The Transportation Practice Group of ALFA International has published the Transportation Update for about eighteen years. Please note that in addition to this issue of the Transportation Update we have an archive of many recent issues on the ALFA website at ALFA Transportation Update Archives, http://www.alfainternational.com/practices/groupdetail.aspx?pgid=57.

If your first contact with the Transportation Update is through our website, you can be added to our email distribution list by contacting Nick Dirienzo at ndirienzo@alfainternational.com. Please put Transportation Update in the subject line and we will email the current issue and each subsequent issue to you as it is published. If you want to receive the Transportation Update in hard copy format, contact an ALFA attorney listed at the end of this newsletter and they can provide this service for you.

Our primary method of distribution of the Transportation Update is by email. Electronic publication allows us to include hyperlinks for the use of our readers. All hyperlinks are in blue. Hyperlinks can be activated by placing the cursor on them and left clicking with the mouse. Links in the contents go to specific points in the newsletter; links to websites take you to the website; and links to email addresses open an email addressed to that person. We encourage you to use the hyperlinks feature and our section headings to quickly get to the information that is most interesting to you. The substantive/informative section headings are as follows: The Editors’ Notepad (this section) where the Editors often provide sources of information and points of interest; ALFA Member Publications and Speaking Engagements; Cases, Regulations, and Statutes; Verdicts, Appeals, and Settlements; Practice Tips; and Articles.

The ALFA Member Publications and Speaking Engagements section lets you know what your ALFA lawyers are doing to share their knowledge and experiences to assist in the defense of claims and cases.

Under the Cases, Regulations, and Statutes section of the Transportation Update, we report to you about developments in the statutory, regulatory, and common law around the country that are of general interest to the trucking community.

The Verdicts, Appeals, and Settlements section addresses the results of litigation affecting the trucking industry and also provides information about significant results achieved by ALFA firm lawyers. We encourage you to report to the Editors any verdict, appeal, or settlement you think is of interest to the trucking community.

1 All hyperlinks are in blue. Hyperlinks can be activated by placing the cursor on them and left clicking with the mouse. Links in the contents go to specific points in the newsletter; links to websites take you to the website; and links to email addresses open an email addressed to that person.

continued on next page
The Practice Tips section of the Transportation Update features articles which address matters of practical interest to those who manage litigation for motor carriers and those who represent them. The essays in this section generally have widespread application throughout the country.

Articles provide in depth analysis of issues, developments, and concerns that are relevant to the transportation industry.

The Chairman of the Transportation Practice Group for 2011-2012 is P. Clark Aspy of Naman, Howell, Smith & Lee, LLP, Austin, Texas, who can be reached at (512) 479-0300 and aspy@namanhowell.com. Our Vice-Chair is Joe R. Swift of Brown & James, P.C., St. Louis, Missouri who can be reached at (314) 421-3400 and jswift@bjpc.com. The Chair Emeritus is Peter Doody of Higgs, Fletcher & Mack, LLP, San Diego, California, who can be reached at (619) 236-1551 and doody@higgslaw.com.

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The Regional Directors help the Transportation Update Editors gather materials for each issue from their areas. If you have any suggestions for content, feel free to contact either the Regional Directors or the Editors. The Editors can be contacted as follows:

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We welcome comments, suggestions for improvement, and topics you would like for us to address in future issues. Our goal is to provide timely relevant information to members of the trucking community.
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DISCLAIMER

The ALFA Transportation Update does not create an attorney-client relationship between the reader and any attorney nor does it render legal advice on any specific matter. No reader should act or refrain from acting on the basis of any statement in the ALFA Transportation Update without seeking advice from qualified legal counsel on the particular facts and circumstances involved. Readers are responsible for obtaining such advice from their own legal counsel.
FUTURE EVENTS

Each year, the Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry. The 2012 Transportation Seminar will be held **May 2-4, 2012**, at the Ritz-Carlton located on Amelia Island, Florida. The official website of this venue is [http://www.ritzcarlton.com/en/Properties/AmeliaIsland/Default.htm?utm_campaign=09018&src=ps](http://www.ritzcarlton.com/en/Properties/AmeliaIsland/Default.htm?utm_campaign=09018&src=ps). The luxurious Ritz-Carlton, Amelia Island, pictured below, is located on the east coast of Florida forty-five minutes from the Jacksonville, Florida Airport. Our seminar here several years ago had so much positive feedback we decided to go back!

In addition to a spa and other amenities offered by the Ritz-Carlton, Amelia Island, the ALFA Transportation Group will also offer its annual program. The Program Chair of the 2012 seminar is Marc Harwell of the ALFA firm Leitner, Williams, Dooley & Napolitan based in Chattanooga and Nashville, Tennessee. Mr. Harwell can be reached at (423) 424-3908 and marc.harwell@leitnerfirm.com.

The theme of this year’s seminar is “Navigating the Potholes of a Long and Winding Road.” The seminar will address issues affecting the trucking industry, including FMCSA’s relatively new Compliance, Safety, Accountability program (“CSA”), which has created a myriad of issues to be resolved by the courts. As you know, hiring, retention, and driver discipline issues affect your CSA rating and the viability of your company. Driver fatigue issues remain a concern, so we are bringing a sleep study expert to the conference. Technological advances continue to change the industry, and the effective use of such technologies is essential to position your company in this competitive world. The plaintiffs’ bar is employing new strategies in light of the many new regulations that affect your business, and being aware of their tactics should prove to be of value to you. New cross-border regulations were implemented in 2011. The effect of these regulations bears a significant impact upon those carriers directly engaged in cross-border traffic and is anticipated to have a “trickle-down-effect” upon those indirectly involved.

At this conference, we will address these issues and other “hot topics” that are likely to have a real and practical impact upon your business. We will bring these issues and concerns to life by applying the regulations and laws and other developments to facts that will be deliberated by a jury after voir dire, opening statements, and witness direct and cross examination. You will also have an opportunity to engage in a discussion with an esteemed jury consultant regarding how to best position your company to address juror perception issues.

Finally, you will have the opportunity to engage in an interactive discourse in smaller groups through a break-out session and round-table discussions with your peers in the industry and with ALFA lawyers who are prepared to provide thoughts and practical tips on best practices.

The 2012 Transportation Seminar is sure to provide outstanding professional development at an unforgettable venue. For more information regarding the 2012 Transportation Seminar, please contact Jessica Zaroski at jzaroski@alfainternational.com or an ALFA attorney listed at the end of this newsletter.

ALFA’S GO TEAM HOTLINE

The **ALFA Go Team Hotline** – along with ALFA International attorneys Peter S. Doody (Fletcher & Mack LLP), Krsto Mijanovic and Peter A. Dubrawski (both of Haight Brown & Bonesteel LLP) – was recently featured in the Los Angeles Daily Journal. The article, *On-Call Lawyers Drive Trucking Defense*, highlighted the increased emphasis attorneys and the trucking industry are placing on “immediate response teams” that can respond to catastrophic accidents at a moment’s notice.

ALFA International CEO Dick Hetke described this group of lawyers, experts, and claims professionals as “kind of like fireman”, who “slide down the pole, and they drive to Wichita or wherever.”
The article also compared these critical response teams to “combat veterans” who have “their own stories of being pulled into action at the scene of accident.”

The bottom line is that early response to accidents can be “critical” in evaluating the case and “snuffing” out lawsuits before they are filed.

The ALFA Go Team Hotline service is simple. If you are in need of immediate legal support, call 1-866-540-ALFA (2532). An ALFA operator will provide contact information about experienced transportation lawyers, accident reconstructionists, and other transportation industry experts specific to your location.

ALFA knows its transportation clients must often confront time-sensitive emergencies. When you contact the ALFA Go Team Hotline, you will be connected to a full-service emergency response team, when you need it. Contact your ALFA lawyer today for more details about the ALFA Go Team Hotline. Remember, 1-866-540-ALFA (2532).

FUTURE ISSUES OF TRANSPORTATION UPDATE

The Spring 2012 issue of Transportation Update will be published in April 2012.

ALFA MEMBER PUBLICATIONS AND SPEAKING ENGAGEMENTS

As noted above, the 2012 Transportation Seminar is quickly approaching. A brochure for the Seminar will be circulated shortly to those who receive this newsletter containing a list of the transportation professionals that will be presenting at the 2012 Transportation Seminar.

CASES, REGULATIONS, & STATUTES

CALIFORNIA

California Supreme Court Rules Against Tractor-Trailer Parked in Emergency Area


A truck driver working for Ralph's Grocery Company (“Ralph’s”) parked his tractor-trailer in a designated emergency area alongside an interstate highway in order to have a snack. While it is true having a snack is not an emergency, the tractor-trailer parked in a dirt lot a full 16 feet from the actual freeway and shoulder. The decedent was driving his vehicle home from work and sharply veered off the freeway and collided at high speed with the stopped trailer. The driver of the vehicle was not intoxicated at the time and experts opined that he most likely fell asleep at the wheel. At the trial level, the jury found decedent to be 90% comparatively negligent and Ralph's to be 10% negligent. The case was appealed by Ralph’s and the appellate court held that Ralph’s owed no legal duty to avoid a collision since the decedent’s actions were unforeseeable. The California Supreme Court disagreed and upheld the trial court’s decision of 10% comparative negligence against Ralph’s. The Supreme Court reasoned Civil Code section 1714 creates a general duty of each person to exercise reasonable care for the safety of others. It is not categorically unforeseeable that a driver may lose control of his or her vehicle and leave the freeway and shoulder area and collide with a vehicle which is improperly stopped in a designated area for emergency parking only. The California Supreme Court determined the analysis should not be based on a question of law, but instead the trial court’s findings of fact.

The court held if the tractor-trailer driver had been stopped for emergency purposes rather than eating a snack there would be no liability. This seems to be an interesting legal distinction. But not for the fact the driver was eating a sandwich versus fixing a flat liability is determined. It seems the California courts are beginning to carve a new theory of liability against parked big rigs. This case dovetails with an earlier Court of Appeal decision in Lawson v. Safeway, 191 Cal.App.4th 400, 119 Cal.Rptr.3d 366 (2010), which essentially held that a tractor-trailer driver had a duty to not only park legally, but also, to park safely. The truck driver in Lawson was parked in a legal parking lot, but may have obstructed the view of a nearby intersection.
These cases are especially significant in the context of California’s hybrid joint and several tort liability law known as “Proposition 51.” All a plaintiff needs to prove is a mere 1% of comparative negligence against a trucking company for unsafe parking and that company will be 100% liable for all of plaintiff’s economic damages such as medical bills and wage loss. Accordingly, if a parked tractor-trailer is either struck by plaintiff’s vehicle or parked legally in the near vicinity of an accident, then we can expect plaintiff’s counsel to now name the motor carrier as an additional defendant.

Based on the two cases of Cabral v. Ralphs Grocery and Lawson v. Safeway it will be very difficult for a motor carrier defendant, whose only involvement in the accident was a parked tractor-trailer, to extricate itself from the lawsuit by way of motion for summary judgment. The duty of a parked big rig will now be a question of fact for the jury to determine.

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The Colorado Supreme Court Decides Plaintiff May Recover All Billed Amounts for Medical Treatment, Rather Than Paid Amounts

On November 15, 2010, the Colorado Supreme Court, despite a strong dissent, issued a noteworthy opinion regarding Colorado’s collateral source rule. In Volunteers of America Colorado Branch v. Gardenswartz, 242 P.3d 1080 (Colo. 2010) (“Gardenswartz”), the court ruled that the contract exception to the collateral source rule prohibits the offset of healthcare provider discounts resulting from a plaintiff’s purchase of third-party insurance. This decision has a far-reaching effect, as it allows a tort plaintiff to recover the higher billed amounts, rather than the lower amounts actually paid. Thus, a plaintiff can now recover medical expenses that neither he nor his insurer paid, or was ever obligated to pay.

To illustrate the effect of the rule, consider this hypothetical:

- The plaintiff is injured in an accident and incurs charges of $100,000 for medical care.
- Through a health insurance contract, the plaintiff’s providers discount $40,000 of the bills.
- The plaintiff’s health insurer pays $60,000. The remaining $40,000 is written off.
- The plaintiff pays none of the medical bills out of pocket. (Note: Colorado law, C.R.S. § 10-16-705(3), prohibits a provider accepting insurance to “balance bill” an insured.)

Ruling 1: Evidence of the amounts actually paid is inadmissible.

Ruling 2: If liability established, plaintiff recovers the full $100,000.

Ruling 3: The insurance discount is not applied to offset any award.

There is often a disparity between the cost of medical services that are billed to a consumer and the amounts that are actually paid by insurance companies. Sometimes the disparity can be significant. Insurers have strong bargaining power to enter into contracts providing discounted rates. Providers have an incentive to accept those discounted rates in exchange for the increased business and payment of a large volume of claims.

Not surprisingly, in personal injury lawsuits, Colorado plaintiff and defense counsel have battled over the issue of whether billed or paid amounts for medical treatment are recoverable. The billed vs. paid issue has been argued in many cases. Trial courts have handled the issue differently, and in some cases, inconsistently. While defendants have won many battles on the billed vs. paid issue in the past, it seems clear now that they have lost the billed vs. paid war, in light of the Gardenswartz decision.

Under the common law collateral source rule, making the injured plaintiff whole is solely the tortfeasor’s responsibility. Gardenswartz at 1083 (citing Colo. Permanente Med. Grp., P.C. v. Evans, 926 P.2d 1218, 1230 (1996)). Any third-party benefits or gifts obtained by the injured plaintiff accrue solely to the plaintiff’s benefit and are not deducted from the amount of the tortfeasor’s liability. These third-party sources are “collateral” and are irrelevant in fixing the amount of the tortfeasor’s liability. The rule therefore allows double recovery by a successful plaintiff. The purpose of this rule is to prevent a tortfeasor from benefitting, in the form of reduced liability, from compensation in the form of money or services that the victim may receive from a third-party source. Id. (citing Quinones v. Pa. Gen. Ins. Co., 804 F.2d 1167, 1171 (10th Cir.1986)). Accordingly, the rule is somewhat punitive in nature. Id. (citing Van Waters & Rogers, Inc. v. Keelan, 840 P.2d 1070, 1074 (Colo.1992), noting that to the extent either party received a windfall, it was considered more just that the benefit be realized by the plaintiff rather than by the tortfeasor).

Colorado’s collateral source rule was codified at C.R.S. § 13-21-111.6. The statute has two contrasting clauses. The first clause partially negates the collateral source rule. It directs a trial court, following a damages verdict, to adjust the plaintiff’s award by deducting compensation or benefits that the plaintiff received from collateral sources, i.e., sources other than the tortfeasor. The second clause, described as the “contract exception” or the “contract clause,” retains the collateral source rule for certain benefits. The statute provides as follows:

In any action by any person or his legal representative to recover damages for a tort resulting in death or injury to person or
property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained; except that the verdict shall not be reduced by the amount by which has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person. Id.

C.R.S. § 13-21-111.6.

Under Colorado common and statutory law, it has generally been accepted that, even though a plaintiff’s insurer was responsible for and paid amounts for medical treatment, the plaintiff could recover for the paid amounts. The concept behind this rule was to benefit the plaintiff, rather than the tortfeasor, for having procured the insurance in the first instance. In addition, the plaintiff may be responsible to pay part or all of a lien asserted by the insurer.

Gardenswartz specifically addressed the issue of provider discounts for health care bills. The court considered whether the plaintiff should recover billed amounts or paid amounts for medical expenses incurred because of the accident. The court – after applying a formula to reduce a portion of the discount – held that plaintiff could recover billed amounts and that the collateral source rule would not operate to offset the provider discount.

Gardenswartz makes clear that the plaintiff should benefit from the insurer’s contract with healthcare providers discounting the rates. In rationalizing this result, the Gardenswartz court noted that the interests of the health insurer, the insured, and the healthcare provider are “intertwined,” and that it is an “oversimplification” to assert that a plaintiff’s insurer and healthcare providers entered into the contracts only to serve their own ends and not on plaintiff’s behalf. Gardenswartz at 1086. More importantly, to the court, the discounted medical rates paid by the insurance company are a direct result of the plaintiff’s health insurance contract, and therefore, a defendant may not claim these discounts to unjustly reduce its liability. Id. In essence, Gardenswartz advanced the intellectually suspect reasoning that amounts were “paid” when they, in fact, were not, under the guise of the collateral source rule. Id.

Justice Nancy Rice (joined by two other Justices) strenuously dissented. Justice Rice reasoned that the value of the benefit the health insurer paid to the plaintiff was not, as the majority held, the theoretical amount the plaintiff would have been liable for had he not carried insurance, but rather the amount the insurer owed the providers under pre-negotiated pricing contracts. Id. at 1089-90. Because the plaintiff carried insurance, he was never liable to his providers for the difference between the amounts billed and paid. Id. at 1090-91. Justice Rice disagreed with the majority and noted that the insurer never negotiated the discount on the plaintiff’s behalf, but on its own behalf. Id. at 1091. Justice Rice concluded that a tortfeasor having to pay a plaintiff damages that neither the plaintiff nor his insurer ever actually incurred was a worse result than any unfairness resulting from a tortfeasor benefitting from an insurer-provider discount. Id. at 1091-92.

Colorado law now holds that a plaintiff is entitled to billed amounts for medical expenses. This increases damages exposure for all defendants in personal injury cases.

Impact on Settlement Evaluation and Negotiations: The billed vs. paid issue as a negotiating chip has been eliminated. A defendant may still argue that the plaintiff will obtain a windfall in the practical (if not legal) sense via a settlement.

Impact at Trial: Evidence of the provider discount or the lower “paid” amount is inadmissible. Defendant will not obtain an offset for the discounted amount.

The Gardenswartz decision leaves open to defendants the opportunity to present evidence that medical charges were unreasonable. In many cases, presenting such evidence will be difficult and costly, and in some cases, impossible. A defendant cannot use health insurer discounts to support an argument that charges were unreasonable. A defendant would probably need to retain an expert to opine that other facilities and providers in the area charge less for the same treatment. A defendant can still argue, if supported by the evidence, that the plaintiff over-treated.
The Gardenswartz decision was in the context of private health insurance. Colorado courts may apply the same rationale in cases involving workers' compensation insurance. Gardenswartz’s applicability in a case involving payment by Medicaid or Medicare remains unknown.

In the current session of the Colorado Legislature, there is legislation pending that would undo major portions of the Gardenswartz decision. At the time of this article, the legislation had passed in the House of Representatives, but was undergoing some major revisions in the Senate.

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On August 10, 2011 emergency amendments to the Public Utilities Commission’s (PUC) Rules and Regulating Transportation by Motor Vehicle, 4 CCR 723-6, were adopted to implement Senate Bill 11-180 and most significantly, House Bill 11-1198. Both Bills were enacted by the Colorado Legislature this year. In order to ensure there is no lapse of regulation due to the recent statutory changes, the emergency rules are in effect for 210 days, or until the permanent rules become effective.

The House Bill 11-1198 reorganizes Title 40, and appeals Articles 10, 11, 13, 14 and 16 of Title 40, replacing them with a new Article, 10.1, which contains five subsections covering the various transportation providers and services.

House Bill 11-1198 also made substantive changes requiring the adoption of the emergency rules. The new law clarifies the services authorized under a children’s activity bus permit; transfers jurisdiction from the PUC to the Colorado Department of Public Safety for all household goods movers; standardizes finger-print based criminal history checks for both the initial issuance and resubmission to qualify to drive for a motor carrier; and requires towing carriers to maintain workers’ compensation insurance and post a $50,000 bond to ensure payment of any civil penalties assessed by the PUC.

Senate Bill 11-180 permits taxis operating in Colorado to pick up passengers at any point near where a taxi has dropped off passengers in close proximity to that point, unless the drop-off point is the airport. “Close proximity” is defined as within a one mile radius of the drop-off point, and within 20 minutes of the drop-off time.

The emergency rules now in effect can be viewed on the PUC website at: https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=11R-638TR.

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Idaho Implements Safe Driving Bill Protecting Doctors from Retaliatory Action for Advising the Transportation Department Regarding Patients Who Should Not Be Driving

Previously, Idaho law allowed a doctor to alert the Transportation Department if a patient should not be driving. Under I.C. § 49-326(c)(1), the Transportation Department is authorized to suspend, disqualify or revoke the license or privileges of a driver upon a showing that a driver was incompetent to drive based on the recommendation of the driver’s personal physician. See I.C. § 49-326(c)(1). Noticeably absent from I.C. § 46-326(c)(1) were provisions protecting doctors from retaliatory actions based upon such recommendations to the Transportation Department or procedures establishing what notice must be given to patients or their families.

Under House Bill No. 160, which went into effect on July 1, 2011, such safeguards are now codified in I.C. § 49-326(c)(4). House Bill No. 160, which was authored by the Idaho Medical Association, also established the procedure a doctor should follow for notifying the patient or patient’s family of the doctor’s concerns regarding the patient’s ability to operate a motor vehicle safely prior to submitting a report to the Transportation Department. Specifically, I.C. § 49-326(c)(4) states:

*Any physician who has reason to believe that a patient is incompetent to drive a motor vehicle as defined in this subsection, may submit a report to the department. Before submitting a report, a physician should notify the patient or the patient’s family of the physician’s concerns about the patient’s ability to drive. If the physician submits a report, the physician shall provide a copy of the report to the patient or to a member of the patient’s family. If a physician submits a report in good faith, no professional disciplinary procedure, not monetary liability and no cause of action may arise against the physician for submission of the report.*

I.C. § 49-326(c)(4).

House Bill No. 160 received the public support and backing of AARP.

Since House Bill No. 160 became effective on July 1, 2011, there have yet to be any legal challenges mounted against the law. Nor is there any publicly available information regarding the number of reports submitted by doctors since the enactment of this law.

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Recently, a jury awarded plaintiffs a $23,775,000 judgment in a wrongful death and personal injury case in Illinois, Sperl v. C.H. Robinson Worldwide, Inc., 408 Ill. App.3d 1051, 946 N.E.2d 463 (2011). This verdict may send shockwaves through the state of Illinois because the jury concluded that defendant C.H. Robinson (CHR) was vicariously liable based on agency theories, despite the fact that there was an agreement in place addressing the status of the driver as an "independent contractor" with language that attempted to limit the liability of the shipper. CHR appealed, the Appellate Court (Third District) affirmed the verdict.

CHR filed a judgment notwithstanding the verdict claiming that evidence failed to establish an agency relationship, and the trial court denied that motion. The driver, DeAn Henry, was driving a tractor-trailer containing a load of potatoes. She was unable to stop her truck in time to avoid a collision and ran over several vehicles, causing a multiple-car accident. Plaintiffs Joseph Sperl and Thomas Sanders were killed, and another sustained serious injuries. Henry owned the tractor she was driving and leased it to Dragonfly, a motor carrier. She was delivering a load for CHR.

Plaintiffs sued Henry, Dragonfly and CHR for wrongful death and personal injuries. Henry and Dragonfly admitted liability, whereas CHR denied liability and sought contribution from its co-defendants. CHR is a logistics company providing a variety of transportation-related services. It does not own tractor-trailers, nor does it employ drivers. CHR sells its services to customers or shippers needing to transport goods and then contracts with carriers to provide transportation for its customers.

Dragonfly and CHR entered into a contract whereby Dragonfly warranted that it was going to use competent drivers and that CHR was not liable for drivers’ salaries, wages, charges, or worker’s compensation expenses. Henry testified at trial that she was not given instructions from CHR as to how to get from one destination to the next. She was given instruction, however, on how to handle materials.

Plaintiff hired an expert, Whitney Morgan, who agreed that CHR was generally a freight broker, but also said its conduct in this case fell into the definition of a motor carrier. He testified that CHR dealt directly with Henry and that if Henry successfully delivered the load, she would be paid directly by CHR.

The court noted that a principal is vicariously liable for the conduct of its agent, but not for the conduct of an independent contractor. The court looked to the level of control CHR had over the driver. The court rejected the carrier agreement as controlling, and instead focused on the conduct of the parties. In this case, the right to control the manner of work performance was paramount. The court determined that the jury’s verdict was not against the manifest weight of the evidence.

CHR clearly controlled the manner of Henry’s work performance. The court distinguished other cases holding that the driver was an independent contractor based on the level of control CHR exercised over its transactions with this driver. The driver, Henry, contacted CHR directly to ask for more work, was given detailed “special instructions” concerning the load owned by CHR, and was required to pick up a load at a specific time, to make daily check-in calls, and to stay in constant communication with CHR dispatchers. She was also required to notify CHR of an accident, and required to measure temperature of the product during the trip. CHR paid the driver directly. Moreover, CHR owned the product being transported and it was being delivered to a CHR warehouse. Finally, CHR imposed fines on the driver to ensure timely delivery and it was these fines that encouraged the driver to violate federal regulations in order to avoid them.

The moral of the story: A shipper’s contract with an independent contractor may have little or no effect on limiting the shipper’s exposure for the actions of their "independent contractor" if the shipper’s conduct in controlling the independent contractor work speaks to the contrary.

If you would like a copy of the court’s ruling, please contact the authors.

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The Illinois Appellate Court, in Gibbs v. Top Gun Delivery & Moving Servs., Inc, 399 Ill.App.3d 765, 928 N.E.2d 503 (1st Dist. 2010) recently held that any settlement between a plaintiff and a defendant/agent necessarily extinguishes any alleged vicarious liability claims made against that agent’s principal. In Gibbs, plaintiff alleged he was injured when a truck driven by Kevin Dunigan crossed the centerline and struck his vehicle. It was undisputed that, at the time of the occurrence, Dunigan was employed by Top Gun Delivery & Moving Services, Inc. (“Top Gun”). In his Second Amended Complaint, plaintiff alleged that Harlem Furniture was vicariously liable for Mr. Dunigan’s actions, as he was delivering furniture for Harlem pursuant to a written contract between Harlem and Top Gun.

Defendants Dunigan and Top Gun eventually filed a motion for good faith finding, based upon a proposed agreement between plaintiff and Safeco Insurance Co. of Illinois, the insurer of Dunigan and Top Gun. Safeco agreed to pay $735,000.00 to plaintiff in exchange for payment of $735,000 paid as consideration for this agreement. The covenant agreement further enumerated that “[n]othing is [sic] this agreement intended to preclude Bertram Gibbs, his heirs or assigns, from executing against defendant Harlem Furniture and/or its Insurer, Citizens Insurance on any judgment in excess of the [$735,000] paid as consideration for this agreement.”

Harlem initially filed a response to the motion for a good faith finding, and then sought leave to file a motion to dismiss Plaintiff’s Second Amended Complaint pursuant to 735 ILCS 5/2-619. Section 2-619 of the Illinois Code of Civil Procedure provides for involuntary dismissal of a Complaint based upon certain defects or defenses, including, among others, that the claim asserted against defendant is barred by affirmative matters avoiding the legal effect of or defeating the claim. In its motion to dismiss, Harlem contended that plaintiff’s covenant not to enforce a judgment against Dunigan and Top Gun was, by law, an agreement not to enforce a judgment against Harlem, thereby extinguishing its liability. Plaintiff responded that its covenant was not actually a settlement, and that it did not purport to release either Dunigan or Top Gun from liability.

The trial court ruled that the covenant not to execute or enforce judgment essentially was a release of liability for Dunigan and Top Gun in the underlying negligence suit in exchange for payment of $735,000.00. The trial court also held that Harlem’s vicarious liability for Dunigan’s conduct was also extinguished by the covenant agreement. Therefore, it granted Harlem’s motion to dismiss.

On appeal, plaintiff argued that the trial court erred in dismissing the case based upon the covenant not to enforce judgment agreement he entered into with Safeco. Specifically, he reiterated his argument that the covenant agreement did not release or dismiss Dunigan and Top Gun from liability, and added that the covenant agreement was not intended to shield them from any subsequent indemnification claim by Harlem.

Before addressing the merits of plaintiff’s arguments, the Appellate Court noted that, in vicarious liability cases, the Illinois Supreme Court has recognized there is no apportionment of damages between the principal and the agent; instead, the principal has an implied, quasi-contractual right to indemnification against the agent. Gibbs, 399 Ill.3d at 770 (citing American Nat’l Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Center, 154 Ill.2d 347, 354, 609 N.E.2d 285, 289 (1993)). In light of this right to indemnification, were the implied indemnity claim against an agent not barred by a plaintiff's settlement with the agent, there would be little to encourage the agent’s desire to settle. Id. Accordingly, where a plaintiff brings a respondeat superior claim against a principal, "any settlement between the agent and the plaintiff must also extinguish the principal's vicarious liability." Id, (quoting American Nat'l Bank & Trust Co., 154 Ill. 2d at 355). This rule "stands regardless of whether the plaintiff's covenant not to sue the agent expressly reserves the plaintiff's right to seek recovery.
from the principal." Id. (quoting Gilbert v. Sycamore Municipal Hospital, 156 Ill. 2d 511, 528-529, 622 N.E.2d 788, 797 (1993)).

Because Harlem’s liability in this matter depended solely upon respondeat superior, the “central issue” of the appeal was whether the covenant agreement constituted a settlement sufficient to release Harlem, the alleged principal of Dunigan and Top Gun, from vicarious liability. The Appellate Court held that the language of the covenant at issue here fell within section 2 of the Illinois Contribution Act, which states that “[w] hen a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent that any amount stated in the release or covenant, or in the amount of consideration actually paid for it, whichever is greater." As such, it was a “settlement,” plaintiff’s contention otherwise notwithstanding.

Under the plain language of that agreement, Dunigan and Top Gun would have been entitled to a satisfaction of judgment from plaintiff for any judgment and in any amount whatsoever at the conclusion of the underlying case. Allowing those defendants to remain liable to Harlem in an implied indemnity action after plaintiff’s settlement with those agents/defendants would result in the type of “Catch 22” that

American Nat’l Bank & Trust Co. and Gilbert sought to obviate. Because American Nat’l Bank & Trust Co. and Gilbert instructed that any settlement between the agent and plaintiff must also extinguish the principal’s liability, the Appellate Court ruled that the trial court did not err in granting Harlem’s motion to dismiss.

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**KANSAS**

**Update on Negligent Entrustment and Negligent Hiring, Retention, and Supervision Claims in Kansas**

In *Stallings v. Werner Enterprises, Inc.*, 598 F.Supp.2d 1203 (D. Kan. 2009), a motorist injured in a motor vehicle collision sued the operator of a tractor-trailer that allegedly ran into the back of the motorist’s minivan and the company with whom the driver (an owner/operator) was employed for negligent vehicle operation and negligent hiring, retention, and entrustment of the commercial motor vehicle, respectively. *Id.* at 1205. The court denied the defendant trucking company’s motion for summary judgment on the motorist’s claims for negligent hiring and retention, and negligent entrustment, but found that the trucking company was not liable for punitive damages under Kansas law. *Id.* at 1208, 1212-13, 1215-16. This case was initially reported as a decision of interest in the Spring 2009 ALFA Transportation Update, but focused on the issues of right of control of a leased vehicle and its owner-operator, and liability of derivative negligence claims against an admittedly vicariously liable employee for the acts and omissions of its employee. This update expands on the prior analysis to include a discussion of the application of *Stallings* on the issues of negligent hiring, training, supervision, and retention in the recent case of *Chubb v. Ryder Integrated Logistics, Inc.*, Case No. 07-CV-05397 in the District Court of Johnson County, Kansas.

In analyzing the motorist’s claims for negligent hiring and retention in *Stallings*, the federal district court there found that even if the trucking company’s investigation and hiring of its driver did not violate the requirements of the Federal Motor Carrier Safety Regulations ("FMCSR"), a jury could find the trucking company breached its common law duty to use reasonable care in the selection of its agents because it was aware of the history of accidents and violations by the driver from which it should have known that his employment as a truck driver would create an undue risk of harm. *Stallings*, 598 F.Supp.2d at 1212-13.

In *Chubb v. Ryder Integrated Logistics, Inc.*, following a collision in which the driver of a car was killed as a result of a collision between the decedent’s car and a tractor-trailer owned by Ryder Integrated Logistics, Inc. ("Ryder") and driven by its leased driver, plaintiffs filed a cause of action against Ryder alleging, *inter alia*, negligence in the hiring, retention, supervision, education, training, and instruction of that leased driver on the reasonable, safe operation of Ryder’s tractor-trailers. Ryder moved for partial summary judgment on plaintiffs’ claims of negligent hiring, retention, supervision, education, training, and instruction because there was no evidence that the driver had a known propensity such that Ryder had a reason to believe an undue risk of harm existed to others as a result of the contract leasing of the driver, and there was no evidence that Ryder had failed to comply with the FMCSR’s when it leased the driver from the leasing company.

Plaintiffs, in response, attempted to use the federal court’s holding in *Stallings* to support the proposition that Ryder was negligent in the hiring and retention of its driver despite the lack of evidence that Ryder violated the requirements of the FMCSR’s in the hiring and retention of its driver. The state trial court found, however, that *Stallings* was in stark contrast to the case at bar because plaintiffs failed to present any evidence establishing a genuine issue of material fact as to what Ryder should have known that made its driver either unfit or unqualified to drive a commercial motor vehicle (i.e., a tractor-trailer). In other words, there was no driving history on the part of the leased driver that would or should have caused Ryder to decline hiring or retaining him and no evidence of requisite training that he should have had but did not. Thus, the court found that Ryder was entitled to judgment as a matter of law on plaintiffs’ claims of negligent hiring, training and retention.

The application of *Stallings* in *Chubb* is important because it demonstrates that even if the trucking company’s investigation and hiring of its driver did not violate the requirements of the FMCSR’s, plaintiffs are proceeding under the common law theory that a trucking company may be liable for negligent entrustment and negligent hiring, training, supervision, and retention if it breaches its duty to use reasonable care in the selection of its agents or employees because it was aware of the history of accidents and other violations by the driver, or the driver’s lack of training or inadequate supervision, from which it should have known that employing (or continuing to employ) the driver could have created an undue risk of harm. The key is knowledge
or awareness of any propensity that would create an undue risk of harm. Thus, defendant transportation companies should be prepared to defend against future claims by plaintiffs brought under the common law theories advanced by the plaintiffs in *Stallings* and *Chubb*.

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Mississippi Courts Affirm Summary Judgment in Favor of Carrier, Hold Post-Accident Medical Tests are Not-Privileged and Admissible to Prove Fault and Examine the Scope of Permissible Accident Reconstruction Testimony.

In Knox v. Mahalict d/b/a Magnolia Plantation, 2011 WL 1122940 (Miss.Ct.App. Mar. 29, 2011), the Mississippi Court of Appeals affirmed the trial court’s grant of summary judgment in favor of the carrier. Yolanda Konx was driving on a rural highway when she rear-ended a tractor-trailer in the process of turning. It appeared that Yolanda did not see the trailer until immediately before she collided with it and was traveling at a high rate of speed at the time of the impact. The injured passengers filed suit. Plaintiffs abandoned vicarious liability claims against the owner of the trailer after it became apparent that the driver was employed by another entity. The driver’s employer was not added as a defendant. Plaintiffs further claimed that the trailer lacked functioning taillights and reflectors and that Magnolia Plantation was liable for failing to outfit the trailer with proper safety equipment.

The only evidence offered by plaintiffs in response to Magnolia Plantation’s Motion for Summary Judgment were two photographs of the trailer. The photographs were of such poor quality that they had essentially no evidentiary value. The Court of Appeals held that, even if the photos showed that the trailer lacked proper equipment, summary judgment would still be warranted since plaintiffs provided no evidence that the alleged missing equipment caused the accident. Plaintiffs were apparently unable to illicit deposition testimony from Yolanda that she would have recognized the hazard if the trailer had properly functioning equipment. Plaintiffs also failed to present expert testimony on causation. “No evidence whatsoever was presented to suggest that Yolanda would not have hit the trailer had it been equipped differently.”

Coleman v. Ford Motor Company, 70 So.3d 223 (Miss.Ct.App.2011) involved a post-accident vehicle fire which caused the death of the driver of a Ford F-150 pickup. Plaintiff, decedent’s widow, filed suit against the manufacturer of the pickup claiming the fire started because of a defective fuel line. During trial the court admitted the results of two blood alcohol content (BAC) tests that were conducted as part of decedent’s medical treatment after the accident. On appeal, plaintiff claimed that the evidence was admitted in violation of the physician-patient privilege. The Mississippi Supreme Court had never addressed the waiver of privilege as it applied to post-accident drug and alcohol tests ordered by treating physicians and used to establish fault of the patient in causing the accident.

Plaintiff argued that, since BAC tests were routine and the results did not affect the treatment given, then the BAC tests were not related to decedent’s injuries and resulting medical treatment. Therefore, plaintiff argued, the medical privilege was not waived. Like many Mississippi plaintiffs seeking to invoke privilege to unfavorable information in medical records, plaintiff relied on Sessums v. McFall, 551 So.2d 178 (Miss.1989) where the Mississippi Supreme Court found the physician-patient privilege was violated when a doctor was permitted to testify that the plaintiff, during the course of treatment, had made certain admissions suggesting he was at fault for the automobile accident in which he was injured. Sessums, 551 So.2d at 181. The Sessums court held that plaintiff waived the privilege only as it related to his injuries. Plaintiff in Coleman argued that the BAC tests, and the results, did not relate to the injuries, but were rather superfluous, routine tests that were immaterial to plaintiff’s injuries and treatment.

The Mississippi Supreme Court rejected plaintiff’s narrow interpretation of the waiver. The court distinguished Sessums by limiting that holding to oral statements and found that Sessums did not apply to results of medical tests. The court found that the BAC testing was performed as part of the treatment of the decedent’s injuries and that plaintiff waived the privilege to decedent’s medical records by placing decedent’s injuries and the course of his treatment at issue in the lawsuit. Once the privilege was waived, the BAC test results were no longer privileged, and the defendant was

Mississippi Rule of Evidence 503 provides that medical information is privileged. Rule 503 also provides that the privilege is waived once the patient’s medical condition is put in issue. Decedent’s doctors testified that the BAC tests were standard and, in this case, did not affect the medical treatment eventually given.
free to use the test results for any legitimate purpose at trial, including establishing decedent’s fault in causing the accident. Coleman limits the Sessums decision and eliminates any doubt that drug and alcohol tests, and other medical information, are not privileged and can be used at trial for any legitimate purpose.

In Denham v. Holmes, 60 So.3d 773 (Miss.2011), the Mississippi Supreme Court examined the proper scope of expert accident reconstructionist testimony. In Denahm, plaintiff turned left into a private drive claiming there was no visible on-coming traffic. Defendant claimed that plaintiff turned left when he was “almost right on them.” Plaintiff designated an accident reconstructionist to perform time and distance calculations and to testify whether or not defendant had the time and opportunity to observe plaintiff’s vehicle and take reasonable steps to avoid the accident. Plaintiff’s expert concluded defendant was speeding and that the facts of the accidents disproved defendant’s testimony that he was traveling at the speed limit (that plaintiff’s vehicle would have cleared the roadway if defendant was closing in at the speed limit).

Plaintiff’s expert used basic time and distance calculations to come up with distances between the vehicles at various times of the accident pattern. The trial court held that this testimony lacked the required reliability for expert testimony because it was based on “a couple of mathematical formulas that could have been done by a high school student.” The trial court further criticized the opinions because

the accident reconstructionist used “no coefficients, no reaction time, none of the things that a true accident reconstructionist could use to benefit the jury.” The trial court found that there was no accident reconstruction performed.

On a question of first impression, the Mississippi Supreme Court reversed holding that the expert’s testimony regarding his timing and distance estimates, based on common mathematics, constituted expert testimony in the field of accident reconstruction. Although jurors could have performed the calculations, the expert collected data from the accident scene using specialized knowledge. He measured distances, timed cars and determined the location of the accident from the available evidence. He interpreted the evidence and ultimately reached conclusions about causation and avoidance. The court further held the reliable methodology (basic mathematics) applied reliably to the facts met Daubert standards. Any reliability questions went to credibility, not admissibility, and should have been left to defendant’s cross-examination.

The court affirmed the exclusion of the expert’s opinion that the lack of skid marks meant that plaintiff’s vehicle did not cause an “immediate hazzard,” a requirement for defendant to have the right-of-way. The expert testified that if plaintiff had in fact turned in front of defendant’s vehicle causing an immediate hazzard, defendant would have applied his brakes and left skid marks or swerve marks. Since there were no skid marks, plaintiff was not negligent. Even though accident reconstructionists may testify as to the ultimate issue of fault in Mississippi, the court held that there was too great an analytical gap between the physical evidence and this opinion. The lack of skid marks might suggest that plaintiff was not at fault; but then again, it might not. The implication of the lack of skid marks was for the jury.
MISSOURI

Negligent Hiring, Retention, and Supervision Claims: Can Plaintiffs Pursue Them When Agency is Admitted? A Missouri Case Study since McHaffie v. Bunch

Since the case came down in 1995, McHaffie v. Bunch, 891 S.W.2d 822 (Mo. banc 1995) has been a great help in defending against negligent hiring, retention, and supervision claims in Missouri. The ruling was that if the company admitted an agency relationship with the driver, a plaintiff could not pursue the negligent hiring, retention, and supervision claims. McHaffie has since worked as an excellent shield against these claims during discovery, with motions to dismiss and for summary judgment, and during trial. The purpose of this article is to look at how courts have interpreted McHaffie over the last decade and to assess its current vitality.

In McHaffie, plaintiff was a passenger in an automobile and was injured in a collision with a tractor-trailer. The plaintiff alleged the tractor-trailer driver’s employer negligently hired and supervised him. The jury found that the employer’s negligent hiring and supervision were the cause of 10% of the passenger’s damages. On appeal, the employer argued it was improper for the judge to submit plaintiff’s negligent entrustment and hiring claims to the jury because the employer admitted the driver was acting in the course and scope of his employment at the time of the accident. Missouri’s Supreme Court ultimately concluded in McHaffie that since the agency relationship was admitted, the trial court should not have permitted the jury to separately assess fault to the employer based upon negligent entrustment or hiring claims. The trial court also should not have admitted evidence on those theories. Missouri’s Supreme Court pointed out that this holding was in line with the majority view at the time, and the reasoning behind this rule was to prevent the waste of court and litigant time and expense.

The McHaffie court cited specifically to like-minded court opinions out of six other states. We have seen, however, those opinions reversed or limited in three of those six states. See Elrod v. G & R Const. Co., 628 S.W.2d 17 (Ark.1982); Armenta v. Churchill, 42 Cal.2d 448, 267 P.2d 303 (1954) (limited by later opinions to entrustment claims only); Clooney v. Geeting, 352 So.2d 1216 (Fla. Ct.App.1977) (holding recently limited to questions of evidence to be heard by jury and not motions to dismiss); Willis v. Hill, 116 Ga.App. 848, 159 S.E.2d 145 (1967), rev’d on other grounds, 224 Ga. 263, 161 S.E.2d 281 (1968); Wise v. Fiberglass Systems, Inc., 110 Idaho 740, 718 P.2d 1178 (1986) (limited to situations where plaintiff does not seek punitive damages); and, Houlihan v. McCall, 197 Md. 130, 78 A.2d 661 (1951). How is McHaffie holding up? While Missouri’s state appellate courts have left McHaffie alone, federal district courts interpreting Missouri law have not been as hands off. The first of these district court cases was Miller v. Crete Carrier Corp., 2003 W.L. 25694930 (E.D.Mo. 2003). In Miller, plaintiffs included negligent hiring and retention claims in their petition. Plaintiffs also sought punitive damages.

Crete moved for summary judgment on the negligent hiring and retention claims and cited McHaffie in support. Plaintiffs argued in response to the motion that their case was different from McHaffie because they sought punitive damages. The federal district court denied Crete’s motion for summary judgment, and the court looked to language outside the holding in McHaffie to support its decision. Specifically, the district court cited the part of McHaffie which read: (1) it may be possible that an employer may be held liable on a theory of negligence that does not derive from and is not dependent on the negligence of an employee; and (2) it is possible that an employer may be liable for punitive damages which would not be assessed against the employee.

McHaffie took another hit in the federal district court case of Jackson v. Wiersema Charter Service, Inc., 2009 W.L. 1310064 (E.D.Mo. 2009). There, the plaintiff also made negligent hiring and retention claims against the defendant and sought punitive damages. The defendant moved to dismiss plaintiff’s negligent hiring and retention claims, citing McHaffie in support. The court denied the motion to dismiss, citing the Miller v. Crete Carrier decision, and ruled that the claims at least could survive a motion to dismiss. In Burroughs v. Mackie Moving Systems Corp., 2010 W.L. 1254630 (E.D.Mo. 2010), the defendant moved to exclude expert testimony regarding its hiring, training, supervision, and entrustment practices, citing
McHaffie in support of its position that such evidence is irrelevant when agency is admitted. The court denied the motion and pointed out that it had previously held that McHaffie does not bar such claims.

The McHaffie case has been helpful to companies in the transportation industry from disputes over what documents need to be produced to what expert opinions can be communicated to the jury. We are left to wonder if Missouri's appellate courts will follow the lead of its federal district courts. Meanwhile, we continue to cite McHaffie during our discovery disputes and in our motions.

What is the status of negligent hiring, retention, and supervision claims in your state? Take a look at the Transportation Law Compendium from the 2008 ALFA Transportation Practice Group Seminar materials. Or, contact your ALFA attorney!

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OREGON

Pleading “Blameworthy” Conduct of a Co-Defendant

In Lasley v. Combined Transport, Inc., 351 Or. 1, 261 P.3d 1215 (2011), the Oregon Supreme Court announced that evidence of a co-defendant joint tortfeasor’s “blameworthy” conduct is admissible even when the co-defendant admits liability. The court also clarified the proper way to plead the co-defendant’s comparative fault – as an affirmative defense to the plaintiff’s claim rather than as a cross-claim.

While driving down Interstate 5, a truck owned and operated by Combined Transport, Inc. (“Combined Transport”) lost part of its load of large-paned glass. During the cleanup effort, traffic backed up. Mark Lasley was among the people who got caught up in the traffic jam. While he was stopped in the traffic jam, he was rear-ended by another car. The crash caused a leak in his fuel system, which, in turn, caused a fire, killing him. The personal representative of Lasley’s estate filed a negligence claim against Combined Transport and the driver who rear-ended him. Combined Transport denied it was negligent and that its conduct was a foreseeable cause of Lasley’s death. The driver who rear-ended Lasley was intoxicated at the time of the collision. The jury found in favor of the plaintiff and against both defendants, finding Combined Transport 22% at fault and the other driver 78% at fault for the plaintiff’s damages.

Combined Transport appealed, and the Court of Appeals reversed, concluding that the trial court erred in excluding evidence of the other driver’s intoxication. The Court of Appeals held the evidence was relevant to (1) whether Combined Transport’s negligence was a substantial factor in causing Lasley’s death, and (2) how fault should be apportioned between the two defendants.

On review, the Oregon Supreme Court affirmed the Court of Appeal’s decision on different grounds. It held that the evidence was not relevant to whether Combined Transport’s negligence was “a cause” of Lasley’s death. The court explained that the other driver “admitted that her conduct – colliding with [Lasley’s] pickup – had the effect of killing him.” Evidence that she was under the influence of alcohol could prove an additional way in which she deviated from the standard of care, but it did not show that she contributed to the chain of events that caused Lasley’s death. Because the fact of the other driver’s intoxication would not have made her conduct more significant or Combined Transport’s conduct less significant in the causation analysis, the court held it was not relevant to that issue.

The court went on to say, however, that evidence of the other driver’s intoxication was material and relevant to how fault should be apportioned between the two defendants. It explained that Oregon’s comparative fault statutes require the jury to compare the fault of the parties and permit the jury to indicate the degree of fault for each one. So, the court held, “all evidence that may bear on that comparison is potentially relevant.” The court therefore remanded the case for a new trial, limited only to the degree of fault of each defendant “expressed as a percentage of total fault” attributable to each defendant.

The plaintiff conceded that under Oregon common law, the jury is required to compare the degree to which each defendant deviated from the standard of care and is therefore “blameworthy.” The plaintiff argued, however, that in evaluating the other driver’s blameworthiness, the jury was not entitled to consider evidence of the other driver’s intoxication because that evidence went beyond the scope of the specifications of negligence that plaintiff pleaded and the other driver admitted, and that Combined Transport failed to allege the other driver’s fault as an affirmative defense.

Combined Transport argued that the other driver’s intoxication was “at issue” because of the general denial in its answer and because it had filed a cross-claim against the other driver for contribution in which it alleged that the other driver was negligent in driving while intoxicated. After a lengthy analysis, the court held that “[i]n a comparative negligence case, a defendant that seeks to rely on a specification of negligence not alleged by the plaintiff
to establish a codefendant’s proportional share of fault must affirmatively plead that specification of negligence and do so in its answer and affirmative defense and not in a cross-claim for contribution.”

Practical Considerations:

• Based on this holding, a defendant must plead the negligence of its co-defendant (and its particular specifications) as an affirmative defense. The defendant may need to amend the affirmative defense as the defendant learns new facts to support additional specifications of negligence during the course of discovery.

• While this case involved evidence of a co-defendant’s intoxication, it can be used to support the admission of other evidence of “blameworthy” conduct (e.g., talking on the phone or texting while driving, falling asleep at the wheel, etc.).

• The holding in this case may not apply in other states. The court based its rulings on the specific language of Oregon’s comparative fault statute.

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SOUTH CAROLINA

South Carolina Court of Appeals Affirms Summary Judgment for Transport Company in Suit Arising out of Driver’s Fight

In a decision that could have implications for the state’s employers, the South Carolina Court of Appeals in Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (2011) affirmed summary judgment for an employer in a suit arising out of a fight involving the company’s driver at a truck stop.

On May 9, 2006, plaintiff James Kase was sitting in his parked truck at a Pilot Truck Stop near Greenville when his vehicle was bumped from behind. As it turned out, his vehicle was “bumped” by a tractor-trailer owned by DMX Transportation and operated by DMX employee Michael Ebert. The damage to Kase’s truck was minimal, and he was not physically injured. Despite the minimal impact, both Kase and Ebert exited their vehicles and became involved in a physical altercation. During this fight, Kase was injured. Ebert fled the scene, but was later arrested. Kase’s injuries caused him to miss several months of work and eventually lose his job.

The evidence established that DMX hired Ebert in 2004, even after Ebert damaged a vehicle during his road test and despite Ebert’s disclosure of an assault conviction 22 years earlier. This conviction arose out of a fight with a security guard who ticketed Ebert for parking in the wrong place while making a delivery in Arizona. Ebert’s employment at DMX continued despite numerous professional and personal difficulties, including (1) suspension of his commercial driver’s license because of too many serious traffic violations within a short time, (2) a written reprimand from DMX concerning numerous accidents and complaints from customers and supervisors about his performance, (3) a second reprimand from DMX admonishing Ebert for hostile disrespect of his supervisors, (4) marital difficulties that were further compounded by DMX’s withholding of his wages to pay child support, (5) a recent citation in Wisconsin for speeding and inattentive driving, and (6) a bizarre written complaint he wrote against the officer who ticketed him in Wisconsin.

DMX continued to employ Ebert for several months after Ebert pled guilty to assaulting Kase. However, Ebert was eventually dismissed after DMX’s insurer refused to provide coverage for him in light of his many speeding tickets.

Kase ultimately filed suit against Ebert and DMX, alleging a cause of action against both for negligence and alleging claims against DMX for respondeat superior, negligent entrustment, and negligent hiring, training supervision and/or retention. After a hearing, the trial court granted summary judgment to DMX, determining that (1) Ebert was acting outside the course and scope of his employment when he assaulted Kase; and (2) Kase could not satisfy the necessary elements to proceed on his claims for negligent hiring, negligent retention, or negligent supervision.

On appeal, the Court of Appeals affirmed the trial court’s ruling. In addressing the issue of respondeat superior, the court noted that in South Carolina, if the servant is doing some act in furtherance of the master’s business, he will be regarded as acting within the scope of his employment, although he may exceed his authority. Jones v. Ebert, 211 S.C. 553, 34 S.E.2d 796 (1945). On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master’s business, his conduct falls outside the scope of his employment. Crittenden v. Thompson-Walker Co., 288 S.C. 112, 341 S.E.2d 385 (1986).

“If a servant steps aside from the master’s business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; and this is so no matter how short the time, and the master is not liable for his acts during such time.” Lane v. Modern Music, Inc., 244 S.C. 299, 305, 136 S.E.2d 713, 716 (1964).

To support his claim, Kase pointed to Ebert’s deposition testimony that he had discussions with his employer indicating that forceful action was at times necessary to protect DMX property. The court noted, however, that the altercation at issue did not arise because Ebert was protecting a company vehicle or company cargo. Instead, the court concluded that the altercation arose after both parties exited their vehicles and began an argument about the fender-bender. Based on this conclusion, the court determined Ebert was not acting within the course and scope of his employment when he assaulted Kase.

As to his claim for negligent hiring, Kase argued that Ebert’s prior
assault conviction was enough to defeat summary disposition. “In circumstances where an employer knew of or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring . . . the employee . . . .” James v. Kelly Trucking Co., 377 S.C. 628, 661 S.E.2d 329 (2008). The court rejected this contention, holding that the conviction, which had occurred over 20 years earlier, was not, by itself, “sufficient to place DMX on notice that Ebert would become involved in a physical altercation with a third party.”

To support his claims for negligent retention and supervision, Kase pointed to Ebert’s poor driving record, insubordinate behavior, and his marital and financial problems. Having already found Ebert was not acting in the course and scope of his employment at the time of the assault, the court held that Kase was unable to pursue these claims as a matter of law. The court cited to Section 317 of the Restatement (Second) of Torts (1965), which places responsibility on a master for the intentional harm by employees acting outside the scope of employment only when the servant is either on the property of the master or using a chattel of the master. Finding that Ebert was neither on DMX property nor using a DMX chattel at the time of the assault, the court affirmed the grant of summary judgment.

Of particular interest to the transportation sector may be the court’s reinforcement of Section 317 of the Restatement (Second) of Torts involving intentional torts. Moreover, the court’s willingness to distinguish Ebert’s admittedly poor driving record from the incident giving rise to the lawsuit is certainly a favorable development and one that should be urged in all cases.
**SOUTH CAROLINA**

**South Carolina United States District Court Excludes Surveillance Video at Trial for Failure to Disclose During Discovery**

In a decision that could have implications for transportation cases in this State, Chief United States District Judge David C. Norton ruled that exclusion was the proper sanction for a defendant's failure to identify or produce, prior to the close of discovery, a surveillance video of the plaintiff. The ruling can be found at *Morris v. Metals USA*, 2011 U.S. Dist. LEXIS 3057 (D.S.C. Jan. 11, 2011).

Plaintiff Dianne Morris filed suit against Metals USA for personal injury arising out of an accident. At some point after receiving notice of the accident, defendant or its counsel retained a private investigator. On May 16, 2009, the investigator recorded 46 minutes of video of the plaintiff. The video depicts her performing normal daily activities, such as walking, getting into a car, meeting with friends and family, and sitting and conversing in a restaurant.

In her first set of interrogatories, to which defendant responded on December 9, 2009, plaintiff requested, "All information and documents which could, or will, be used at trial or during discovery for impeachment purposes." Plaintiff requested the same information in her first requests for production, to which defendant also responded on December 9, 2009. In each instance, defendant replied, "The defendant has not determined what documents may be used at trial as direct evidence or impeachment evidence; however, any and all documents produced through discovery may be used." Plaintiff then submitted a second request for production on February 3, 2010. In this request, she requested that defendant "[p]rovide all videos, photographs, plats, sketches or other prepared documents in the possession of the defendant or counsel that relate to all claims and defenses in the case." Defendant did not identify the investigator or video in response to the second request for production.

On August 25, 2010, defendant disclosed the videotape for the first time near the end of mediation. Five days later, on August 30, 2010, defendant submitted supplemental answers to plaintiff's first set of interrogatories, formally identifying both the videotape and the investigator who obtained the tape. This disclosure came after all depositions had been taken, and approximately one week prior to the deadline for all discovery to be completed.

Plaintiff subsequently moved for sanctions pursuant to Federal Rule of Civil Procedure 37(c)(1), arguing defendant's failure to disclose the video and investigator required that both be excluded from evidence at trial. Defendant countered with a commonly used argument – that disclosure was not required because both were intended to be used solely for impeachment purposes.

After discussing the substance of the video and the applicable case law, the court determined the video and investigator should have been disclosed because they had both a substantive purpose and an impeachment purpose. The court found the tape's contents were in effect "statements" by the plaintiff that undermined an essential component of her case, and were thus substantive evidence that should have been disclosed. The court further found that the tape was responsive to the plaintiff's request for all "videos" relating to the claims and defenses in the case.

Perhaps the most important part of the ruling had to do with the sanction chosen by the court for this omission. Applying a five-part test, the court found the omission was neither substantially justified nor harmless, and excluded any mention of the tape at trial. This decision rested in part on the determination that the plaintiff would not be able to cure the surprise, with the court stating "the court finds that plaintiff's ability to cure the surprise was effectively negated because plaintiff, her daughter, and one of plaintiff's treating physicians, Dr. Thomas Roush, had already been deposed, the parties were in the process of mediating the case, and the discovery deadline was less than a week away. Therefore, plaintiff could not present testimony addressing her ability to perform the activities captured on the surveillance videotape."

In the instant case, the court excluded evidence that it acknowledged would likely contradict the plaintiff's testimony regarding the extent of her injuries and limitations. This decision should be read as a caution to defense attorneys. While many defense attorneys support the argument that actual production of the video may not be necessary
before the plaintiff's deposition, one must be very careful in disclosing at least the existence of surveillance evidence.

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TENNESSEE

Court of Appeals Rules Unrelated Guest Passengers Excluded From Drivers’ Uninsured Motorist Coverage

According to the Middle Section of the Tennessee Court of Appeals in Galloway v. Vaughn, 2011 WL 345960 (Tenn.Ct.App.), insurance companies have the unequivocal right to refuse benefits to unrelated guest passengers who seek uninsured motorist coverage under the insured owner/driver’s policy. In this case, the plaintiff was a passenger in Dara Cockrill’s car when it was hit by a truck driven by the defendant, Brian Vaughn. George Daniel was the owner of that truck and had been a passenger at the time of the collision. Of the four involved, only Ms. Cockrill had automobile liability insurance.

When the plaintiff sought coverage for his injuries under Ms. Cockrill’s policy, the Shelter Insurance Company denied her claim on grounds she was not “(1) the policy holder, (2) any relative by blood, marriage or adoption, (3) any individual listed as an additional listed insured, [or] (4) any other person using the vehicle.” Rejecting plaintiff’s claim that she was an “insured” because she “used” the vehicle as an unrelated guest passenger, the court pointed to the policy’s definition of “use” as “maintenance and operation.” The court furthermore highlighted the fact the policy described “maintenance,” as “the performance of services which are necessary to keep a motor vehicle in working order or to restore it to working order,” and “operation” as “physically controlling, having physically controlled, or attempting to physically control, the movements of a vehicle.” Ultimately, the court held the plaintiff “was neither ‘maintaining’ nor ‘operating’ Ms. Cockrill’s vehicle in her capacity as a passenger and, thus, was not covered by the Shelter policy.

In support of its decision, the Galloway court cited to a recent case with identical facts. In Martin v. Williams, 2009 WL 2264339 (Tenn.Ct.App.), the plaintiff had too been an unrelated guest passenger seeking uninsured motorist coverage under the driver/owner’s policy with the Shelter Insurance Company. Therein, the court held that “the Shelter policy clearly and unambiguously defines an ‘insured’ for UM coverage, and [an unrelated guest passenger] does not meet that definition.” Id. at *2-3.

The Galloway court further refused to adopt plaintiff’s theory that she was entitled to recovery based on Tennessee’s Uninsured Motorist Statute, which provides that “[e]very automobile liability insurance policy delivered . . . shall include uninsured motorist coverage.” In doing so, the court found that the plaintiff had “misconstrued the statute” which “only requires the insurance carrier to offer UM coverage to persons insured under the policy.” This, the court stated, is specifically limited to “those insured for purposes of liability.” Accordingly, the insurance company in Galloway was granted summary judgment on the basis that the plaintiff was “not an insured under the UM provisions of Ms. Cockrill’s policy with Shelter Insurance,” and “cases involving the construction of a contract, such as an insurance policy, are particularly well-suited to disposition by summary judgment.” In light of the example set forth by Galloway, it is important for insurance companies to reevaluate their existing policies regarding uninsured motorist coverage and any provisions defining an “insured.” In doing so, changes may be necessary and the language used by Shelter in this case may serve as a model for eliminating exposure in claims brought by unrelated guest passengers under policies providing uninsured motorist coverage.

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TENNESSEE

Tort Reform Comes to Tennessee – The Tennessee Civil Justice Act of 2011

On June 16, 2011, the “Tennessee Civil Justice Act of 2011” was signed into law by Governor Haslam. The pro-business legislation has made headlines in Tennessee as a comprehensive tort reform. One of the most dramatic aspects of the legislation is a cap placed on noneconomic and punitive damages that can be awarded to a plaintiff in a personal injury suit. Details of the legislation are summarized below:

Venue: Civil actions against defendants who are non-natural persons must be brought in one of three enumerated venues: the county where all or a substantial part of events or omissions occurred; the county where a defendant organized under the laws of Tennessee maintains its principal office; or, if the defendant is not organized under Tennessee law, the county where the defendant’s registered agent or person designated as the defendant’s agent for service of process is located. In civil actions that are transitory in nature, the bill provides that proper venue is in the county where the cause of action arose or where the individual defendant resides. The county where such a defendant is found is no longer a proper venue.

Stays of Execution and Appellate Bonds: The maximum amount of the appeal bond will be reduced to $25,000,000.00 which is a $50,000,000.00 reduction from the prior limit. Absent extraordinary circumstances, the total amount of the bond or equivalent security may not exceed 125% of the judgment amount (still subject to the $25,000,000.00 limitation). For purposes of determining the bond amount, punitive damages are NOT included. Certain limited exceptions are available to protect appellees from appellants who are dissipating assets to avoid judgments entered against them. Narrow variances from the bond amount are also available for appellants who would be forced into insolvency because of high bond premiums.

Damages in Health Care Liability Actions: The term “medical malpractice claims” is no longer preferred. Such claims now fall under the umbrella of “health care liability actions.” The term “health care provider” is defined with an expansive list of health services that are subject to “health care liability actions.” Importantly, this legislation likely expands coverage to nursing home claims.

Noneconomic Damages: The bill limits damages in personal injury actions. A plaintiff is entitled to receive economic compensatory damages, but noneconomic damages are now limited to a $750,000.00 cap. The cap on noneconomic damages is to apply regardless of whether the underlying cause of action results from a series of acts or a singular event.

In the event liability is shared by multiple defendants, the amount of noneconomic damages is to be apportioned based on percentage of fault. Losses that are deemed “catastrophic” in nature are subject to an exception that elevates the cap for noneconomic damages from $750,000.00 to $1,000,000.00.

Serious spinal cord injuries resulting in paraplegia or quadriplegia; amputation of two hands, two feet or one of each; third degree burns covering more than 40 percent of the body as a whole or 40 percent of the face; and wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation are all examples of “catastrophic” damages.

It is important to understand that the caps on noneconomic damages will not apply in personal injury or wrongful death actions if it is established that (1) there was intent to injure the plaintiff; (2) that the defendant was under the influence of drugs or alcohol; or if (3) the defendant wrongfully concealed, altered, or destroyed “records containing material evidence.”

The limitations on damages are not to be revealed to the jury. Instead, such adjustments will be applied by the court as necessary.

Vicarious liability for noneconomic damages is determined separately from that of any alleged agent, employee, or representative.

If liability is found in a personal injury or wrongful death action, the legislation makes clear that the trier of fact must make separate, additional, findings. For each claimant, amounts of past damages for medical and other costs of health care, other economic damages, and noneconomic damages must be specified. Future medical and other costs of health care, other economic damages, and noneconomic damages must also be specified. In addition, the
Punitive Damages: Punitive damages, in most cases, will have an absolute cap of $500,000.00, but in no case will punitive damages exceed two times (2x) the award for compensatory damages. The amount of punitive damages cannot be disclosed to the jury. Accordingly, caps will be applied to jury awards by the court. Alleged vicarious liability for punitive damages is to be determined separately from any alleged agent, employee, or representative.

As with noneconomic damages, the cap on punitive damages will not apply if it is established that (1) there was intent to injure the plaintiff; (2) that the defendant was under the influence of drugs or alcohol; or if (3) the defendant wrongfully concealed, altered, or destroyed “records containing material evidence.”

Sellers of products only assume liability for punitive damages in specified scenarios. The new law imposes liability on sellers if the seller caused the harm while the product was in its control; if the seller altered or modified the product resulting in the harm; or if the seller had actual knowledge of the defective condition and proceeded to tender the product for sale. Drug and device manufacturers are generally immune from punitive damages liability if their products are labeled in accordance with FDA or other relevant acts; or, if the product was an over-the-counter drug or device, if the product was marketed pursuant to federal regulations, was safe and effective, and satisfied relevant conditions. This immunity is invalidated and a manufacturer is liable for punitive damages if the manufacturer of the drug or device withholds information from the FDA that is known to be material and relevant to the particular harm in question.

Punitive damages are also barred in a civil action if the defendant can demonstrate substantial compliance with applicable federal and state regulations. If those regulations set forth standards for the activity that has caused the harm and if the defendant complied with those standards in an effort to protect a class of persons to which the plaintiff belongs, there is no liability as long as the regulation was in effect at the time the defendant engaged in the activity.

A different standard applies to manufacturers of products other than drugs or medical devices. Liability is waived if the product met all relevant terms of approval, licensing, or similar determination by a governmental agency. Manufacturers are also free from liability if the product complies with state law, federal law, or other agency regulation, when such law or regulation is pertinent to the risks at issue and when such compliance was valid at the time the product left the control of the manufacturer or seller. If a manufacturer or seller sold a product after a recall or similar governmental order was in effect or sold a product in violation of a regulation that is related to the harm suffered by the claimant, liability for punitive damages remains.

Product Liability Actions: Under Tennessee product liability law, actions generally cannot be brought against any seller, other than a manufacturer. The bill, however, provides five specific instances where the seller, other than the manufacturer, will be subjected to liability. The seller will be liable if the seller exercised control over the aspect of manufacturing that resulted in the harm at the core of the claim; if the seller altered or modified the product in a way that led to the harm; if the seller gave an express warranty; if the United States manufacturer or distributor of the product or part in question is not subject to service of process; or if the manufacturer has been judicially declared insolvent.

Consumer Protection Act: The legislation codifies current Tennessee case law in many respects. The Tennessee Consumer Protection Act is revised by prohibiting a private right of action for the marketing or sale of a security; by placing enforcement of unfair or deceptive practices within the exclusive...
purview of the attorney general and reporter and the director of the division of consumer affairs in the department of commerce and insurance; by prohibiting punitive damages in addition to the treble damages penalty already in place for unfair or deceptive practice; by requiring, in addition to the copy of any notice of appeal served upon the director of the division of consumer affairs, another service of such notice on the attorney general (allowing the attorney general to intervene on appeal); and by prohibiting class action lawsuits for claims brought under the Act.

**Class Actions:** Appeals from class action certification suits are no longer discretionary. The new legislation gives parties to a class action certification suit the ability to appeal the trial court order “as of right.” Notice must be filed within ten (10) days after the entry of the order. Trial court proceedings are to be automatically stayed until the appeal of the class certification ruling has been resolved.

**Effective Date:** The Act applies to all liability actions for injury, wrongful death, and losses accruing on or after October 1, 2011.
The Texas Supreme Court Considers What Amount of Medical Expenses Will Be Admissible at Trial

In *Haygood v. Escabedo*, ___ S.W.3d ___, 2011 WL 2601363 (Tex.), the Texas Supreme Court resolved the question as to what amount of medical bills should be admitted into evidence and considered by a jury. The court held that evidence of the amount of medical expenses is limited to expenses that a provider has a legal right to be paid.

Therefore, plaintiffs may not introduce evidence of the "full charges" which healthcare providers set. "Full charges" are the amount of charges before adjustments and credits have been deducted. The full charges typically include some amounts for which the claimant would have no legal obligation to pay. To admit these full charges into evidence would lead to confusion and would be a "windfall" for plaintiffs.

In this case, Haygood's twelve healthcare providers billed a total of $110,069.12. He was covered by Medicare Part B which generally "pays no more for . . . medical and other health services than the 'reasonable charge' for such service." Haygood's healthcare providers adjusted their bills with credits of $82,329.69 leaving a total of $27,739.43. Of that latter amount, $13,257.41 had been paid, and the balance of $14,482.02 was due.

At trial, Haygood introduced evidence of the full charges of $110,069.12 over the defendant's objection.

Under the Supreme Court's holding, the jury should have only given evidence of $27,739.43.

In the past, Texas courts have often submitted the entire "full charges" to the jury. After the verdict, courts would then reduce the amount of medical to the smaller paid/incurred amount. This procedure is no longer to be followed. In trial, the only evidence which should go to the jury, on medical expenses, is for those medical expenses which a provider has a legal right to be paid. These are those which have actually been paid or incurred. Tex. Civ. Prac. & Rem. Code § 41.0105.

Because juries will not see the "full charges" in evidence, verdicts should be lower, and evaluations should be adjusted accordingly.

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In Memorial Hermann Hospital System v. Progressive County Mutual Insurance Company, ___ S.W.3d ___, 2011 WL 940783 (Tex.Ct.App.), the court considered the proper reading of the hospital lien statute in Texas. The Texas Hospital Lien Law allows a hospital to place a lien on the claim of an individual who receives medical care for injuries from an accident caused by the negligence of another. Tex. Prop. Code Ann. § 55.002. To secure a lien, a hospital must file written notice of the lien with the county clerk and the notice must be filed before money is paid to an entitled person. The statute also provides “the county clerk shall record the name of the injured individual, the date of the accident, and the name and address of the hospital or emergency medical services provider and shall index the record of the injured individual.” Tex. Prop. Code Ann. § 55.005.

The patient (“Martinez”) was injured in a car accident with an insured of Progressive. Progressive settled a claim brought by Martinez against its insured. Memorial Hermann Hospital treated Martinez after the accident. Progressive and Martinez settled his negligence suit and Progressive issued a settlement check to Martinez, his wife, his attorney, and Memorial Hermann. Shortly after receiving the check, Martinez’s counsel contacted Progressive and asked it to issue a new check not including Memorial Hermann as payee, because Memorial Hermann had not filed a lien notice. Before re-issuing the check, Progressive conducted lien searches and did not find the existence of a lien. As a result, Progressive issued a check at 3:23 p.m. on December 12, 2007.

However, thirty minutes before, Memorial Hermann had filed its notice of lien. The Memorial Hermann lien was indexed on December 17, 2007. According to the county clerk, the process of recording and indexing a lien usually takes two business days after filing.

Progressive moved for summary judgment contending that Memorial Hermann was not entitled to the settlement proceeds because it could not show that the county clerk had indexed its hospital lien before Progressive paid out the settlement. The motion was granted, and Memorial Hermann appealed.

The Houston Court of Appeals First District held that a lien is secured when the lien holder files a complying written notice of lien; the county clerk’s ministerial recording and indexing is not required to secure the lien. The requirement that the lien notice “be filed before money is paid” applies only to the filing requirement and not the indexing requirement. See Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578, 580 (Tex.2000).

The court pointed out that the statute does not set any deadline for the clerk to index the lien. The court further reasoned that Progressive’s interpretation of the statute would make the county clerk liable for damages and civil penalties if it violated the specified recording requirements, and would potentially expose the clerk to liability. The court does not believe the legislature intended that result.

The court’s interpretation of the Hospital Lien Law is consistent with its purpose, which is to “provide hospitals an additional method of securing payment for medical services, thus encouraging the prompt and adequate treatment of accident victims.” Bashara v. Baptist Mem’l Hosp. Sys., 685 S.W.2d 307, 309 (Tex.1985) (quoted in Daughters of Charity Health Servs. of Waco v. Linnstaedter, 226 S.W.3d 409, 411 (Tex.2007)); and Members Mut. Ins. Co. v. Hermann Hosp., 664 S.W.2d 325, 326 (Tex.1984) (explaining that legislature aimed to encourage hospitals to treat persons injured in accidents on emergency basis by providing means of obtaining compensation for care of patients who otherwise would be unable to pay).

As a result, Memorial Hermann’s lien was secured on filing, which
was before Progressive paid out the settlement funds. This holding further illustrates the necessity of including in your personal injury settlements indemnification from the plaintiffs (and their counsel, if possible) against liens arising out of the injured party's medical care.

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**VERDICTS, APPEALS AND SETTLEMENTS**

**Newly Reported Verdicts**

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**ILLINOIS**

**Gregory D. Conforti and Adam Sidoti of Johnson & Bell, Ltd. Obtain a Not Guilty Verdict - Plaintiff Sought $3.3 Million**

Gregory D. Conforti and Adam Sidoti of Johnson & Bell, Ltd. obtained a not guilty verdict in favor of all defendants, including a waste-removal trucking company and its driver from a jury in Cook County, Illinois.

The plaintiff, a 34-year-old male, had pre-existing paraplegia from a gunshot to the back when he was 15 years old. The plaintiff alleged that the defendant driver pulled out of an alley and t-boned him. With the assistance of accident reconstruction testimony, the defendants were able to argue that the plaintiff had actually side-swiped the front of the truck. The defense began by discrediting the plaintiff’s expert in demonstrating that he was actually disclosed before reviewing any materials relevant to the case and by creating actual simulations from the plaintiff’s expert’s data that plaintiff failed to show the jury during trial.

The defense leveraged the plaintiff’s expert’s accident reconstruction data to demonstrate to the jury that the accident simply could not have occurred as described by the plaintiff and the plaintiff’s expert. The defense created actual simulations from the data which showed the jury that the accident occurred as described by the defendant driver. The plaintiff used still drawings with their expert and showed no actual simulations, which proved damaging to their expert’s credibility. The photographic evidence of the damage to the plaintiff’s van also proved beneficial in this regard.

The plaintiff claimed he sustained neck and back injuries that aggravated his underlying paraplegia. His three treating physicians said there would be some permanent components to his injury, but were unable to specifically outline treatment. The plaintiff’s current treating doctor testified at trial that the plaintiff’s pain condition was likely permanent and that this could affect his ability to care for himself resulting in the potential need for in home care. Using the medical records, the defense was able to show that the plaintiff had a history of back pain complaints before the accident and that he had actually applied for home health assistance within months of the occurrence. The plaintiff asked for $3,300,000.00 in closing, accounting for a significant claim for future medical and home health assistance ($1,250,000.00) and future pain and suffering and disability ($2,000,000.00). After deliberating for more than five hours, and asking several questions, the jury returned a unanimous "not guilty" verdict in favor of all defendants.
petition in intervention, based on Okla. Stat. tit. 85 § 44 (d), which at the time gave an employer a direct cause of action to recover death benefits paid. The parties attended mediation but were unable to resolve the case due to the worker’s compensation insurer demanding 100% on the amounts it had paid to date as well as cessation of all future, weekly death benefits.

After mediation, the parties filed a motion for summary judgment arguing that the worker’s compensation insurer was only entitled to recover the funeral expenses and not the death benefits because Section 44 (d) only allowed recovery by the employer, not the employer and its insurance carrier like Sections 44 (a), (b), and (c). The trial judge granted the motion for summary judgment and it was taken to the Oklahoma Supreme Court on an accelerated appeal as a case of first impression. The Oklahoma Supreme Court assigned the case to the Court of Civil Appeals and it overruled the trial judge, stating that the legislature intended Section 44 (d) to include the insurance carrier recovering on behalf of the employer. The Oklahoma Supreme Court accepted certiorari and affirmed the trial court’s granting of summary judgment, holding that the legislature could have included the words “insurance carrier” in Section 44 (d), just as it did in Sections 44 (a), (b), and (c). With the worker’s compensation insurer out of the case, the parties were able to settle all plaintiff’s claims. However, Section 44 (d) was amended approximately one month later and now includes the worker’s compensation insurance carrier as a party who can maintain a direct action against a tortfeasor for death benefits paid.

Plaintiff worked for a construction sign leasing company and was traveling to an out-of-state construction site when he lost control of his pickup and trailer on an icy bridge, coming to rest partially on the shoulder and partially blocking the outside lane of travel. Another motorist stopped to assist plaintiff and as they were standing on the shoulder of the bridge, two tractor-trailers and three cars approached their position. The first tractor-trailer attempted to change lanes but in doing so, lost control and jack-knifed, causing the trailer to strike plaintiff’s trailer. The motorist assisting plaintiff jumped over the bridge and landed in a pool of water some 40 feet below. Plaintiff’s trailer was also struck by the second tractor-trailer and at least one other vehicle. Plaintiff died as a result of the multiple collisions. Plaintiff sued two trucking companies, their drivers and insurance carriers, as well as the drivers of four other vehicles.

Plaintiff, at the time of his death, was estranged from his wife and had two children. Plaintiff’s oldest child, who plaintiff had never met, was from a high school relationship. Plaintiff’s youngest child was born two weeks before his death and the mother was plaintiff’s current, live-in girlfriend. Because plaintiff was in the course and scope of his employment at the time of his death, his employer’s worker’s compensation carrier paid funeral expenses and lump sum and weekly benefits to his wife and two children. Employer’s worker’s compensation carrier filed a
PRACTICE TIPS

EDITOR’S NOTE

THESE ARTICLES WERE FIRST PUBLISHED IN THE COURSE BOOK OF THE ALFA TRANSPORTATION PRACTICE GROUP 2011 SEMINAR IN MAY 2011. AS THAT COURSE BOOK REACHES A LIMITED AUDIENCE IT IS USED HERE WITH THE PERMISSION OF THE AUTHORS.

CSA 2010 LAW UPDATE

A. What is CSA 2010?


2. How is CSA 2010 different from FMCSA's former safety program?

3. Key difference: introduced the Safety Measurement System (SMS), a new system the FMCSA uses to identify high-risk motor carriers requiring federal intervention. SMS replaces the former system, SafeStat.

4. SMS relies on assessment of each carrier’s performance in seven Behavior Analysis and Safety Improvement Categories (BASICS), representing behaviors that can lead to crashes (whereas SafeStat was organized into four broad Safety Evaluation Areas (SEAs)).
   a) The seven BASICS are:
      1) Unsafe Driving (CFR Parts 392 & 397)
      2) Fatigued Driving (hours of service) (CFR Parts 392 & 395)
      3) Driver Fitness (CFR Parts 383 & 391)
      4) Controlled Substances/Alcohol (CFR 382 & 392)
      5) Vehicle Maintenance (CFR Parts 393 & 396)
      6) Cargo-Related (CFR Parts 392, 393, 397 & hazardous materials)
      7) Crash Indicator (reportable crashes)
   b) Using the past 24 months of performance data, SMS calculates a measure for each BASIC by combining the time and severity weighted violations/crashes (more recent is weighed more heavily), normalized by exposure (e.g. hybrid of number of power units/vehicle miles traveled or number of relevant inspections).
   c) SMS converts these measurements into percentiles; the FMCSA then considers a carrier’s percentile in each BASIC (along with other factors) in determining whether to proceed with any enforcement tool (known as an “intervention”).
   d) This data also supports the FMCSA’s Safety Fitness Determination (SFD) for each motor carrier. Each carrier is rated either “continue to operate,” “marginal,” or “unfit.”

5. Other differences:
   a) SMS identifies safety performance deficiencies to determine the intervention level while SafeStat
identified carriers for a compliance review.

b) SMS emphasizes on-road performance using all safety-based inspection violations while SafeStat used only out-of-service and selected moving violations.

c) SMS uses risk-based violation weightings while SafeStat does not.

d) SMS will eventually be used to propose an adverse safety fitness determination based on a carrier’s own data while SafeStat has no impact on an entity’s safety fitness rating.

e) SMS provides a tool that allows investigators to identify drivers with safety problems during carrier investigations.

6. What is the implementation schedule for CSA 2010?

a) February 2008 – July 2010 → Operational Test Model (OTM)

b) Nine states participated:
   1) Colorado
   2) Delaware
   3) Georgia
   4) Kansas
   5) Maryland
   6) Minnesota
   7) Missouri
   8) Montana
   9) New Jersey

c) New interventions are being applied to all interstate and hazmat motor carriers domiciled in these states.

d) December 2010 → SMS implemented for all motor carriers

7. SMS data is calculated for motor carriers in every state based on the previous 24 months of roadside inspection and crash data.

8. Values derived from the former SafeStat measurement system will not be merged or used in any way in SMS.

9. SMS data will be available to the general public, just as it was under the SafeStat measurement system.

B. What Impact Will CSA 2010 have on Trucking Litigation?

1. How will SMS data be used in litigation?

a) Because the key difference between CSA 2010 and the former safety program is the introduction of the SMS, a major concern is how SMS data will be used in litigation.
b) Similar to what we’ve seen with the SafeStat data, plaintiffs’ attorneys will likely try to introduce a carrier’s SFD of “marginal” or “unfit” into evidence.

c) Conversely, a carrier may want to introduce a “continue to operate” SFD.

2. Why do we typically want to keep SMS data out of litigation?

a) From a carrier’s perspective, the main concern is that evidence based on SMS data is inherently unreliable because the data itself is unreliable, misleading and incomplete. Consider the following examples:

1) **Under the crash indicator BASIC, the SMS considers a carrier’s “reportable crashes” without considering whether the carrier was at fault.** For example, even if a carrier is found to be at fault for only 2 out of 10 reportable crashes in one year, the SMS system will consider all 10 reportable crashes.

2) Note: while the FMCSA has said it will not make a carrier’s data about this particular BASIC publically-accessible because it doesn’t account for liability, this same information contributes to a carrier’s overall SMS rating.

b) **Under the unsafe driving BASIC, the SMS considers all recorded moving violations from roadside inspections whether or not a traffic citation has been issued to the driver.** In support of its decision to use this information, the FMCSA reports “there is a strong relationship” between high scores in this BASIC and future crashes.

c) **Under the fatigued driver BASIC, a violation can be as harmless as** a driver failing to submit his/her logs to the carrier within 13 days, failing to keep 7 days worth of logs in the power unit, or even failing to promptly record a change in duty status.

d) Not only do these examples show how SMS data can be unreliable, misleading and incomplete, but they also demonstrate why this data is not appropriate for use in litigation. Interestingly, the FMCSA seems to agree. Previously, before any user could access SafeStat data online, the FMSCA directed the user to the following disclaimer and warning:

3. Disclaimer: “...the completeness, timeliness and accuracy of crash data – and to a lesser extent roadside inspection data – vary from state-to-state. Accordingly, SafeStat’s ability to accurately and objectively assess the safety fitness of individual motor carriers may be inconsistent and not conclusive without additional analysis.”

4. Warning: “**WARNING – because of state data variations, FMCSA cautions those who seek to use the SafeStat data analysis system in ways not intended by FMCSA. Please be aware that use of SafeStat for purposes other than identifying and prioritizing carriers for FMSCA and state safety improvement and enforcement programs may produce unintended results and not be suitable for certain uses.**”

5. It’s unknown whether this disclaimer and warning will appear before an online user enters the SMS system, but because SMS and SafeStat data present similar issues, it’s reasonable to conclude the FMSCA will provide some type of disclaimer and/or warning.

C. How Can Carriers Keep SMS Data Out of Litigation?

1. Pre-litigation

   a) Review SMS data as soon as it becomes available and then on a monthly basis.
b) Correct outstanding safety problems immediately.

c) This includes following-up on any warning letters received and correcting any violations.

d) Request review of any potentially erroneous violations.

e) Submit request for review of any erroneous data along with necessary documentation through the DataQs electronic database at [https://dataqs.fmcsa.dot.gov](https://dataqs.fmcsa.dot.gov).

f) Maintain accurate, complete and easily-accessible records regarding behaviors outlined in the seven BASICs.

g) Examples: driver logs, vehicle maintenance, corrective measures, etc.

h) Supporting documentation may be needed to clarify or explain SMS data presented at trial; having accurate, easily-accessible documents will save time and money down the road.

2. Litigation

   a) Pre-Trial

      1) File motion in limine to exclude SFD based on SMS data.

      2) SMS data is not relevant and thus inadmissible.

      3) Relevant evidence is “any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FRE 401

      4) SMS data has no tendency to make the existence of any fact more or less probable.

      5) SMS data is used to evaluate carrier safety performance and is based on criteria that is not intended to be used in allocating tort liability.

      6) SMS data is unreliable, incomplete and misleading.

      7) Because SMS data is irrelevant, it’s inadmissible. FRE 402.

      8) Even if relevant, SMS data’s probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. FRE 403.

   b) Trial

      1) Make timely, proper objections to any attempt to admit SFD and SMS data to preserve the record.

      2) Be prepared to argue and/or explain to jury why this information is inaccurate, incomplete and misleading.

      3) Have documentation to support specific discrepancies/inaccuracies.
What Impact Will CSA 2010 have on Trucking Litigation?

A. What is MCS-90?

Sections 29 and 30 of the Motor Carrier Act of 1980 require motor carriers hauling general commodities in interstate commerce to demonstrate proof of financial responsibility in one of four ways: (1) insurance; (2) a guarantee; (3) a surety bond; or (4) qualification as a self-insurer. 49 U.S.C.A. §31139(f). Federal regulations provide that if a motor carrier chooses to pursue the first option—insurance—the insurer must maintain a “Form MCS-90 Endorsement” as part of the policy. 49 C.F.R. §387.15. The International Risk Management Institute comments that the purpose of the MCS-90 is to certify that the insured maintains a minimum level of financial responsibility for compensating others involved in truck-related accidents resulting in bodily injury, property damage, or environmental damage. Essentially, MCS-90 creates a suretyship among the injured public, the insured, and the insurer, under which the insurer agrees to guarantee a minimum payment to the injured public, regardless of whether the injury would, in fact, be covered by the policy. Auto Owners Ins. Co. v. Munroe, 614 F.3d 322, 327 (7th Cir. 2010).

The endorsement provides, in relevant part:

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operations, maintenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980. . . It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of the policy herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured.

49 C.F.R. §387.15.

B. Recent Case Law

In Auto Owners Ins. Co. v. Munroe, 614 F.3d 322, 323 (7th Cir. 2010), the defendants, an injured husband and wife, entered a settlement agreement releasing those who allegedly caused the accident from any individual liability above their insurance coverage. The court granted plaintiff insurer’s declaratory judgment action that the insurance policy limited coverage to $1,000,000. The defendants attempted to get around this limit by arguing that the MCS-90 endorsement was applicable. In this case, three tractor trailers were involved in the injured party’s accident, and therefore the defendants argued that the accident had a combined MCS-90 coverage of $2.25 million. Id. at 326. The court first noted that it was skeptical of the defendants’ argument that the MCS-90 applied per vehicle as well as per accident, but dodged this question of law. Id. at 326-27. Instead, the court ruled that the MCS-90 endorsement did not apply because there was no final judgment, and without this judgment and insurer’s obligation under MCS-90 was not triggered. Id. at 327.

In Canal Insurance Co. v. Coleman, 625 F.3d 244, 245 (5th Cir. 2010), the plaintiff insurer sued defendants, an insured and a claimant, seeking a declaratory judgment that an MCS-90 endorsement did not cover an accident that occurred when a trucker who was employed by the insured was backing a truck into his driveway and collided with a car occupied by the claimant. The parties stipulated that the trucker was not engaged in the transportation of property at the time of the collision. Id. The Court of Appeals held that the MCS-90 endorsement did not cover the accident because it applied only to liability for the transportation of property. The applicability of the MCS-90 endorsement to an automobile liability policy was determined at the time of the loss, and because the driver was not presently engaged in the transportation of property when the accident occurred, the MCS-90 endorsement did not apply. Id. at 249-250. The court noted that the important point about an MCS-90 endorsement on an auto insurance policy is that it does not apply on a blanket basis to every accident. Id. at 250, fn. 8. The court in Carolina Casualty Co. v. Yeates, 584 F.3d 868 (10th Cir. 2009), overruled long standing precedent in the context of MCS-90. Prior to Yeates the
Empire Fire framework was utilized in the Tenth Circuit (as well as others). This framework held that liability for primary coverage was to be allocated among the insurers “pursuant to traditional state insurance and contract law principles.” Id. at 871 (citing Empire Fire & Marine Ins. Co. v. Guar. Nat’l Ins. Co., 868 F.2d 357, 368 (10th Cir. 1989)). This rule of law was interpreted to allow an MCS-90 endorsement to modify the underlying insurance policy in a variety of ways, including: (1) allowing recovery from a policy that otherwise did not provide liability coverage; and (2) allowing primary liability recovery from a policy that provided only excess coverage. Id. at 871. Plaintiff insurer in Yeates argued that the court should abandon its Empire Fire framework because it was inconsistent with both the intended purposes of MCS-90 and the interpretation of the endorsement by the majority of other circuits. Id. at 872. The court agreed and concluded that the MCS-90 endorsement was intended to impose a surety obligation on the insurer. Consequently, when an injured party obtained a negligence judgment against a motor carrier, an obligation under the MCS-90 endorsement was not triggered unless: (1) the underlying insurance policy did not provide liability coverage for the accident; and (2) the carrier’s other insurance coverage was either insufficient to meet the federally mandated minimum amount or non-existent. Id. at 885-86. The endorsement in this case was not applied because the motor carrier’s insurer satisfied the required federal minimum amount. Id. at 888.

The court in Carolina Casualty Co. v. Karpov, 559 F.3d 621, 625 (7th Cir. 2009) ruled that MCS-90 applied on a strictly per-accident basis even when an accident involved more than one injured party. The court noted that the Secretary of the U.S. Department of Transportation had set forth in 49 C.F.R. § 387.15, Illustration I, the appropriate form for the MCS-90 endorsement. This form stated the policy limits on a per-accident basis, providing: “The policy to which this endorsement is attached provides primary or excess insurance, as indicated by ‘X’, for the limits shown: This insurance is primary and the company shall not be liable for amounts in excess of $______ for each accident.” Therefore, an MCS-90 endorsement did not establish a $750,000 per-person minimum liability coverage for motor carriers. Id. The court concluded that “neither legislative history nor public policy can overcome the clear statutory language and regulatory form, which establish $750,000 as the minimum amount of financial responsibility, and the policy language which defines the liability on a per-accident basis.” Id.

Ooida Risk Retention Group v. Williams, 579 F.3d 469 (5th Cir. 2009) was a case concerning a plaintiff insurer that sought a declaration that it owed no duty to defend or indemnify defendant, a common carrier insured’s driver, in connection with an accident that killed a passenger. The appellate court rendered summary judgment for the insurer because the driver was not the “insured” in the context of an MCS-90 endorsement for indemnity. Id. at 477. The court stated that “the MCS-90 endorsement required the insurer to indemnify only the carrier. The driver, as an employee of the insured, did not fall within the ambit of the MCS-90 endorsement. Id. at 478.

The facts of Herrod v. Wilshire Ins. Co., 737 F. Supp. 2d 1312 (D. Utah 2010) were that Kimball Herrod was driving his own car when a wheel came off the trailer of a double wheeled semi trick driving in the opposite direction. The wheel flew across the median and struck Mr. Herrod’s car, killing him. At the time of the accident, DATS Trucking Inc. owned and insured the tractor, while Espenschied Transport Corporation owned the trailer and had leased it to DATS. Id. at 1314. After settling with the trailer owner (Espenschied), the decedent’s family sued defendant DATS’s insurer, alleging that the insurer was liable to the family for the liability policy maximum value under an MCS-90 endorsement. Id. at 1315. Therefore, the issue before the court was whether the insurer was obligated to payout an MCS-90 endorsement to the decedent when another motor carrier had already paid out an MCS-90 endorsement. Id. at 1316. The court noted that neither the Motor Carrier Act of 1980, nor its regulations suggested that once an injured person received the statutory minimum from one tortfeasor, the MCS-90 protection for all other tortfeasors disappeared. To the contrary, motor carriers were held to the federally mandated financial responsibility individually. Id. at 1317. The court therefore ruled that the previous settlement with the owner and the allocation of any risk between the parties was irrelevant to whether the defendant had to pay under an MCS-90 endorsement. Id. at 1320.

In Canal Indemnity Corpo. v.
Employees were additional insured under policies issued to the owner of the trailer. In this case, only the trailer owner was named as an insured under the umbrella policy. The trailer lessee and its employee were permissive users of the trailer, but an endorsement on the policy excluded lessees of vehicles from coverage. Id. at 798. The court rejected plaintiffs’ argument that the MCS-90 endorsement negated the lessee exclusion endorsement. Id. at 803. Looking to the purpose and language of the Motor Carrier Act and its regulations, the court concluded that the only plausible interpretation of the MCS-90 was that “the insured” referred only to the named insured under the policy. Id. at 823. Therefore, the MCS-90 endorsement did not obligate the defendants to pay judgments against the trailer lessee and the court denied plaintiffs’ motion for summary judgment on their declaratory judgment action. Id. at 826.

Armstrong v. US. Fire Ins. Co., 606 F. Supp. 2d 794, 797 (E.D. Tenn. 2009) concerned plaintiffs’ declaratory action that sought a ruling that defendant insurance companies had a duty to indemnify a tractor trailer lessee and its employees in an underlying tort action based. The plaintiffs based this argument on the premise that the lessee and its employees were additional insured under policies issued to the owner of the trailer. In this case, only the trailer owner was named as an insured under the umbrella policy. The trailer lessee and its employee were permissive users of the trailer, but an endorsement on the policy excluded lessees of vehicles from coverage. Id. at 798. The court rejected plaintiffs’ argument that the MCS-90 endorsement negated the lessee exclusion endorsement. Id. at 803. Looking to the purpose and language of the Motor Carrier Act and its regulations, the court concluded that the only plausible interpretation of the MCS-90 was that “the insured” referred only to the named insured under the policy. Id. at 823. Therefore, the MCS-90 endorsement did not obligate the defendants to pay judgments against the trailer lessee and the court denied plaintiffs’ motion for summary judgment on their declaratory judgment action. Id. at 826.


Criminal Defense

• A woman who killed her passenger when driving under the influence saw her sentence rise from probable probation to five years in prison based on Facebook pictures of her in a Halloween costume with plastic shot glasses attached to the belt. See www.usatoday.com/tech/webguide/internetlife/2008-07-19-facebook-trials_N.htm.

• Another judge threw the book at a man who dressed as a “jailbird” just weeks after seriously injuring a woman while driving drunk. Prosecution used both of these incidents as evidence of a lack of remorse. Id.
Given the wealth of relevant and compelling evidence available on SNSs, monitoring the social network profiles of parties throughout the litigation process is certainly a good practice. In some circumstances it may be an expected part of an attorney’s due diligence.

2. Use of Social Networking Sites to Research Jurors and Ethical Concerns

SNSs are being used more and more often to research potential jurors as lawyers use these profiles to look for clues into how they might think. Prosecutors might shy away from CSI fans, fearing they will have unrealistic expectations of forensic evidence, lawyers might avoid those who post long, passionate rants, fearing that opinionated people can dominate a jury, and all sides should be cautious about jurors who have a high volume of tweets, because there is a risk they will tweet during trial and cause a mistrial. See http://online.wsj.com/article/SB10001424052748703561604576150841297191886.html. See also Sharon Nelson, John Simek & Jason Foltin, The Legal Implications of Social Networking, available at http://www.senseient.com/articles/pdf/The_Legal_Implications_of_Social_Networking.pdf.

Courts have taken different approaches to this development. Some have embraced technology, allowing lawyers to bring laptops into the courtroom to search prospective jurors during the selection process. Id. One court even suggested that a lawyer has a duty to search potential jurors. See Johnson v. McCullough, 306 S.W.3d 551, 558-559 (Mo. 2010) (granting a mistrial when a juror failed to disclose participation in past litigation, but also admonishing lawyers to search jurors on their own to avoid such problems). However, others are more skeptical about this new development. Some are concerned that internet searches are less effective than traditional voir dire, while others just want to ban all technology from the courtroom to avoid any improper influence.

This second concern is supported by numerous incidents of juror misbehavior, often leading to mistrials. Jurors have posted advice not to buy a defendant's stock, announced their excitement to tell a defendant he is guilty, and even conducted an informal poll of friends about how they should vote.

Attorneys should use caution with any SNS-related jury investigations. Some forms of SNS snooping, such as adding jurors as friends or following them on twitter, automatically send out messages to the juror. This could be considered jury contact and an ethics violation. In addition, if an attorney discovers any juror misbehavior it should be immediately reported to the court. This is especially true if it is a seeming helpful post like “why don’t they just pay that poor plaintiff” or other insight that might affect settlement discussions. See Barry R. Temkin, “Twittering Jurors and The Rules of Professional Conduct: Should Lawyers Avert Their Eyes from Juror Social Network Postings?” ABA/BNA Lawyers' Manual on Professional Conduct Current Reports 27 (2011), available at http://works.bepress.com/barry_temkin/29/. For more examples of juror misconduct see http://www.llrx.com/features/jurorbehavior.htm#ftn9.

B. What Evidence is Discoverable?

Social Networking evidence is subject to the same discovery rules as other types of evidence, but it also presents unique challenges that have yet to be fully addressed by many American jurisdictions.

Bass v. Miss Porter’s School, 2009 U.S. Dist. LEXIS 99916, at *3–4 (D. Conn. Oct. 27, 2009) takes in interesting approach to relevance and discovery. The court initially ordered the plaintiff to submit relevant Facebook data to the defendant and to submit all other data to the court for in camera review. When the plaintiff submitted 150 pages to the defendant and 750 pages to the court, the court took exception, stating:

The selections of documents plaintiff disclosed to defendants and those she referred for in camera review reveal no meaningful distinction. Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting. Therefore, relevance of the content of plaintiff's Facebook usage as to both liability and damages in this case is more in the eye of the beholder than subject to strict legal demarcations, and production should not be limited to plaintiff's own determination of what maybe “reasonably calculated to lead to the discovery of admissible evidence.”

The Bass court held that since the plaintiff withheld clearly relevant data from the defendant, fairness required complete disclosure.

In EEOC v. Simply Storage Management, 270 F.R.D. 430 (S.D.Ind. 2010), the court took a step back from the Bass approach. It refused to order that the EEOC produce the entire social network profile in question “in the first instance.” Instead it gave the EEOC a chance to produce the relevant information and held that complete production is only required if the initial production is inadequate.

This area of law has only begun to develop as courts are just beginning to decide how to balance online privacy with the need for liberal discovery. See Ledbetter v. Wal-Mart Stores, Inc., 2009 WL 1067018, at *2 (D.Colo.) (finding that subpoenas to SNSs were enforceable where plaintiffs had put at issue extent of their damages and postings on sites by plaintiffs could be relevant); Beye v. Horizon, No. 06-Civ-5337 (D.N.J. Dec. 14, 2007) (ordering plaintiffs to turn over children's e-mails, diaries and other writings "shared with other people" about their eating disorders, including Facebook or MySpace postings); Mackelprang v. Fidelity National Title Agency of Nevada, Inc., 2007 WL 119149 (D.Nev.) (finding that those communications will remain private.); T.V. v. Union Township Board of Education, No. UNN-L-4479-04 (N.J.Super.Ct. June 8, 2007) (court denied request upfront absent a more specific showing of relevance); and Leduc v. Roman, No. 06-CV-305466PD3, [2009] O.J. No. 681, at 6 (O.S.C.J. Feb. 20, 2009) (Canadian case that insisted on opening up social networking site to discovery for relevant material and includes a thorough discussion of this issue and could provide insight into where American courts may end up.).

C. Best Practices for Discovery

Once an attorney determines that an SNS contains relevant information, actually obtaining the information can still pose a challenge. Attorneys (or their investigators) will be able to access some information on their own (being careful to stay within legal and ethical bounds). Other information will have to be accessed through the discovery process, which provides its own set of challenges.


Because privacy controls can be changed and items can be deleted, it is good practice to take a screenshot or save the page as a .pdf upon finding relevant evidence. To provide extra documentation, some investigators use software like GoToMeeting or CamStudio to record a video of their actions as they access and save posts, narrating as they go.

Making records of any SNS evidence is particularly important, as evidence preservation laws have not caught up to technology in all places. In Cincinnati a judge recently ordered the preservation of physical evidence, but not evidence of a juror's online conduct, from the trial of Ryan Widmer. See http://news.cincinnati.com/article/AB/20110523/NEWSO10702/105240328/ Judge-Preserve-physical-evidence-from-Widmer-case. Ohio law apparently draws a distinction between physical and non-physical evidence, so it is always good practice to record and secure online evidence in case it disappears.

Finally, attorneys should be aware of the ethical implications of attempting to access SNS profiles. Obviously anything that is publicly accessible is fair game, but when profiles are behind privacy controls things get trickier. In general attorneys are not allowed to engage in deceitful practices. A lawyer can borrow the account of someone who already has access to the profile (such as her client or a witness) to view whatever that person has access too. It is also acceptable for an attorney or investigator to send a friend request to the person, so long as she discloses who she is and why she is trying to access the account. However, sending a friend request without the profile necessarily means the account is not inaccessible.
While some jurisdictions (New York) consider this to be acceptable practice, others (Pennsylvania) have suggested this is deceit by omission.

2. Using the Discovery Process

When privacy protections prevent access to a profile, discovery rules can help procure the information, although direct subpoenas to the social network company will probably meet resistance. The Stored Communications Act (SCA) prohibits hosting companies from disclosing the contents of certain private electronic communications. What elements of a social networking profile fall under this protection is still a developing area, but a recent decision from the middle district of California held that Facebook communications are protected.

Under the SCA, Facebook and other social networking companies will not disclose the content of any communications without the consent of the user, and even then they will usually only send the content to the user herself. Instead of wasting energy fighting the companies over this, the best practice is to serve the opposing party with a discovery request, requiring them to subpoena the hosting company and to give their consent to release the information. The company will send the data to them, and they can then hand it over through the normal discovery process. At least two courts have held that consent can be compelled through the discovery process so this method should work so long as the judge considers the request reasonable. Crispin v. Christian Audigier


Depending on the company’s interpretation of what “content” is under the SCA, some companies will honor subpoenas if they are only asking for subscriber information or IP logs showing when and from where an account has been updated, since that may not be considered content and therefore would be unprotected by the SCA.

D. Admissibility of Social Network Evidence – Authentication.

For the most part SNS profiles face the same admissibility concerns as any other types of evidence. However, authentication presents some unique issues that have yet to be fully addressed. There is not yet a national consensus on what how much authentication is required before SNS evidence can be admitted, and courts are trying to find the right balance between overburdensome authentication requirements and keeping manufactured evidence out.

A recent case by the highest court in Maryland does an excellent job of reviewing the national landscape on authentication. Griffin v. State, 419 Md. 343, 19 A.3d 415 (2011) raised the bar for how much authentication is required in Maryland for a MySpace profile. In that case, a police officer testified that he had gone online and found the profile in question, and that he believed it was created by the defendant’s girlfriend. He testified that profile contained a photo of her and her birth date as evidence that it was indeed her profile.

Citing concerns that it is very easy to create fake profiles, and that anyone who knew her birth date could have easily faked this profile, the court held that the profile was insufficiently authenticated. While circumstantial evidence can be used to authenticate a profile, more is needed than was offered here.

Griffin cites a number of states that have taken similarly conservative approaches. In Commonwealth v. Williams, 926 N.E.2d 1162 (Mass. 2010), the court excluded MySpace messages because there had been no attempt to connect the profile to the actual person. In People v. Lenihan, 911 N.Y.S. 2d 588 (2010), the court excluded photos printed from MySpace because there was no witness to affirm that the photos were not altered. Lastly, in United States v. Jackson, 208 F.3d 633 (7th Cir. 2000), the Seventh Circuit refused to allow postings that were allegedly made by white supremacist groups claiming credit for the defendant’s crime, on the grounds that there was no evidence that suggested the defendant didn’t write those posts herself.

Both Ohio and Pennsylvania have cases that take a more permissive approach to authentication. In Pennsylvania the court held an instant message conversation was authenticated when one party to the conversation identified the defendant as the owner of the other screen name, and the defendant mentioned his own first name in the conversation. See In the Interest of F.P., 878 A.2d 91 (Pa.Super.Ct. 2005). In State v. Bell, 2009 Ohio App. LEXIS 2112
(Ohio Ct. App. 2009), the Ohio Court of Appeals authenticated MySpace messages, despite the defendant’s claim that the messages had been altered when the police turned on his laptop after it had been seized.

A recent Kentucky case addressed this issue in passing. In Lalonde v. Lalonde, No. 2009-CA-002279-MR, 2011 Ky. Ct. App. LEXIS 161 (Feb. 25, 2011), a mother lost a child custody case in part because of the admission of photos taken from Facebook depicting her drinking and partying. The appellate court found no error in admitting the photos because, while they acknowledge the risk of photos being altered, the mother herself had admitted that these photos were accurate. The mother also argued that she had never given the other person permission to tag her in the photos, but the court found no legal requirement that she give permission. The Kentucky court had little concern with how the photographs ended in the public domain or how they were authenticated, so long as they were in fact reasonably authenticated. The court also had little time for the argument that the photos “may” have been doctored in the absence of reasonable evidence that they had “in fact” been modified.

Given the uncertainty in this still-developing area of law, the prudent approach would appear to be, when practicable, to take extra steps to authenticate the contents of any social media profile. Griffin provides some guidance for how an attorney might do this. (1) Testimony of someone with actual knowledge is the easiest approach. Ideally, the prosecution could have put the girlfriend on the stand to admit the profile was hers. (2) They could have searched the girlfriend’s computer. Since computers leave an electronic trail of evidence, a computer forensics team could have determined if she had indeed made the posts in question. (3) They could have requested information directly from MySpace that would link her to the profile (such as an email address associated with the account). This last method was successfully used to authenticate an account in People v. Clevenstine, No. 2009-CA-002279-MR, 2011 Ky. Ct. App. LEXIS 161 (Feb. 25, 2011).

While there is still debate about what the absolute minimum acceptable level of authentication is, there are a number of ways to authenticate a site that are generally accepted. It is much easier to take a little extra time to do so before trial than it is to risk a prolonged appeals battle over authentication.

The possibilities for use in impeachment of this type of evidence in trucking cases are endless, and should be strongly considered in almost all cases.

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Geoffrey L. Oberhaus
The Tired, Distracted Driver

THIS ARTICLE WAS FIRST PUBLISHED IN THE COURSE BOOK OF THE ALFA TRANSPORTATION PRACTICE GROUP 2011 SEMINAR IN MAY 2001. AS THAT COURSE BOOK REACHES A LIMITED AUDIENCE IT IS USED HERE WITH THE PERMISSION OF THE AUTHORS.

Fatigued driving has been referred to as “one of the most pressing problems in the trucking industry today.” See Dan Ramsdell, National Director of the Association of Plaintiff Interstate Trucking Lawyers of America (June 2009), http://www.youtube.com/watch?v=Y6XJNw50erU.
The plaintiff’s bar is increasingly focused on fatigue as a major theme in its marketing and continuing legal education programming. A current national trucking bar website argues, “Ever Trucking Case is a Fatigue Case!” While the term fatigue used to be synonymous with “hours of service” requirements (or a more acute issue of a “too long day”), the science of sleep has advanced to the degree that today, fatigue refers to a “condition,” usually chronic, that has its origin in a number of biological, physiological, psychological, and sociological factors.

As such, it is no longer good enough for motor carriers and their operators to simply comply with hours of service requirements. For the health and safety of commercial motor vehicle operators and those with whom they share the road, motor carriers should act now to adopt policies and procedures that identify and treat operators suffering from fatigue. When accidents happen, claims professionals and attorneys need to obtain a broader understanding of the operator’s medical history and his or her conduct in the hours and days prior to the subject accident to determine what effect, if any, fatigue had on the accident.

A. Defining the Issue

The Federal Motor Carrier Safety Regulations (“FMCSRs”) state that no driver shall operate a commercial motor vehicle “while the driver’s ability or alertness is so impaired, or so likely to become impaired, through fatigué, illness, or other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.” FMCSR § 392.3. The FMCSRs provide little guidance with regard to what is meant by this regulation as the term “fatigue” is not defined within the FMCSRs.

In general, “fatigue” is defined as “weariness or exhaustion from labor, exertion, or stress” or the “temporary loss of power to respond that is induced in a sensory receptor or motor end organ by continued stimulation.” See Fatiguë, Merriam-Webster New Online Dictionary (2011), www.merriam-webster.com/dictionary/fatigue. In the medical community, the term “fatigue” refers to an acute or chronic “condition characterized by a lessened capacity for work and reduced efficiency of accomplishment, usually accompanied by a feeling of weariness and tiredness.” See Fatiguë, MedTerms Online Medical Dictionary (2004), www.medterms.com/script/main/art.asp?articlekey=9879.

There are at least five metabolic causes of fatigue, which include (1) a decrease in the phosphocreatine level in the muscle; (2) a proton accumulation in the muscle; (3) depletion of the glycogen store in muscles; (4) hypoglycemia; and (5) an increase in the plasma concentration ratio of free tryptophan to branched-chain amino acids. See Alan Cocchietto, A Brief but Updated Scientific Look at the “F” Word: Fatiguë, The National CFIDS Foundation (2004), www.ncf-net.org/forum/Fword.htm. The trigger for these metabolic changes can include reduced sleep, disrupted sleep, chronic sleep deprivation, sleep disorders (e.g. sleep apnea, restless legs syndrome, narcolepsy, etc.), other illnesses (e.g. allergies, a cold, the flu, acid reflux, cancer, etc.), use of legal and illegal drugs, physical or mental exertion, and stress. See Martin Moore-Ede, M.D., Ph.D., The Definition of Human Fatiguë, Circadian Information Limited Partnership (2009), www.seriousinjury.com/library/Circadian.com_Dr._Moore_Ede_White_Paper_on_Fatiguë.pdf.

The most prevalent sleep disorder is sleep apnea, which is characterized by pauses in breathing (or “apneas”) which occur frequently during sleep. The most common form of sleep apnea is known as “obstructive sleep apnea,” which refers to an obstruction of the upper airway that causes the pauses in breathing during sleep. It is estimated that 20 million Americans suffer from obstructive sleep apnea, although a vast majority of those persons are undiagnosed. There are a number of factors that increase the risk of sleep apnea, some of which are not controllable (gender, age,
family history), some of which are controllable (drinking alcohol, smoking), and some of which may be controllable (hypertension, diabetes, obesity). Symptoms of sleep apnea include loud snoring and daytime drowsiness.

Symptoms of fatigue include drowsiness, difficulty focusing, heavy eyelids, frequent blinking, yawning, irritability, and restlessness. Drivers may also have difficulty remembering the last few miles just driven, and have difficulty keeping their vehicle in their lane of travel. For comparison purposes, a person who has been awake for 17 hours is twice as likely to be involved in a motor vehicle accident as a person who is not fatigued, and is just as likely to be in an accident as a person with a blood alcohol content of .05 g/100 ml. A person who has been awake for 24 hours is seven times more likely to have an accident and has the equivalent driving performance of a person with a blood alcohol content of .1 g/100 ml. See Drew Dawson and Kathryn Reid, Fatigue, alcohol and performance impairment, 388 Nature 235 (July 17, 1997), www.fatiguescience.com/assets/pdf/Alcohol-Fatigue.pdf.

B. The Risk Posed by Fatigued Driving

Although there is no physical exam or test that can conclusively establish that fatigue was a factor in an accident, the National Highway Traffic Safety Administration estimates that fatigue results in 1,550 deaths, 71,000 injuries, and more than 100,000 accidents each year. These accidents are more likely to be serious because the driver usually fails to take evasive action to avoid the accident. According to a 2010 study performed by the AAA Foundation for Traffic Safety, fatigue is a factor in approximately 16% of all fatality accidents, 12% of accidents that result in hospitalization, and 7% of accidents that result in a vehicle being towed. In the same study, 54% of the participants admitted to driving while fatigued during the last year, while 28% of the participants admitted to falling asleep while driving within the last year. Again, these figures are representative of all drivers. See Drowsy Driving Prevention Week® 2011 Highlights Prevalent and Preventable Accidents, National Sleep Foundation, (November 11, 2010), www.sleepfoundation.org/alert/drowsy-driving-prevention-week-highlights-preventable-accidents.

In the trucking industry, fatigue is a contributing factor in approximately 13% of all accidents, although some sources cite a 1988 NTSB Safety Study in support of the proposition that as many as 31% of all heavy truck accidents are caused by driver fatigue. See Joe Rajkovacz, Obscure fatigue “statistic” has worn out its welcome, Owner Operator Independent Drivers Association (October 13, 2010), www.ooida.com/blog/?p=171. While the causes of fatigue vary, the FMCSA estimates that approximately 28.1% of all truck drivers currently suffer from mild to severe sleep apnea alone. Drivers with severe sleep apnea are 460% more likely to be involved in a severe crash over a seven year period than those without sleep apnea.

C. Legislative Action Addressing Fatigued Driving

It should come as no surprise that the FMCSRs already contain regulations related to the issues of fatigue and sleep disorders such as sleep apnea. In addition to FMCSR § 392.3, discussed above, § 391.34, which outlines the physical qualifications for drivers, states that drivers who have an “established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to control and drive a commercial motor vehicle” are disqualified from operating a commercial motor vehicle. In this regard, the Medical Examination Report states:

There are many conditions that interfere with oxygen exchange and may result in incapacitation, including emphysema, chronic asthma, carcinoma, tuberculosis, chronic bronchitis and sleep apnea. If the medical examiner detects a respiratory dysfunction, that in any way is likely to interfere with the driver’s ability to safely control and drive a commercial motor vehicle, the driver must be referred to a specialist for further evaluation and therapy.

The Medical Examination Report also requires drivers to affirmatively state whether they have “[s]leep disorders, pauses in breathing while asleep, daytime sleepiness, loud snoring.”

In addition to increasing enforcement of the existing regulations related to driver fatigue, the Federal Motor Carrier Safety Administration (“FMCSA”) has proposed revisions to the hours of service requirements...

The best guess related to these new regulations comes from the Expert Panel Recommendations presented to the FMCSA on January 14, 2008. See Sonia Ancoli-Israel, Ph.D. et al, Expert Panel Recommendations, Obstructive Sleep Apnea and Commercial Motor Vehicle Driver Safety, Presented to Federal Motor Carrier Safety Administration (January 14, 2008), http://www.fmcsa.dot.gov/topics/mep/report/Sleep-MEP-Panel-Recommendations-508.pdf. The report was prepared by a panel of five experts in sleep medicine who reviewed the existing FMCSRs and made the following recommendations related to obstructive sleep apnea:

1. A driver diagnosed with obstructive sleep apnea may not obtain a commercial driver’s license unless (1) the driver’s apnea-hypopnea index is less than 21 – moderate sleep apnea is considered between 15 and 30 API -- and the driver has no daytime sleepiness; or (2) the driver is being effectively treated.

2. A driver diagnosed with obstructive sleep apnea must be recertified every year and must at that time, demonstrate compliance with treatment.

3. A driver should not be certified if the driver has (1) excessive sleepiness while driving; or (2) a crash associated with falling asleep; or (3) failed to comply with treatment at any point; or (4) a body mass index (“BMI”) of 33 or greater (obese) pending evaluation by an overnight polysomnogram.

4. A driver exhibiting (1) high risk according to the “Berlin Questionnaire”; or (2) a BMI of 33 or greater; or (3) a high risk of obstructive sleep apnea based on clinical evaluation are required to undergo an overnight polysomnogram.

5. New education requirements for drivers with obstructive sleep apnea.

With respect to body mass index alone, it is estimated that 24% of all drivers have a BMI of 33 or greater. One member of the expert panel recommended that any driver with a BMI of 30 or more be tested. This requirement would encompass 42% of all commercial motor vehicle operators.

It should also be noted that some states have begun to address this issue on their own. For instance, in an effort to assist troopers with identifying fatigued drivers, Minnesota adopted a Fatigued Driving Evaluation Checklist. The checklist included categories related to the condition of the tractor (e.g., dirty exterior, lack of overall care), the condition of the sleeper berth (e.g., no mattress in the sleeper berth, video game system in the sleeper berth, television in the sleeper berth, reading material in the sleeper berth), the condition of the cab (e.g., full or overflowing wastebasket, urine bottles, empty soda bottles, a cell phone, a computer), the driver’s driving behaviors (e.g., missed turns, difficulty maintaining lane position, hours of service violations, tailgating), the driver’s medical condition (e.g., snoring, sleep apnea, acid reflux, dental problems, active dreams), and the driver’s physical condition (e.g., unshaven, disheveled, bloodshot eyes, use of prescription medications, allergies, body odor, job/home related stress, money concerns).

The Fatigued Driving Evaluation Checklist is the centerpiece of Owner-Operator Independent Driver Assoc., Inc. v. Dunaski, _____ F.Supp.2d _____, 2011 WL 317648 (D.Minn.), which case is pending in the United States District Court for the District of Minnesota. The Dunaski case was filed by the Owner-Operator Independent Association and Steven House. Mr. House and his wife were operating their commercial vehicle in Minnesota on May 10, 2008, when they approached the Red River Weigh Station located in Clay County, Minnesota. That evening, the Minnesota Highway Patrol was performing a saturation patrol for fatigue impairment, seatbelt violations, and other traffic violations. Upon arriving at the weigh station, Mr. House provided his log book, which was reviewed by the trooper and found to be in compliance with all state and federal regulations.

Mr. House was then directed to the weigh station building to answer some questions. Among other things, Mr. House was asked for his neck size, whether he had Playboy magazines in his truck, how often he went to the restroom at night, how many times he
opened his eyes at night when his wife was driving, whether he had a television in the sleep berth of his truck, and whether he had books in the sleeper berth of his truck. When Mr. House asked what was going on, he was told the troopers were simply conducting a sleep study. Following the questioning, Mr. House was advised that the trooper had “reached a determination” that Mr. House was “too tired to drive.” As such, Mr. House was placed out of service for 10 hours. Of the six drivers the trooper interviewed, four drivers (including Mr. House) were placed out of service due to fatigue.

On January 28, 2011, the district court found that the use of the Fatigued Driving Evaluation Checklist on May 10, 2008, constituted an unreasonable seizure in violation of Mr. House’s Fourth Amendment rights. The court primarily relied on the fact that the questioning was performed without a “reasonable articulable suspicion” that the driver was fatigued, without “any limitations placed on the scope of the inquiry or inspection” of the driver, and without “any notice of the procedures in place to evaluate whether drivers are too fatigued, ill, or impaired to drive safely.” The court also noted that the Minnesota State Patrol did not afford drivers a meaningful post-deprivation review of the out of service order.

Prior to the court’s order, on May 5, 2010, the Minnesota State Patrol issued General Order 10-25-002. The General Order was revised on August 24, 2010. In sum, the General Order requires that troopers have some reasonable articulable suspicion that the driver may be impaired prior to requiring the driver to undergo additional questioning concerning the driver’s fatigue. The General Order also requires that the additional questions used by the trooper to determine the driver’s impairment “must be reasonably related to whether the driver can safely operate the vehicle at the time,” and in this respect, troopers are no longer allowed to use the Fatigued Driving Evaluation Checklist. A driver can only be placed out of service when “there is an imminent risk to public safety.” The Fatigued Driving Evaluation Checklist briefly adopted by Minnesota exemplifies the difficulty of legislating a solution to the problem of the tired driver.

While a majority of the initiatives in this field have been dedicated to educating and identifying in drivers the predominant symptoms (e.g., excessive sleepiness) of fatigue and then attempting to determine the cause of the symptoms (e.g., disruptive sleep, sleep apnea, etc.), New Jersey has criminalized the behavior in an attempt to deter driving while fatigued. Known as “Maggie’s law,” N.J.S.A. 2C:11-5 was amended in 2003 to provide that “[p]roof that the defendant fell asleep while driving or was driving after having been without sleep for a period in excess of 24 consecutive hours may give rise to an inference that the defendant was driving recklessly,” and is guilty of criminal homicide.

Maggie’s law was enacted following the death of Maggie McDonnell, a 22-year-old college student who was killed when another car swerved across three lanes and hit her car. The driver of the other vehicle had not slept for thirty hours prior to the accident. Because there was no law forbidding a driver from falling asleep at the wheel, the jury was not allowed to consider the issue of sleep deprivation. The jury found the driver not guilty of vehicular homicide and he was fined $200.00 for reckless driving.

States have also adopted a number of other measures addressing the issue of fatigued driving. See National Sleep Foundation, State of the States Report on Drowsy Driving: Summary of Findings (Nov. 2008).

D. What Should Motor Carriers Do To Address Driver Fatigue?

It is clear that carriers that do not take proactive steps to diagnose and treat sleep apnea among its drivers will eventually be forced to do so by government regulation. The good news for carriers is that in most cases, there is a quick, inexpensive cure for obstructive sleep apnea. A CPAP (continuous positive airway pressure) can be worn at night and provides respiratory ventilation which breaks the cycle of obstructive sleep apnea by keeping the airway from becoming obstructed in the first place. CPAP machines are lightweight, portable, and can be purchased for less than $1,000.00. Again, once diagnosed and treated, carriers must follow-up with the drivers to ensure compliance with the treatment.

Carriers should also consider a holistic approach to evaluating driver fatigue by analyzing its supply chain, which may be causing or contributing to its driver’s fatigue. As a part of routine operational reviews,
carriers should identify practices and policies that contribute to fatigue, including inflexible delivery and loading times, and poor management of truck loading and unloading caused by inadequate equipment or personnel.

When accidents do occur, claims professionals must go beyond simply reviewing the driver’s log book. Claims professionals should first evaluate the driver’s physical condition to determine whether the driver has ever been diagnosed or is at risk for a sleeping disorder. Claims professionals should then garner an understanding of the driver’s sleeping habits, including when the driver last slept, how long the driver slept (i.e., was the driver on the cell phone or computer all night), where the driver slept, and whether the driver’s sleep was interrupted. Simply put, the plaintiff’s bar is starting to treat every case as a fatigue case. It’s time for claims professionals to do the same.

E. Conclusion

In the song “Truck Driver’s Blues,” the Texas swing band Asleep at the Wheel sings, “Feeling tired and weary from my head down to my shoes”, “I got a low down feeling truck driver’s blues.” We now have an idea why truck drivers feel “tired and weary,” and we have the means to prevent such a “low down feeling.” It is clear that plaintiff’s attorneys handling motor carrier cases will continue to evaluate every case as a potential fatigue case, and that the federal government is intent on not only enforcing current regulations but also adopting new regulations that will require motor carriers to identify people with high risk of sleep disorders, lead them to medical treatment, and then expect that they follow up to ensure the driver is complying with such treatment. Motor carriers can chose to wait for the federal government to provide guidance on these issues, or carriers can take matters into their own hands by instituting a fatigue management program.

Establishing policies and procedures to identify those operators with sleep apnea and other sleep disorders proactively addresses the issue of driver fatigue, allowing the motor carrier to take the lead in improving the health and welfare of its operators, while decreasing the risk posed to the motoring public. In addition, studies suggest that drivers who are treated for obstructive sleep apnea incur lower total health plan costs, fewer missed workdays because of short-term disability, and a lower rate of short-term disability claims. See Benjamin Hoffman, M.D., M.P.H., et al., *The Long-Term Health Plan and Disability Cost Benefit of Obstructive Sleep Apnea Treatment in a Commercial Motor Vehicle Driver Population*, 52 Journal of Occupational and Environmental Medicine 473 (May 2010), [www.rmaoem.org/Pdf%20docs/Sleep%20apnea%20article%206-10.pdf](http://www.rmaoem.org/Pdf%20docs/Sleep%20apnea%20article%206-10.pdf). As such, eliminating the truck driver blues through the diagnosis and treatment of sleep disorders is good for carriers, operators, and the general public.
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