FUTURE EVENTS

ALFA is returning to Amelia Island! Please join us and members of the Trucking Industry for the 2012 Transportation Seminar, being held from May 2-4, 2012. This year’s conference is being held at the luxurious Ritz-Carlton located in Amelia Island, Florida, approximately forty-five minutes from Jacksonville International Airport. The official website of the Ritz Carlton, Amelia Island, Florida is http://www.ritzcarlton.com/en/Properties/AmeliaIsland/Default.htm?utm_campaign=09018&src=ps. ALFA is returning to this stunning venue after all the positive feedback we received from our seminar here several years ago.

In addition to golf, surfing, 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. The theme of this year’s seminar is “Navigating Around the Potholes.” The seminar will address a variety of issues affecting the Trucking Industry, including FMCSA’s relatively new Compliance, Safety, Accountability program (“CSA”), driver fatigue, effective use of cutting edge technological advances, popular strategies and tactics being employed by the plaintiffs’ bar, cross-border regulations, and more.

This year’s Annual Seminar will address these issues and other “hot topics” that are likely to have a real and practical impact upon your business. The distinguished panels will bring these issues and concerns to life by applying 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 a 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 Transportation Practice Group’s annual multi-day seminar is quickly approaching. For more information regarding the 2012 Transportation Seminar, please contact Tara Miller at tmiller@alfainternational.com, Jessica Zaroski at jzaroski@alfainternational.com, or an ALFA attorney listed at the end of this newsletter.
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.

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ALFA'S GO TEAM HOTLINE

ALFA knows its transportation clients must often confront time-sensitive emergencies. In order to meet this demand, the ALFA Transportation Practice Group provides the ALFA Go Team Hotline, which is designed to offer ALFA clients immediate legal and other support services, 24 hours a day and 7 days a week.

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

Contact your ALFA lawyer today for more details about the ALFA Go Team Hotline. Remember, 1-866-540-ALFA (2532).

EDITORS’ NOTEPAD

The Transportation Practice Group of ALFA International has published the Transportation Update for about twenty 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.

Our primary method of distribution of the Transportation Update is by email. If your first contact with the Transportation Update is through our website, you can be added to our email distribution list by contacting Tara Miller at tmiller@alfainternational.com. Please put Transportation Update in the subject line, and ALFA 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 one for you.

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 of the Transportation Update 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 and other matters affecting the Trucking Industry.

The Cases, Regulations, and Statutes section reports developments in the statutory, regulatory, and common law around the country that are of general interest to the Trucking Industry.

The Verdicts, Appeals, and Settlements section addresses the results of litigation affecting the Trucking Industry and 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.

The Practice Tips section features articles that address matters of practical interest to those who manage litigation for motor carriers and those lawyers 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 Clark Aspy of Naman, Howell, Smith & Lee, LLP, Austin, Texas. Mr. Aspy can be contacted at (512) 479-0300 and aspy@namanhowell.com. The Vice-Chair of the Transportation Practice Group is Joe Swift of Brown & James, P.C., St. Louis, Missouri. Mr. Swift 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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Our goal is to provide timely relevant information to members of the trucking community. To help us meet this goal, we invite you to provide comments, suggestions for improvement, and topics you would like addressed in future issues.

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**FUTURE ISSUES OF TRANSPORTATION UPDATE**

The Summer 2012 issue of Transportation Update will be published in July 2012.
ALFA MEMBER PUBLICATIONS AND SPEAKING ENGAGEMENTS

As noted above, the 2012 Transportation Seminar is quickly approaching. The following is a list of the transportation professionals that will be presenting at the 2012 Transportation Seminar:

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Derek J. Ashton, Cosgrave Vergeer Kester LLP
P. Clark Aspy, Naman Howell Smith & Lee
Robert E. “Bob” Barton, Cosgrave Vergeer Kester LLP
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Duke Naipohn, Sleep Pointe
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Larry D. Warren, Naman Howell Smith & Lee PLLC
Christopher W. Weber, Mullin Hoard & Brown, LLP
Greg Weiss, Waste Management Inc.
CASES, REGULATIONS, AND STATUTES

ARKANSAS

Arkansas’s Statutory Punitive Damages Cap Found to Violate the Arkansas Constitution

In *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, ___ S.W.3d ___ (Dec. 8, 2011), the Arkansas Supreme Court held that a statutory punitive damages cap violated the Arkansas Constitution’s prohibition of limitations on the amounts recoverable for personal injury, wrongful death, and property damage.

Schafer arose from the August 18, 2006 USDA announcement that trace amounts of genetically modified rice had been found in the United States long-grain rice supply. Before trial, the lower court ruled, without explanation, that Arkansas’s statutory cap on punitive damages violated the Arkansas Constitution’s prohibition of limitations on the amounts recoverable for personal injury, wrongful death, and property damage.

As originally enacted as part of the Arkansas Civil Justice Reform Act of 2003, punitive damages were generally capped at the greater of either $250,000.00 or three times the award of compensatory damages, with an upper cap of $1 million. Ark. Code Ann. § 16-55-208(a). The cap did not apply if the plaintiff could prove, by clear and convincing evidence, that the defendant intentionally pursued a course of conduct for the purpose of causing injury and did in fact injure the plaintiff. Ark. Code Ann. § 16-55-208(b). Further, the fixed cap amounts were tied to the Consumer Price Index and were to be adjusted every three years. Ark. Code Ann. § 16-55-208(c).

Article 5, section 32 of the Arkansas Constitution provides that, with the exception of workers’ compensation statutes, “no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property.” In prior cases involving this provision, the Arkansas Supreme Court held that it prohibited limitations on “tort liability” for “physical injuries” to persons or property. See *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (1998); *SW Bell Tel. Co. v. Wilks*, 269 Ark. 399, 601 S.W.2d 855 (1980).

The defendants argued that this provision only prohibited limitations on the amount of compensatory damages. They further relied on the fact that under Arkansas law, punitive damages are not intended to compensate for injuries and may properly constitute a windfall to the plaintiff.

The Arkansas Supreme Court rejected these arguments, noting that, under Arkansas law, punitive damages may not be awarded in the absence of compensatory damages and that in previous cases, the Court had found the issues of compensatory and punitive damages to be so interwoven that an error in one required reversal of the whole case. Thus, the Court concluded, “Although compensatory and punitive damages serve differing purposes, an award of punitive damages is nonetheless an integrant part of ‘the amount recovered for injuries resulting in death or for injuries to persons or property.’” Accordingly, the Court held that the statutory cap on punitive damages violated the Arkansas Constitution’s prohibition on limitations of tort liability for personal injuries, wrongful death, and property damages.
Arkansas Courts Do Not Have Personal Jurisdiction Over Manufacturers Whose Products Enter the State Solely Through the “Gray Market”

In Yanmar Co. v. Slater, 2012 Ark. 36, ___ S.W.3d ___ (Feb. 2, 2012), the Arkansas Supreme Court held that an Arkansas court lacked personal jurisdiction over a foreign company whose products had entered Arkansas through the “gray market” and which maintained an American subsidiary that sold its parts in Arkansas.

Yanmar was a wrongful death case involving a rollover of a tractor. The tractor was manufactured by Yanmar Japan and originally sold in 1977 to an authorized Japanese distributor of Yanmar products. Without the knowledge of Yanmar, the tractor eventually was sold to a Vietnamese company, which imported it to the United States and sold it to an Oklahoma distributor, which sold it to an Arkansas dealer, which sold it to the decedent.

Yanmar Japan was not authorized to do business in Arkansas and did not have any assets, employees, offices, bank accounts, or property in Arkansas. Its only ties to Arkansas were that (1) Yanmar knew that a “gray market” existed for its tractors; (2) it had, until 1991, sold other makes of tractors in Arkansas through its subsidiary, Yanmar America; and (3) Yanmar America continued to sell replacement parts for authorized Yanmar tractors in Arkansas. The trial court found that it had personal jurisdiction over Yanmar Japan either because these contacts were sufficient to confer general jurisdiction over Yanmar Japan or because Yanmar Japan and Yanmar America had a “symbiotic relationship,” which would allow personal jurisdiction over Yanmar Japan based on Yanmar America’s ties to Arkansas.

The Arkansas Supreme Court rejected both of these premises. The Arkansas long-arm statute extends the jurisdiction of Arkansas courts to the limits of the Due Process clause of the 14th Amendment to the United States Constitution. Ark. Code Ann. § 16-4-101(C). Here, it was undisputed that only general, and not specific, jurisdiction was at issue. As to Yanmar Japan’s knowledge of the “gray market” for its tractors, the Arkansas Supreme Court, relying on Goodyear Dunlop Tires Operations v. Brown, 131 S.Ct. 2846 (2011), held that the trial court had improperly conflated the “stream of commerce” analysis of specific jurisdiction with the proper analysis for general jurisdiction, which requires “continuous and systematic” contacts with the forum state. For similar reasons, the Court held that the facts that Yanmar Japan used to sell its tractors in Arkansas and that Yanmar America continued to sell its parts in Arkansas were insufficient to support personal jurisdiction over Yanmar Japan.

As to the alleged “symbiotic relationship” between Yanmar Japan and Yanmar America, this theory of jurisdiction was based on the Eighth Circuit’s decision in Anderson v. Dassault Aviation, 361 F.3d 449 (8th Cir. 2004). But the Arkansas Supreme Court, relying on Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG, 646 F.3d 589 (8th Cir. 2011), noted that the Eighth Circuit had recently cautioned against a broad application of Anderson. Accordingly, under current Eighth Circuit precedent, a finding of personal jurisdiction under this theory requires that the foreign parent company exercise a degree of control and domination over its American subsidiary. Essentially, for jurisdiction to lie against the parent based solely on the subsidiary’s contacts with the forum state, the subsidiary must be so controlled as to become the mere alter ego for the parent. Here, the proof on this issue was that Yanmar Japan and Yanmar America shared a website, jointly used the Yanmar brand, and had worked together on trademark litigation involving Yanmar tractors. The Arkansas Supreme Court held that this proof was insufficient to impute Yanmar America’s contacts to Yanmar Japan. Accordingly, the Arkansas Supreme Court held that the trial court lacked personal jurisdiction over Yanmar Japan.

As to Yanmar America, the Arkansas Supreme Court also reversed the denial of its directed verdict motion on the basis that it owed no duty to the decedent. Yanmar America had not existed when this tractor was manufactured and therefore was not involved in its design, manufacture, or distribution. The Court further rejected any claim that a duty of Yanmar Japan could be imputed.
to Yanmar America and that Yanmar America had voluntarily assumed a duty to the decedent by taking steps to inform consumers about the “gray market.” Accordingly, since Yanmar America owed no duty to the decedent, it could not be liable for alleged negligence.

Arkansas Supreme Court Places Important Limitations on Admissibility of Expert Testimony and Addresses Spoliation Instruction

Although Bedell, et al. v. Williams, 2012 Ark. 75, ___ S.W.3d ___ (Feb. 23, 2012), involved nursing home neglect, some of the points decided by the Arkansas Supreme Court extend to all tort litigation, including personal injury claims against trucking companies. Specifically, the court placed limitations on expert testimony, and it held that a spoliation instruction is not necessarily appropriate just because required records have been lost.

Brenda Williams brought suit against the defendants asserting claims for (1) ordinary negligence, (2) medical malpractice, (3) violations of the Residents’ Rights Act, and (4) felony neglect after Williams’ mother died following a stay in the defendants’ nursing home. A jury returned a verdict in favor of Williams for a total of $10.2 million in damages.

The appellants contended on appeal, among several other points, that the circuit court made evidentiary errors. The points that extend beyond the nursing home neglect setting and have relevance here are as follows. First, with regard to plaintiff’s experts, the Court held that the trial court erred in (1) allowing one expert to define statutory terms and (2) allowing the expert to simply regale the simple facts from the case and offer an opinion that the statute was violated. The court said, “We cannot find any reason to say that an average juror would not be competent to determine from the facts, when considered together, whether the resident was treated with dignity. This court has held that it is prejudicial error to admit expert testimony on issues which could conveniently be demonstrated to the jury from which they could draw their own conclusions.”

The court made note of another error committed by the trial court in allowing expert testimony from another one of plaintiff’s experts. The court stated, “While much is made of Dr. Loren Lipson’s, appellant’s expert, testimony regarding her opinion that a legal duty was created, we take this opportunity to note that the fact that an expert testifies that a duty existed does not make it so. A jury question is not created simply because an expert believes a legal duty exists.”

These rulings place significant limitations on experts in all cases.

The second point that can have helpful implications in trucking litigation involves the issue of spoliation. In Bedell, the nursing home failed to maintain nursing records that arguably were required under applicable federal regulations. As a result, the trial court included a spoliation instruction which was read to the jury that permitted an adverse inference against the nursing home. The Supreme Court found this instruction inappropriate under the circumstances saying, “We hold that evidence . . . that ADL sheets were required to be maintained; that ADL sheets existed at one time; but that ADL sheets were not produced – does not support a basis for a spoliation instruction. Therefore, we hold that the circuit court
abused its discretion by giving the spoliation instruction in the instant case.”

This holding should apply equally to the highly regulated trucking industry. Where required documents are simply lost, this fact should not give rise to a jury instruction permitting an adverse inference against the company.

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Kansas Adopts Federal Changes to Rules Governing Expert Disclosure


The first revision is to K.S.A. 60-208(c), which was amended to remove “discharge in bankruptcy” from the list of affirmative defenses a party must state in responding to a pleading.

The second change is to K.S.A. 60-226(b)(5), which concerns discovery of expert materials. Subsection 60-226(b)(5)(B) was added to extend the protections from discovery outlined in 60-226(b)(4) – which prevent a party from discovering documents and other things prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party’s attorney, consultant, surety, indemnitor, insurer or agent unless the documents or other things are otherwise discoverable and the moving party shows it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means – to protect drafts of expert disclosures required by K.S.A. 60-226(b)(6), regardless of the form in which the draft is recorded. In addition, new subsection (C) provides that communications between a party’s attorney and an expert witness are also protected from disclosure regardless of the form of the communications. There are three exceptions to this general rule, which are when the communications (1) relate to the compensation for the expert’s study or testimony; (2) identify facts or data that the party’s attorney provided and that the expert witness considered in forming his or her opinions; or (3) identify assumptions that the party’s attorney provided and that the expert witness relied on in forming his or her opinions.

The third and final change is to K.S.A. 60-226(b)(6), which now requires disclosure of the subject matter on which the expert is expected to testify and the substance of the facts and opinions to which the expert is expected to testify, regardless of whether the expert is retained or specially employed to provide expert testimony.

The primary effect of these changes concerning expert disclosures is that the Kansas Code of Civil Procedure is now consistent with the Federal Rules of Civil Procedure, which adopted similar amendments to Rule 26, subsections (a) and (b), effective December 1, 2010.

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I Wanna Talk About Daubert

In Carolyn Joan Covel, Individually, and as Personal Representative of the Estate of H. K. Covel, Deceased, Tonni Covel, Toby Keith Covel, and Tracy Kaye Covel v. Elias A. and Pedro Rodriguez, d/b/a Rodriguez Transportes and Republic Western Insurance Company, 2012 OK 5, ___ P.3d ___ (Jan. 31, 2012), plaintiffs asserted that defective brakes on a bus owned by Elias A. and Pedro Rodriguez caused the death of decedent, H. K. Covel. Mrs. Covel, as the personal representative, sued pursuant to Oklahoma’s wrongful death statute. The decedent’s son, country singer Toby Keith, and his siblings were also named as plaintiffs.

Covel was traveling northbound in the inside lane of the four-lane highway when he lost control of his pickup truck, crossed the median and entered the southbound lanes of traffic. Defendants’ bus was traveling in the outside southbound lane. Covel’s pickup and the bus collided almost head-on. H. K. Covel died on the spot. Plaintiffs asserted that another driver bumped Covel and caused him to lose control of his vehicle. Defendants responded that their bus was not the cause of the accident and that their driver was confronted with a sudden and unavoidable accident. They maintained that even if their brakes were defective, it was merely a condition and not a cause of the accident. After a five-day jury trial, the plaintiffs were awarded $2.8 million dollars and $5,000 in punitive damages. The trial court denied defendants’ motions for judgment notwithstanding the verdict, remitter or new trial.

On appeal, the Court of Civil Appeals deemed the evidence of plaintiffs’ expert on causation, Dr. Mark Strauss, to be legally insufficient on Daubert grounds and reversed with directions to enter judgment for the defendants. In so ruling, the Court of Civil Appeals relied upon Christian v. Gray, 2003 OK 10, 65 P.3d 591. In Gray, the Oklahoma Supreme Court decided that the procedures set forth in Daubert and Kumho Tire were appropriate for determining the admissibility of expert testimony in civil cases in Oklahoma.

Although acknowledging that the defendants had not objected to plaintiffs’ expert’s testimony or conclusions, and, finding that admission of the evidence was not fundamental error, the Court of Civil Appeals went on to hold in Covel that plaintiffs’ expert’s opinions were not based on scientific method or foundation and that his opinion on causation was ipse dixit. On petition for certiorari plaintiffs argued that defendants’ failure to timely object to the expert’s testimony and conclusions waived any contentions that Dr. Strauss’ testimony was not supported by proper methodology. Therefore, they argued it was improper for the Court of Civil Appeals to disregard the testimony of their expert.

The defendants argued that in their motion for JNOV they were objecting to the sufficiency of the expert’s evidence, which presented a question of law for the court. They argued that because engineering testimony rests upon scientific foundations, the sufficiency and competency of the expert’s testimony must be scrutinized under Daubert and Kumho Tire, which focus on whether there is a valid scientific basis for the expert’s opinion. They further asserted that where there is no evidence on a material issue such as causation, it becomes a question of law for the court rather than the jury.

A. Daubert and Trial Court’s Gatekeeping Function

Defendants first raised their Daubert arguments in their motion for directed verdict after all the evidence was in. Defendants argued there was no competent evidence of negligence and that it was pure speculation on the part of Dr. Strauss whether it would have made a difference that the bus’ brakes were malfunctioning. Although defendants did not object in limine or contemporaneously to Dr. Strauss’ opinions or conclusions regarding causation on Daubert grounds, they attempted, after the testimony was already admitted, to use Daubert grounds to undermine the testimony.

The Oklahoma Supreme Court explained that Oklahoma’s rules of evidence provide that an expert may testify by opinion or inference and give reasons therefore without previous disclosure of the underlying facts or data, unless required to disclose the underlying facts or data on cross-examination or by the court. 12 O.S. 2011 § 2705.5. The Court noted that “it is the responsibility of the opposing party to establish
that the expert is beyond his expertise or, if within his ‘general expertise,’ that he has failed to provide the proper basis or foundation for his opinions. Allowing the defendants to raise Daubert objections to the expert’s testimony in the guise of an insufficiency-of-the-evidence argument after the testimony has been admitted without objection deprives the expert of the opportunity to offer other supporting proof.” The Court explained that Daubert creates a gatekeeping function for the trial court regarding the admission of an expert’s evidence, when challenged, at the time of admission. It does not enable a party to allow the expert’s testimony to be admitted and then attempt to discredit that testimony on Daubert grounds after all the evidence is in. By failing to object, the error was waived on appeal in the absence of fundamental error.

B. Fundamental Error Must Involve a Substantial Effect on the Rights of the Parties

In addressing whether there was fundamental error, the Court held that the admission of Dr. Strauss’ testimony on causation, where the defendants failed to object, was not so manifestly unreasonable that its admission constituted fundamental error, as it did not seriously affect the fairness or integrity of the trial.

In support of this conclusion, the Court reasoned that the conclusions and opinions of the plaintiffs’ and defendants’ expert witnesses were in conflict. Both experts relied upon Total Station electronic survey measurements of the accident scene and photographs taken at the scene. Neither expert examined the bus’ brakes. In considering all evidence favorable to the nonmoving party and disregarding all evidence favorable to the movant, the court could not find error in the trial judge’s denial of defendants’ motion for judgment notwithstanding the verdict. The plaintiffs did not contend that defendants’ bus caused the accident; rather, plaintiffs contended that the faulty brakes resulted in a more severe injury to Mr. Covel, i.e., his death. The plaintiffs introduced evidence that defendants’ bus was operating on the highway with brakes that needed repair; that the brakes were not working as they should have; that the chance of greater injury is present if a collision is head-on and intrusion occurs into the vehicle; that the impact with the bus caused intrusion of the pickup’s engine into the cab compartment; that such an intrusion was not survivable; and that the bus owners were required by federal law to conduct pre-trip inspections and keep the brakes properly adjusted, but that they failed to do so, and such failure was the direct cause of Mr. Covel’s death. The court explained that the plaintiffs had the burden of proving that defendants’ brakes malfunctioned and that the malfunction was more probably than not the cause of Mr. Covel’s death. Whether defendants were negligent and, if negligent, whether the consequences could reasonably have been foreseen or anticipated, were questions for the jury to decide. The jury found for the plaintiffs and the trial court held that there was competent evidence to support the jury’s verdict.

Finally, defendants complained that plaintiff’s counsel, during closing argument, urged the jury to award a substantial verdict in order to make sure that bus companies “operate properly in McClain County, in Oklahoma and in the United States.” Defendants objected, and the trial court admonished the jury to disregard argument of counsel regarding punishment of the bus or insurance company. Defendants also complained of plaintiffs’ questioning during opening statements about the defendants’ bus route to Mexico; plaintiffs asking the highway patrol troopers about language obstacles faced with the bus’ passengers; plaintiff’s questioning of the origins and ancestry of the Rodriguez defendants; Mrs. Covel’s remarks about finding Mexican liquor stickers at the accident scene; and plaintiffs’ counsel’s comparison of the defendants’ compliance with Mexican regulations versus noncompliance with certain U.S. regulations. They assert that the prejudicial references assured that the defendants would be seen as Mexican bus owners who transported Mexican people and goods back and forth from Oklahoma to Mexico, while Mr. Covel would be perceived as an avowed patriot who had served his country in the military and had fathered a country singing superstar and writer of patriotic songs. The defendants did not object to the questions or statements, contending that by objecting to
each comment, they would have highlighted the remarks in the minds of the jurors. As such, defendants’ asserted that it was incumbent on the trial court to “rein in” the plaintiffs whenever they “crossed the line.”

The Supreme Court explained that the defendants’ business was transporting passengers to and from Mexico was a fact in the case. That Toby Keith is the son of the decedent was a fact in the case. The court noted that at the hearing on the motion for JNOV, the trial judge remarked that although she initially was concerned about the celebrity issue and having an interpreter for the defendants, she felt that it was not a problem in the conduct of the trial because everyone conducted themselves in a professional manner and tried to avert any kind of prejudice being part of the trial. In reviewing the matter, the Supreme Court concluded that statements of counsel were not so unfairly prejudicial as to render the jury’s verdict a product of passion and prejudice. Because the defendants did not object or move for a mistrial they were deemed to have taken their chances with the jury.

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**TENNESSEE**

*In a Workers’ Compensation Action, Tennessee Courts are Likely to Give More Weight to an Employee’s Treating Physician’s Testimony When the Cause of an Injury is Disputed*

A recent decision by the Tennessee Supreme Court Special Workers’ Compensation Appeals Panel illustrates that courts are likely to assign more weight to the testimony of treating physicians than to other expert witnesses in workers’ compensation actions. The case of *Bright v. Shoun Trucking Company* concerned a truck driver who claimed he suffered torn rotator cuffs as a result of and in the course of his employment. At trial, the employee truck driver’s treating orthopedic surgeon testified that Mr. Bright had suffered torn rotator cuffs in his left and right shoulders and that “there... was a very good chance that [these injuries were] related to [his job as a truck driver].” The employer presented contrary expert testimony disputing that Mr. Bright’s injuries had been caused by his employment. Despite this expert testimony, the trial court found that Mr. Bright’s injury had arisen out of and was related to unemployment benefits. Moreover, even though Mr. Bright’s own treating physician only assigned him a 10% impairment to his whole body, the trial court awarded 50% permanent partial disability benefits.

Robert Bright was employed by Shoun Trucking as a truck driver between 2003 and 2008. During this time period, he drove an average of 146,000 miles per year. As part of his job responsibilities, Mr. Bright was actually required to unload cargo. Additionally, one of trucks he regularly drove had a leak in its powering steering system, which would invariably make his truck more difficult to turn.

Mr. Bright began experiencing increased pain in his shoulders in May 2007. He was eventually referred to an orthopedic surgeon, and an MRI was scheduled. Dr. Park, Mr. Bright’s treating orthopedist, diagnosed him with a torn left rotator cuff, concluded that it was caused by his employment with Shoun Trucking, and recommended that Mr. Bright undergo surgery. Mr. Bright gave notice of his injury to his employer and, in March 2008, he underwent the recommended surgery. While recovering from the surgery, Mr. Bright began experiencing pain in his right shoulder, and he was later diagnosed with a torn...
rotator cuff. Surgery to repair this rotator cuff was performed in March 2009.

Mr. Bright filed suit seeking workers’ compensation benefits for these injuries. Shoun responded and contended that the injuries did not arise out of or occur within the course and scope of his employment as a truck driver. Following trial, the court entered judgment for Mr. Bright concluding that his injuries, although gradual in nature, did arise out of and occurred within the course and scope of his employment. Moreover, the court awarded Mr. Bright 50% permanent partial disability benefits, which was five (5) times the medical impairment rating to the body as a whole. On appeal, the central issues were (1) whether there was sufficient evidence for the trial court to find that Mr. Bright’s injuries were caused by his employment and (2) whether the five (5) times the medical impairment rating was appropriate under the circumstances.

At trial, Dr. Park, Mr. Bright’s treating physician, testified that based on what Mr. Bright had told him about his employment duties, he had concluded that Mr. Bright’s injuries were related to his assigned work duties. During cross-examination, Dr. Park admitted he had not reviewed Mr. Bright’s job description and he had assumed that Mr. Bright was required to load and unload his truck on a frequent basis. Despite being informed that Mr. Bright was only required to perform such tasks occasionally, he held firm to his conclusion that Mr. Bright’s injuries were attributable to his job responsibilities.

The employer offered two expert witnesses who disputed the treating physician’s conclusion regarding the cause of the torn rotator cuffs. They offered testimony of an orthopedist who had conducted an independent medical examination. That expert concluded that Mr. Bright’s torn rotator cuffs were caused by arthritis, a probable lack of vascularity in the joint, and aging. Another orthopedist, who had reviewed Mr. Bright’s medical records, concluded the injuries were attributable to genetics and smoking.

In analyzing whether the actual evidence presented preponderated against the trial court’s conclusion that the injuries were job-related, the court noted that “generally, an injury arises out of and in the course of employment if it has a rational causal connection to the work and occurs while the employee is engaged in the duties of his employment.” In order to demonstrate that an injury is job-related, “a claimant must establish by expert medical evidence the causal relationship between the claimed injury and the employment activity.” Finally, the court noted that “all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee.”

In this instance, the court found that it was proper for the trial court to assign increased weight to the testimony of Dr. Park, the treating physician. The trial court had noted that as the treating physician and someone who had regular contact with Mr. Bright over a number of years, Dr. Park was in a better position to assess his injuries than the other experts. Moreover, the Court found that the trial court had “the discretion to choose which expert to accredit when there [was] a conflict of expert opinions.” Applying the trial testimony with the principle that “all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee”, the court concluded that the evidence did not preponderate against the trial court’s ruling that Mr. Bright’s shoulder injuries were job-related.

The court also found that the trial court’s award of 50% permanent partial disability to the body as a whole was supported by the evidence. In reaching this decision, the court stated that courts should consider a number of factors, including an employee’s job training, age, and anatomical impairment rating, before reaching a conclusion as to an appropriate impairment rating. At trial, evidence was presented that Mr. Bright had limited education and training, and that he had been working as a truck driver his entire adult life. Moreover, Mr. Bright stated that he had not been able to work since March 2008 and would be unable to perform the requisite duties to be a truck driver in the future due to increased shoulder stiffness and the fact he was taking prescription narcotics to treat his shoulder pain. Further, if the trial court’s award includes a multiplier of five (5) or greater
than the impairment rating for the body as a whole, the court must make specific finding of fact detailing the reasons for making such an award.

In this instance, the court found that the trial court had made extensive findings of fact. Specifically, the trial court had noted that, at the time of trial, Mr. Bright was forty-six years, attended school only until 10th grade, and that he had been a truck driver his entire adult life. Based on this information, it was proper for the trial court to find that, as a result of his injuries, Mr. Bright would no longer be able to perform his job as a truck driver and that he would probably need additional education and training to successfully reenter the workforce. Based on the evidence presented at trial, the court found the 50% partial disability award to be appropriate.

In Tennessee, based upon this ruling, when conflicting expert testimony is presented concerning the source of an employee’s injury, courts are likely to assign more weight to the testimony of the employee’s treating physician than to that of non-treating experts. Moreover, employers can be prepared for courts to award a disability rating that is significantly more than the total body impairment rating in the right circumstance. Accordingly, employers should remain aware of both of these issues when evaluating workers’ compensation claims.

Drivers Can Be Denied Workers’ Compensation Benefits If They Are Injured in an Accident While They Are in Violation of Hours of Service Requirements

The Tennessee Supreme Court Special Workers’ Compensation Appeals Panel recently considered whether an employer can deny an employee workers’ compensation benefits when they are in violation of the Federal Motor Carrier Safety Administration’s (“FMCSA”) “hours-of-service rules” at the time they are injured in a traffic accident. In the case of Keith v. Western Express, the court held that under certain conditions, workers’ compensation benefits can be denied to an employee who is found to be in violation of the hours-of-service rules.

Daniel Edward Keith was employed by Western Express, Inc. On February 12, 2010, Mr. Keith picked up a load of freight in Tennessee with instructions to deliver the load to a California destination approximately 1,800 miles away by 4:00 p.m. on February 15, 2010. Mr. Keith departed Lebanon, Tennessee for California at approximately 11:00 a.m. on February 13, 2010, after taking his required ten (10) hour break. While driving through New Mexico, Mr. Keith lost control of his truck and it overturned. He later admitted he might have fallen asleep just prior to the accident. In the accident’s aftermath, the driver filed a workers’ compensation claim which his employer proceeded to deny on grounds that the accident was caused by his willful violation of the FMCSAs hours-of-service rules, which Western Express had previously adopted as part of its safety rules. The trial court entered judgment for the employer finding that Mr. Keith’s failure to comply with the hours-of-service rules constituted a willful disregard of its established safety rules that barred Mr. Keith from recovering workers’ compensation benefits under Tennessee Code Annotated Section 50-6-110(a).

On appeal, in order to determine whether it was appropriate for Western Express to deny Mr. Keith’s workers’ compensation claim, the court concluded that Western Express was required to satisfy a four (4) element
test to determine whether Mr. Keith had willfully disregarded its safety rules. The first three (3) elements concern whether the employer has implemented given rules, whether they are enforced, and whether adequate notice has been provided to the employee. The fourth element focuses on whether the employee willfully and intentionally failed to comply with the safety rules.

Mr. Keith did not dispute that Western Express had satisfied the first three (3) elements of this test. First, a representative of Western Express testified at trial that its internal safety rules included the hours-of-service rules adopted from the FMCSA. Moreover, Mr. Keith admitted at trial that Western Express had provided him a copy of the rules, that he had undergone training on the rules at his initial orientation, and that he recognized compliance with the rules was mandatory. Furthermore, Western Express required each employee to sign a new copy of the rules on a yearly basis. Lastly, it was clear from the testimony that Western Express enforced compliance with the hours-of-service rules as numerous drivers had been counseled, issued written warnings, and even terminated for failing to comply. Based on these facts, the Supreme Court agreed that Western Express had adopted the FMCSA hours-of-service rules, that they were being strictly enforced, and that its employees were aware they were part of the company’s safety rules.

The more difficult issue for the Supreme Court in this case was whether Mr. Keith’s failure to comply with the FMCSA hours-of-service rules amounted to “willful misconduct.” Mr. Keith testified at trial that while he was aware that his employer required him to comply with the rules, his failure in this instance could not be regarded as willful because it was impossible for him to comply with the hours-of-service regulations and still meet his delivery deadline in California. In addition, Mr. Keith testified that he believed he was in compliance with the rules at the time of the accident, and that he had intended to stop at the next rest area twenty (20) to thirty (30) minutes away from the scene of the accident. The trial court found Mr. Keith’s arguments to be unpersuasive and concluded that he had willfully violated the hours-of-service rules and was barred from receiving workers’ compensation benefits.

Interestingly, the Supreme Court did not find grounds to overturn the trial court’s decision that Mr. Keith’s conduct amounted to willful misconduct. In essence, the Supreme Court found that the trial court had justifiably viewed Mr. Keith’s testimony with extreme skepticism due to concerns about his credibility. Evidence at trial revealed that Mr. Keith had failed to disclose that he was prescribed methadone at the time of his employment. The Supreme Court found that as a result of its legitimate concerns about Mr. Keith’s credibility, the trial court was justified in discounting his testimony that he was forced to disobey the hours-of-service rules to meet his delivery deadline.

Therefore, in Tennessee, truck drivers that are involved in an accident that occurs when they are found to be in violation of the FMCSA’s hours-of-service rules can be denied workers’ compensation benefits under certain conditions. First, the employer must demonstrate it has adopted the hours-of-service rules as part of its own safety rules. Next, the employer must demonstrate that the hours-of-service rules are strictly enforced by the employer, and employees must have adequate notice that the rules have been adopted by the employer. Lastly, and certainly the most difficult to prove, the employer must demonstrate that the employee willfully and intentionally failed to comply with the hours-of-service rules.
NEWLY REPORTED VERDICTS

ARIZONA

This negligence action was brought by Alan Pribble, his mother, adult son, and adult daughter against Sunbelt Rentals (a Chartis insured), its driver Julian Garcia, and Jose Gonzalez. The case arose out of a motor vehicle accident that occurred on January 7, 2008. On that date, there was a minor collision between the Sunbelt Rentals flatbed truck driven by Mr. Garcia and a light pickup truck driven by Mr. Gonzalez. As a result of that impact, Mr. Gonzalez lost control of his vehicle, hit the freeway wall and proceeded back across traffic. The flatbed truck driven by Mr. Gonzalez then hit Mr. Pribble’s vehicle and sent it across the center divider and into oncoming traffic.

As a result of the accident, Mr. Pribble was rendered a complete quadriplegic. Mr. Pribble incurred in excess of $2.5 million in medical special damages. His lost earnings were in excess of $1 million and his life care plan was between $4.5 and $5.5 million. Mr. Pribble was totally without fault. Arizona allows the children and parents of an injured person to make loss of consortium claims. Mr. Pribble was not married, so his life partner, Linda Hanson, did not have a claim.

At trial, defendants’ counsel, William W. Drury and William S. Sowders of Renaud Cook Drury Mesaros, PA, called their accident reconstruction expert Paul Guthorn. Mr. Guthorn explained to the jury the impossibility of plaintiffs’ theory of liability. Mr. Guthorn explained that the accident occurred as Sunbelt’s driver Julian Garcia had always explained – i.e., that Mr. Garcia was traveling westbound on State Route 101 in the slow lane of the freeway and that the Garcia vehicle was hit by the red Ford pickup driven by Mr. Gonzalez. Mr. Guthorn showed that the damage to the right rear mud flap of the Sunbelt flatbed was caused by Mr. Gonzalez, who entered the freeway carelessly from an on/off ramp. Mr. Gonzalez hit the Sunbelt flatbed from behind while traveling approximately two (2) mph faster than the Sunbelt flatbed. Defendants were also able to prove that Mr. Gonzalez made a careless lane change in violation of Arizona law. Sunbelt’s driver Julian Garcia was, pursuant to Arizona law, correct in his presumption that Mr. Gonzalez would obey the rules of the road and yield to traffic as he entered the freeway.

Plaintiffs’ expert Michael Shepston also reconstructed the accident. Mr. Shepston changed theories of liability no less than three (3) times. He explained to the jury his theory of the accident, which was that the Sunbelt vehicle was simultaneously merging into the slow lane from the middle lane at the same time Mr. Gonzalez was merging from the on/off ramp into the slow lane of the freeway. This was Mr. Shepston’s third theory of impact. Mr. Shepston’s third theory was not only contradicted by Sunbelt’s driver Julian Garcia, but also by an independent eyewitness who testified live at trial. This eyewitness confirmed that the Sunbelt vehicle never left the slow lane prior to impact.

Once the jury had the case, they deliberated for one (1) full day rendering their verdict twenty-four (24) hours after being given the case. The jury found in favor of the defendants, Sunbelt Rentals and Julian Garcia. The jury was instructed that they must find at least some fault against Jose Gonzalez as a result of his failure to answer plaintiffs’ Complaint or appear at trial. Jose Gonzalez was found 100% at fault for plaintiff’s injuries. Mr. Pribble was awarded $25.6 million in damages. In addition, Mr. Pribble’s mother was awarded $1 million, Mr. Pribble’s adult son was awarded $1 million, and Mr. Pribble’s adult daughter was awarded $3 million in damages. Mr. Pribble and his family were very sympathetic plaintiffs and his injuries were catastrophic. The jury was asked by plaintiffs to allocate 65% of the fault to Sunbelt and Garcia and 35% of the fault to Jose Gonzalez. Defendants Sunbelt and Garcia argued that the jury should find that Sunbelt and Garcia were not at fault and that 100% of the fault should be assessed against defendant Gonzalez.

William W. Drury, Jr.
This past February, a trial was held in the case of Carolina Gutierrez v. David Eugene Harris and Fortune Transportation in the Fourth Judicial District, County of San Miguel, New Mexico. Monica Garcia of Butt Thornton & Baehr, PC, of Albuquerque, New Mexico tried that case with Michael Langford of Scopelitis, Garvin, Light, Hanson and Feary, P.C. of Indianapolis, Indiana.

The Fourth Judicial District is considered to be pro-plaintiff and anti-outsider, and there have been substantial plaintiff verdicts recently rendered from the District. Add to that the fact that a major highway crosses through the District, which is mainly rural, with a fairly large volume of tractor-trailer activity. Accordingly, the defense was concerned about how all of this would impact the clients, who were not from the area. The concern grew when the jury panel questionnaires were received and reviewed. Fortunately, the panel that was ultimately selected was better than anticipated.

The case arose out of a collision between Ms. Gutierrez’s automobile and Fortune’s tractor-trailer, driven by Mr. Harris, at the intersection of US Highway 84 and a county road south of I-25 near Las Vegas, New Mexico. Ms. Gutierrez was driving south on US 84. Mr. Harris was also southbound, ahead of Ms. Gutierrez, but was having engine troubles with his tractor. He was being followed by a tow truck, in response to his request for assistance. On advice of the towing company (which the court dismissed from the matter prior to trial), he decided take the tractor-trailer for repairs in Las Vegas. He stopped on the side of US 84 on the northwest corner of the intersection with the county road. After making sure no vehicles were approaching from the north or south, he slowly crossed US 84 to make a u-turn. There is a small hill on US 84 to the north of the intersection. The plaintiff was coming from that direction. After she crested this hill, she admittedly spotted the tractor-trailer, yet still collided with the trailer. Damage to her vehicle was substantial but fortunately, her injuries were minor. She claimed economic damages and pain and suffering. Ms. Gutierrez argued that under no circumstance was Mr. Harris to have undertaken a u-turn, and it was contrary to “rules of the road” for truck drivers to do so. In addition, Mr. Gutierrez asserted that Mr. Harris failed to keep a proper lookout and pulled out right in front of her without warning.

Defendants fought liability and the nature, extent and causation of the claimed injuries. Their experts established that at the point where Ms. Gutierrez first saw the tractor-trailer, a time and distance analysis indicated she had sufficient time to stop. However, due to inattention and the fact that she was speeding (which was supported by the investigating officer), impact occurred. Fact witness testimony supported Mr. Harris’ recollection that there was no approaching traffic when he started the u-turn, and that he was moving very slowly throughout the maneuver.

After approximately 1½ days of deliberating and three instances of being advised by the court they need to work hard at rendering a verdict, the jury stated they were unable to reach a consensus. As a result, the court called a mistrial due to a hung jury. The jurors were never able to reach the required number of jurors (10 of 12) on the first question of the verdict, which asked: “Was any defendant negligent?”

In interviewing those jurors who were willing to discuss the case, they stated that, as hard as they tried, they could not break a deadlock on that first question. It was reported that six (6) of the jurors, all men, immediately reached the opinion that Mr. Harris was negligent for making a u-turn. The remaining six (6) jurors, all women, disagreed. One proposal made during deliberations was that if some of the “hold-out” jurors were willing to find negligence on the part of Mr. Harris, they could keep comparative fault on him very low. It was reported that...
all of the jurors were of the opinion that Ms. Gutierrez was negligent. As of this writing, the second trial is expected to take place later this summer.

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NEW MEXICO

Young rocker dude Sean Holbrook was northbound on San Mateo Boulevard in Albuquerque riding a Honda motorcycle during rush hour on a hot August day when a tractor-trailer rig driven by Sam Gavito allegedly pulled rapidly across San Mateo Boulevard from a tire store and into Holbrook’s path of travel, causing him to lay down the bike and slide under the tandem axles, where the tries supposedly crushed both legs and bilateral tibia-fibula fractures resulted. Our position (the true story) was that Gavito had pulled across the six lane road to make a left turn when traffic was clear and slowed to a virtual stop to wait until some unexpected southbound traffic cleared before proceeding with the turn. Our truck had obtained and held the right of way for at least ten (10) seconds and other northbound traffic began to slow to allow Gavito’s 73 foot rig to make the turn. But not Holbrook. We believe he raced out of a side business just to the south, looked to the south, but did not look north to see Gavito until it was too late.

We denied running over him and our position was that the fractures occurred during the tumble with the bike or upon contacting the asphalt, as there was no good evidence of a crushing injury or compartment syndrome. With the assistance of plates and screws, and good care at UNM Hospital, Holbrook made a remarkable recovery, and within seven months he went back to jumping around on stage with his rock band and waiting tables in-between gigs. At the time of the accident, Holbrook had long dyed blonde hair and was covered with tattoos. We obtained good surveillance on him and planned to show the jury the “real” Sean Holbrook and his capabilities. By trial time, his hair was cut short, he wore a suit, and he appeared to be a respectable young man. Opposing counsel was so concerned about keeping the surveillance out of evidence that he asked Holbrook to demonstrate some of his current physical abilities to the jury. Much to opposing counsel’s horror, and my delight, Holbrook did a running forward tumble and sprang back to his feet right in front of the jury box! Thus, the need to show the surveillance tape was essentially eliminated.

The federal court jury deliberated approximately two hours and returned a defense verdict on liability. The insurer was Great West Casualty Company. Sam Gavito no longer makes left turns across San Mateo Boulevard.

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TEXAS

Darryl S. Vereen and Kurt G. Paxson, shareholders in the El Paso, Texas ALFA Firm of Mounce, Green Myers, Safi, Paxson & Galatzan, recently defended a wrongful death and survival claim to a jury verdict in the United States District Court, Western District of Texas. The case involved a truck/pedestrian accident. The truck driver and motor carrier were both domiciled in the Republic of Mexico, but operating in the commercial border zone of El Paso, Texas pursuant to their OP-2 operating authority. The driver ran over and killed an 82 year old grandmother who was crossing the street in a crosswalk in broad daylight. The accident occurred while the truck driver was making a right
turn on a green light. Plaintiffs presented expert evidence that the decedent would have been visible and that the driver had other accidents and had violated hours of service on various occasions. The defense presented expert evidence that the driver could not have seen the decedent due to her size and proximity to the truck, and that the decedent did not have a walk signal permitting her to cross at that time. The Plaintiffs consisted of the decedent’s elderly surviving husband, her estate and her three adult children. The jury found that the truck driver was not at fault, but that the decedent and motor carrier were both 50% responsible. The jury also found that the motor carrier was grossly negligent. There were significant issues on whether the charge was correctly worded and presented with regard to the motor carrier’s liability. Plaintiffs sought from 2-5 million dollars from the jury. The actual damages awarded, after considering reduction for the Plaintiff’s percentage of responsibility, were approximately $75,000. The trial had been bifurcated on the issue of exemplary damages, and the parties settled the case before that phase of the trial was reached. Under Texas law, any exemplary damages awarded would have been capped at $200,000 based on the actual damages awarded.
PRACTICE TIPS

“BUT I REPORTED THE CLAIM TO THEIR INSURER!” NEVER ASSUME AN INSURANCE CARRIER IS A “CARRIER” UNDER 49 C.F.R. PART 370

The Carmack Amendment sets forth the rights, duties and liabilities of carriers and shippers with respect to interstate cargo loss and damage claims. Although the Carmack Amendment specifies a nine (9) month minimum period that may be imposed by a carrier for the filing of a cargo claim, it does not provide the mechanics for filing such a claim. Those details are articulated in parallel provisions of 49 C.F.R. Parts 370 (for motor carriers and surface freight forwarders) and 1005 (for rail carriers). To simplify the discussion, this article will reference only the Part 370 rules except as otherwise specified. Those rules include 49 C.F.R. § 370.3, entitled “Filing of claims,” which states the following:

A. Compliance with regulations. A claim for loss or damage to baggage or for loss, damage, injury, or delay to cargo, shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.

B. Minimum filing requirements. A written or electronic communication (when agreed to by the carrier and shipper or receiver involved) from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and:

1. Containing facts sufficient to identify the baggage or shipment (or shipments) of property,

2. Asserting liability for alleged loss, damage, injury, or delay, and

3. Making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage; provided, however, that where claims are electronically handled, procedures are established to ensure reasonable carrier access to supporting documents.

Although case law appears well-developed in various jurisdictions as to what information is sufficient to constitute a “claim” for the purpose of this regulation, there is little guidance (aside from the wording of the regulation itself) as to who can receive notice on behalf of the carrier. The regulation states that notice must be filed “with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury or delay occurred. . . .” With respect to the movement of household goods, an authorized agent of a disclosed principal carrier may receive a written notice of claim on behalf of the principal; even in a situation where the agency agreement may have been violated, such an agent may nonetheless have apparent authority if the disclosed principal does not disavow the relationship to the shipper.

It is much less clear, however, whether written notice of a claim (which otherwise complies with the regulation and the requirements of the shipping contract between the parties) will be valid if it is provided not directly to the “proper carrier,” but to the carrier’s insurance provider. The Carmack Amendment provides authority for an insurer to disallow a claim on behalf of a carrier; however, it is silent as to the insurer’s authority to accept a written claim on the carrier’s behalf. Interestingly, there does not yet appear to be any case law directly addressing this question under the current language of 49 C.F.R. Part 370. As discussed below, however, the answer to this question appears to be “no.”

The current rules in 49 C.F.R. Part 370 were part of a package of amendments to Title 49 of the Code of Federal Regulations in 1997 that reflected legislation abolishing the Interstate Commerce Commission (“ICC”). This legislation divided certain ICC functions, including rules for processing cargo claims, between a new Surface Transportation Board in the case of railroads and a predecessor agency of the Federal Motor Carrier Safety Administration.
In the case of other surface carriers. In particular, 49 C.F.R. Part 370 was created as a new home for motor carrier/freight forwarder claims processing rules. Those rules were copied in large part from 49 C.F.R. Part 1005, which previously covered cargo claims against all ICC-regulated carriers. When Part 370 was adopted, Part 1005 was narrowed to cover only cargo claims against railroads. In all other pertinent respects, the claim filing requirements have remained generally the same under “old” Part 1005, “new” Part 1005, and “new” Part 370.

While a number of courts have construed the minimum claim filing requirements of Part 1005, it appears that only one has squarely addressed the issue of whether proper notice of a claim, if timely provided to the carrier’s insurance company, complies with those requirements. In *LTA Group, Inc. v. J.B. Hunt Transp., Inc.*, 101 F.Supp.2d 93 (N.D.N.Y. 2000), LTA Group contracted with J.B. Hunt for the interstate shipment of goods. Because this shipment predated the division of claims filing rules discussed above, Part 1005 covered all ICC-regulated surface modes at that time. J.B. Hunt handled the highway portion of the shipment, and arranged for Conrail to provide the rail transport. The goods were damaged when the train derailed on August 6, 1996. LTA’s insurer, The Hartford, paid the cargo loss and pursued claims in subrogation against both J.B. Hunt and Conrail. On September 23, 1996, a Hartford affiliate contacted J.B. Hunt to discuss the loss, and was informed that the motor carrier was investigating the matter. In response to a letter sent on behalf of The Hartford on the same date, J.B. Hunt responded with a letter clearly outlining what was required to constitute a proper notice of claim. Thereafter, another employee of The Hartford sent a second letter to National Union Fire Insurance Company (National Union), J.B. Hunt’s insurer, on April 10, 1997, purportedly presenting a claim for damages in connection with the cargo.

Following additional communications between the parties, The Hartford, in the name of LTA, filed suit against J.B. Hunt in New York state court to recover the damage to the cargo. After removing the case to federal court, J.B. Hunt moved for summary judgment, contending that National Union failed to timely provide written notice of a claim as required by the all-modes version of 49 C.F.R. § 1005.2(b) then in effect. In response, The Hartford asserted that its letters of September 23, 1996 and April 10, 1997 (along with its verbal communications with J.B. Hunt) supplied adequate notice of its claim. The court disagreed because the September letter to J.B. Hunt, while falling within the nine (9) month time frame for filing of a claim, did not meet several of the notice requirements. The Hartford also sent its April letter within the nine (9) month time frame. As explained by the court, however, “[this letter] was sent by plaintiff’s insurer’s affiliate, The Hartford, to J.B. Hunt’s insurer, National Union Fire Insurance Company of Pittsburgh, Pennsylvania (who is not a party to this action). As such, it does not constitute notice to J.B. Hunt.” Accordingly, summary judgment was rendered in favor of J.B. Hunt.

In concluding that J.B. Hunt had not received proper notice, the *LTA Group* court relied on the Second Circuit’s decision in *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900 (2d Cir. 1980) and its analysis of the adequacy of notice of a claim under the same version of 49 C.F.R. § 1005.2(b). In *Pathway Bellows*, the Second Circuit strictly construed and applied the claim-filing regulations to deny a claim that was received only one (1) day outside the nine (9) month notice period. Acknowledging that its ruling might appear “Draconian” under the facts, the court suggested in a footnote that a shipper might be excused from complying with the applicable claim notice requirements, stating the following:

Had any conduct on the part of Penn Central misled Pathway Bellows into believing that there was no need to file a claim, or that the letter of May 12, 1975 was sufficient to constitute a claim, Penn Central might be held estopped from insisting on Pathway Bellows’s compliance with the timely written claim requirement contained in the bill of lading. [*Citation omitted.*] . . .

Nothing in the present case, however, indicates that the reason for the untimely submission of Pathway Bellows’s claim was attributable to either of these factors or to any factors beyond Pathway Bellows’s control.
The LTA Group court’s reliance on Pathway Bellows suggests that the court might have entertained an estoppel argument, had The Hartford presented some evidence that J.B. Hunt represented to the plaintiff that National Union was J.B. Hunt’s agent for the receipt of notice.

Estoppel does not, however, necessarily provide relief for a claimant that finds itself in the position of having communicated its claim to the insurer instead of the carrier. In the context of statutory written claim requirements, equitable estoppel “is not to be found lightly” and “cannot be invoked absent evidence that the carrier told the shipper not to file or otherwise led it to believe that filing was unnecessary to have its claim satisfied.” As one court has noted, “when [estoppel] has been invoked, there has been evidence that some communication from the carrier to the shipper induced the nonfiling, misfiling, or untimely filing of the written claim.” In the absence of such communication from the carrier, it is likely difficult to establish an agency relationship for the insurer’s receipt of a notice of claim on behalf of the carrier.

For example, in Miracle of Life, L.L.C. v. North American Van Lines, Inc., 444 F.Supp.2d 478 (D.S.C. 2006), a case decided subsequent to the adoption of Part 370, damage occurred to goods shipped from Charleston, South Carolina to Germany. Carriage of the goods was provided by Atlantic Transfer & Storage Company (“ATS”), which was alleged to be an agent for North American Van Lines. Upon discovery of the damage, the plaintiffs verbally contacted ATS, which allegedly advised plaintiffs to communicate with their insurer, PAC Global Insurance. Although plaintiffs did not file a written claim directly with ATS, they did file one with Pac Global. Plaintiffs subsequently sued ATS, which moved for summary judgment based on plaintiffs’ failure to submit a written claim as a condition precedent to filing suit. Plaintiffs asserted in response that ATS was equitably estopped because ATS misled them into believing that filing a written claim directly with the motor carrier was unnecessary.

The South Carolina district court upheld summary judgment for ATS, noting that (1) the bill of lading expressly set forth the requirement of a written claim, and (2) there was no evidence that ATS told plaintiffs either not to submit a written claim or that a written claim was not necessary – the plaintiffs’ primary witness testified that she did not know who directed her to contact Pac Global regarding the claim, and thus could not definitively establish misleading conduct on the part of ATS. The court went on to state that, even if ATS had suggested that the plaintiffs file their claim with Pac Global, “such a suggestion does not in itself imply that filing a claim according to the terms of the bill of lading would be unnecessary.”

LTA Group and Miracle of Life suggest that a claimant will be hard-pressed to establish an insurer as an agent of the motor carrier for receipt of written notice of a claim, absent a carrier’s clear expression of the insurer’s authority to act as such. Short of making such a statement in the bill of lading, tariff or other document constituting the contract of carriage between the parties, or in a subsequent writing by the carrier, verbal “suggestions” that the claim be filed with an insurer will not suffice, and will not support an estoppel argument to circumvent the requirement.

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FEDERAL COURTS
JURISDICTION AND VENUE CLARIFICATION ACT OF 2011

On January 5, 2011 the One Hundred Twelfth Congress of the United States of America at the First Session handed down the “Federal Courts Jurisdiction and Venue Clarification Act of 2011.” This Act became effective thirty (30) days after its enactment, which was February 4, 2011.

The Act amends Sections 1332, 1441 and 1446, and creates 1455 of Title 28 of the United States Code. Most notably the Act adopts the later-served defendant rule, codifies the rule of unanimity, provides a procedure to establish the amount in controversy when not apparent from the complaint, creates a bad faith exception to the one (1) year limit on removal, and limits the federal court’s subject matter jurisdiction with respect to claims involving federal questions and state law claims.

In Section 1332, the Act further limits the federal court’s exercise of diversity jurisdiction by expanding the citizenship of foreign citizens, corporations and insurers. Under the Act, citizens or subjects of foreign states who are lawfully permanent residents in the United States are residents of the State in which they are domiciled. The Act also expands the citizenship of corporations by expanding their citizenship from “any State” to “every State and foreign state”. Furthermore, the Act expands the citizenship of insurers by inserting language that makes an insurer a citizen of every State and foreign state in which the insurer is a citizen, has been incorporated, and has its principle place of business.

Section 1441 is subject to many sweeping changes not only in its wording but also in its import. The title of the section itself is amended from “Actions Removable Generally” to “Removal of Civil Actions” such that 1441 no longer applies to the procedure for the removal of criminal actions. The procedure for the removal of criminal actions is now found in the newly created Section 1455.

In Section 1441(a), the last sentence is deleted, which dealt with defendants sued under fictitious names. Subsection (b) is completely rewritten; however, the new wording merely provides clarification and does not change (b)’s substance. Similarly the headings of 1441(d), 1441(e) and 144(f) are re-titled for clarification.

The amendments to 1441(c) not only provide clarification to some of the existing provisions but also change the substance of 1441(c). Section 1441(c)(1) applies to multi-claim actions and is divided into two subparts: (A) claims brought under 1331, and (B) claims that are not within the original or supplemental jurisdiction or claims that are non-removable by statute. As in the prior version of 1441(c), the entire action may be removed. However, the newly created 1441(c)(2) now requires the court to sever and remand those claims described in (B). The prior version of 1441(c) permitted the court in its discretion to sever and remand. Additionally, subsection 1441(c)(2) only requires those defendants against whom a claim described in 1441(c)(1)(A) has been asserted to join or consent to removal.

In keeping with the limitation of Section 1441 to civil actions and the creation of Section 1455, Section 1446 is amended to apply to the “Procedure for removal of civil actions.” To that end, all references to criminal prosecution in Section 1446 are deleted. In the amended version, subsection 1446(b) is parsed in subsections (1) and (2). Except for the deletion of all references to criminal prosecution, 1446(b)(1) is identical to the former first paragraph of 1446(b). The second paragraph of 1446(b), however, is amended and now resolves an ambiguity in the former version. First, under 1446(b)(2)(A), when a civil action is removed under 1441(c), which included actions with the jurisdictional bases of 1331 and 1332, all the properly served and joined defendants must join and consent to removal. Remember 1441(c) removal does not require defendants against whom 1441(c)(1)(B) to join and consent to removal. The prior version of 1446 required defendants to join and consent to removal within thirty (30) days but was unclear about when the thirty (30) period began as to defendants served at different times. While the amended 1446(b)(2)(B) keeps this thirty (30) day window, 1446(b)(2)(C) resolves the ambiguity by starting a new thirty (30) day period when each subsequent defendant is served. Now earlier served defendants have a thirty (30) day window that is governed by the last served and joined defendant. Subsection
1446(b)(3) applies to actions that as initially pled were not removable but that later become removable. A defendant has thirty (30) days to file for removal after obtaining “through service or otherwise, a copy of an amended pleading, motion, order or other paper” which makes the action removable.

Subsection 1446(b)(3) is limited by the amended 1446(c). Subsection 1446(c) formally applied only to criminal prosecutions, but it is now amended to provide the “Requirements; Removal Based on Diversity of Citizenship.” Under 1446(c)(1) an action may not be removed pursuant to 1446(b)(3) more than one (1) year after the commencement of the action “unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.”

While the prior removal statutes for cases invoking Section 1332 jurisdiction were unclear as to the calculation of the amount in the controversy, the amended subsection 1446(c)(2) resolves this ambiguity. First, in subsection 1446(c)(2), the sum demanded in good faith is deemed to be the amount in controversy. Second, in subsection 1446(2)(A), the notice of removal may assert the amount in controversy where either the claim is for nonmonetary relief, or where the pleading practice of the State “does not permit a demand for a specific sum or permits recovery of damages in excess of the amount demanded.” Finally, in subsection 1446(c)(2)(B), if the amount in controversy is governed by 1446(c)(2)(A), the district determines if the requirements of Section 1332 are met by the preponderance of the evidence.

If by the initial pleadings a case is not removable based solely on the amount in controversy then “information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as ‘other paper’ under 1446(b)(3).” Similar to 1446(c)(1), a defendant can only remove an action under this section more than one (1) year after its commencement where the district court finds that the “plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal.” The court uses a preponderance of the evidence standard in this evaluation.

Subsection 1446(d) is amended only for clarification purposes and the substance of this section remains the same. However, the prior version of section 1446(e) is deleted and the old 1446(f) is now the new 1446(e).
CSA DATA IN THE PALM OF YOUR HAND WITH THE SAFERBUS APP

On March 20, 2012, the Federal Motor Carrier Safety Administration announced its first “app” developed for iPhones and iPads. The “SaferBus” app provides the general public with the ability to review safety records on nearly 6,000 interstate commercial passenger carriers operating in the United States before, during, and after a bus trip.

To use the SaferBus app – which can be downloaded for free by visiting the Apple iTunes App Store – you simply type in the name of a bus company or a USDOT number for the company. The name does not have to be exact, as the search works just like any other general search engine, retrieving all companies with names similar to the search term(s).

After selecting a certain motor carrier from the list, the app provides basic information about the company, including its USDOT number, MC number, telephone number, and address. The app also displays the number of motorcoaches, school busses, limousines, mini-buses, and vans operated by the carrier.

With respect to a motor carrier’s safety record, the app notes in red font those carriers that are “NOT ALLOWED TO OPERATE.” For those motor carriers that are allowed to operate, the app provides a summary of the company’s safety profile over the last 24 months. Essentially, the app takes the data available on the FMCSA’s Compliance, Safety, Accountability (CSA) website and makes it available at the touch of a screen, such that one can easily obtain an up-to-date summary of each bus company’s performance in the areas of unsafe driving, fatigued driving, driver fitness, controlled substances/alcohol, and vehicle maintenance.

Lastly, the SaferBus app allows you to make a complaint regarding the bus company. Below the company’s contact information is a button entitled “Leave Complaint.” By pressing this link, the person is taken to a pop-up screen which states, “FMCSA encourages customer to report unsafe bus vehicle or driver to the agency through a toll free hotline 1-888-368-7238 (DOT-SAFT) or FMCSA’s National Customer Complaint Database http://nccdb.fmcsa.dot.gov/IN CASE OF EMERGENCY CALL 911.”

FMCSA Administrator Anne S. Ferro praised the app, noting that “SaferBus is FMCSA’s first step at making our thorough safety data on commercial bus companies available through smartphone technology.” Ms. Ferro continued, noting that “[b]y placing a bus company’s safety record in the palm of your hand, SaferBus encourages riders to think safety first, supports our agency’s commitment to make bus travel as safe as possible, and provides good bus companies a way to highlight their positive safety records.” Similarly, U.S. Transportation Secretary Ray LaHood noted that the app “gives Americans the information they need to make smart safety decisions when they book their next bus trip.”

The app has been highlighted in national and regional publications, including the Denver Post.
ARTICLES

EDITOR’S NOTE

THIS FACT PATTERN WILL BE USED DURING THE ALFA TRANSPORTATION PRACTICE GROUP 2012 SEMINAR, BEING HELD AT AMELIA ISLAND, FLORIDA, FROM MAY 2-4, 2012. THE FACT PATTERN IS REPRODUCED HERE FOR THE BENEFIT OF THOSE PERSONS ATTENDING THE SEMINAR, BUT MAY ALSO BE OF ASSISTANCE FOR OTHER PURPOSES (E.G., DRIVER TRAINING, ETC.) TO THOSE WHO ARE NOT ABLE TO ATTEND THE SEMINAR.

Parties To The Lawsuit

The events which give rise to this lawsuit occurred in Charleston, South Carolina, at 5:20 am on Sunday, January 10, 2010.

The plaintiff is Suzie Alexander, the 21 year old widow of Freddie Alexander, age 23. Freddie died at 6:18 am on January 11, 2010 from massive crush injuries caused by the subject accident. Suzie was 7 months pregnant with their first child. Freddie was driving alone in the family’s 2010 Smart Car. Freddie was headed to work as an insurance adjuster for Coverage Insurance Company.

Defendants in this case are Transport Inc., ABC Temporary Services, Inc. and driver Jesse Bean.

Plaintiff’s Complaint

Plaintiff has sued for wrongful death. She seeks to recover the following:

1. Loss of love, companionship, care and support of her husband now and in the future;
2. Loss of love, care, guidance and support for their child, Baby Kaye;
3. Medical expenses totaling $325,421.23;
4. Punitive damages; and
5. Pre and post-judgment interest.

Ms. Alexander alleges that defendants are the sole and proximate cause of the collision which took the life of her young husband after 25 hours of anguish and suffering. She specifically alleges the following:

As Against Driver Bean:

1. Failure to control speed so as to avoid a collision;
2. Failure to keep a proper look out for reasonably foreseeable roadway hazards;
3. Failure to properly use on-board electronic devices to accurately track hours of service;
4. Failure to use on-board electronic accident avoidance technology;
5. Negligently wearing one ear bud to listen to classical music which resulted in desensitization and distraction;
6. With intentional and reckless disregard for the safety of others, knowingly operating a commercial vehicle in violation of the strict hours of service regulations set forth in 49 CFR 395;
7. With intentional and reckless disregards for the safety of others, knowingly operating a commercial vehicle despite suffering long standing PTSD and taking powerful psychotropic medication to control same;

As Against ABC:

1. Negligently hiring driver Bean after driver Bean disclosed long standing PTSD and use of psychotropic drugs to control same and failing to tell Transport;
2. With intentional and reckless disregard for the safety of others, failing to properly train driver Bean on all electronic equipment being used in the commercial transportation industry so as to ensure driver Bean’s knowledge and safe operation of the same with all possible temporary employers;
3. With intentional and reckless disregard for the safety of others, negligently retaining driver Bean after known hours of service violations with temporary employer, Smith Trucking.
4. Failure to complete full background check which would have revealed driver Bean was involved in fatal crash 9 years before in his/her private vehicle as a result of chronic fatigue caused by chronic sleep apnea;
**As Against Transport Inc.:**

1. Negligently relying exclusively on ABC to check, clear, approve, test, and train driver Bean to drive for Transport Inc.;

2. With intentional and reckless disregard for the safety of others, failing to exercise its non-delegable duty to comply with all aspects of the Federal Motor Carrier Safety Regulations, company policies, and industry standards to ensure driver Bean was qualified, not disqualified, properly trained and safe to operate Transport Inc’s equipment on public roadways.

3. Failure to prohibit drivers from using any headphones or headsets or ear buds for any purpose whatsoever while driving;

4. Failing to use the GPS/EOBR system in real-time to constantly monitor driver Bean’s compliance with routing and hours of service regulations so as to prevent actual or probable driver acute and/or chronic fatigue and inattention;

5. Negligently retaining driver Bean after repeat offenses of the company policy, industry standards and federal regulations committed by driver Bean in the days and weeks preceding this fatal collision;

6. Failure to complete full background check which would have revealed driver Bean was involved in fatal crash 9 years before in his/her private vehicle as a result of chronic fatigue caused by chronic sleep apnea.

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**Factual Background Of Collision**

The subject accident took place on northbound Memorial Bridge which crosses the Ashley River on State Route 7 in Charleston, South Carolina. It was Sunday, January 10, 2010. Traffic was light. Visibility was compromised to 30’ due to early morning fog. The time of collision was set by investigating police to be 5:20 am; civil twilight.

The roadway crossing this bridge is two lanes northbound, two lanes southbound with a center concrete Jersey barricade. The posted speed limit is 35 mph. Accidents are common on this roadway given the propensity for fog to accumulate on and near this waterway.

Driver Bean was driving a 2009 Peterbilt tractor pulling a BEMEX container filled with electronics. Bean was traveling northbound in Lane 1 and planned to move into Lane 2 as he/she approached the exit ramp to his/her destination approximately one (1) mile away. Freddie Alexander was driving the family 2010 gray Smart Car. He was directly in front of Bean in Lane 1. All traffic was initially going the posted speed limit of 35 mph.

Traffic ahead of Freddie came to a sudden and unexpected stop due to a three (3) vehicle, non-injury accident caused in part by foggy visibility. Bean noticed the traffic was stopping, covered the brake and looked over his/her right shoulder to check if it was clear to move to Lane 2. When Bean looked back forward, the Smart Car was slowing more quickly than Bean and was also in the process of changing into Lane 2. Bean shot-gunned the brakes at the same time the truck collided with the rear of the Smart Car.

Freddie was pushed across the roadway and into the concrete Jersey barricade then slammed into the three-vehicle collision up ahead. He was pinned and unconscious inside. After EMT extrication, he was flown to Charleston County Hospital where he was placed on life support. He was declared brain dead by the trauma surgeon at the ER. The family disengaged life support at 6:21 am the following day.

**Other Facts Learned During Discovery**

1. ABC Temporary Services is a Mexican based company with headquarters in El Paso, Texas and is a subsidiary of Servicios de Chofer headquartered in Acapulco, Mexico. Servicios provides Mexican rail and cross border cargo transportation under temporary authority while their final application is processed by US authorities.

2. Servicios transports container cargo from the port in Acapulco, Mexico to the Mexican/US border where loads are transferred to US carriers for delivery to the consignee. To expedite this cargo shipment, ABC Temporary Services offers temporary Mexican drivers for hire to US carriers to haul container loads from the US border to the consignee for a percentage of the load charges.
3. Driver Bean has held a CDL since 2006. It has never been suspended or revoked. Driver Bean was hired by ABC as a for-hire truck driver in October 2009. His first for-hire job was for Smith Trucking. This job lasted only two (2) months when he was terminated by Smith Trucking for falsifying paper logs, driving in violation of the hours of service and failing to disclose PTSD and use of Wellbutrin. ABC was made aware of these violations. Bean was given a written warning and had to complete three (3) hours of retraining on paper logs. The fact of the PTSD and Wellbutrin were never disclosed to Transport.

4. Driver Bean was hired by Transport on December 26, 2009 when a company driver unexpectedly quit leaving a trans-continental route unattended. Bean was hired to transport cargo containers from the US border in El Paso, Texas to locations around the country and back-hauls to return to El Paso.

5. On this trip, Bean had driven a load from El Paso to Charleston and was given a back-haul by Transport to take to Memphis, TN.

6. Born to a Mexican mother and Texan father, driver Bean is working in the US without a green card or US citizenship. Driver Bean was hired by ABC as a for-hire temporary driver under the temporary operating authority given to Servicios de Chofer. Bean splits time between Juarez, Mexico and El Paso, Texas.

7. Bean was involved in a fatal crash in Bisbee, Arizona in 2001 while driving a new Durango. Bean was reportedly at fault for the accident as a result of chronic fatigue caused by sleep apnea that Bean did not know he/she had. The case settled out of court with a strict confidentiality agreement. Otherwise, Bean’s driving record is clear.

8. Because of and since the accident in 2001, Bean has suffered from PTSD and takes Wellbutrin to control situational depression that comes with it. Bean takes the medication at 10 pm every night in order to sleep off any potential adverse effects. Bean testified at deposition that the medication no longer makes him/her tired or spacey and that it was not regulated by the federal trucking rules and was therefore no one’s business. A post-accident drug test was completely clean; no traces of Wellbutrin.

9. Bean had once been an aspiring musician. To calm the nerves and quiet the mind, Bean often listens to classical music. On this morning, Bean was listening to Mozart with one ear bud.

10. Bean has always disputed having ever had sleep apnea because he/she does not snore and if anything is under weight. If the condition ever existed, it has never been treated. Bean’s DOT long form examination report for 2006 indicates “history of fatigue” but reports for 2008 and 2010 are silent on this issue.

11. The Transport tractor involved in this accident was equipped with a new, state of the art, STAY ALERT accident avoidance system. The system had been placed on the fleet trucks only three (3) months before this accident. Training of company drivers had been completed. For-hire drivers were not trained on the system by Transport but were expected to have been trained by ABC.

12. Transport’s company policy regarding the new STAY ALERT system was that if a driver did not know how to use it or was not comfortable using it, the system was to be deactivated to avoid it causing an accident.

13. Driver Bean had no idea the truck was equipped with STAY ALERT, had never been trained on the use of this system and the system was OFF at the time of this accident.

14. Transport is a paperless company. Their drivers generate logs electronically. All drivers are given a thirty (30) minute tutorial on the use of the EOBR.

15. The system was capable of tracking all the drivers real-time. However, Transport only had three (3) members in the safety department (Safety Director Shannon Pumpernickel, clerk Drew Rye and clerk Gill Smith who just started with Transport two (2) days before the accident) and an average of fifty (50) drivers at any given time on the road. Transport did not track their drivers real-time. Instead, they continued to use the pre-EOBR system of performing spot audits of hours of service within thirteen (13) and fifteen (15) days of the end of each load.
16. Driver Bean was given this thirty (30) minute tutorial and this was his/her first exposure to the use of EOBRs to track hours of service. By January 2, 2010, Bean quit using the EOBR because it was too time consuming and too confusing. Because Bean had no paper logs to use as a backup and telling Transport he/she did not know how to use the EOBR could get him/her fired, Bean kept notes in a personal note pad of hours of service.

17. By the time of the accident, Bean’s personal notes were illegible and inaccurate. EOBR records from the start of Bean’s employment to the date of the accident confirm Bean had been consistently driving over hours in violation of the 70 hour, 11 hour and 14 hour rules for the entire sixteen (16) days.

18. Bean testified at deposition that he/she took thirty-four (34) consecutive hours off right before this accident. However, it was later discovered that Bean had spent that entire time at the Little River Casino roughly three (3) hours north of Charleston, South Carolina, which was six (6) hours round-trip out of route. Transport had not audited any of Bean’s EOBR reports prior to this accident.

19. Transport Inc. is engaged in the international transportation business. Transport operates large warehouses in major border and port cities including El Paso, Texas and Charleston, South Carolina. Transport contracts with rail companies like Servicios de Chofer to pick up cargo containers at the US/Mexican border and deliver them to Transport’s warehouses where the cargo is broken down and delivered to consignees. Transport maintains forty (40) owner/operator drivers, four (4) company drivers, five (5) independent contractors and ten (10) agent drivers from other companies.

20. Based upon customer demand and unexpected employee driver departures, Transport has to hire temporary drivers through a temporary driver placement service. For container cargo going to and from El Paso, ABC offers the best prices for temporary drivers.

21. Before hiring a temporary driver, Transport policy is for all applicants to be vetted by ABC for licensing, fitness for duty, driving record, electronic equipment training and full background check. Final applicants then must be approved by Transport’s Operations and Safety Departments.

22. When a temporary driver is needed, Ops Manager Jan Crawford submits an email request directly to ABC. ABC then sends Jan Crawford the final applicants list with the presumptively completed application. Jan Crawford must review and approve the driver. The file then goes electronically to Shannon Pumpernickel for review and approval. The deal is closed simply with an email to ABC confirming which of the driver’s has been accepted and where/when the driver is to be available to drive. In this case, the email simply stated “We’ll take Jesse Bean, due El Paso warehouse December 26, 2009 0400 hours. Thx, Julia.” Julia was the front desk receptionist for Transport.

23. ABC’s application file for driver Bean included a three (3) year clear MVR, clear criminal background check, clean random drug test, valid CDL and medical card.

24. ABC and Transport had worked together many times before and Transport had come to trust that ABC was properly qualifying it’s for-hire driver. Crawford and Pumpernickel only gave a passing glance at the electronic paperwork for driver Bean before Bean was brought on board to driver for Transport until a full time, employee driver could be hired.

25. Plaintiff’s toxicology expert has testified at deposition that the fact that Bean’s post-accident drug test does not show traces of Wellbutrin suggests Bean had failed to take the 10 p.m. dose on January 9, 2010, because Bean was busy gambling and in a hurry to drive back to Charleston to resume the route at day break. Failure to maintain strict compliance with doctor’s orders for taking this drug can have severe adverse consequences including, but not limited to, uncontrollable fatigue, inability to concentrate, sensation of “spaciness,” dramatic mood changes including suicidal ideation. Combined, there is no doubt Bean was impaired in his/her ability to safety operate the truck at the time of this accident. Given the very high risk, Bean should never have been hired.

26. Defendants’ toxicologist has testified at deposition that Bean was only seven (7) hours
of him. Absent medical proof of an active sleep disorder and knowledge of this fact on the part of ABC and Transport, there is no evidence Bean suffered a micro-sleep and there was fault on the part of ABC and Transport for hiring Bean.

29. Plaintiff’s industry standards expert testified at deposition both ABC and Transport fell below the industry standards by each failing to fully, completely and properly investigate Bean before hire. By holding itself out as the source for for-hire CMV drivers, ABC assumed the responsibility to be sure all drivers were properly trained and proficient in using all current, industry-wide electronic equipment. ABC failed to do this with Bean. Consequently, Bean was grossly over hours and should have been fired long before this accident. And, Bean did not have a clue about the early warning accident avoidance system which would have prevented this fatal collision. Transport cannot delegate its duty to be sure Bean was safe to operate their equipment. Transport failed to ensure Bean knew how to use their electronic equipment. It’s not enough to have STAY SAFE and then turn it off. Transport failed to track their drivers in real-time which would have caught Bean going a long way off route and going to the casino instead of resting. It is not enough to say you have the system but not enough people to use it. It is not enough to meet the Federal Motor Carrier Safety Regulations for a driver to be truly safe to operate an 80,000 pound vehicle. It is not enough to presume “the other company” has complete a due diligence investigation. Just because the FMCSRs do not prohibit drivers with situational depression does not mean drivers with this mental illness are safe CMV drivers. Just because the FMCSRs do not prohibit drivers taking psychotropic drugs like Wellbutrin does not mean drivers taking psychotropic drugs are safe CMV drivers. Just because the FMCSRs do not yet prohibit drivers with any history of sleeping disorders including sleep apnea does not mean that a driver with a probable history of sleep disordered is a safe CMV driver. The risks posed by persons like Bean are far too great and Bean should never have been hired or retained.

28. Defendants’ sleep expert testified that there is no clinical correlation between a nine (9) year old claim of possible sleep apnea and what happened during this accident. It is counter intuitive that Bean suffering a micro-sleep but was alert enough to see traffic ahead slowing down quickly, thinking enough to cover the brake, checking the side mirror for clearance to change lanes and then hammering the brake when Bean’s efforts to avoid a collision were thwarted by Freddie pulling directly in front off schedule and this is not enough time to cause any of the adverse side effects claimed by plaintiff’s expert. Bean was not suffering any effects from taking or being seven (7) hours slow to take Wellbutrin and was therefore not at all unable to safely operate the truck on the date of this accident.

27. Plaintiff’s sleep expert testified at deposition that a person can suffer from sleep apnea without knowing it and without being obese. If a person’s apnea remains untreated, the consequences can be substantial including higher risk of spontaneous stroke or heart attack or nearly undetectable episodes of micro-sleeps. Micro-sleeps can result in significantly reduced ability to concentrate, stay awake, perform any executive functions, and operate heavy equipment like a fully loaded eighteen (18) wheeler. Bean suffered a micro-sleep. The reference in the 2008 long form to “history of fatigue” should have been enough to reject hiring Bean.
prospective drivers to ABC. ABC is definitely in the commercial trucking business by virtue of offering CMV drivers to motor carriers. Accordingly, it was entirely reasonable for Transport to rely upon ABC to provide only the very best CMV drivers. In addition, industry standards are the product of industry wide customs and practice as well as federal regulations. They are not the product of a small minority of companies that do things a certain way and certainly they are not the product of one expert’s personal opinions absence solid, recognized authoritative support.

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