Three Sticks of Dynamite in the Road: Don’t Blow Up Verdicts

Authored by ALFA International Attorneys:

John Tarpley
LEWIS THOMASON
Nashville, TN
jtarpley@lewisthomason.com

Joseph Swift
BROWN & JAMES
St. Louis, MO
jswift@bjpc.com
The Foundation for and Admissibility of Blood Testing

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Fed. R. Evid. 901(a). “[A] party may authenticate a matter through the testimony of a witness who has knowledge that the matter is what its proponent claims it to be. In proving a chain of custody, the proponent of an item of evidence shows that it was continuously in the safekeeping of one or more specific persons.” DeLaTorre v. Minnesota Life, 2005 WL 2338809 at * 5 (N.D. Ill. Sept. 16, 2005) (internal citations omitted). It is usually unnecessary to establish a perfect or unbroken chain of custody. Rule 901(a)’s standard of “sufficient to support a finding” is a minimal one, and thus courts commonly tolerate gaps in the chain that might present some limited opportunity for tampering with the evidence. Id.

In DeLaTorre, a plaintiff attempted to exclude evidence of a toxicology report arguing that defendant had not provided adequate foundation because defendant had not shown a chain of custody with respect to the blood sample taken from the decedent. 2005 WL 2338809 * 5. The court noted that the medical examiner, a board-certified physician in pathology and forensic pathology, took the sample from the decedent, labeled the samples, and testified generally about the procedures for transporting the samples directly to a laboratory for testing. Id.

The court denied plaintiff’s motion in limine, reasoning that plaintiff failed to point to any evidence sufficient to create a genuine issue of material fact that the blood sample
described in the report was not from the decedent. *Id.* Accordingly, the court found that the evidence met the minimal standard under Federal Rule of Evidence 901. *Id.*

Similarly in *Dahl*, the defendant contended his alleged post-accident blood test results should be excluded because plaintiff could not present sufficient chain of custody evidence to authenticate whether the sample is the sample reflected in the test results. 2017 WL 6628334, at * 3 (N.D. Ind. Mar. 28, 2017). The court denied defendant’s motion to exclude any such evidence, holding that any discrepancies in the chain of custody that create the hypothetical possibility of tampering goes to the weight of the evidence, not its admissibility. *Id.* See also *U.S. v. Shackelford*, 735 F.2d 776, 785 (7th Cir. 1984) (*abrogated on other grounds*).

Blood test results used to show a driver was under the influence of drugs or alcohol at the time of an incident are relevant because the driver’s perception and recall of the events in question may have been affected by the substances. *Hallett v. Richmond*, 2009 WL 5125628 at * 3 (N.D. Ill. May 15, 2009). See also *U.S. v. Gallardo*, 497 F.3d 727 (7th Cir. 2007). See also *Bramlette v. Hyundai Motor Co.*, 1992 WL 213956 at * 1-3 (N.D. Ill. Aug. 28, 1992).

**The Driving Record**

a. **Records of prior accidents are only admissible if circumstances were substantially similar**

Although the standard for relevancy under Rule 401 is an “extremely low burden” to meet, a previous accident does not meet the burden unless it “happened under
substantially the same circumstances”. *Kozlov v. Associated Wholesale Grocers, Inc.*, 818 F.3d 380, 396 (8th Cir. 2016) (affirming district court exclusion of prior accident from 13 years before the accident at issue because the prior accident involved, and was caused by, icy roads). Although the district court’s decision was based on Nebraska law, the 8th Circuit opinion went further and specified that it would also be inadmissible under FRE 401 because it “does not make any fact or consequence ‘more or less probable.’” *Id.* quoting Fed.R.Evid. 401.

**b. Driver records and other records kept in accordance with the Federal Motor Carrier Safety Regulations are admissible if there is a claim for negligent entrustment/hiring/retention**

When the only claim against a carrier arises out of vicarious liability for its driver’s negligence, the carrier’s conduct is irrelevant under FRE 401. See *Bautista v. MVT Services, LLC*, 16-CV-01086-NYW, 2017 WL 6054888, at *7 (D. Colo. Dec. 7, 2017). In *Bautista*, the Court refused to admit an expert opinion regarding a carrier’s failure to comply with the Federal Motor Carrier Safety Regulations because:

any evidence of [the carrier’s] failure to comply with any standard, including the Federal Motor Carrier Safety Regulations (“FMCSR”), is simply not relevant to the issue of whether [the carrier’s driver] acted negligently in operating a tractor-trailer that struck the tractor-trailer that [the plaintiff] occupied. *Id.*

**c. When a claim for negligent trust/hiring/retention exists, only the driving record for the driver involved in the accident is admissible. A carrier’s other driver’s records are inadmissible.**
When there is a claim for negligent entrustment, retention, training, or supervision, however, prior driving records are admissible. See *Crawford v. Yellow Cab Company*, 572 F.Supp. 1205, 1209-10 (N.D.Ill. 1983) (the court held that evidence of a driver's prior driving record and employment history with his employer was admissible in a wrongful entrustment action); *Southern Pacific Transp. Co. v. Builders Transport, Inc.*, 1993 WL 185620, (E.D.La. May 25, 1993) (evidence of train crew's past performance record is admissible to prove negligent entrustment); *Bowman v. Norfolk Southern Railway Co.*, 832 F.Supp. 1014, 1021 (D.S.C. 1993) (engineer's prior driving record is admissible in negligent entrustment action to show notice and knowledge on the part of the railroad company); *McCarson v. Foreman*, 692 P.2d 537, 541 (N.M. App.Ct. 1984) (in negligent entrustment action, driver's prior DUI conviction and cocaine charge were admissible because they were relevant to the issue of his competence and fitness as a driver).

In *Crawford*, the plaintiff sought to admit a summary of the driving records of the defendant taxi cab company’s 4,400 other drivers to prove its “intentional” disregard for the safety of others under 404(b), which permits admission of crimes/wrongs/bad-acts to prove “intent.” *Id.*; See also FRE 404(b)(2). In rejecting this argument, the Court reasoned that the other drivers’ records would not establish the taxi cab company’s “intent” for the purpose of 404(b), which it noted is different when applied to civil as opposed to criminal cases. *Id.*
d. A driver’s medical condition is admissible if related to the cause of the accident in question

“If [the driver’s] health caused him to be unable to properly operate the vehicle, which in turn contributed to the accident, this evidence is relevant. It makes it more probable that [the driver], and therefore [the carrier], was at fault for the collision.” Kozlov, 818 F.3d 380 at 396. While the Court in Kozlov found the district court’s refusal to admit this evidence was in error, it did not find it was an abuse of discretion.

Admissibility of Preventable/Non-Preventable Determinations

a. Statutory inadmissibility

Preventability determinations created to comply with the Federal Motor Carrier Safety Regulations are inadmissible under section 504(f), which states:

No part of a report of an accident occurring in operations of a motor carrier, motor carrier of migrant workers, or motor private carrier and required by the Secretary, and no part of a report of an investigation of the accident made by the Secretary, may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation.

There have not been any appellate court interpretations regarding the meaning of this section, and district courts have been somewhat hostile to attempts at keeping out various reports unless they were explicitly created to comply with a specific section of the FMCSR. See e.g., Sajda v. Brewton, 265 F.R.D. 334, 341 (N.D. Ind. 2009) (“[Section 504(f)] does not extend to regularly-gathered information that the carrier acquires and uses to fill in the blanks on [a] DOT report”); Rogers v. Quality Carriers, Inc., 4:15-CV-22-JD-JEM, 2016 WL 3413766, at *5 (N.D. Ind. June 21, 2016) (incident report not covered by section 504(f) because carrier failed to establish it was required to be created by the Secretary);
Wolfgang v. Channell, 3:12-CV-1218, 2013 WL 2278091, at fn 1 (M.D. Pa. May 22, 2013) ("[t]he Court has reviewed 29 U.S.C. Section 504(f) and concludes that it has nothing to do with motor vehicle accidents or the reporting requirements for such events"); Chavez v. Marten Transport, Ltd., 2012 WL 12861607 at *3 ("Defendants, however, fail to establish either that the accident report itself was “required” by the Secretary of Transportation, or that the accident report was “made by the Secretary.” Rather, defendants contend that, because there first must be an investigation by the motor carrier in order to make a report to the Secretary, Marten’s accident investigation committee’s determination should be deemed to be ‘a part of the report required by the Secretary.’ Defendants provide no authority for this interpretation of the statute, which is contrary to its plain language."); Cameron v. Werner Enterprises, Inc, 2:13-CV-243-KS-JCG, 2016 WL 3030181, at *3 (S.D. Miss. May 25, 2016) (excluding preventability report but allowing plaintiff to admit other evidence to show the accident was preventable);

b. Preventability determinations may be kept out when based on a different standard than duty owed and therefore are Misleading, Confusing and pose a Danger of Unfair Prejudice

If a preventability determination does not use the same standard of care, it will likely be found to be inadmissible. See Villalba v. Consol. Freightways Corp. of Delaware, 98 C 5347, 2000 WL 1154073, at *6 (N.D. Ill. Aug. 14, 2000). In Villalba, the Court found that there was a difference between the preventability standard used by the National Safety Council and Illinois law defining negligence. The National Safety Council standard at the time of that case was:

A preventable accident is one in which the driver failed to do everything that reasonably could have been done to avoid the accident. In other words,
when a driver commits errors and/or fails to react reasonably to the errors of others, the National Safety Council considers an accident to be preventable.

Id.

Whereas the negligence was defined under Illinois law as:

the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence.

Id.

Under these circumstances, the Court held:

Although the standards appear similar, the National Safety Council makes clear that its preventability standard “is not solely based on or determined by legal liability.” Defendants' Ex. E, p. 3. Thus, the two standards may confuse and mislead the jury and result in a mini-trial regarding the different standards and the significance of the preventability finding, diverting attention away from the real issue of negligence. Likewise, there exists a danger that the proposed evidence could suggest a decision to the jury on an improper basis. CF's finding of preventability could lead the jury to decide the issue of negligence by improper reference to the preventability standard and CF's finding of preventability.


c. Subsequent Remedial Measure?

Federal Rule of Evidence 701 excludes subsequent remedial measures. An objection that the preventability determination is inadmissible because it is a subsequent remedial measure may not keep it out of evidence. However, in Harper v. Griggs, 2006 WL 2604663 (W.D. Ky. Sept 11, 2006) and in Martel v. Massachusetts Bay Transp. Auth., 525 N.E. 2d 662 (Ma. 1988) the determination was kept out of evidence.
Electronic Evidence

A proponent must show the authenticity of an item of evidence before its admission. *Nester v. Textron, Inc.*, 888 F.3d 151, 160 (5th Cir. 2018). To show authenticity, courts do not require conclusive proof. *Id.* Rather, Federal Rule of Evidence 901(a) merely requires some evidence that is sufficient to support a finding that the evidence in question is what its proponent claims it to be. *Id.*

The analysis of authenticity is not formalistic and permits authentication in multiple ways. Fed. R. Evid. 901(b); *Jones v. Union Pac. R.R. Co.*, No. 12 C 771, 2014 WL 37843, *3 (N.D. Ill. Jan. 6, 2014). The proponent should provide the testimony of a witness with knowledge that an item is what it is claimed to be, or provide evidence describing a process or system and showing that the process or system produces an accurate result. *Vazquez v. City of Allentown*, 689 F. App'x 695, 700 (3d Cir. 2017). For the first method of authentication, testimony from an eyewitness is certainly preferable, but the authentication requirement is satisfied when a witness with knowledge testifies that an item is what it is claimed to be. *Nester*, 888 F.3d at 160; *Jones*, No. 12 C 771, 2014 WL 37843, at *4.

For the second method of authentication, *Jones* provides a good illustration. In *Jones*, the court held that defendant’s evidence of how the video was downloaded and preserved further supported its admission. *Jones*, 2014 WL 37843, at *4. The defendant summarized its process for securing video footage from train cameras as involving six steps, which were followed: (1) a request is made for a video download, (2) an electrician downloads a “digitally encrypted and watermarked video to CD,” (3) the maintenance-
shop foreman puts this CD in a sealed envelope and signs it, (4) the envelope is delivered to and signed by the maintenance director, (5) the envelope is retrieved and signed by a claims-department employee, and (6) that employee gives the envelope to the assigned claims representative. Id.

Further, courts in the Seventh Circuit hold that the chain of custody need not be perfect. Id., at *5. Merely raising the possibility of tampering is not sufficient to render evidence inadmissible because the possibility of a break in the chain of custody of evidence goes to the weight of the evidence, not its admissibility. Id.; United States v. Prieto, 549 F.3d 513, 524–25 (7th Cir.2008); United States v. Kelly, 14 F.3d 1169, 1175 (7th Cir.1994); United States v. Collins, 715 F.3d 1032, 1036 (7th Cir.2013).

Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Fed. R. Evid. 401. The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R. Evid. 403. Videos of accidents are usually admissible.