

# Transport *Update*

*American Law Firm Association Transportation Practice Group Reports*

*From Around the Country Concerning Legislation, Regulations  
and Decisions of Interest*

## Editor's Notepad



**(NEED 30 WORD CAPTION)** telefonoj vere rapide gajnas kvin arboj, kaj Kolorado trinkis nau bela bildoj, sed Ludviko saltas tre malrapide, kaj la vere bona birdoj promenos. Kvin malpura arboj rapide.

**P**lans are already well underway for the 2003 ALFA Transportation Practice Group Seminar. Mark your calendars now! The Seminar will be held April 30-May 2, 2003 at the Kiawah Island Resort in Kiawah, South Carolina. Although the schedule of topics and speakers is almost completed, we certainly welcome any suggestions you might have to make this year's program the best ever. Please forward any comments or suggestions to this year's program chairperson:

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We look forward to seeing you in South Carolina in April.



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## A r i z o n a

## Abolition of the Common Carrier Doctrine

The Arizona Court of Appeals recently abolished the common carrier doctrine, a doctrine that dates back to “the age of steam railroads.”

In *Lowrey v. Montgomery Kone, Inc.*, 202 Ariz. 190, 42 P.3d 621 (App. 2002), the elevator in which Plaintiff Krystal Lowrey was riding shook, the lights went out, and it dropped from the fourth to second floor, stopping abruptly. She suffered a back injury that eventually required surgery. Plaintiff sued, among others, the elevator maintenance company, Montgomery Kone, Inc.

The trial court granted summary judgment for the maintenance company finding that Plaintiff was precluded from relying upon *res ipsa loquitur* and that the Defendant maintenance company was not subject to a higher than ordinary standard of care under the common carrier doctrine. Plaintiff appealed. The Court of Appeals reversed the trial court on the *res ipsa loquitur* issue and remanded the case.

The Court of Appeals went on to examine the common carrier doctrine. “Common carriers were traditionally said to have a duty to exercise the ‘utmost’ or ‘the highest degree of care’ in the maintenance and operation of their vehicles and equipment.” The class of common carriers contains such disparate members as railroads, airplanes, taxis, horse-drawn carriages, and elevators.

Echoing the New York Court of Appeals in *Bethel v. New York City Transit Auth.*, 92 N.Y.2d 348, 703 N.E.2d 1214 (1998), the Arizona Court of Appeals concluded that the common carrier doctrine retained no current viability. The rationale for the doctrine was the perceived ultra-hazardous nature of the instrumentalities of public rapid transit, and passengers’ total dependency upon carriers for safety precautions. Technological improvements and government regulations have obviated the need for the doctrine. The

Court of Appeals recognized that the standard of reasonable care under the circumstances is flexible enough to accommodate whatever levels of care a particular set of dangers may require. The Court also reasoned that an attempt to explain the common carrier doctrine to a jury would be riddled with confusion and the concept very likely misunderstood.

“The time has come to discard the notion that a common carrier bears a higher duty toward its passengers than that of reasonable care under all of the circumstances.” “There is no stratification of degrees of care as a matter of law.... Rather, ‘there are only different amounts of care, as a matter of fact.’ ”

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## A r i z o n a

## Court of Appeals Rules in Favor of Preemption

In *Hernandez-Gomez v. Volkswagen of America, Inc.*, 201 Ariz. 141, 32 P.3d 424 (App. 2001), the plaintiff sustained severe injuries while riding as a front-seat passenger in a 1981 Volkswagen Rabbit, which veered off the road, and rolled over onto its roof. The plaintiff contended that the vehicle had a negligently or defectively designed passive restraint system because it did not include a lap belt, which was the cause of her injuries. Volkswagen argued that the National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. 89-563, 80 Stat. 718 (Safety Act), and the Federal Motor Vehicle Safety Standard 208 (FMVSS 208), which was promulgated pursuant to the Act, expressly or implicitly preempted the plaintiff’s state tort claim. FMVSS 208 allows manufacturers to choose one of three safety restraint system options. The first option requires a “complete passive protection system,” the second requires a “head-on passive protection system,” and the third requires a “lap and shoulder belt protection system with belt warning.” 49 C.F.R. § 571.208, S4.1.2.1, S4.1.2. 2, and S.4.1.2.3 (1980). Volkswagen chose the second option to install in the 1981 Rabbit, which does not require a lap belt.

The Arizona Supreme Court previously decided twice that federal law did not preempt plaintiff’s state tort claim, *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994) (Hernandez-Gomez I); vacated, *Volkswagen of America, Inc. v. Hernandez-Gomez*, 514 U.S. 1094, 115 S.Ct. 1819, 131 L.Ed.2d 742 (1995); *Hernandez-Gomez v. Leonardo*, 185 Ariz. 509, 917 P.2d 238 (1996) (Hernandez-Gomez II). The case proceeded to trial before a jury which awarded the plaintiff \$3.1 million in damages. The Court of Appeals noted that absent a subsequent decision by the United States Supreme Court governing the same subject, the Arizona Supreme Court’s analysis that the relevant provisions of the Safety Act and

FMVSS 208 neither expressly nor implicitly preempted plaintiff's state tort claim was binding on the Court of Appeals.

Shortly after oral arguments, the U.S. Supreme Court decided *Geier v. American Honda Motor Co, Inc.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). In *Geier*, the Supreme Court noted that a Department of Transportation comment made "clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices" and that a common law action that imposes a duty higher than that provided for in FMVSS 208 "would have presented an obstacle to the variety and mix of devices that the federal regulation sought" and therefore is preempted. *Id.* at 875, 120 S.Ct. at 1922, 146 L.Ed.2d at 927-928.

The court's analysis in *Geier* led the Court of Appeals to reach the same conclusion. FMVSS 208 gave Volkswagen three options for equipping the 1981 Rabbit with a safety restraint system. Volkswagen chose and complied with one of those options, which did not require a lap belt. To allow plaintiff's claim that the 1981 Rabbit was negligently designed because it did not have a passenger lap belt would impose a duty on Volkswagen to include a lap belt in order to avoid tort liability, which presents an obstacle to the variety and mix of devices that FMVSS 208 sought, and thus, is implicitly preempted by federal law. The judgment against Volkswagen was therefore vacated.

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## California

### California Supreme Court Confirms No Pain and Suffering Damages For Uninsured Motorist

In *Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, the California Supreme Court once again confirmed California Code of Civil Procedure section 3333.4 (Proposition 213) which disallows pain and suffering damages for uninsured motorists. Proposition 213 was passed by voter enactment in California in 1996 and restricts the ability of an individual who is the owner/operator of an uninsured vehicle to recover pain and suffering damages. This class of plaintiffs is limited to only economic damages such as medical bills, wage loss and property damage.

In *Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, plaintiff was operating his motorcycle without any bodily injury liability insurance. On the evening of the accident, he entered a roadway which was under repair by defendant Sully-Miller Contracting Co., a road construction company. During construction, a "bus pad" was installed and was not level with the asphalt surface of the street and rose up to three inches above the street in some places. At the time of the accident, no barricades, warnings or delineations were in place. When plaintiff attempted a right-hand turn across the bus pad, the front tire of plaintiff's motorcycle caught on the elevated lip of the pad and catapulted plaintiff, causing significant injuries to his knee.

Plaintiff did not have bodily injury liability insurance as required by California law. In an effort to avoid the limiting penalties of Proposition 213, plaintiff asserted a premises liability cause of action for negligently maintaining the roadway. At the trial court level, the defendants successfully argued that despite the novel cause of action for premises liability on a motor vehicle case, Proposition 213 still applied since plaintiff

did not carry bodily injury liability insurance. The case went to jury trial and plaintiff recovered only his economic damages and received no award for pain and suffering. Plaintiff then appealed the verdict and the court of appeal reversed and remanded for new trial. The reasoning of the appellate court was that Proposition 213 was limited to motor vehicle accidents and not an action for premises liability.

The California Supreme Court reversed the court of appeal and agreed with the holding of the trial court. The Supreme Court reasoned that the legislative intent behind Proposition 213 is to prevent rewarding an injured person who is the owner/operator of an uninsured vehicle involved in an accident. Since the vehicle operator cannot properly establish financial responsibility, the recovery should be limited to economic damages and no entitlement to pain and suffering.

#### ANALYSIS

Proposition 213 is a tort reform remedy unique to California and is a bane to the plaintiffs' bar. It has emasculated many otherwise lucrative personal injury cases for plaintiffs' lawyers. The plaintiffs' bar continues to attempt to find creative ways to circumvent the statute. However, as the *Allen v. Sully-Miller Contracting Co.* case makes clear, the California Supreme Court affirms the clear language and intent of Proposition 213. Accordingly, in any personal injury action arising out of a motor vehicle accident in California, the claims handler or defense counsel should first learn whether or not plaintiff actually carried bodily injury liability insurance. If the answer is in the negative, then pursuant to Proposition 213 and the California Supreme Court, plaintiff is not entitled to any damages for pain and suffering.

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## California

## Reasonable Medical Treatment Means Actual Cost

As many of you are probably aware, a couple of California cases, (which have not necessarily been given the attention they deserve), have created a reasonably dramatic change in the world of personal injury litigation and settlement. The cases have the effect of reducing the reasonable costs of medical treatment, sometimes with surprising results, based on modern practices of health care provider compensation. The purpose of this article is to identify those cases, discuss application of the principles set forth in those cases and offer some practical guidelines for an aggressive approach to identifying the actual reasonable cost of medical care.

Oftentimes, plaintiff's counsel produces the gross medical billings, then claims those amounts as the actual cost of medical care and hopes that the general damages award is based on this inflated view of these special damages. This presentation may be accurate, if there are no secondary sources for payment of these medical charges, such as private health insurance. In most cases, however, there are secondary sources for payment of these charges and the amounts actually paid for the charges are well below the amount presented on the initial bill. In some cases, capitated fees can reduce the bill by almost 90% of the amount initially claimed. The question presented is whether the plaintiff's counsel can claim the amounts shown on this first bill as reasonable medical bills. In most cases, the answer is no. Only the actual amount of the reimbursement rate may be claimed, as well as any out of pocket costs, such as co-payment fees or additional fees, which are the personal responsibility of the patient.

In a personal injury action, plaintiff is entitled to recover from the defendant the reasonable value of medical services rendered to plaintiff. *Nishibama v. City and County of San Francisco* (2001) 93 Cal.

App. 4th 298, 306. In California, "an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes over-compensation." *Hanif v. Housing Authority* (1988) 200 Cal. App. 3d 635, 641; see also *Nishibama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 298 (citing *Hanif*); *Chapman v. Mazda Motor of America, Inc.* (D. Mont. 1998) 7 F. Supp. 2d 1123, 1125.

In *Hanif v. Housing Authority* (1988) 200 Cal. App. 3d 635, a minor plaintiff was struck by a car and suffered severe and permanent injuries. *Id.*, at 638. At trial, the court awarded plaintiff medical damages of \$53,314. The defendant appealed, arguing that it was error to allow plaintiff to introduce "evidence that the 'reasonable value' of the medical services rendered in this case was in excess of amounts Medi-Cal (the state sponsored indigent reimbursement plan) had actually paid the providers." *Id.*, at 639. For example, the trial court had found the reasonable value of hospital services to be \$27,000, but Medi-Cal had only paid \$16,494 and there was no evidence that plaintiff was liable for the difference. *Id.* In essence, the hospital had "written off" the balance. *Id.*

Addressing this issue, the court of appeal discussed the purpose of awarding damages in tort actions, specifically stating, "The primary object of an award of damages in a civil action, and the fundamental principle on which it is based, are just compensation or indemnity for the loss or injury sustained by the complainant, and no more [citations]." *Id.*, at 640 (italics in original) (quoting *Mozzetti v. City of Brisbane* (1977) 67 Cal. App. 3d 565, 576).

Moreover, "A plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done." *Hanif*, at 641 (quoting *Valdez v. Taylor Automobile Co.* (1954) 129 Cal. App. 2d 810, 821-2). Ultimately, the *Hanif* court held, "an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes over-compensation." *Hanif*, at 641 (emphasis added). Therefore,

"a plaintiff is entitled to recover up to, and no more than, the actual amount expended or incurred for past medical services so long as that amount is reasonable." *Id.*, at 643 (italics in original). The *Hanif* court called the expression "reasonable value" a term of limitation, noting that when a sum certain has been paid, that sum is the most plaintiff may recover. *Id.*, at 641.

Applying the above analysis, the court of appeal concluded that "the trial court in this case erred in awarding plaintiff, as special damages for past medical care and services, the reasonable value of that amount exceeding the actual amount paid." *Id.*, at 643-4. The court then reduced the judgment by the amount plaintiff had been overcompensated. *Id.*, at 644.

Recently, this issue was addressed again in *Nishibama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 298, which cited *Hanif v. Housing Authority* (1988) 200 Cal. App. 3d 635, 641. In *Nishihama*, the court reduced the jury's award to a personal injury plaintiff from \$99,064 to \$85,496 because the jury included certain medical costs that the plaintiff did not incur. *Id.*, at 301. Specifically, the jury had included in its award the full amount of \$17,168 as costs of medical care received from California Pacific Medical Care (CPMC). *Id.*, at 306. However, as the court stated, due to plaintiff's participation in a Blue Cross plan and Blue Cross contract with CPMC, CPMC accepted \$3,600 as payment in full for services rendered to plaintiff. *Id.*, at 306-7. Applying the holding of *Hanif*, supra, the court modified the judgment accordingly, based on the difference between the billed amount and the amount actually paid. *Nishihama*, at 309.

## Discussion

For years after *Hanif* was decided, plaintiff's counsel typically attempted to limit the holding in *Hanif* to cases involving Medi-Cal. With the opinion in *Nishibama*, which is now final, a much broader application of *Hanif* is now possible. Each of the cases cited above cured the defect by adjusting the verdict downward. In all likelihood, if the reduced size of the med-

ical bills had been presented to the jury as the initial figure, the value of the entire case would probably have been less.

While the definition of reasonable medical treatment is now certain, determining the actual amount paid is still difficult. Getting plaintiff's counsel to provide the "Explanation of Benefits" form is the first step. Accept no substitutes! It is this form which should sets forth the exact rate of reimbursement. The EOB form, as it is known in the medical world, should tell you the amount the health care provider was actually paid by the health insurance carrier, or state medical program. Without the EOB or similar document, you are left to guess about the actual rate or reimbursement.

As mentioned at the outset, the result can be surprising. In one recent case, the gross billing sheet gave the cost of medical treatment at \$31,009.03. However, the Medi-Cal reimbursement rate was \$3,600.00, a savings of nearly 90% off the bill!

What happens when you can't get the EOB? A specific subpoena is the suggested remedy. Even that step may not disgorge the information, because some providers may claim such information is private, being the subject of negotiation between the providers or their treatment associations and the health insurers. It may be that a deposition of the back office personnel of a particular medical provider is necessary to learn the actual reimbursement information. In any case, diligent effort to learn the exact amount of reimbursement will pay off not only on the issue of special damages, but also on the amount of general damages, based on the multiplier effect. In other words, the case will not seem as dramatic if the medical specials are lower. It follows that the general damages award will also probably be less.

What about situations where there are no reimbursements? Can plaintiff's counsel claim the gross bills are reasonable

compensation under that scenario? This question is left unanswered by case law. Plaintiff can still argue that the gross bill is fair, based on the risk the health care provider took in providing the service to a person without health insurance. The defense could rebut this with an expert such as a seasoned back office employee from a similar health care provider to offer a range of reasonable amounts based on industry norms and put forth those amounts as a more realistic view of what would be reasonable compensation.

What about medical providers such as Kaiser, who create a bill which is never paid, because the Kaiser system is not a fee for services system? Is the information produced by Healthcare Recoveries, Kaiser's collection arm, a reasonable amount for the medical care provided? This, too, would appear to be an area for expert testimony, if the amounts claimed do not match industry norms for such services.

If the actual reimbursement rate can be discovered, that is the measure of medical special damages. This change in the law is expected to reduce settlements and judgments by a substantial and meaningful percentage—for those savvy insurance professionals and their counsel who are informed about the implications of this recent opinion.

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## Georgia

### Georgia Court of Appeals Holds that Under the Terms of the State's Direct Action Statute a Claim Cannot be Asserted Against a Motor Carrier's Excess Insurance Provider

In a recent decision, the Georgia Court of Appeals has finally answered a question perplexing many insurance carriers in the State. In *Jackson v. Sluder*, Case No. A02A0456 (Ga. Ct. App. July 11, 2002), the Court of Appeals was faced with the question of whether Georgia's direct action statute allows for the prosecution of a suit against the motor carrier's excess insurance provider. Applying the long-standing doctrine that the direct action statute must be strictly construed due to the fact that it is a derogation of the common law, the Court of Appeals held that under the plain terms of the direct action statute a claim cannot be asserted against a motor carrier's excess insurance provider.

O.C.G.A. § 46-7-12 requires that motor carriers give and maintain a bond, or carry a minimum level of indemnity insurance in lieu of a bond, which must be approved and certified by the Georgia Public Service Commission. The Georgia Public Service Commission also has the power to certify self-insurance, "whenever in its opinion the financial ability of the motor carrier so warrants." O.C.G.A. § 46-7-12(d). The direct action statute allows for joinder of an insurance carrier in a lawsuit against the motor carrier only "[i]f a policy of indemnity insurance is given in lieu of bond." O.C.G.A. §46-712(e).

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The Court reasoned that since the statute does not directly authorize suit against an excess carrier, such a claim is not allowed. The importance of this holding is difficult to overstate. As Georgia is a direct action state, many of the motor carriers within the state retain the self-insured minimums and also purchase excess coverage above the required minimums. The Sluder holding makes clear now that these excess carriers may not be named in a lawsuit against the motor carrier. The practical impact of this decision is that in many cases involving self-insured motor carriers, the issue of insurance will not be placed before the jury. This long overdue holding once again makes the general prohibition against injection of a party's financial status applicable to many of the cases involving domestic motor carriers, and remove the risk that juries will award damages based upon their knowledge of the existence of insurance and their assumption that "well-pursed and heartless insurance compan[ies]" will pay the bill. *Denton v. Con-way Southern Express*, 261 Ga. 41, 42-43 n.2 (1991) (quoting 2 Wigmore, Evidence § 282a (3)).

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## I n d i a n a

**Commentary on Race-Based Challenges**

In *Pryor v. Hoskins*, \_\_\_ N.E.2d \_\_\_ (Ind.Ct.App. 2002), the Indiana Court of Appeals discussed at length the use of a trucker's peremptory challenge of black jurors when the plaintiff was black.

The plaintiff was driving near Indianapolis on a very foggy night and struck the rear of a tractor trailer that was parked on a residential street at the 3:00 a.m. She filed suit, the matter went to trial, and the jury awarded \$453,000. The jury found her 35% at fault and the trucker 65% at fault. However, during the course of the trial, two black jurors were struck with peremptory challenges. One juror had responded that she had a bad experience with a truck driver when they were almost run off the road twice; that truck drivers were not her favorite; and that the plaintiff looked familiar and thought the plaintiff's children went to her church. She said she could sit and hear the evidence with an open mind though. The other black juror had a plausible and clearly articulated non-discriminatory strike. The trial court, however, sustained the plaintiff's objection to striking of the juror that did not like truck drivers.

The court discussed the case of *Batson v. Kentucky*, 476 U.S. 79 (1986), and showed that the objecting party must establish a prima facie case with the challenge having been racially discriminatory. The court of appeals, with that background, reviewed the trial court's denial of the trucker's peremptory challenge of the one black juror.

The court noted that since the plaintiff had objected, the trucker was required to provide a race-neutral reason for the challenge. They found that the trucker's explanation of the church-related activities of the juror was based on something other than race and reversed the trial court's verdict.

The court also reviewed the trucker's motion for judgment on the evidence

because he parked his truck in a residential area in heavy fog. While the court found that the judge was well-founded in denying the trucker's motion, nevertheless, they reversed and remanded based on the jury selection process error. In a footnote, the court questioned why the trucker did not attempt to challenge the juror for cause.

Anyway, they get to try it again.

**Missing Author and Firm Information**

## I n d i a n a

## Opposing Counsel Can Contact Former Employees Without Permission

A recent Indiana Court of Appeals decision clarified opposing counsel's contact with former employees. The Court of Appeals ruled that opposing counsel may contact the former employees of a represented party without violating the Indiana Rules of Professional Conduct.

In *P.T. Barnum's Nightclub v. Dubamell*, a patron of the exotic dance club was injured by one of the dancers. 766 N.E.2d 729 (Ind. Ct. App. 2002). The patron brought a claim for personal injuries against the dance club. During the course of discovery, plaintiff's counsel contacted the general manager at the time of the incident who was no longer employed by the club. Counsel asked the former general manager if he was represented by counsel. When he stated that he was not, plaintiff's counsel prepared an affidavit for the former general manager.

The dance club contended that plaintiff's counsel violated Rule 4.2 of the Indiana Rules of Professional Conduct. The Rule states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The Official Comment to the rule states, in relevant part:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the

organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Since Indiana Rule 4.2 is identical to Rule 4.2 of the Model Code of Professional Responsibility, the Indiana court examined Formal Opinion 91-359 of the American Bar Association Standing Committee on Ethics and Professional Responsibility which interpreted this rule. The Opinion identifies three particular categories of present employees, but concluded that contact with all other employees is allowed. The Opinion discarded the notion that former employees could be classified into one of the three protected categories of employees.

The Indiana appellate court agreed with the position set forth in the formal opinion and other jurisdictions. As a result, opposing counsel may contact former employees not represented by counsel. However, counsel must still be wary of other rules of conduct. Rule 4.4 of the Indiana Rules of Professional Conduct bars an attorney from inducing the former employee to violate the attorney-client privilege. Also, Rule 4.3 requires an attorney to make his or her role in the matter and positions the parties clear to the former employee. Still, as long as these rules are observed and followed, contact with former employees may be made.

This decision affects many of the current and future causes of action in Indiana. For example, numerous actions for damages are filed naming both the employer and employee as defendants. However, as a result of the underlying incident, the employment of the employee may have been terminated. If the case is filed after termination, the former employee may not be aware that an attorney is usually retained by the employer's liability carrier to represent both the employee and employer. If the employee is contacted by plaintiff's counsel prior to the appearance of an attorney on his behalf, he may make incriminating statements. However, if counsel knows of the representation, this would probably violate the rule.

As a result of this decision, plaintiffs may begin to file more suits against the employer

and not include the employee when liability through the doctrine of *respondeat superior* is clear. If the employee is no longer working for the employer, this recent decision allows plaintiff's counsel to contact the former employee who may be more than willing to make negative statements regarding the incident. Therefore, it is imperative that employers and their attorneys locate and contact the former employee to explain the situation.

As of August 12, 2002, this recent case has not been granted transfer to the Indiana Supreme Court. If and when the Indiana Supreme Court decides to review this decision, it will most likely scrutinize Rule 4.2 as written and the rationale of the lower court. Until that time, the current status of Indiana law allows a former employee to be contacted as long as the attorney complies with all other applicable Rules of Professional Conduct.

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## I n d i a n a

Towing Company  
Justice

*Rodziewicz v. Waffco Heavy Duty Towing*, 763 N.E.2d 491 (Ind.App. 2002)

Rodziewicz, a New Jersey truck driver was trying to make it through Lake County, Indiana, when he got his rig hung up on a Jersey barrier. Indiana State Police contacted Waffco to assist with the removal. Rodziewicz asked how much it would cost to tow the truck, and he was told \$275.00. He instructed Waffco to take his truck to the local dealership. However, the towing company took it a few miles to its yard then advised the poor driver from New Jersey that he owed not only \$275.00 but additional \$4,070.00 in labor costs calculated at \$.11 per pound. Apparently Waffco remembers the “Lincoln Park pirates” of towing fame in the 1970s. In order to get his rig back on the road and try to make some money, Rodziewicz paid the entire amount then filed a pro se claim in small claims court seeking \$3,000.00, the jurisdictional limit. The trial judge found for the towing company. Rodziewicz appealed and the Indiana Court of Appeals reversed finding that the \$4,070.00 charge was not part of the agreement. The court went on to say that it would have been compelled to find such an agreement unconscionable any way. “In this case, no one not under delusion would offer to tow a truck a few miles for \$4,070.00 in labor, let alone accept it.” The New Jersey trucker found justice in Indiana.

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## I n d i a n a

Worker's  
Compensation  
Coverage Expanded,  
Again

In *Expressway Dodge, Inc. v. McFarland*, 766 N.E.2d 26 (Ind.App.2002), the Indiana Court of Appeals apparently took an independent contractor situation and made it into a common law employer/employee situation. McFarland sporadically drove vehicles to and from auto auctions for Expressway Dodge. They would call him at home with an assignment, which he was free to accept or reject. He would go to Expressway, which provided him a driver to transport him to pick up and drop off sites. He wore a uniform with Expressway's logo, but they did not dictate any routes or the manner of driving. He was paid as an independent contractor with no withholding and a Form 1099, along with mileage for the most direct route along with insurance, dealer plates, gasoline, meals, and occasional lodging.

McFarland was involved in a 1-car crash and afterwards expired. The worker's comp board examined 7 different factors in Indiana law as set out *GKN Co. v. Magness*, 744 N.E.2d 397 (Ind. 2001). They are 1) right to discharge; 2) mode of payment; 3) supplying tools or equipment; 4) belief of the parties in the existence of an employer-employee relationship; 5) control over the means used in the results reached; 6) length of employment; and 7) establishment of the work boundaries. McFarland's counsel however relied on the 10 factors of the Restatement (Second) of Agency §220(2)(1958) as discussed in *Moberly v. Day*, 757 N.E.2d 1007 (Ind. 2001). The opinion specifically rejected the *GKN* 7-factor test. The court noted that the worker's compensation concept of the word 'employee' may differ from the common-law concept of employee or servant. The court also noted that they believe that the Restatement or *Moberly* test is also applicable in the worker's compensation context. The court found

that Expressway did not control the work, but that the need for supervision was minimal. McFarland had worked for a number of years for Expressway and had no other special skills or no separate business. He worked in the course of Expressway's regular business as an auto dealership. They found that even though McFarland was paid by the job and no tax was withheld, the parties believed that he was an employee. The Court of Appeals based their opinion on the Worker's Compensation Board's factual findings and, applying the 10-factor Restatement test of *Moberly*, found that he was an employee when he was injured. This was a 2 to 1 decision with Judge Friedlander filing a strong dissent. Thus, it appears that the court system continues to expand the definition of “employee” in the worker's compensation sense now utilizing 10 factors instead of 7.

Businesses using the services of intermittent or casual workers would do well to consult with their insurance agents and, regardless of how the worker's are paid, there is a chance that they would be considered an employee for worker's compensation and perhaps other coverages under the ever-changing case law.

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## Louisiana

### DUI Reform May Fall Short

As a result of ongoing tort reform, the Louisiana legislature in 1999 enacted LA-R.S. 9:2798.4. This statute protects the state, or any person, from liability for “damages,” including those under survival and wrongful death actions, for injury, death or loss of the operator of a motor vehicle while his blood alcohol concentration is 0.10% or more, or he is under the influence of any controlled dangerous substance. These protections only apply if the actions of the operator driving under the influence are found to be in excess of 25% negligent, and this negligence was a contributing factor causing the damage. This statute defines “damages” to include property damage. Based on the recent enactment of the statute, which is not retroactive, there is a lack of reported cases applying the statute. Consequently, it cannot yet be determined what restrictions may be placed on the application of the statute by Louisiana courts.

The Louisiana Supreme Court in a 4-3 decision recently decided *Petre v. State, Department of Transportation and Development*, 817 So.2d 1107 (La. 4/3/02), which could have answered some of these questions. The statute, however, was not applicable since the accident at issue occurred in 1992. Petre involved a single vehicle accident in which Lajuana Petre was traveling with her 10 year old daughter on La. Hwy. 107. While Petre was glancing to the left at a vehicle she thought might be driven by a friend, the right wheels of her vehicle left the paved surface. She attempted to re-enter the highway without applying the brakes, and possibly by accelerating, but traveled along the ditch until she hit a culvert. A driveway running perpendicular to the highway and ditch acted as a launching ramp, causing her vehicle to become airborne and travel an additional 122 feet. The vehicle bounced off of two trees, overturned, and ultimately came to rest on a stump. Both Petre and her daughter were injured.

The daughter's injuries resulted in her untimely death.

Nearly two hours after the accident, a blood sample was obtained from Petre which yielded a blood-alcohol reading of 0.247% (more than three times the legal limit under Louisiana's criminal DUI law). In the prior 24 months, Petre had been convicted of two DUI's. Petre filed suit against the State for her injuries, and along with her deceased daughter's father filed a wrongful death action based on the daughter's death. The suit alleged that there existed an unreasonably dangerous defect on the highway. Following a bench trial, the court found Petre and the State equally at fault, awarding the father \$259,120.95, and Petre \$559,430.59, which included \$250,000 for the wrongful death of her daughter subject to a 50% reduction for her allocated fault. The Court of Appeal affirmed. While the Supreme Court ultimately affirmed, it stated that writ was granted because the court was “concerned about allowing an intoxicated driver in a single car accident to recover in part damages from the State.”

If LA-R.S. 9:2798.4 had been applicable, Petre would have been precluded from recovering damages attributable to her own injuries. Likewise, if Petre's injuries had been fatal, any of her survivors would have been precluded from recovering under a survival or wrongful death action for her death. The interesting question is whether Petre would have been allowed to recover any portion of the \$250,000 she was awarded for the wrongful death of her daughter. As written, the statute does not appear to preclude Petre receiving her reward of \$125,000. Was this the legislature's intent—probably not.

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## Massachusetts

### Article 7 of the UCC is Preempted By Federal Law and is Not Applicable To Tort Claims for Personal Injuries

In 1991, Plaintiff, Edward Rando, was injured unloading a pallet of goods shipped from Allite's facility in New York to a company in Waltham, MA by New England Motor Freight, Inc. (hereinafter NEMF), which according to the bill of lading and packaging slip weighed 100 pounds. Mr. Rando injured his back unloading the pallet, which actually weighed over 300 pounds. The Defendants, National Union Fire Ins. Company of Pittsburgh, PA (hereinafter National Union), insurer of NEMF, and Allite were found negligent for the injuries sustained by Mr. Rando. A judgment of approximately 1.34 million dollars was entered for the plaintiff. The Defendants appealed. During appeal Defendant, Allite, settled with the plaintiff for \$625,000.00. Months later, National Union settled with the plaintiff for \$797,707.61. At the time of settlement, Defendant, National Union, stipulated that its contribution rights to Allite were satisfied, but made no mention of its rights to indemnification by Allite to have been satisfied. Thereafter, in 1998 National Union brought suit against Allite for indemnification pursuant to Article 7 of the Uniform Commercial Code (hereinafter UCC), codified under Massachusetts law as Mass. Gen. Laws ch. 106, § 7-301(5).

National Union moved for summary judgment. On July 13, 1998 the Superior Court of Massachusetts denied National Union's Motion for Summary Judgment and entered Summary Judgment on behalf of Allite. The judge ruled that indemnification was not available to National Union under Mass. Gen. Laws ch. 106, §7-301 (5) because the Federal Bills of Lading Act (hereinafter

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FBLA) and the Carmack Amendment to the Interstate Commerce Act (hereinafter Carmack) pre-empted the state law. See, *National Union Fire Ins. Company of Pittsburgh, PA v. Allite, Inc.*, 1998 WL 512985 (Mass. Super. 1998). Specifically, the court stated that due to the aforementioned federal laws Article 7 of the UCC, as codified by Massachusetts law, is limited in application to intrastate transactions and transactions from a foreign country to a state. Id. Since the transaction involved an interstate shipment, Article 7 of the UCC did not apply. National Union appealed.

On February 29, 2000, the Supreme Judicial Court of Massachusetts affirmed the decision of the Superior Court and further held that the indemnity afforded by MASS. GEN. LAWS ch. 106, §7-301 does not extend to tort claims for personal injuries. See, *National Union Fire Ins. Company of Pittsburgh, PA v. Allite, Inc.*, 430 Mass. 828, 829, 724 N.E.2d 677, 678 (Mass. 2000). The Court reasoned that if subsection five (5) is read in context with the rest of Mass. Gen. Laws ch. 106, §7-301 it appears that the statute “specifically intended to provide a means for the issuer of a bill to receive compensation from the shipper for any damages the issuer must pay to consignees or holders of bills of lading for harm caused by the shipper’s false statements.” Id. at 833, 724 N.E.2d 677, 681 (Mass. 2000). “Subsections (1) through (4) of §7-301 provide for the recovery of damages against the issuer of a bill of lading for “damages caused by the misdating of the bill or the non-receipt or misdescription of the goods” where the plaintiff has relied on the information contained in the bill.” Id. at 832, 724 N.E.2d 677, 680 (Mass. 2000) citing, MASS. GEN. LAWS ch. 106, §7-301. “Subsection (1) allows two kinds of plaintiffs to obtain damages in such circumstances: consignees of non-negotiable bills who have given value in good faith and holders to whom negotiable bills have been duly negotiated. Id. Moreover the court concluded that because Congress did not incorporate the provision regarding indemnity in section 80113 of the

FBLA, which reads very similarly to §7-301, it was not an inadvertence and rather intended. Id. at 833, 724 N.E.2d 677, 681 (Mass. 2000).

Wherefore, the FBLA and Carmack pre-empt Massachusetts state law that codified Article 7 of the UCC, limiting the article to intrastate commerce and commerce between a foreign country and a state. Moreover, Article 7 of the UCC does not extend to tort claims of personal injury.

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**M i c h i g a n****Michigan Supreme Court Ruls Default of a Truck Driver Does Not Operate Default Against Trucking Company**

The Michigan Supreme Court recently addressed the issue of whether the default of a defendant employee affects the liability of a co-defendant employer who has no direct liability to plaintiff, but who would be vicariously liable for the defaulting defendant’s negligence in *Rogers v J. B. Hunt Transport, Inc.*, Slip Op. No. 118766 (July 23, 2002).

In *Rogers*, J. B. Hunt Transport employed Wesley Howard Crenshaw as a truck driver. On June 17, 1996, Crenshaw parked a tractor-trailer owned by J.B. Hunt on the shoulder of a freeway in Eaton County, Michigan. The tractor-trailer was completely off the main traveled portion of the highway and the rear tail lights were on, although Crenshaw admitted he did not set out his emergency reflective triangles, and it was disputed whether he activated his flashers. The decedent was driving an automobile on that same freeway when, unexplainably, the decedent’s vehicle left the paved portion of the highway, traveled on the shoulder for approximately 75 feet, and collided with the right rear section of the truck’s trailer—killing decedent instantly. The police were unable to determine why decedent’s vehicle left the roadway. J. B. Hunt terminated Crenshaw’s employment in July 1996.

On July 23, 1996, plaintiff filed a Complaint alleging Crenshaw’s negligence was a proximate cause of the decedent’s death and J. B. Hunt was vicariously liable for Crenshaw’s negligence. J. B. Hunt, in its Answer to the Complaint, admitted it owned the truck involved in the collision, it employed Crenshaw, and Crenshaw was acting within the scope of his employment at the time of the accident. J. B. Hunt

denied negligence and proximate cause. Crenshaw's Answer likewise admitted the employment relationship between Crenshaw and J.B. Hunt but denied negligence and causation.

After many attempts, and subsequent failures, to secure the deposition of Crenshaw, the trial court issued an order stating that if Crenshaw did not appear for a deposition, the court would sanction him. Plaintiff eventually moved to default Crenshaw for failing to cooperate with discovery. Neither Crenshaw nor J. B. Hunt responded to the motion. However, defense counsel, who represented both J. B. Hunt and Crenshaw, filed a motion seeking to withdraw from representing Crenshaw. At the hearing on the motion for default, defense counsel did not oppose the motion on behalf of J. B. Hunt, noting they were unable to reach Crenshaw, and had done everything in their power to convince them to appear for a deposition and cooperate. The court granted both plaintiff's motion to default Crenshaw, and defense counsel's motion to withdraw from representing Crenshaw.

Plaintiff next moved for partial summary disposition, on the issue of liability, maintaining defendant J. B. Hunt could not dispute its vicarious liability for Crenshaw's negligence. The trial court granted plaintiff's motion and noted defendant J. B. Hunt could still argue that the decedent was comparatively negligent.

The Michigan Court of Appeals affirmed the ruling of the trial court, holding the default of truck driver, Crenshaw, operated as a default against trucking company, J.B. Hunt. *Rogers v J. B. Hunt Transport, Inc.*, 244 Mich App 600, 624 NW2d 532 (2001). Though the Court of Appeals sympathized with J. B. Hunt's precarious position, it noted well that J. B. Hunt would be allowed to pursue the defense of comparative negligence. Further, as a passive tortfeasor, J. B. Hunt would be entitled to seek contribution or indemnification from employee, Crenshaw, the active tortfeasor, pursuant to MCL 600.2925(a). However, the Court of Appeals limited this holding to cases where the employee has in effect admitted his or her negligence, and where the employer has

admitted that the employee's negligent conduct occurred during the course of an employment relationship. *Rogers* at 612.

The Court of Appeals weighed policy decisions, and ultimately reached the conclusion the doctrine of vicarious liability holds a defendant employer financially responsible for an employee's negligence, even where the defendant is not directly responsible for the negligent conduct, as the loss is caused by the torts of employees are placed upon the enterprise itself as a required cost of doing business.

The Michigan Supreme Court reversed the Court of Appeals, commenting, "by misapplying the policies underpinning vicarious liability, the Court of Appeals panel in this case took the doctrine too far." *Rogers*, Michigan Supreme Court Slip Op. No. 118766 at 7. The Supreme Court noted the reasoning of the Court of Appeals suggested that if the employer financially profits from an employee's activities, the employer is vicariously liable not only for everything the employee does within the scope of employment, but also to all acts tangentially related to that employment recurring outside the scope of employment, even if they occurred after the employee leaves the employment. *Rogers*, Michigan Supreme Court Slip Op. No. 118766 at 4. Crenshaw, although operating within the scope of employment when the accident occurred, was no longer an employee of J. B. Hunt when *Rogers* lawsuit was filed.

The Supreme Court disagreed with the very policies that the Court of Appeals utilized in arriving at its decision. For instance, the Supreme Court took issue with the lower court's view of the function of *respondent superior*. Thus, the Court felt it was important to clarify that courts have imposed liability on those who were not the actors, but merely the masters of the actors because a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment. *Rogers* at 5, citing *Murphy v Kubartz*, 244 Mich 54, 56; 221 NW 143 (1982). An employer is not vicariously liable, however, for acts committed by its employees outside the scope of employment, because the

employee is not acting for the employer or under the employer's control. *Id.*

In light of the above, the Court ruled *respondent superior* and vicarious liability principles did not support imposing liability on J. B. Hunt merely on the basis of Crenshaw's default. After all, when Crenshaw failed to participate in this litigation, he was not acting within the scope of employment. Rather, Crenshaw was acting on behalf of himself only in regard to the litigation. The Court opined, "because his non-participation was not in the course of his employment with J. B. Hunt, extending liability to J. B. Hunt for Crenshaw's non-participation is beyond the scope of vicarious liability." *Rogers*, Michigan Supreme Court Slip Op. No. 118766 at 6.

Moreover, the Supreme Court held any additional rationales forming the basis for vicarious liability did not apply to the instant case. One additional rationale for vicarious liability for acts of agents within the scope of employment includes providing an incentive for employers to attempt to reduce tortious conduct by their employees, and the fair distribution of risk associated with activity characteristic of a business or other entity. *Rogers*, Michigan Supreme Court Slip Op. No. 118766 at 7 citing *Dobbs*, *Torts*, §334, p 908-910. The Court noted well risks typically associated with operating trucks may fairly be said to be characteristic of J. B. Hunt's business activities. However, Crenshaw's refusal to participate in litigation is not a characteristic risk of operating a trucking business. Accordingly, such non-participation is not something that J. B. Hunt could not reasonably be expected to deter, or fairly expected to absorb as a cost of doing business. *Rogers*, Michigan Supreme Court Slip Op. No. 118766 at 7.

The Supreme Court next addressed the legal principles related to the effect of a default. The Court noted defaults and default judgments are not favored in the law. *Rogers*, Michigan Supreme Court Slip Op. No. 118766 at 9 citing *Wood v Detroit Automobile Inter-Ins Exchange*, 413 Mich 573, 586; 321 NW2d 653 (1982). The trial

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court entered an Order of default against Crenshaw as a sanction for his failure to cooperate with the discovery process. Although that default would operate as an admission of Crenshaw's negligence, the traditional rule of default provides that the default of one party is not an admission of liability on the part of a non-defaulting co-party. *Rogers*, Michigan Supreme Court Slip Op. No. 118766 at 8 citing *Allstate Insurance Company v Hayes*, 442 Mich 56, 73; 499 Nw2d 743 (1993).

The Supreme Court stated the Court of Appeals unjustifiably extended the effect of a default to a co-defendant:

Default is a punitive measure, appropriate in defined circumstances, the threat of which encourages the cooperation of parties to a suit. Our court rules governing the entry of defaults and default judgments are narrowly designed to sanction an uncooperative party. Nowhere in the rules is it contemplated that a cooperating party can be sanctioned for a co-party's procedural shortcomings.

Obviously, J.B. Hunt could not force its former employee, Crenshaw, to participate in discovery. Indeed, it has never been contended that J. B. Hunt controlled Crenshaw's litigation activity or participated in misconduct that produced Crenshaw's default. Therefore, the goal of forcing defendants to properly cooperate with litigation would not be reasonably furthered by extending the consequences of the default to J. B. Hunt. As recognized by *Stillwell v City of Wheeling*, 210 WVA, 599, 606; 558 SE2d 598 (2001), penalizing a party that has no control over a co-party's default would "have no deterrent effect." *Rogers*, Michigan Supreme Court Slip Op. No. 118766 at 8-9.

The Supreme Court emphasized that the entry of a default against Crenshaw does not establish that he was actually negligent in connection with the accident underlying the case. Rather, the entry of the default simply

barred him from contesting the issue of his negligence because of his failure to properly participate, procedurally, in the litigation. *Rogers*, Michigan Supreme Court Slip Op. No. 118766 at 9.

The default against Crenshaw would remain in force throughout the litigation, and would foreclose Crenshaw's ability to present proofs denying his own negligence. The Supreme Court conceded both *Rogers* and J. B. Hunt may be prejudiced by the absence of Crenshaw's testimony. However, possible prejudicial consequences of Crenshaw's failure to appear, and the default, did not justify the extension of the punitive effect of the default to J. B. Hunt.

Any employer following the *Rogers* case may now rest a little easier. The Supreme Court ultimately concluded where a party's sole source of liability is vicarious, a default entered against a co-party does not preclude the former from contesting its vicarious liability. Michigan Supreme Court *Rogers* Slip Op. No. 118766 at 10-11.

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**M i s s o u r i**

## Driver Who Suffers a Stroke is Deemed To Have Had an Injury Arising Out of His Employment—Trucking Company's Failure to Produce Phone Records was Deemed Spoliation

R.L. Hannah Trucking Company employed James DeGraffenreid as a driver. In March of 1994, Mr. DeGraffenreid made a trip to San Antonio, Texas for Hannah Trucking. In San Antonio, Mr. DeGraffenreid suffered a stroke while in the cab of his parked truck.

On November 7, 1994, Mr. DeGraffenreid filed a claim for workers' compensation benefits. In his claim Mr. DeGraffenreid alleged that his stroke was caused by the stress he suffered as a result of Hannah Trucking's "demanding over the road truck driving schedule". Specifically, Mr. DeGraffenreid sought to establish that he was driving more hours than Department of Transportation regulations permitted and he was keeping two sets of drivers logs to conceal his violation of the federal regulations. In an attempt to prove his allegation that he was violating the regulations, Mr. DeGraffenreid requested that Hannah Trucking produce various documents that would indicate the number of hours that he was driving and the number of miles he was driving. The documents requested included: drivers logs, telephone logs, payroll records, and freight bills. Hannah Trucking produced many documents, but it did not produce complete telephone logs for the period from March 23, 1992 through February 7, 1994.

Hannah Trucking's representative, Sharon Green admitted that Hannah Trucking had possession of the requested documents, namely the telephone logs. However, she admitted that she had not looked for them.

The Worker's Compensation Commission held that spoliation had occurred and, on that basis, awarded compensation to Mr. DeGraffenreid's estate. On appeal, the court reiterated the standard for the application of spoliation doctrine by commenting: "The doctrine requires that there is evidence of an intentional destruction of the evidence indicating fraud and a desire to suppress the truth".

Getting to the merits, the court indicated that there was sufficient evidence to support the spoliation finding, however, the effect of the concealment of the records was not to presume that the injury was compensable. Rather, the commission was entitled to presume that the concealed documents would have shown that Mr. DeGraffenreid drove in excess of the hours and miles allowed under federal regulations and that he lacked the requisite sleep.

The proper application of spoliation doctrine, then, is for the Commission to find that the destroyed records would show that Mr. DeGraffenreid drove an excess of the hours and miles allowed under federal regulations and that he lacked the requisite sleep. While the court determined that the spoliation doctrine did not necessarily prove that the injury arose out of the work, the court determined that the other evidence presented was credible and established that the stroke, was in fact, as a result of employment.

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## North Carolina

### Plaintiff Still Entitled to Jury Trial Even Though Plaintiff Crossed Center Line and Had No Expert Witness and Defendant Had Opinions of Expert Witness and Investigating Trooper

North Carolina courts continue to show their reluctance to award summary judgment for a defendant motorist even when the overwhelming weight of the evidence shows no negligence. In *Headley v. Williams*, 563 S.E.2d 630 (N.C.App. 2002), the decedent was operating a motorcycle in a southeasterly direction along Castle Ford Road, a two-lane, two direction road. Defendant was driving an automobile in the opposite direction on Castle Ford Road. At a point in the road where decedent had come out of a curve to his right and defendant was approaching the curve to her left, the vehicle driven by defendant collided with decedent's motorcycle, resulting in the death of the decedent.

There were no eye-witnesses to the collision other than the defendant. However, one witness Mason had been driving behind decedent along Castle Ford Road for a mile and a half prior to the accident. In his affidavit, Mason stated that decedent was operating the motorcycle in a normal manner at a speed of 30 to 35 miles per hour, and was staying within his lane of travel. As decedent entered the curve, Mason lost sight of him due to the curve. As Mason rounded the curve, he came upon the scene of the crash, and stopped his vehicle "directly in front of an automobile with a damaged front left corner which was stopped and sitting approximately two-thirds of the way into my lane of travel." Mason saw debris in the motorcycle's lane of travel.

Trooper Garland arrived on the scene following the crash and conducted a preliminary investigation. Although he had originally been of the opinion that defendant had traveled left of the center line, the Trooper filed a final collision reconstruction report wherein he concluded that decedent "entered a right hand curve and appears to have leaned to [sic] far into the curve. This caused the crash bar on the motorcycle to touch the asphalt as it leaned right. The motorcycle then began to travel out of control and was leaned to the left side causing it to travel across the center of the roadway into the path of Ms. Williams [sic] 1995 Mazda. . . . [I]t was absolutely impossible that the car had traveled left of center and struck the motorcycle in the manner that I had originally concluded." The Trooper testified that debris was present in decedent's lane of travel following the crash, scrape marks were present in decedent's lane, and the motorcycle was found in decedent's lane of travel.

Defendant's own accident reconstructionist witness gave the opinion that the collision occurred in decedent's lane of travel. Plaintiff had no expert witness or investigating officer on his side.

The trial court granted defendant's motion for summary judgment. The N.C. Court of Appeals reversed due to factual disputes, allowing the case to go to a jury.

According to the appellate court, "there was evidence that decedent had been operating his motorcycle within the speed limit and entirely within his travel lane for some distance before the collision, and there was no evidence of any condition of the roadway which may have caused him to lose control in the vicinity where the collision occurred. Immediately after the collision, defendant's car was found at rest across the center line of the roadway in decedent's lane of travel; decedent's motorcycle came to rest in its proper travel lane. Decedent was found in a ditch to the right side of his travel lane. There are differing inferences which may be drawn from the various skid and gouge marks found at the scene and from the damage to the motorcycle and to defendant's automobile; although the opinions of

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the reconstruction witnesses based upon the physical evidence are admissible as helpful to a jury in understanding such evidence, the weight and credibility to be given to those opinions is for the jury. . . Finally, there was evidence that defendant was driving in violation of the restriction on her driver's license requiring that she wear corrective lenses."

This case highlights the difficulty of getting summary judgment for a defendant in any motor vehicle negligence case.

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## North Carolina

### Trucker Killed in Accident While Under Influence of Cocaine Not Entitled to Worker's Compensation Benefits

The family of a tractor-trailer driver was denied benefits under the Worker's Compensation Act when it was determined that the driver was under the influence of cocaine at the time of his fatal accident. The case is *Willey v. Williamson Produce*, 149 N.C.App. 74, 565 S.E.2d 185 (2002).

The facts revealed that the decedent was killed on November 17, 1997 while driving a truck for his employer during the course and scope of his employment. Two eyewitnesses reported that the decedent was driving erratically, weaving from one lane to the other, for a period of forty-five minutes prior to the accident. The tractor-trailer the decedent was driving left the pavement on the right side of the road and slid down an embankment. The decedent's urine contained cocaine and marijuana at the time of his death. The decedent left one dependent, a minor child, who requested a hearing through her Guardian Ad Litem and sought benefits pursuant to the North Carolina Worker's Compensation Act.

At the hearing, the employer elicited testimony from an expert in pathology and toxicology who opined that the decedent was impaired by cocaine, and that this impairment caused the accident and the employee's death. Testimony was presented by a forensic toxicologist on behalf of the decedent's minor child. According to that expert, it was impossible to determine from the drug screens and other information whether the decedent was impaired at the time of the fatal collision. The deputy commissioner denied benefits, but the Full Commission reversed.

On appeal to the North Carolina Court of Appeals, the only issue was whether the defendants presented sufficient competent evidence to establish the affirmative defense

of intoxication or impairment embodied in the North Carolina Worker's Compensation Act. N.C. Gen. Stat. (97-12 provides:

No compensation shall be payable if the injury or death of the employee was proximately caused by:

(2) his being under the influence of any controlled substance listed in the North Carolina Controlled Substances Act, G.S. 90-86, et. seq., where such controlled substance was not by prescription by a practitioner.

In considering the issue, the North Carolina Court of Appeals acknowledged established precedent on this point. First, the employer bears the burden of proof for the affirmative defense of intoxication or impairment. Secondly, the employer is not required to disprove all other possible causes or that intoxication or impairment was the sole proximate cause of the employee's injury, but the employer is required to prove only that it is more probable than not that the intoxication or impairment was a cause in fact of the injury. The Court also acknowledged the appropriate standard of review, to wit, (1) whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision. The Court of Appeals reversed the decision of the Full Commission and remanded the case for further findings of fact on the issue of impairment.

In reaching this conclusion, the Court of Appeals noted that the evidence was undisputed that cocaine and marijuana were present in the decedent's system at the time of his death. The plaintiff failed to offer any competent evidence that the decedent was not impaired at the time of the accident. Further, the Court concluded that the competent evidence supported a finding that the decedent's impairment was more probably than not a cause of the accident resulting in the employee's death. The Court reiterated that the defendants are not required to prove that the decedent's impairment was the sole proximate cause of the accident.

There was a dissenting opinion in the case. The dissenting judge argued that the majority opinion failed to comply with the applicable standard of review. He noted that the standard requires the Court to decide whether there is any competent evidence to support the Commission's findings, not whether there is any competent evidence to support a different finding. The dissenting judge further reasoned that, since there was expert testimony presented on both sides of the issue of impairment and intoxication and whether such was a cause in fact of the accident, there was sufficient evidence to support the Commission's findings. Since issues of credibility remain within the sole discretion of the Commission and cannot be second-guessed on appeal, the dissenting opinion would have affirmed the Full Commission's order. Since there was a dissenting opinion, the case will now proceed to the North Carolina Supreme Court for consideration.

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## Oklahoma

### Vicarious Liability of the Employer for the Negligence of the Employee

In *Sisk v. J.B. Hunt Transport, Inc.*, 2002 OK 7, the Oklahoma Supreme Court held that the dismissal of the driver precluded any liability of the employer trucking company, absent claims of independent negligence against the employer. The plaintiff had dismissed the driver, and proceeded to trial against only the employer.

The decision discusses the nature of an employer's liability for the torts of its employee. The liability is called respondeat superior, and basically permits the employer (or master) to be liable for the torts of its employees (or servants), so long as the employees are acting within the course and scope of their employment. The employer's liability is also considered vicarious, since it places the risk of damages on the employer, without requiring any fault of the employer. The court stated:

Vicarious liability is imposed by law when one person is made answerable for the actionable conduct of another. The liability is not the result of fault, but a matter of allocation of risk, which is established by law, . . . .

Because there is no fault on the part of the employer, the employer does not fit within the conventional definition of a "tortfeasor." Generally, a tortfeasor is one who has breached a duty to an injured party, like the employee in this case. Punitive damages may be awarded against an employer solely for the acts of its employee.

The court explained, *J.B. Hunt's* liability is contingent upon the negligence, if any, of its employee, who drove the tractor-trailer rig that struck the plaintiff. It then ruled that the dismissal of the employee truck driver extinguished any claim that plaintiff could have maintained against the company, stating:

We hold that a dismissal with prejudice of a servant precludes further action against the master under a theory of respondeat

superior when no independent negligence is asserted against the master.

The court cited *Burke v. Webb Boats, Inc.*, 2001 OK 83, 37 P.3d 811, which held that a release of a servant also exculpates the master from vicarious liability, even if the master is specifically excluded in the release.

Without the negligent employee, there can be no independent claim against the employer. If the plaintiff has asserted that the employer was also negligent—by claiming the employer was negligent in the hiring, retention, training or supervision of the employee—then the employer can be held liable even where the employee has been dismissed. It is only the company's vicarious liability for the employee's torts which is affected by this recent decision.

Of course, it is not always necessary to sue the employee in order to get a judgment against the employer. If the plaintiff in *Sisk* had never sued the employee, it could have proceeded against the employer alone, because the liability of the master and servant is joint and several. That is, either the master or the servant (or both) can be sued, and either one will be liable for the entire amount of any judgment rendered against them. A prior case held that where the employee's dismissal is *without prejudice*, it will not relieve the employer of liability. In *Sisk*, the dismissal was *with prejudice* because a prior dismissal of the employee precluded any further action against him. The release of either the master or the servant will discharge the other from any further liability to the plaintiff.

Generally, the courts will not find an assault by an employee within the course and scope of the employment. An obvious exception is where the employee is a bouncer at a bar, whose job description might include forcibly removing patrons from the premises. In *Jordan v. Cates*, 1997 OK 9, 935 P.2d 289, plaintiff claimed damages resulting from an altercation with an employee, Cates, at a convenience store. The employer admitted Cates was acting within the course and scope of his employment when the fight happened. As a result, claims against the employer for negligent hiring and retention

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were properly dismissed. Where the employer stipulates that its liability, if any, would be under the respondeat superior doctrine, it makes any other theory for imposing liability on the employer unnecessary and superfluous. Because vicarious liability can include liability for punitive damages, the theory of negligent hiring and retention imposes no further liability on the employer.

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## O k l a h o m a

### Cell Phone Use Relevant on Issue of Negligence

In *Hiscott v. Peters*, 324 Ill.App.3d 114, 754 N.E.2d 839 (2001), the court held that circumstantial evidence that the defendant was using his cellular phone when the accident happened was relevant, and should have been admitted. The cellular phone records showed he was using his cellular phone within minutes of when the accident was reported. Further, there was testimony that the defendant did not have both hands on the steering wheel just before the accident. The appellate court believed the evidence would have affected the jury's allocation of fault, and remanded the case for new trial. The court obviously believed using a cellular phone in traffic was negligent, and could have caused or contributed to the accident.

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## O k l a h o m a

### Firefighter Rule Applied To Fuel Truck Owner

The Alaska Supreme Court has held that the Firefighter's Rule, which states that firefighters and police officers who are injured in the line of duty may not recover based on the negligent conduct that required their presence, applied to bar a police chief's negligence action against a fuel truck owner. The fuel truck owner's employee left an unlocked, loaded truck in a driveway, with the keys in the ignition. Coolidge, a very intoxicated man, got into the truck and started driving it around. He ran cars off the road, nearly colliding with several vehicles, and drove at speeds exceeding seventy miles per hour. The chief of the police department was one of the officers who responded to the reports of the recklessly driven fuel truck. The chief received permanent injuries when Coolidge rammed his van.

Affirming summary judgment to the fuel truck company, the court discussed the Firefighter Rule. The rule is based, in part, on the idea that firefighters and police officers are paid to confront crises and allay dangers by an uncircumspect citizenry. They are summoned when there is danger; and are in fact paid to confront situations from which other citizens flee. Thus, they are employed in part, to deal with the hazards which can result from their taxpayers' negligence. The court stressed, however, that the Rule is narrow, and only bars recovery for the negligence that creates the need for the public safety officer's service. It does not apply to conduct occurring after the officer arrives at the scene. *Moody v. Delta Western, Inc.*, 38 P.3d 1139 (Alaska 2002).

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## R h o d e I s l a n d

### Liability of Long-Term Lessors

In the past year, in *Oliveira v. Lombardi*, 794 A.2d 453 (R.I. 2000), the Rhode Island Supreme Court decided the question whether existing state law holding motor vehicle owners vicariously liable for the negligence of drivers who operate at the owner's consent applies to owners who are in the business of financing long-term leases. Relying on the plain language of R.I. Gen. Laws 1956\_ 31-1-17(b) that defines an owner as A[a] person who holds the legal title to a vehicle, the Court held that long-term lessors are indeed vicariously liable. The Court's opinion arose out of consolidated cases involving personal injuries caused by drivers of leased vehicles. The trial justice below it had granted the lessors' motion for summary judgment finding that the applicable statutory language—the term “owner” shall include—was a limiting definition. The trial court therefore reasoned that anyone who is not in lawful possession or control of the vehicle could not be deemed an owner for the purposes of the statute, rendering long-term lessors not liable.

In overturning the trial justice, the Rhode Island Supreme Court found that the Legislature's use of the word “include” was not a limitation of the definition of “owner”, but an expansion of the general definition to add those who lawfully possess or control a vehicle under a written sale agreement—even if they did not otherwise own the vehicle under R.I. Gen. Laws \_ 31-33-6. Instead, the Court turned to the definition of “owner” under R.I. Gen. Laws \_ 31-1-17(b) which maintains an “owner” was “[a] person who holds the legal title to a vehicle.”

In so holding, the Court held that the Legislature intended “to give more adequate security against financial loss to those injured in motor vehicle accidents when one of the vehicles involved was operated by a person other than the owner.” Because the long-term lessors qualified as “owners”, in

the Court's view, based on their legal title to the leased vehicles, the Court reversed summary judgment in their favor.

The Court also dismissed another troublesome section of R.I. Gen. Laws 31-33-6, which relieved lessors when they received proof of financial responsibility.

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## S o u t h C a r o l i n a

### Statute of Limitations Addressed in Worker's Compensation Claims

In the recent non-trucking case of *Carolyn J. McCraw v. Mary Black Hospital*, the South Carolina Supreme Court dealt with the issue of when an injured employee is required to file a claim for benefits within the applicable statute of limitations. McCraw worked for Mary Black Hospital as a nursing assistant from 1961 until November 1992. During the course and scope of her employment, McCraw came into contact with a respiratory irritant that caused numerous injuries and damages.

Dr. Mary Lou Applebaum, a pulmonary specialist, worked with McCraw and observed her breathing difficulties while working with the chemicals. Although McCraw was not a patient, Dr. Applebaum gave her some general advice about her problem. By 1991, McCraw realized her respiratory symptoms were related to her exposure to the chemicals and she asked Dr. Applebaum if it would help her to leave the unit where she worked. Dr. Applebaum agreed, and in September of 1991, McCraw transferred out of her unit. She was ultimately placed in the child care center of the hospital, but she continued to have breathing problems and respiratory infections.

In March of 1992, McCraw began seeing Dr. Applebaum regularly as a patient. From March through November 1992, Dr. Applebaum treated McCraw for asthmatic bronchitis, sinusitis and pneumonia. On November 19, 1992, Dr. Applebaum advised McCraw that she needed to stop working and that same day, McCraw was admitted to the hospital with diagnoses of asthma and pneumonia.

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McCraw's last day of work at the hospital was November 18, 1992. She thereafter submitted a long-term disability claim to the hospital dated January 12, 1993, in which she stated her condition was related to her employment. She then filed her worker's compensation claim on November 14, 1994.

In deposition testimony, Dr. Applebaum testified that exposure to the chemicals had been associated in medical literature with the development of occupational asthma. Dr. Applebaum believed that McCraw's exposure to chemicals and her work in the childcare center exacerbated her condition to the point that McCraw was unable to maintain employment. A single worker's compensation commissioner awarded McCraw benefits, finding that she sustained a compensable occupational respiratory disease caused by her exposure to chemicals. The single commissioner also found that McCraw was permanently and totally disabled as of November 19, 1992, and that her claim met the notice and statute of limitation requirements.

In a two-to-one decision, the full commission reversed the decision, noting that Dr. Applebaum diagnosed McCraw with lung disease, i.e. occupational asthma, in 1991 and that McCraw failed to file her claim within two years of receiving notice of this diagnosis.

Thereafter, the circuit court reversed the full commission's decision, finding that the statute of limitations for an occupational disease claim is triggered by definitive diagnosis and total disability. Since total disability did not occur until November 19, 1992, the circuit court held that the November 14, 1994 filing on McCraw's claim was timely. This decision was later affirmed by the South Carolina Court of Appeals.

On final appeal, the Supreme Court affirmed the decision of the Court of Appeals, noting that the testimony clearly showed that the initial consultations with Dr. Applebaum were informal and undocumented, and were not within the context of the doctor-patient relationship. The Court noted that the statute of limitations requires that the employee be: (1) diagnosed definitively

as having an occupational disease; and (2) notified of the diagnosis. Accordingly, in order to pursue a workers' compensation claim, an injured employee must file his proof of claim within two years of injury and notice.

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**T e n n e s s e e****UM Benefits Reduced by Other Coverage**

In *Akin v. Thompson* (Tenn. App. July 12, 2002), the plaintiff was involved in an automobile accident. He was rear-ended by the vehicle driven by the defendant who was uninsured. Plaintiff filed suit against his uninsured motorist carrier. The UM policy on the plaintiff's vehicle provided uninsured motorist coverage with limits of \$100,000 per person. The plaintiff was found to be within the course and scope of his employment when he was injured in the subject accident.

Plaintiff's employer did not have a workers' compensation program, but it had a benefit program for on-the-job injuries, under which it would pay the employee's medical expenses, 100% of wages for 130 days, and disability benefits. The plaintiff's UM policy provided that "damages payable will be reduced by: all amounts paid or payable under any workers compensation law, disability benefits law, or similar law. . ." *Id.* at \*2 (emphasis added). The total benefits that were paid by plaintiff's employer exceeded \$100,000.

The trial court held that the UM limits were reduced by amounts paid "under any workers' compensation law, disability law, or similar law . . ." and also found that the loss of consortium claim of plaintiff's spouse was derivative in nature and subject to the same \$100,000 "each person" limit and reduction.

The Tennessee Court of Appeals affirmed the trial court's grant of summary judgment in favor of the UM carrier.

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## Virginia

# Virginia Federal Court Expands the Admissibility of Accident Reconstruction Testimony

Virginia has consistently placed strict limitations on expert testimony involving accident reconstruction. However, a recent decision by the United States District Court for the Western District of Virginia has expanded the role of accident reconstruction testimony in Virginia's federal courts. The District Court's decision in *Hatten v. Scholl* will create a significant tension between the admissibility of accident reconstruction testimony in Virginia's federal courts versus its state courts.

In *Hatten v. Scholl*, 2002 WL 236714 (W.D. Va.), the defendant backed up his tractor to reconnect it with his trailer at the loading dock. Before backing up, the defendant blew his horn and put on his flasher lights, looked at both set of mirrors, and leaned over the passenger seat to get a better view of the passenger inside mirror. He observed the decedent walking in the same southerly direction as he was backing up. After the defendant finished backing up, he found that he had struck the victim, who later died from the injuries.

According to the plaintiff's expert, the defendant did not back up his tractor in a straight line, but rather veered to the right, before beginning the alignment maneuver with his trailer. The plaintiff's expert opined that the defendant did not undertake normal safety procedures while backing up his rig, thereby determining that the defendant had violated the standard of care in backing up the trailer. The expert based his opinion on the Virginia Commercial Driver's License Manual, the Ohio Commercial Driver's License Manual and the Federal Highway Administration Student Manual and various other driving training manuals and videos.

In a *motion in limine*, the trial court considered the admissibility of the plaintiff's expert opinion under the U. S. Supreme Court's standard set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). The United States District Court admitted the testimony because he relied upon federal, state and commercial publications on the subject. The court permitted the expert to rely on these practical guides as a basis by which to measure the actions and testimony of the defendant. The district court found the expert's testimony sufficiently reliable under the requirements of Federal Rule of Evidence 702. Additionally, the district court found that the expert testimony would assist a judge or jury in understanding the proper procedures in backing up a 50,000-ton vehicle.

In contrast, Virginia state courts have been steadfast in applying their strict requirements for the admission of such expert testimony. In *Keese v. Donigan*, 259 Va. 157 (2000), the Supreme Court ruled that expert testimony based on broad scientific principles about drivers as applied to a particular driver lacked the required foundation for the admission of evidence. As recently as March of this year, the Virginia Supreme Court, in *Jones v. Ford Motor Company*, 263 Va. 237 (2002), held that an expert may not testify about a particular accident based upon a general study conducted by the manufacturer.

The District Court's decision in *Hatten* has widely broadened the admissibility of such expert testimony in Virginia federal courts, thereby making Virginia federal courts a preferable venue for the admission of accident reconstruction testimony.

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