of one of the consolidated cases, *State Farm Fire and Casualty Co. v. Craley*, were representative of the facts in the other three cases. Three family members were involved in an automobile accident with an uninsured motorist. They sought uninsured motorist coverage from State Farm. State Farm maintained that it had no obligation to pay such benefits and filed a declaratory judgment action. Because the facts of the case were undisputed, the parties submitted the case to the trial court for a non-jury trial on stipulated facts. The trial court thereafter issued its decision and verdict on December 22, 1998, declaring State Farm responsible under its insurance policy and awarding damages to the family members.

Both parties filed post-trial motions. By order dated April 26, 2000, the trial court denied State Farm’s motion, but granted the Craleys’ motion and amended the verdict accordingly. Twenty-nine days later, State Farm filed a notice of appeal. In an *en banc* opinion and order, the Pennsylvania Superior Court quashed State Farm’s appeal as untimely. The Superior Court explained that under the Declaratory Judgment Act, the trial court’s December 22, 1998 order

which declared the rights of the parties had “the force and effect of a final judgment” (42 Pa. C.S. §7532), and was therefore subject to an immediate appeal. Because State Farm had not appealed that order within thirty days of its entry but rather, filed a post-trial motion and then appealed, the Superior Court concluded that State Farm’s appeal was untimely and that the Superior Court therefore had no jurisdiction to hear State Farm’s appeal.

In its opinion, the Pennsylvania Supreme Court dealt with the apparent conflict between the Pennsylvania Declaratory Judgment Act and relevant provisions of the Pennsylvania Rules of Civil Procedure. On the one hand, Section 7532 of the Declaratory Judgment Act provides, in relevant part, that “[T]he declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.” It was based upon this specific language that the Pennsylvania Superior Court quashed the appeals in the four cases, finding that in all four cases, the appealing party had filed a post-trial motion and later appealed the order denying the post-trial motion, all well outside of the thirty-day appeal period. See Pennsylvania Rule of Appellate Procedure 903 (appeal must be taken within thirty days of final order). On the other hand, the appealing parties cited Pennsylvania Rule of Civil Procedure 227.1(c)(2), which requires that “[P]ost-trial motions shall be filed within ten days after . . . notice of nonsuit or the filing of the decision or adjudication in the case of a trial without jury or equity trial.”

In its opinion, the Supreme Court specifically referred to its earlier precedent in *Chalkey v. Roush*, 569 Pa. 462, 805 A.2d 491 (Pa. 2002). In *Chalkey*, the Supreme Court considered the issue of whether a

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trial court which affirmatively granted declaratory relief following an equity trial was subject to the post-trial motion procedure set forth in the Pennsylvania Rules of Civil Procedure. In holding that the appealing party was not excused from filing a post-trial motion under these circumstances, the Supreme Court noted that it specifically adopted Pennsylvania Rules of Civil Procedure 227.1 through 227.4 (dealing with post-trial relief) “. . . in an effort to establish uniform procedures for post-trial relief in actions at law and equity.” *Motorists Mutual*, 830 A.2d at 962. In *Chalkey*, the Supreme Court held that as long as a post-trial order following an equity trial fell within the scope of Rule 227.1(c), the order was subject to the post-trial motion procedure.

Following this analysis, the Supreme Court held in *Motorists Mutual* that where a trial court enters a declaratory order following a trial, the parties must first file post-trial motions from that order, as they would in any other civil proceeding, before the order is deemed a final order for purposes of an appeal. In this way, “[T]he venerable purpose of the post-trial motion procedure [which] is to permit the trial court to correct its own errors before appellate review is commenced . . .” will be served. Moreover, permitting parties to bypass the post-trial motion procedures in a declaratory judgment action would effectively deprive the trial court of its critical “gatekeeping” function while at the same time doing little to expedite appellate review. Therefore, under the holding in *Motorists Mutual*, post-trial declaratory judgment orders are subject to the same post-trial motion procedures set forth in Pa. R.C.P. 227.1 just like any other post-trial order.

It is also important to note, however, that the Court in *Motorists Mutual* distinguished and reaffirmed the prior opinion in *Nationwide Mutual Insurance Co. v. Wickett*, 563 Pa. 595, 763 A. 2d 813 (Pa. 2000). In *Wickett*, a declaratory judgment action, the Supreme Court held that a trial court order sustaining preliminary objections and dismissing certain defendants was a final and immediately appealable order. In so holding, the Supreme Court specifically relied upon Section 7532 of the Declaratory Judgment Act. *Motorists Mutual* makes it clear that where the trial court enters a declaratory order based upon a pre-trial motion, as opposed to a post-trial motion, such order is final and immediately appealable since the parties are obviously not required to follow the post-trial motion practice rules.

Though the analysis followed by the Supreme Court might be questioned, *Motorists Mutual* does have the benefit of providing for uniform post-trial motion practice in Pennsylvania regardless of whether the order from which post-trial relief is sought followed a jury trial, a non-jury trial, or an equity trial.

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P E N N S Y L V A N I A**Pennsylvania Supreme Court Adopts Rule Which Permits Jurors to Take Notes in Longer Civil Trials**

In an order dated July 30, 2003, the Pennsylvania Supreme Court amended Pennsylvania Rule of Civil Procedure 223.2 to permit jurors in a civil case to take notes in any jury trial which is expected to last for more than two days. It is within the Court’s discretion to permit jurors to take notes in a civil case where the jury trial is not expected to last for more than two days. The amendment is effective September 1, 2003 and by the terms of the amendment, the rule is rescinded as of December 31, 2005. An Explanatory Comment to the amended rule provides that it is temporary and “. . . promulgated for the purpose of assessing whether juror note taking in civil cases is beneficial to the system of justice in Pennsylvania.”

The amendment also makes it clear that jurors are not permitted to take notes when the judge is instructing the jury as to the law that will govern the case. Rule 223.2 (a)(2). In addition, the amended rule specifically provides that the Court is required to give an appropriate cautionary instruction to the jury prior to the commencement of any testimony. Rule 223.2(b)(1)-(8) contains the specific instructions which the Court must provide. Among the more important required cautionary instructions which must be given to the jury are: first, that jurors are not required to take notes and those who elect to take notes are not required to take extensive notes; second, note taking should not divert a juror’s full attention to the evidence and to the evaluation of witness credibility; third, that notes are merely aids to memory and are not evidence in the case; fourth, that jurors who

take few or no notes should not permit their independent recollection of the evidence to be influenced by any juror who may have taken more extensive notes; fifth, notes are confidential and will not be reviewed by the Court or anyone else; sixth, a juror may not show his or her notes or disclose their contents to any other juror until deliberations begin but once deliberations have begun, a juror may show the notes or disclose the contents thereof during deliberations; seventh, jurors are not permitted to take their notes out of the courtroom except to use the notes during deliberation; and eighth, all juror notes will be collected at the completion of trial and immediately destroyed.

Rule 223.2 (c) also requires that the Court provide materials suitable for jurors' note taking, that the Court is required to safeguard all jurors' notes at each recess and at the end of each trial day, and that the Court is responsible for collecting the jurors' notes as soon as the jury is dismissed. At that time, without inspection, the Court is required to immediately destroy the jurors' notes.

Rule 223.2 (d)(1) provides that neither the Court nor counsel may either request or suggest that jurors take notes. Similarly, both the Court and counsel are prohibited from commenting on the jurors' note taking and both the Court and counsel are specifically prohibited from attempting to read any of the jurors' notes.

Finally, Rule 223.2(d)(2) specifically provides that jurors' notes may not be used by any party to the litigation as a basis for a request for a new trial.

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SOUTH CAROLINA

Court Determines Whether or Not Future Medical Expenses are Included in the Definition of "Compensation"

In the recent case of *Breeden v. TCW, Inc./Tennessee Express* (Op. No. 25652), the South Carolina Supreme Court attempted to resolve some thorny issues regarding the nature of compensation pursuant to the SC Workers' Compensation Act (the "Act"). The dispute arose following a vehicular accident that occurred on December 14, 1993, when Breeden was injured after a truck crossed a center line and hit his truck head on. As a result of the accident, Breeden filed a workers' compensation claim. As a part of this claim, he alleged that he was totally disabled as a result of a traumatic brain injury. Following a hearing, Breeden was awarded lifetime benefits by the Workers' Compensation Commission (the "Commission").

Breeden also pursued a third-party claim against the trucking company that had caused his injury. He claimed economic losses in excess of \$9 million, including future medical expenses, and a range of total cognizable damages if \$18 million to \$25 million. (The Commission had found that the total cognizable damages were \$13.5 million). Although liability was clear, and although the at-fault party had plenty of insurance coverage, Breeden settled his claim for \$4.2 million, and his wife settled her loss of consortium claim for \$1.8 million.

After settling the third-party claim, Breeden notified the Commission of the settlement, and moved to have the Commission determine the lien and the

balance to be paid to the workers' compensation carrier. The carrier's lien is subject to reduction pursuant to SC Code Ann. Sec. 42-1-560(f), and Breeden argued that this should include future medical expenses. The question before the Court was whether the lien includes medical expenses that have not been incurred and whether "future compensation benefits" (as defined by the Act) includes future medical expenses.

After reviewing plans and arguments from Breeden and the carrier, the Supreme Court held that the carrier's lien includes only those medical expenses paid or accrued but not yet paid at the time of the third-party settlement, and does not include future medical expenses. Rather, the Court reasoned, future medical expenses are to be included in a fund designated to pay future compensation benefits under a specific provision of the Act.

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S O U T H D A K O T A

Vehicle Owner's Duty to Provide a Safe Vehicle is Extended to a Non-Authorized User

In *Harris v. Best Business Products, Inc.*, 2002 SD 115, 651 N.W.2d 875, the South Dakota Supreme Court reversed the lower court grant of summary judgment to the defendant in a personal injury case where the plaintiff, as to the owner, was an uninjured passenger in the owner's vehicle.

Defendant Best employed Marvin Harris as a copier salesman at the time of the accident. Marvin was delivering some copiers he had sold and had asked his sixteen-year-old daughter, Jennifer, to accompany him. While Jennifer was driving the company van, the right rear tire blew out, and she lost control of the vehicle. Jennifer sustained numerous injuries, and Marvin died as a result of the accident.

Jennifer brought this claim against Best for her injuries alleging that Best was negligent in failing to properly maintain the delivery van. The record reflects that the right rear tire was severely worn and did not meet the requirements of SDCL 32-19-13, which requires tires to have a minimum tread depth no less than two thirty-seconds of an inch on any two adjacent tread grooves. The record also reflects a dispute as to whether Marvin had permission to invite Jennifer to accompany him.

Best defended, asserting that Jennifer was a trespasser and accordingly Best owed no duty to Jennifer, or, alternatively, only a limited duty not to inflict willful and wanton injury. Best contended that although it owes a duty to everyone on the road to equip its vehicles with safe tires, there is an exception to this duty as to Jennifer because she was a trespasser.

The court held that there is no such exception. "The issue of whether or not Jennifer is a trespasser does not . . . determine whether Best owed Jennifer a duty to equip safe tires on the van. . . . There is no reason why Best should owe a duty of reasonable care to its *own employee* in its van, but not to a person riding with the employee's permission." *Harris*, 2002 SD 115, ¶ 17, 651 N.W.2d at 879.

The court rejected Best's line of case authority, which holds that an owner cannot be liable for ordinary negligence to a plaintiff who was not an invitee of the owner. *Antonon v. Swanson*, 74 S.D. 1, 48 N.W.2d 161, 167 (1951). The court disregarded *Antonon* by drawing a distinction between employee negligence in the *Antonon* line of cases and employer negligence in this case. This is supported by Restatement (Second) of Agency § 242 (1957), which states that a master is liable, even to a trespasser, when the injury is caused by the negligence of the master.

This case was remanded to the Second Judicial Circuit Court for trial and is still pending resolution.

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T E N N E S S E E

It's Okay to Say "I'm Sorry"

Tennessee has adopted Rule 409.1 to the Tennessee Rules of Evidence effective on July 1, 2003. The new rule states as follows:

a) That portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault that is part of, or in addition to, any of the above shall not be inadmissible because of this Rule.

b) For purposes of this Rule:

(1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

(2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.

(3) "Family" means an injured party's spouse, parent, grandparent, stepparent, child, grandchild, sibling, half sibling, adopted sibling, or parent-in-law.

The comments to this rule state that "a simple apology may go a long way toward making an injured party feel more comfortable with a nonjudicial settlement of the matter. This process is consistent with the modern focus on mediation and other methods of dispute resolution that seek to avoid a trial by facilitating a resolution acceptable to all parties."

As a matter of course, we need to stress to our drivers not to speak to anyone about the accident except the police and representatives of the company. However, if comments are made by the driver that do not portray the actions of our driver in a favorable light, Rule 409.1 allows us the opportunity to preclude some of these comments from reaching the jury. Note that this rule does not exclude admissions of guilt and is not applicable in a criminal proceeding.

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T E N N E S S E E

A Speed Bump in the DOT's Police Powers

Long gone are the days when the United States Department of Transportation limited itself to the tasks of deciding where to put roads and suggesting helpful laws such as criminalizing the cooking of 'road kill' on the side of the highway. When President Johnson created the department in 1966, he probably didn't foresee it regulating such things as the installation of 'kill switches' for passenger airbags, and the division of our nation into the proper time zones. Certainly, the scope of the DOT is broader now than what its creators could have imagined.

One area of particular concern is the scope of the investigative and enforcement power of the Department of Transportation's Inspector General. The Inspector General Act of 1978 that created the office probably didn't give it the power to investigate private motor carriers and seize their property. However, the Inspector General often does just that. The office frequently requests and is issued subpoenas and frequently carries out searches and seizures of motor carrier property when it is thought that the trucking company is involved in criminal activity.

The impetus for the 1978 Act was to allow for intra-departmental investigations due to "significant corruption and waste in the operations of the federal government." See *Inspector General Authority*, 13 U.S. OP. Off Legal Counsel 54, 58 (1989). Apparently, the practice of the Inspector General conducting criminal investigations stems from some confusing wording in the Act, which authorizes the Inspector to transfer power to its officers that would "further the purposes of the Act" 5 U.S.C. app. § 9(a)(2). The Inspector General has interpreted this language as giving it general enforcement and police powers. A few

recent cases indicate that the courts have taken notice and may soon bring this custom to an end.

On October 31, 2003, a memorandum opinion was handed down by the United States District Court for the Western District of Virginia in the matter of *United States of America v. K&C Trucking*, Case No 6:02CR70125. Apparently, the Virginia court found that the activities of the Department of Transportation in executing a search warrant and conducting general seizures of documents and goods at the K & C Terminal was egregious enough to warrant attention and possibly end the pattern of police action by the Inspector General of the DOT. The Court began by recognizing that the search and seizure activities of the Inspector General of the Department of Transportation was beyond any power that congress had extended and also stated that the department was on notice it did not have such power due to a recent opinion letter issued by the Department of Justice regarding the powers of Inspectors General.

The Court went on to indicate that it was shocked by the way that the search was carried out and referred to it as a 'raid' on the private business by the government. Apparently, to execute the warrant on the trucking terminal, forty agents of the Department of Transportation in full combat dress converged on the business in thirty-six vehicles, and interrogated the employees while armed and wearing bulletproof vests. According to affidavits by the agents, the show of force was simply because K & C had not timely complied with subpoenas for their records.

The Court, finding the conduct deplorable, first voided the search, throwing out all evidence that it stated was gathered in "bad faith." The Court then admonished the Department of Transportation for taking actions against the private carrier and stated

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that their actions were unlawful and beyond the scope of its power.

It is clear that the District Court felt the sole power of the Inspector General of the Department of Transportation was to investigate his or her own, not to conduct criminal investigations of Motor Carriers; this duty falls to the federal police forces, such as the FBI and the Attorney General. While the Department of Transportation certainly has authority to enforce the rules of the Motor Carrier Safety Act, such as odometer fraud and compliance with logbook regulations, its authority to institute criminal investigations is now in question.

It is likely that the Department of Transportation will appeal the Virginia Court's decision. Additionally, other cases in varying jurisdictions are proceeding through the appellate process even now. *See for example Airtrans, Inc., v. Kenneth Mead, Inspector General of the United States Department of Transportation*, United States Court of Appeals for the Sixth Circuit No. 02-6411. These decisions will likely shape the way that the Department of Transportation conducts investigations and clarify the duties and powers of the Department. It is quite possible that the Inspector General will be stripped of its police power and the power to investigate private motor carriers for criminal violations, leaving this up to the FBI and leaving the Department of Transportation to perform only its most basic function; supporting the nation's transportation needs.

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T E X A S

The Wisdom of *Solomon*: No Cause of Action for Negligent DOT Drug-Testing of Drivers in Texas

Regulations in the trucking industry govern everything. Really, it's true.

Regulations impact the equipment used, the cargo carried, the records kept, the leases maintained, the hours driven, the routes traveled, the maintenance required, and ultimately, the anxiety of claims managers when something happens. Administrative penalties exist for carriers that do not comply with regulations. The penalties are also set by regulations.

However, do penalties exist outside of the regulations? In other words, can a motor carrier incur civil damages, such as for economic losses, mental anguish, and punitive damages that result from *negligently* carrying out responsibilities under the regulations? Recently, the Texas Supreme Court said "no" in the context of a driver who was terminated as a result of a positive result on a random drug test.

In *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705 (Tex. 2003), the Court considered the claim of Roy Solomon. Mission Petroleum randomly selected Solomon for drug testing as required by the Federal Motor Carrier Safety Regulations. It is sufficient to say that according to Solomon's version of the events, Mission did not adhere to the DOT collection protocols. Those protocols are designed to ensure the validity of the drug test result. Solomon was fired after he tested positive for marijuana use.

After Mission terminated Solomon, he applied to work as a driver with other motor carriers. Each prospective employer

asked Solomon to sign a consent form authorizing Mission to release his drug test results. He did. After learning Solomon previously tested positive, no one offered him a job.

Solomon sued. He argued the Mission's failure to follow DOT protocols resulted in a "false positive" test result. Solomon's primary complaint was not that he was wrongfully terminated, but that Mission's negligent collection practices destroyed his prospects for future employment as a truck driver.

At trial, the jury awarded Solomon past and future damages for medical care, loss of earning capacity, and mental anguish totaling \$802,444.22. The jury also assessed \$100,000 in exemplary damages on a finding that Mission acted with malice. Wow.

On appeal, the Texas Supreme Court noted that DOT regulations do not specifically give employees a private cause of action for breaches of collection protocols. The question, then, was whether Texas employers owe a common-law duty of care when they collect employees' urine samples. The issue had never been decided.

The Court observed DOT guidelines provide a number of protections to employees in the event of a breach of collection protocol (e.g., refusing to sign consent forms requested by potential employers, refusing to initial the seal on the specimen, requesting that the positive test result be reported by the medical review officer as negative, or initiating administrative proceedings against Mission). Solomon did not take advantage of any of them.

The Court explained that the DOT's protections serve as both an incentive for employers to carefully abide by protocols and as a safe harbor for employees whose test results are tainted by unacceptable breaches of collection procedures. The Court found those protections are adequate

to ensure protocols are followed and employees are protected.

Thus, in *Solomon*, the Texas Supreme Court declined to impose a common-law duty on employers who conduct in-house urine specimen collection under DOT regulations. The Court's refusal to adopt a new theory of liability avoids stickier issues including potential inconsistencies with the federal regulatory scheme and other common-law.

And that, my friends, is the wisdom of *Solomon*.

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T E X A S

The Fifth Circuit Strengthens Federal Pre-Emption over State Law Claims for the Loss of or Damage to Goods Shipped in Interstate Commerce

On September 10, 2003, the Fifth Circuit issued its most recent decision on federal pre-emption under 49 U.S.C. § 14706, the Carmack Amendment to the Interstate Commerce Act. This federal statute typically pre-empts a shipper's claims against a motor carrier arising out of the interstate transport of the shipped goods. The court in *Hoskins v. Bekins Van Line, et al*, 2003 U.S. App. LEXIS 18759 (5th Cir. 2003), cleared up previous case law within the circuit that thwarted the Carmack Amendment's intent to establish a uniform federal scheme of liability for goods damaged or lost in interstate commerce.

In *Hoskins*, the plaintiff contracted with Bekins to move and temporarily store her personal belongings in a storage facility in Houston, Texas, then later ship her belongings to her new residence in Virginia. At the time of delivery in Virginia, Hoskins noticed that many of her items were damaged or missing, including antique furniture and silverware. Hoskins filed her petition in state court alleging state law causes of action including negligence, breach of contract, and violations of the Texas Deceptive Trade Practices Act. She also sought exemplary damages and attorney's fees. Her petition did not allege any federal claims. Contending that the Carmack Amendment completely pre-empted all of Hoskins' state law claims, Bekins removed the case to federal district court. Bekins then filed a motion to dismiss Hoskins' state law claims based on federal pre-emption under the

Carmack Amendment, which was granted. Hoskins appealed.

Generally, the plaintiff is the master of her complaint and has the right to choose the legal causes of action under which to bring her case. A plaintiff with a choice between federal and state law claims may elect to proceed in state court on the exclusive basis of state law, thus defeating the defendant's opportunity to remove, but takes the risk that the federal claims will one day be precluded. However, the exception to this rule is that if the federal statute completely displaces the plaintiff's state law causes of action, making the plaintiff's case either wholly federal or nothing at all, then the defendant has the right to remove the case to federal court despite the absence of a federal question on the face of the petition.

In this case, although Hoskins did not allege a federal cause of action, her factual allegations sufficiently established that her claim arose out of goods damaged in interstate commerce. In the 1988 case of *Beers v. North American Van Lines*, the Fifth Circuit rejected removal jurisdiction under the Carmack Amendment when the plaintiff's complaint was based entirely on state law. At that time, the court found that there was "no manifest congressional intent to make this state claim removable to federal court," which was one of the requirements in establishing complete pre-emption. Since that time, many shippers have cited *Beers* to fight removal and pre-emption under the Carmack Amendment.

However, in 1993, the Fifth Circuit in *Moffit v. Bekins Van Lines* granted defendant common carrier's motion for summary judgment on each of plaintiff's state law claims arising from an interstate move, based on the broad pre-emptive effect of the Carmack Amendment.

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Unfortunately, *Beers* and *Moffit* created uncertainty in the circuit by producing conflicting decisions regarding the complete pre-emptive effect of the Carmack Amendment.

Due to the recent U.S. Supreme Court decision in the *Beneficial National Bank v. Anderson* case that expressly overrules the analysis used in the *Beers* decision, the court held that it was no longer bound by the holding in *Beers*. Prior to the U.S. Supreme Court's decision in *Beneficial*, in order to demonstrate complete pre-emption over a plaintiff's otherwise purely state law claims, the defendant had to show the following: (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law, (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right, and (3) there is a clear congressional intent that claims brought under the federal law be removable.

In *Beers*, the court found that Congress had not manifested a clear intent that state law claims for loss or damage to goods during an interstate shipment by common carrier could be removable. However, based on language in the *Beneficial* decision, the court determined that the Supreme Court evidenced a shift in focus from Congress' intent that the claim be removable, to Congress' intent that the federal action be exclusive, changing the third prong of the test.

To determine if Congress intended the Carmack Amendment to be exclusive, the Fifth Circuit discussed the history and intent of the Carmack Amendment. Most notably, the Fifth Circuit referenced the U.S. Supreme Court's decision in *Adams Express Company v. Croninger*, 226 U.S.

491 (1913), which uses strong language to emphasize the Carmack Amendment's purpose. In *Adams Express*, the Supreme Court found that "almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supercede all state regulations with reference to it."

Jurisprudence after *Adams* recognizes that Congress intended by the Carmack Amendment to provide a uniform national remedy against carriers for breach of the contract of carriage, including liability for default in any common law duty as a common carrier. The court was persuaded that Congress intended for the Carmack Amendment to provide the exclusive cause of action for loss or damages to goods arising from the interstate transportation of those goods by a common carrier. Therefore, the court held that the Carmack Amendment completely pre-empts state law claims arising out of the interstate shipment of goods.

This decision enforces a carrier's right to remove regardless of whether the plaintiff asserts a claim under the Carmack Amendment in her state law case. At least in the Fifth Circuit, if the allegations in plaintiff's complaint show that the claims arise out of loss or damage to goods moved in interstate commerce, a defendant carrier has the right to remove the matter to federal court and proceed under the Carmack Amendment.

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T E X A S**Texas Standard Personal Auto Policy Does Not Cover Diminished Value of Fully Repaired Vehicle**

In *American Manufacturers Mutual Insurance Co. v. Schaefer*, 2003 LEXIS 472 (publication status pending), the plaintiff filed a class action against numerous insurance companies, including his own, seeking to recover payment for his vehicle's alleged diminished market value after it had been fully and properly repaired following an accident. Plaintiff argued that there was a decrease in his car's value following damage repairs that should be covered by insurance. The trial court disagreed and granted the insurance company summary judgment against Plaintiff, but was reversed by the Court of Appeals. The Texas Supreme Court, then, reversed the Court of Appeals and rendered judgment against Plaintiff; holding that the standard policy language in use at this time does not cover any difference in value between a properly repaired car and a never damaged car.

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VIRGINIA

Virginia Supreme Court Limits Negligent Hiring and Presumption of Ordinary Care

Scope of Negligent Hiring Narrowed

In *Interim Personnel of Central Virginia, Inc. v. Messer*, 263 Va. 435, 559 S.E.2d 704 (2002), the Supreme Court of Virginia addressed the issue of foreseeability in the context of an action for negligent hiring. Interim Personnel of Central Virginia, Inc. (“Interim”), a temporary staffing agency employed Ricky Edward East (“East”). Interim assigned East to work part-time for the University of Virginia’s Alumni Association (“Association”), where his duties included processing and delivering mail to the post office. The job required a valid driver’s license.

Prior to his assignment at the University, East completed two employment applications for Interim on which he concealed the fact that he did not possess a valid driver’s license. In fact, East had two prior DUI convictions, a suspended driver’s license, and had been classified as an “habitual offender” by the Department of Motor Vehicles (“DMV”). At no time did Interim check East’s criminal background, request a copy of his driver’s license, or check his DMV record. Similarly, the Association official who interviewed East did not verify that East possessed a valid license.

While working for the Association, East illegally procured an Association pickup truck, became intoxicated, and caused a three-car accident in which the plaintiff was injured. The plaintiff sued East, Interim and the Association and was awarded compensatory damages. The only theory of liability against Interim and the Association was negligent hiring.

On appeal, the Virginia Supreme Court vacated the lower court’s decision on the

ground that, even if the defendants should have discovered East’s propensities for operating a motor vehicle without a valid license and driving while intoxicated, the plaintiff failed to establish that it should have been foreseeable that East posed a threat to others. It reasoned, “Liability for negligent hiring is based upon an employer’s failure to exercise reasonable care in placing an individual with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.” It noted, “Negligence carries with it liability consequences that, in view of the circumstances, could reasonably have been anticipated by a prudent person, but not for casualties which, though possible, were wholly improbable.

The Court’s decision in this case has effectively raised the bar in actions for negligent hiring. Even if an employer could have discovered an employee’s dangerous propensities through a reasonable investigation, the employer may still not be liable if it the plaintiff fails to prove that these propensities could foreseeably result in harm to others.

Presumption of Ordinary Care Limited

Virginia, like many other jurisdictions, recognizes the well settled rule that, “[I]n tort actions to recover compensation for personal injuries or death, the injured party or deceased is presumed to have exercised ordinary care for his own safety . . .” *Burks v. Webb*, 199 Va. 296, 307, 99 S.E.2d 629, 638 (1957).

In *Hot Shot Express, Inc. v. Brooks*, 264 Va. 126, 563 S.E.2d 764 (2002), the Court extended the presumption of ordinary care to actions in which the injured party suffers from amnesia caused by an accident.

However, the Court tightened the rule’s application by requiring that the plaintiff prove that the memory loss was the direct result of injuries sustained in the accident and not some other condition.

In *Hot Shot*, a tank truck driver stopped his truck on the highway after realizing that he had passed a delivery site. He determined that he could not back up to the site and instead proceeded down the highway at approximately five miles per hour. Plaintiff Brooks was traveling behind the defendant. She struck the rear of his trailer and was severely injured.

The trial court instructed the jury that it should presume that the plaintiff, who had no memory of the incident, had exercised ordinary care in the operation of her vehicle. The defendant appealed.

At trial, the plaintiff did not attribute her memory loss to the injuries she sustained in the collision, and her counsel sought to avoid the introduction of evidence of the plaintiff’s prior history of memory problems. The Court ruled, “So long as the plaintiff’s inability to testify fully in his own behalf was caused by injuries suffered in the accident with the defendant, then such a surviving plaintiff and a deceased plaintiff differ logically only in the degree of their injuries rather than their entitlement to the presumption of ordinary care.” Consequently, it ruled that the plaintiff was not entitled to the presumption of ordinary care because she failed to show that her amnesia was caused by her injuries.

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WASHINGTON

Trucker's Claim for Workers' Compensation Benefits Addressed

In *Stelter v. Department of Labor & Indus.*, 147 Wash.2d 702, 57 P.3d 248 (2002), the Washington Supreme Court addressed the claims of a truck driver for workers' compensation benefits. Robert Stelter was employed by Drotzmann, Inc., a common carrier operating interstate under the authority of the Interstate Commerce Commission. Under Revised Code of Washington §51.12.095, a common carrier engaged exclusively in interstate commerce is permitted to request exempt status, permitting it to avoid mandatory coverage under Washington's Industrial Insurance Act, and to avoid paying industrial insurance premiums for its employees. Drotzmann, Inc., had previously requested that exemption, and had stopped paying industrial insurance premiums.

As part of its business operations, Drotzmann, Inc., sometimes leased its trucks and drivers to Drotzmann Intrastate Trucking, a company engaged in intrastate transportation under the authority of the Washington Utilities and Transportation Commission. Occasionally, Mr. Stelter would drive an intrastate load under the lease agreement between Drotzmann, Inc., and Drotzmann Intrastate Trucking. He never drove a mixed interstate and intrastate load.

While on an interstate trip for Drotzmann, Inc., he was injured. He filed an application for industrial insurance benefits with the Washington Department of Labor and Industries. The Department rejected the claim because Mr. Stelter was excluded from mandatory coverage under

the provisions of the Industrial Insurance Act due to his employer's exempt status. Although his employer could have made arrangements for coverage by means of an elective adoption, it had not done so.

In challenging the Department's rejection of his claim, Mr. Stelter made two arguments. First, he argued that the leasing arrangement between Drotzmann, Inc., and Drotzmann Intrastate Trucking showed that Drotzmann, Inc., was not engaged exclusively in interstate commerce—that the two companies, in effect, were one and the same. Therefore, he argued, Drotzmann, Inc., was not exempted from the mandatory coverage provisions of the Industrial Insurance Act. Second, he argued that he was unaware of the existence of Drotzmann Intrastate Trucking, and that he believed he was driving for Drotzmann, Inc., even on his intrastate loads. Because he never consented to the leasing arrangement, he argued, he must have been engaged at times in intrastate activities on behalf of Drotzmann, Inc., meaning that Drotzmann, Inc., was not engaged exclusively in interstate commerce. Either way, he argued, he was afforded mandatory coverage under the Industrial Insurance Act.

The Board of Industrial Insurance Appeals sided with the Department, concluding that neither the leasing arrangement, nor Mr. Stelter's subjective belief about the business operations of Drotzmann, Inc., warranted finding that Drotzmann, Inc., was not engaged exclusively in interstate commerce. The Superior Court affirmed the Board, and granted summary judgment to the Department.

The Court of Appeals reversed, finding that a material question of fact remained as to whether Mr. Stelter had consented to his occasional employment with

Drotzmann Intrastate Trucking pursuant to the leasing arrangement. The Court of Appeals accepted Mr. Stelter's argument that his subjective belief that when he was carrying intrastate loads he was carrying them for Drotzmann, Inc., created a question of fact as to whether Drotzmann, Inc., was engaged exclusively in interstate commerce.

The Washington Supreme Court reversed the Court of Appeals, and upheld the Department's determination that Drotzmann, Inc., was engaged exclusively in interstate commerce. Neither the leasing arrangement, nor Mr. Stelter's subjective belief that he had delivered intrastate loads for Drotzmann, Inc., changed the fact that all evidence indicated that Drotzmann, Inc., was engaged exclusively in interstate commerce. Because Mr. Stelter was employed by Drotzmann, Inc., and he was injured while performing interstate activities as part of his employment, the Department correctly determined that no coverage existed for Mr. Stelter under the Industrial Insurance Act due to the exempt status of Drotzmann, Inc.

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WASHINGTON

Trucking Company's Duty to Properly Secure a Load Extended

In *Skeie v. Mercer Trucking Co., Inc.*, 115 Wash. App. 144, 61 P.3d 1207 (2003), the Washington Court of Appeals addressed whether a statutory violation in a trucking company's failure to properly secure a load on its trailer could serve as the basis for a legal duty on the part of the trucking company to other drivers on the road. Jason Skeie was injured when the car in which he was a passenger crossed the centerline and crashed head-on into a tractor-trailer owned and operated by Mercer Trucking Company, Inc. Mercer's trailer carried a load of cement blocks, some of which fell onto Mr. Skeie, who had been ejected from the car during the collision. Mr. Skeie sued both the driver of the car in which he had been a passenger, and Mercer.

Mercer acknowledged that it had not adequately secured the load of cement blocks. Nevertheless, it moved for summary judgment, arguing that it had no duty to "accident proof" its truck in anticipation of the negligence of the driver of the car in which Mr. Skeie had been a passenger. The trial court granted Mercer's motion, concluding that Mercer did not have a duty to protect Mr. Skeie from the injuries caused by the falling cement blocks.

The Court of Appeals reversed, finding that Mercer's failure to secure the trailer's load pursuant to statutory standards was a legal cause of Mr. Skeie's injuries. The Court found that Mercer had a duty to protect Mr. Skeie against injuries caused by the falling cement blocks. This duty arose under Revised Code of Washington §46.61.655, which provides that no vehicle be driven upon a public roadway

unless loaded in such a way as to prevent its load from "escaping", and unless the load is covered in such a way as to prevent the load from coming loose.

Because the statute in question was designed to protect persons in Mr. Skeie's position, namely persons traveling on the roadway, the statute gave rise to a legal duty on the part of Mercer. Mercer was obligated to "fasten its load at least to minimum safety standards so as to protect against injuries from falling loads in a collision." The fact that the collision leading to Mr. Skeie's injuries had been caused entirely by the driver of the vehicle in which he was a passenger did not change Mercer's duty. Because persons in Mr. Skeie's position were foreseeably put at risk by Mercer's inadequate securing of the cement blocks, Mercer owed a duty of care to Mr. Skeie to secure its load so that the load would not detach during a collision, regardless of the cause of the collision.

As a result, the Court of Appeals held that the trial court should have considered Mercer's arguable violation of RCW 46.61.655 in determining whether Mercer had a duty to Mr. Skeie, and should have found that the statute did impose a duty.

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WEST VIRGINIA

New Laws in West Virginia Allowing Increase in Coal Truck Weights Affects Shippers and Receivers as Well

In 2003, lawmakers in West Virginia passed legislation which allows commercial motor vehicles that transport coal across certain highways in West Virginia to increase their hauling capacity up to 120,000 lbs. of coal. However, this increase is only allowed for coal trucks who are traveling over the Coal Resource Transportation System (CRTS). The CRTS is designated by the West Virginia Department of Transportation (DOT) and requires that coal truck operators obtain a permit which is to be renewed annually for use of the roads in the CRTS.

Pursuant to the new legislation, the West Virginia Public Service Commission (PSC) promulgated Rules and Regulations for the Transportation of Coal by Commercial Motor Vehicles, C.S.R. 150-27, *et seq.* Along with the coal weight increase, burdensome obligations to the shippers and receivers of coal transported by commercial motor vehicles have been implemented, including requirements that they record the weight of the coal shipped or received and submit daily reports. In addition, receivers of coal must use a certified scale to weigh the coal shipments where shippers may estimate the weight. Many receivers do not currently have access to a certified scale as required under the rule, making it difficult, if not impossible, to comply with the recording requirement. Perhaps the most burdensome requirement is that the receivers and shippers must report the information the next business day after the coal is shipped.

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Although the reporting requirements for coal transported on the CRTS became effective October 1, 2003, the designated CRTS was not readily available so as to give notice to shippers and receivers of the affected shipments. The PSC has announced that it would be months before the roads in the CRTS would be posted. All other coal transported by commercial motor vehicle across non-CRTS highways must be recorded and reported beginning July 1, 2004, when a final CRTS designation is expected from the DOT. Under the PSC regulations shippers and receivers are subject to administrative and criminal sanctions if they do not comply with the rules.

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